



**In the matter of Marathon Resources Limited
[2006] ATP 31**

Catchwords:

Disclosure in target's statement – misleading statements – value of offer per pound of inferred resource – comparison with uranium oxide spot price – supplementary disclosure – withdrawal of application

Guidance Note 16 Correction of Takeover Documents

Marathon Resources Limited, Buttermere Australia Pty Ltd, Crosby Capital Partners Inc

These are the Panel's reasons for its decision to consent to Buttermere Australia Pty Ltd withdrawing its application to the Panel dated 15 September 2006. The application sought a declaration of unacceptable circumstances in relation to disclosure in Marathon Resources Limited's target's statement. It was made under section 657A¹ of the Corporations Act 2001 (Cth).

THE PROCEEDINGS

1. These reasons relate to an application (the **Application**) to the Panel from Buttermere Australia Pty Ltd (**Buttermere**) dated 15 September 2006 in relation to the affairs of Marathon Resources Limited (**Marathon**).

THE PANEL & PROCESS

2. The President of the Panel appointed Robyn Ahern (sitting Deputy President), Martin Alciaturi and Guy Alexander (sitting President) as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
3. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
4. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

SUMMARY

5. Buttermere submitted in the Application that there were deficiencies in the disclosure made in Marathon's target's statement (**Target's Statement**), including:
 - (a) comparison of the implied value per pound of Marathon's inferred resource in Buttermere's offer, with the spot price per pound of uranium oxide;
 - (b) disclosure of risks associated with holding Marathon shares; and
 - (c) disclosure concerning Marathon's future plans.
6. Buttermere sought a declaration of unacceptable circumstances under section 657A and final orders requiring Marathon to make remedial disclosure in a supplementary target's statement (**Supplementary Target's Statement**) to be sent to Marathon shareholders.

¹ Unless otherwise specified, all statutory references are to the Corporations Act.

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7. Without conceding that the disclosure in its Target's Statement was deficient, Marathon issued a Supplementary Target's Statement which (among other things):
 - (a) clarified factors relevant in assessing the implied value per pound of Marathon's inferred resource in Buttermere's offer; and
 - (b) commented further on risks associated with holding Marathon shares (including by attaching an extract from the October 2004 Marathon prospectus).
8. In light of the further disclosure by Marathon described above, Buttermere requested the Panel's consent to the withdrawal of the Application.
9. The Panel considered that Marathon's further disclosure had met any concerns the Panel might have had regarding the issues raised by Buttermere in relation to the Target's Statement. The Panel concluded that continuing the proceedings would not be likely to benefit the parties or their shareholders, or the market generally. Accordingly, the Panel consented to Buttermere withdrawing the Application.

APPLICATION

Background

10. On 6 July 2006 Crosby Capital Partners Inc announced a proposed takeover bid for 100% of the issued Marathon shares, together with any shares to be issued upon the exercise of Marathon options, offering 68 cents for each Marathon share (**Offer**).
11. On 15 August 2006, Buttermere lodged its bidder's statement with ASIC and ASX and served it on Marathon. Buttermere completed dispatch of its bidder's statement on 31 August 2006.
12. On 8 September 2006 Marathon lodged its target's statement (**Target's Statement**) with ASIC and ASX and served it on Buttermere.
13. On 12 September 2006, Buttermere's advisers wrote to Marathon's advisers setting out Buttermere's concerns regarding alleged misleading statements in and omissions from the Target's Statement and requesting Marathon to make remedial disclosure, in the form of a supplementary target's statement.
14. On 13 September 2006, Marathon's advisers responded that Marathon did not intend to issue a supplementary target's statement in relation to the matters raised.
15. As at the date of the Application, Buttermere's Offer was due to close on 3 October 2006.

Declaration and orders sought in the Application

16. Buttermere applied to the Panel seeking:
 - (a) a declaration of unacceptable circumstances pursuant to section 657A; and
 - (b) final orders pursuant to section 657D requiring Marathon to make remedial disclosure to its shareholders by issuing a supplementary target's statement, to be released on ASX and mailed to each shareholder who received the Target's Statement, rectifying the misleading statements and omissions outlined in the Application.

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DISCUSSION

Disclosure issues

17. The Application raised 3 key disclosure issues:
- (a) *comparison of value “per pound” inferred uranium oxide under the Offer with the commodity price* – Buttermere complained about statements in the Target’s Statement which sought to compare the implied value per pound of Marathon’s inferred resource under Buttermere’s offer, with the spot price per pound of uranium²;
 - (b) *risks* – Buttermere submitted that there was incomplete disclosure in the Target’s Statement of the risks of investing in Marathon securities. Buttermere noted that the Target’s Statement merely cross-referred to the risks outlined in Marathon’s prospectus (which was issued almost 2 years before); and
 - (c) *future plans for Marathon* – Buttermere highlighted statements in the Target’s Statement which referred to future “plans”. Buttermere contended that this disclosure was inadequate.
18. Based on its consideration of the Application the Panel considered that 2 issues warranted further consideration by the Panel:
- (a) whether the comparison of the implied value “per pound” of inferred uranium oxide under the Offer, with the spot market commodity price was reasonable without appropriate benchmark comparisons (for example against other uranium oxide resource companies); and
 - (b) whether it was appropriate to simply cross-refer to the prospectus. On this point, the Panel felt that current Marathon shareholders should have access to the current risk factors relating to investing in Marathon securities. Not all current Marathon shareholders would be the same as the shareholders who had subscribed for shares under the prospectus and accordingly, they should not be expected to have immediate access to it. The Panel considered that the Target’s Statement should contain at least a summary of the key risks to which it referred, and shareholders should not be required to consult another document to see what those risks involved³.
19. The Panel noted that, consistent with Guidance Note 16 (Correction of Takeover Documents) Buttermere had first raised its disclosure issues with Marathon before coming to the Panel. However, the Panel considered that, in relation to the matters which the Panel considered may have warranted further consideration by it, there may have been further scope for the parties to reach a negotiated outcome without the intervention of the Panel. Accordingly, the Panel invited Marathon to outline the extent to which it would be prepared to make any further disclosure and, following such indication, Buttermere to advise whether the disclosure was acceptable.

² For example, the Target’s Statement provided “*The implied value attributed by the Offer to the U₃O₈ estimated to be contained in your Mt Gee resource of 48.5 cents per lb of U₃O₈ is in stark contrast to the current spot price for U₃O₈ which at 28 August, 2006 was US\$48.50 per lb of U₃O₈.*”

³ The Panel noted that the prospectus was available on Marathon’s website. It was dated 20 October 2004

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DECISION

20. Without conceding that the disclosure in its Target's Statement was deficient, Marathon issued a Supplementary Target's Statement which (among other things):
- (a) clarified factors relevant in assessing the implied value per pound of Marathon's inferred resource under Buttermere's offer. In particular, the Supplementary Target's Statement:
 - (i) noted that Marathon's value clearly cannot be calculated on the basis of the per pound price of refined U₃O₈ in the spot market, and that Marathon would not, in the event Mt Gee went into production, necessarily receive the full value of the prevailing U₃O₈ price net of capital costs and operating expenses;
 - (ii) referred to a proposed transaction between Sinosteel Corporation and PepinNini Minerals Limited which effectively valued PepinNini's inferred resource at \$3.42 per lb of U₃O₈; and
 - (b) commented further on risks associated with holding Marathon shares (including by attaching an extract of risks from the October 2004 Marathon prospectus).
21. In light of the further disclosure by Marathon described above, Buttermere requested the Panel's consent to the withdrawal of the Application.
22. The Panel considered that Marathon's further disclosure had met any concerns the Panel might have had regarding the issues raised by Buttermere in relation to the Target's Statement. The Panel concluded that continuing the proceedings would not be likely to benefit the parties or their shareholders, or the market generally. Accordingly, the Panel consented to Buttermere withdrawing the Application.

Guy Alexander
President of the Sitting Panel
Decision dated 26 September 2006
Reasons published 9 November 2006