



In the matter of Midwest Corporation Limited

[2007] ATP 33

Catchwords:

Information deficiencies –targeted production – JORC Code –Exploration Results – Exploration Target – Mineral Resource – misleading statements – Ore Reserve – Competent Person – reasonable basis – assumptions – risks – forward looking statements – forward looking financial statements – financial assumptions – market practice – outdated information – production implies financial viability – aspirational statements

Corporations Act 2001 – sections 602(b)(iii), 636(1), 643(1), 657C, 670A(2)

ASIC RG 170 – Forward looking financial statements

Midwest Resources Limited – MMX Investments Pty Ltd – Murchison Metals Limited – Crosslands Resources Limited

SUMMARY

1. While the Panel considered Murchison had made forward looking statements for the purposes of s670A(2)¹ when talking about the Production Target for the Jack Hills Project, they were not forward looking financial statements, and subsequent disclosures had sufficiently alerted Midwest shareholders to the risks and uncertainties inherent in the statements in relation to, or based on, the Production Target.

INTRODUCTION

2. The Panel, Robyn Ahern, Teresa Handicott and Anthony Sweetman, having commenced proceedings, declined to make a declaration of unacceptable circumstances in relation to the affairs of Midwest.
3. In these reasons the following definitions apply.

Term	Meaning
Application	An application to the Panel by Midwest on 8 November 2007 (under section 657C) in relation to the affairs of Midwest.
Bidder’s Statement	MMX bidder’s statement dated 19 October 2007.
Exploration Results	As set out in paragraph 16 of the JORC Code, Exploration Results include data and information generated by exploration programmes that may be of use to investors. They may or may not be part of a formal declaration of Mineral Resources or Ore Reserves.
First Supplementary Bidder’s Statement	MMX’s first supplementary bidder’s statement dated 1 November 2007.

¹ All statutory references are to the *Corporations Act (Cth) 2001*, unless otherwise indicated.

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Term	Meaning
Jack Hills Project	An iron-ore project known as “Jack Hills” located in the mid-west region of Western Australia, in which Murchison has a 50% interest. ²
JORC Code	The <i>Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves 2004 edition</i> , prepared by the Joint Ore Reserves Committee of the Australian Institute of Mining and Metallurgy, Australian Institute of Geoscientists and Minerals Council of Australia.
Midwest	Midwest Corporation Limited ACN 009 224 800.
Mineral Resource	As set out in paragraph 19 of the JORC Code, a ‘Mineral Resource’ is a concentration or occurrence of material of intrinsic or economic interest in or on the Earth’s crust in such form, quality and quantity that there are reasonable prospects for eventual economic extraction. The location, quantity, grade, geological characteristics and continuity of a Mineral Resource are known, estimated or interpreted from specific geological evidence and knowledge. Mineral Resources are sub-divided, in order of increasing geological confidence, into Inferred, Indicated and Measured categories.
MMX	MMX Investments Pty Ltd ACN 127 812 659, a wholly owned subsidiary of Murchison.
Murchison	Murchison Metals Limited ACN 078 257 799.
Ore Reserve	As set out in paragraph 28 of the JORC Code, an ‘Ore Reserve’ is the economically mineable part of a Measured and / or Indicated Mineral Resource. It includes diluting materials and allowances for losses, which may occur when the material is mined. Resources may only be described as Reserves if appropriate assessments and studies have been carried out, and include consideration and modification by realistically assumed mining, metallurgical, economic, marketing, legal, environmental, social and governmental factors. These assessments demonstrate at the time of reporting that extraction could reasonably be justified. Ore Reserves are sub-divided in order of increasing confidence into Probable Ore Reserves and Proved Ore Reserves.
Production Target	Murchison’s stated production target for the Jack Hills Project of up to 25Mtpa (with the potential to expand) of iron ore over a 15+ year mine life.
RG 170	ASIC Regulatory Guide 170 – Prospective financial information.

² This interest is held via Crosslands Resources Limited ACN 061 262 397, an incorporated joint venture between Murchison and Mitsubishi Development Pty Ltd.

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Term	Meaning
Second Supplementary Bidder's Statement	MMX's second supplementary bidder's statement dated 27 November.
Third Supplementary Bidder's Statement	MMX's third supplementary bidder's statement dated 11 December 2007.

4. In these proceedings the Panel :

- (a) Adopted the published procedural rules.
- (b) Consented to parties being represented by their commercial lawyers.

FACTS

MMX Offer

5. On 10 October 2007 MMX announced its intention to make an unconditional scrip takeover offer for Midwest shares.³ On 19 October 2007 MMX lodged its Bidder's Statement with ASIC. On 1 November 2007 MMX lodged its First Supplementary Bidder's Statement with ASIC. Both the Bidder's Statement and First Supplementary Bidder's Statement were dispatched to Midwest shareholders on 6 November 2007 (**Offer**).

Panel Application

6. On 26 October 2007 legal advisers for Midwest wrote to the legal advisers for Murchison outlining what they alleged to be a number of deficiencies in the Bidder's Statement. Despite extensive correspondence between the parties and release by Murchison of the First Supplementary Bidder's Statement, Midwest did not consider that the concerns it had raised had been satisfactorily addressed. Accordingly, on 8 November 2007 Midwest lodged the Application.

Deferred consideration

7. On 14 November 2007 the Panel decided to conduct proceedings. While a brief was provided to the parties on 15 November 2007, a number of developments delayed the Panel's deliberation of the issues. In particular:

- (a) On 19 November 2007 Midwest released its target's statement, which contained an analysis of a number of matters relevant to the Application. In particular, it annexed an independent report prepared by AMC Consultants Pty Ltd⁴ (**AMC**

³ Murchison announced that under a "two-tiered" offer structure, it is offering a higher price for Midwest shares if it is reasonably satisfied, prior to the end of the offer period, that Midwest will not incur a material tax liability if Midwest sells a 50% interest in the Weld Range and Koolanooka projects to Sinosteel Corporation. The base price offered by Murchison is 1 new Murchison share for every 1.16 Midwest shares held, and the higher price is 1 new Murchison share for every 1.08 Midwest shares held. The offer (through MMX) in the Bidder's Statement is 1 new Murchison share for every 1.08 Midwest share held.

⁴ The report is dated 16 November 2007, and titled: "Independent Report – Murchison and Midwest Resource and Resource Potential"

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Report), which estimated the resource potential at the Jack Hills Project (based on publicly available information) to be 128 Mt (significantly less than the Production Target).

- (b) In response, Murchison announced that it would make a *“full rebuttal of the statements contained in the Target’s Statement so far as they relate to the resource potential of the Jack Hills project.”*⁵
8. Given the potential for the additional disclosure to resolve the underlying dispute, the Panel consulted with the parties and deferred consideration of the Application (and extended the lodgement time for submissions on the brief) pending the release of the additional disclosure.
9. Subsequently, Murchison / MMX made:
- (a) An ASX Announcement on 23 November 2007, detailing further information in support of the resource potential of the Jack Hills Project and the Production Target, and rejecting Midwest’s claims. This information was incorporated into the Second Supplementary Bidder’s Statement.
 - (b) An ASX announcement on 6 December 2007, being a JORC compliant mineral resource update for the Jack Hills Project. This information was incorporated into the Third Supplementary Bidder’s Statement.

Application Summary

10. In summary, Midwest alleged that:
- (a) The Bidder’s Statement and First Supplementary Bidder’s Statement contain:
*“...a number of statements regarding the Jack Hills Project (“Project Statements”) to the effect that the Production Target from the Jack Hills Project is up to 25Mtpa (with the potential to expand) of iron ore over a 15+ year mine life and that, [sic] the Jack Hills Project is a viable stand alone project. These Project Statements ... imply an ore reserve for the Jack Hills Project of at least 375Mt. If the Production Target is not achievable, the viability of the Jack Hills Project as a stand alone project is called into question.”*⁶
 - (b) Under section 636(1)(m), in combination with sections 643(1)(a) and 643(1)(b), the Bidder’s Statement and supplementary bidder’s statements are required to include information that is material to the making of the decision by Midwest shareholders whether to accept Murchison’s offer, is known to Murchison, and does not relate to the value of Murchison’s securities offered as consideration under the bid (**Material Information**).
 - (c) The reasonable basis (if any) for the Project Statements, including what ore comprises the Production Target, is highly relevant to the value of Murchison shares (and therefore the decision of a Midwest shareholder whether or not to accept the Offer). Accordingly, it constitutes Material Information for Midwest shareholders.
 - (d) The Project Statements must comply with:

⁵ MMX announcement to ASX of 19 November 2007.

⁶ Application, at paragraph 5.1.

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- (i) RG 170,⁷ because the Production Target is prospective financial information in that it can readily be used to project revenue. In particular, when combined with project capital and operating cost assumptions, the Production Target enables a calculation of cash flows and profit derivable from the Jack Hills Project; and
 - (ii) paragraph 18 of the JORC Code, which discusses the requirements for making statements regarding exploration targets.⁸
- (e) The Bidder's Statement and First Supplementary Bidder's Statement do not comply with RG 170 and paragraph 18 of the JORC Code for the following reasons:
- (i) the Project Statements are subjective, and are not supported by existing JORC Code compliant information;
 - (ii) the qualifications, assumptions and sensitivities underlying the Project Statements have not been disclosed;
 - (iii) the Production Target figure has not been expressed as a range; and
 - (iv) a detailed explanation of the basis for the Project Statements has not been provided.
- (f) It is not market practice to offer targeted production figures in circumstances where JORC Code compliant figures supporting the stated target are not available.
- (g) If Murchison is unable to disclose a reasonable basis for the Project Statements, it must be inferred that the Project Statements are misleading and deceptive.
- (h) The deficiency in the level of disclosure contained in the Bidder's Statement is not fully addressed by the additional disclosure contained in the First Supplementary Bidder's Statement.
11. Midwest sought a declaration of unacceptable circumstances under s657A, and final orders under s657D that:
- (a) Murchison *"issue a further supplementary bidder's statement to provide a level of disclosure which would provide a single, comprehensive and consolidated set of information in relation to the Project Statements, satisfy the requirements of RG 170*

⁷ RG 170 gives guidance on ASIC's approach to the use in disclosure documents of prospective financial information (including financial forecasts and projections) i.e. financial information of a predictive character based on assumptions about events that may occur in the future and on possible actions by an entity. It relevantly discusses: (a) when prospective financial information can or should be disclosed; (b) what are reasonable grounds for stating prospective financial information; and (c) how prospective financial information should be disclosed

⁸ Paragraph 18 of the JORC Code provides that: *"It is recognised that it is common practice for a company to comment on and discuss its exploration in terms of target size and type. Any such information relating to exploration targets must be expressed so that it cannot be misrepresented or misconstrued as an estimate of Mineral Resources or Ore Reserves. The terms Resource(s) or Reserve(s) must not be used in this context. Any statement referring to potential quality and grade of the target must be expressed as ranges and must include (1) a detailed explanation of the basis for the statement, and (2) a proximate statement that the potential quantity and grade is conceptual in nature, that there has been insufficient exploration to define a Mineral Resource and that it is uncertain if further exploration will result in the determination of a Mineral Resource."*

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and paragraph 18 of the JORC Code and neutralize the misleading impression that may otherwise be created.”⁹

- (b) Further, that either:
 - (i) all acceptances by Midwest shareholders of Murchison’s Offer made before the supplementary bidder’s statement is dispatched be cancelled, with those shareholders being given the opportunity to accept once they are given corrected information; or
 - (ii) withdrawal rights be granted, enabling any Midwest shareholder to withdraw their acceptance and retain their Midwest shares if they have accepted the Offer prior to receipt of the further supplementary bidder’s statement.

Panel consideration

A reasonable basis?

- 12. The first issue considered by the Panel was the nature of the Project Statements, and the disclosure standard applicable to them.
- 13. In response to the allegations of Midwest (see paragraphs 10(c) - 10(e) inclusive and 10(h) above), Murchison submitted that it had a reasonable basis for the Project Statements, and that it had discharged its disclosure obligation (including its reasonable basis for the Project Statements) under s636(1)(g).
- 14. In particular, Murchison submitted that the Bidder’s Statement and First Supplementary Bidder’s Statement:
 - (a) Described the nature of the Production Target, and the inherent risk and key conclusions associated with achieving it.
 - (b) Demonstrated that considerable work had been conducted by appropriately qualified persons to reach the relevant bases to support the Project Statements.
 - (c) Set out the results of a range of information (including a 97Mt Mineral Resource figure for the Jack Hills Project) assessed by a Competent Person (as that term is defined in the JORC Code), who had consented to its conclusion (and had not withdrawn that consent).
- 15. Murchison further submitted that:
 - (a) The Production Target does not constitute prospective financial information for the purposes of RG 170 as it is not “financial” in nature (and so is outside the scope of the policy underlying RG 170).
 - (b) The Project Statements are supported by a comprehensive internal process, which involved the assessment of significant amounts of technical data and other information relating to the Jack Hills ore body by a Competent Person.
 - (c) Its reasonable basis for the Project Statements and Production Target (including some of the underlying technical data) has previously been released on ASX, and adequate details have been provided in the Bidder’s Statement and First

⁹ Application, at paragraph 5.10

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Supplementary Bidder's Statement to enable Midwest shareholders to understand the approach taken.

- (d) The market understands that Murchison faces significant risks associated with delineating adequate Mineral Resources and Ore Reserves to support the Production Target, and these have been addressed in the Bidder's Statement and First Supplementary Bidder's Statement.
- (e) The level of disclosure contended for by Midwest is unreasonable, and significantly in excess of that provided by Midwest in relation to its own targeted production statements.
- (f) The level of information Midwest contends should be disclosed is not in fact material, and was not provided to shareholders by Midwest as part of the disclosure for its recent rights issue.
- (g) Midwest's concerns can be dealt with through comments in its target's statement.¹⁰
- (h) Details about the basis for aggregate targeted production are not typically required to be disclosed to the market.

Forward looking statements

- 16. Having reviewed the Project Statements and the submissions made by the parties, the Panel concluded that the Project Statements relate to future matters and are forward looking statements for the purposes s670A(2) of the Corporations Act. Accordingly, Murchison is required to have a reasonable basis for them.
- 17. The Panel considered that Murchison was also required to disclose sufficient of the bases and assumptions underlying the statements to target shareholders to allow them to understand and assess the weight they should give to the forward looking statements. The principle is set out in section 602(b)(iii) and given further expression in section 636 and in section 670A where it is negatively expressed as a prohibition on misleading or deceptive statements.¹¹ The disclosure is, in the Panel's view, all the more necessary when it is likely that Midwest shareholders would import the Project Economics Assessment into their consideration of the Offer (see discussion of Project Economics Assessment below).

RG 170

- 18. The Panel did not consider that the Production Target was prospective financial information for the purposes of RG 170. In particular:
 - (a) While the Production Target carries a financial implication i.e. that Murchison has a reasonable basis to believe that:
 - (i) there is sufficient extractable ore to meet the target; and
 - (ii) it will be economically viable to extract and sell the ore,

¹⁰ This submission was made to the Panel prior to release by Midwest of its target's statement on 19 November 2007.

¹¹ Examples of this approach include Infratil Australia Ltd 02 [2000] ATP 1, VincorpWineries Ltd [2001] ATP 6, and Magna Pacific (Holdings) Ltd 01 [2007] ATP 02.

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when viewed in context, the references to targeted production in the Bidder's Statement and First Supplementary Bidder's Statement are limited (both in number and in nature), and do not purport to amount to "financial information of a predictive character based on assumptions about events that may occur in the future and on possible actions by an entity."¹²

- (b) To derive a meaningful financial forecast based on the Production Target, extensive additional information would be required with respect to the economics of the Jack Hills Project including, for example, production costs and capital expenditure.
- (c) Murchison submitted to the Panel that:
 - (i) it does not believe that it has adequate information in relation to the economics of the Jack Hills Project to publish a full financial forecast as to profitability / EBITDA, particularly as a bankable feasibility study for the project has not yet been completed; and
 - (ii) the Bidder's Statement explains to Midwest shareholders that Murchison does not possess information having a sufficient degree of certainty to support a financial forecast, and to provide any such forecast would be unduly speculative given the early stage of development of its mining and infrastructure business.¹³

19. The Panel concluded that the disclosure required by RG 170 is not applicable to the Project Statements.

Previous release of prospective financial information

- 20. During the proceedings the Panel noted that Murchison had released prospective financial information with respect to the project economics for Stage 2 of the Jack Hills Project on ASX (**Project Economics Assessment**), but that the Project Economics Assessment had not been included in the Bidder's Statement.¹⁴
- 21. The Panel sought submissions as to why the Project Economics Assessment had not been included in the Bidder's Statement, and whether any inference should be drawn from exclusion of the Project Economics Assessment as to whether a reasonable basis exists for the Project Statements.
- 22. Murchison advised that the Project Economics Assessment was based on a pre-feasibility study completed in March 2006 (details of which were released to ASX on 24 April 2006 and again on 14 March 2007), and that material changes had occurred since the study was completed. It:

"... was not intended to provide a financial forecast relating to the prospects of Murchison, but rather to demonstrate the potential financial impact between being an owner and user of the necessary port and rail infrastructure as opposed to being a user of that infrastructure with third parties constructing and operating the

¹² Definition of "prospective financial information" in RG 170.

¹³ Section 3.5(g) of the Bidder's Statement.

¹⁴ In particular, the Panel noted an investor presentation released to ASX on 14 March 2007, which included (subject to a disclaimer) forecast information in connection with Stage 2 of the Jack Hills Project with respect to a range of financial criteria including capital expenditure and iron ore sales price.

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infrastructure...The disclaimer applicable to that presentation makes it clear that the assumptions used are under review as part of the ongoing development and feasibility studies and accordingly, reliance should not be placed on those assumptions.”¹⁵

23. Midwest submitted that a key input of the Project Economics Assessment was the Production Target. If the Project Economics Assessment is reliable and supported by reasonable assumptions, it is Material Information, and its exclusion from the Bidder’s Statement indicates that it *“is no longer accurate or cannot be verified (potentially because the 25Mtpa production target is not supportable). Accordingly, Murchison should correct those statements, or if they are sufficiently reliable, repeat them in the Bidder’s Statement.”¹⁶*
24. The Panel accepted Murchison’s explanation that it did not consider the Project Economics Assessment to be current or sufficiently reliable for inclusion in the Bidder’s Statement. However, the Panel was concerned that by including the Production Target in the Bidder’s Statement without also including prospective financial information in support of the target, it was likely that Midwest shareholders would (given the relatively recent release of the Project Economics Assessment) import the Project Economics Assessment into their consideration of the Offer. Accordingly, in the absence of a clear qualification in the Bidder’s Statement i.e. that the Project Economics Assessment is not current and should not be relied upon, the existence of such prospective financial information in the market (in circumstances where that information was not included in the Bidder’s Statement) had the ability to mislead and confuse.
25. The Panel did not take submissions on whether a clear statement had been made to the effect that any financial information previously released by Murchison with respect to the project economics for Stage 2 of the Jack Hills Project was no longer current, should not be relied upon, and was withdrawn. However, the Panel considered that it would have assisted Midwest shareholders if the Bidder’s Statement, in stating that a financial forecast had not been included, had also included a qualification to the effect that any financial information previously released by Murchison on ASX with respect to the project economics for the Jack Hills Project is not current, and should not be relied upon.

The JORC Code

26. The Panel noted that while the JORC Code addresses the use of targets in connection with Exploration Results¹⁷, it does not address statements about targeted production.
27. As the Project Statements do not relate to disclosure about Exploration Results, Mineral Resources and Ore Reserves for the purposes of the JORC Code, the Panel concluded that the disclosure requirements of the JORC Code are not directly applicable to the Project Statements.
28. The Panel noted, however, that:

¹⁵ Submissions by Murchison in response to Panel supplementary brief dated 28 November 2007, at page 6.

¹⁶ Submissions by Midwest in response to Panel supplementary brief dated 28 November 2007, at page 5.

¹⁷ Under paragraph 16, if a company reports Exploration Results in relation to mineralisation not classified as a Mineral Resource or an Ore Reserve, then estimates of tonnages and average grade must not be assigned to the mineralisation unless the situation is covered by paragraph 18, and then only in strict compliance with the requirements of that clause.

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- (a) The JORC Code aims to improve and standardise disclosures about Exploration Results, Mineral Resources and Ore Reserves.
- (b) The terms recommended by the JORC Code for the description of Exploration Results, Mineral Resources and Ore Reserves have become standard usage in publications by listed companies, and material departures from them (i.e. the use of non-JORC Code compliant terminology to describe Exploration Results, Mineral Resources and Ore Reserves) risk being misleading.¹⁸
- (c) Where statements concerning mineralisation deposits go beyond “exploration target” stage, the JORC Code requires the economic implications of ore extraction to be addressed. For example, portions of a deposit that do not have reasonable prospects for eventual economic extraction must not be included in a Mineral Resource, and if the judgment as to “eventual economic extraction” relies on untested practices or assumptions, this is a material matter which must be disclosed in a public report.¹⁹
- (d) The economic implications of ore extraction are similarly important in assessing the Project Statements. Accordingly, applying the same logic underlying the JORC Code, disclosure of the financial information, assumptions and risks underlying the Project Statements would be appropriate to ensure Midwest shareholders are in a position to properly evaluate the Project Statements.
- (e) If statements that are not covered by the JORC Code are to be made regarding mineralisation deposits, they should not be inconsistent with the JORC Code (at least the spirit of the JORC Code, if not also the letter).

Market practice

29. The Panel considered market practice when referring to targeted production in the iron ore / bulk commodities industry. In particular, the Panel considered whether it is market practice to offer “targeted production” figures for projects which have not reached levels of certainty under which the mineralisation could be described under JORC Code consistent terminology i.e. projects that do not have a supporting bankable feasibility study and/or Mineral Resource or Ore Reserve signed off by a Competent Person which is at least equal to (or in excess of) the stated production target.
30. Murchison contended that it is market practice to make statements regarding targeted production in the absence of such JORC Code compliant mineralisation, and provided a number of recent examples in support of its position. Murchison also referred the Panel to:
- (a) Paragraph 18 of JORC, which includes the statement *“It is recognized that it is common practice for a company to comment on and discuss its exploration in terms of target size and type.”*
 - (b) The practice of both Murchison and Midwest.
31. In contrast, Midwest contended that it is not market practice to make statements regarding targeted production in the absence of JORC Code compliant mineralisation

¹⁸ [In the matter of Namakwa Diamond Company NL \(No.2\) \[2001\] ATP 9](#), at [para 20].

¹⁹ JORC Code, at paragraph 19.

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equal to (or in excess of) the stated target, and referred the Panel to a number of recent examples in support of its position.

32. The Panel concluded that:

- (a) There does not appear to be a clear market practice when referring to targeted production. A number of the examples provided by Murchison refer to “exploration targets” (as opposed to production targets), which does not carry the same implication of economic viability. Equally, a number of the examples provided by Midwest to support its position refer to production targets in circumstances where the production targets are supported by JORC Code compliant Ore Reserves, and appear to relate to companies that have completed bankable feasibility studies (and hence are at a different stage of their development cycle to Murchison in respect of the Jack Hills Project).
- (b) In the absence of clear market practice, and given the highly specialized nature of the resources industry, further evidence (including expert evidence) would be required to form a view on what constitutes current market practice in relation to the standard of disclosure applicable to demonstrate a reasonable basis for a statement in relation to targeted production.

Additional Disclosure

33. The Panel noted that:

- (a) The First Supplementary Bidder’s Statement contained a number of “*updates and amendments*” with respect to the Production Target, including the fact that:
 - (i) Murchison had previously announced to ASX the targeted production of the Jack Hills Project, and information relevant to achievement of the target, noting that a target by definition does not carry the level of certainty that is implied by a forecast or a projection and the achievement of a target should be recognised as having a greater level of risk;
 - (ii) the potential quantity and grade of the exploration target implied by the Production Target is conceptual in nature and is not intended to represent a Mineral Resource or Ore Reserve for the Jack Hills Project; and
 - (iii) there is currently insufficient exploration and analysis to describe the exploration target as a Mineral Resource.
- (b) The First Supplementary Bidder’s Statement also provided²⁰ that:

“Referring to “targeted production” is common for mineral development projects held by both established producers and exploration/development companies both within Australia and in major mining centres such as South Africa, Canada, United States and South America. A “target” by definition does not carry the level of certainty that is implied by a “forecast” or a “projection” and the achievement of a target should be recognised as having a greater level of risk”.

34. However, the Panel did not consider that the qualifications contained in the First Supplementary Bidder’s Statement fully addressed their concerns in relation to the Project Statements (set out in paragraph 38 below).

²⁰ Murchison’s first supplementary bidder’s statement dated 1 November 2007, at page 1.

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35. Subsequent to the Application, a number of additional disclosures were made, including:
- (a) The Midwest target's statement, which contained extensive criticism of the Production Target, its inherent risk, and (based on the AMC Report) the concerns of Midwest as to the likelihood of it being achieved.
 - (b) The Second Supplementary Bidder's Statement, which contained Murchison's response to the Midwest target's statement, and included "*the information on which Murchison has relied and the methodology Murchison has used in forming its views on the resource potential*" of the Jack Hills Project.
 - (c) The Third Supplementary Bidder's Statement, which contained (amongst other things) a JORC Code compliant Mineral Resource update in respect of the Jack Hills Project.
- (collectively, the "**Additional Disclosures**")

Discussion

36. Ultimately, the Panel considered it was not necessary to form a concluded view on whether Murchison had disclosed a reasonable basis for the Project Statements, or its level of disclosure in the Bidder's Statement or First Supplementary Bidder's Statement met (or exceeded) current market practice. The key issue for determination was whether, at the time it was considering the Application, Midwest shareholders were likely to understand that:
- (a) the Production Target is aspirational only.
 - (b) Financial information to support the Production Target is not currently available.
 - (c) The Production Target is not supported by a JORC Code compliant Ore Reserve.

Misleading/confusing statements

37. The Panel noted that:
- (a) Exploration Results and Mineral Resource information in respect of the Jack Hills Project form part of the basis on which Murchison considers its Production Target to be reasonable.
 - (b) Murchison advised the Panel that while its statements about its "exploration targets" had been signed off by a Competent Person²¹, the Production Target had not been (and technically could not be, as the JORC Code does not address production). However, no clear statement to that effect is contained in the

²¹ The Panel noted that the Bidder's Statement contains a discrepancy in that the JORC Code compliant information stated to have been signed off by a Competent Person includes a reference to Exploration Results, Mineral Resources and Ore Reserves, however the form of consent itself is limited to Mineral Resources and Ore Reserves. In particular, compare the form of consent at paragraph 10.15 of the Bidder's Statement (which relates solely to Ore Reserves and Mineral Resources) with the paragraph on Exploration Results, Mineral Resources and Ore Reserves on the inside cover.

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Bidder's Statement (or supplementary bidder's statements)
(collectively: **Misleading Statements**).

38. Accordingly, the Panel was concerned that Midwest shareholders may have:
- (a) Understood from the context of the Project Statements in the Bidder's Statement that the Production Target of 375Mt had significance under the JORC Code, or had been signed off by a Competent Person.
 - (b) Assumed, in the absence of a clear and proximate statement to the contrary, the existence of financial information supporting the Production Target.
 - (c) Imported the financial information previously released by Murchison on ASX into the Bidder's Statement (given the relatively recent release of that financial information, the fact that it could easily be applied to the Production Target, and the absence of a clear and proximate statement to the effect that any financial information previously released by Murchison on ASX with respect to the project economics for the Jack Hills Project is not current, and should not be relied upon).

Conclusion

39. As a consequence of the Misleading Statements, the Panel concluded that the Project Statements had the ability to mislead and confuse Midwest shareholders, and should only have been included in the Bidder's Statement if underlying financial information, assumptions and risks were also included.
40. Having reached this conclusion on the Misleading Statements, the Panel was minded to make a declaration of unacceptable circumstances. However, for the reasons set out in paragraphs 41 to 42 below, the Panel did not consider the circumstances that existed at the time of its decision in relation to the affairs of Midwest to be unacceptable circumstances.

DECISION

41. In light of the Additional Disclosures, the Panel considered that the aspirational nature (and associated risk) of the Project Statements have been sufficiently brought to the attention of Midwest shareholders, who can evaluate for themselves the relative merits of the arguments put forward by bidder and target. In particular, Midwest shareholders will have understood from the qualifications contained in the First Supplementary Bidder's Statement and the Additional Disclosures (see paragraphs 33 to 35 above) that:
- (a) While Murchison believes that it has a reasonable basis for the Production Target, the target is aspirational only.
 - (b) Financial information in relation to the economics of the Jack Hills Project is not currently available.
42. This understanding would have assisted in correcting any misapprehension that the Production Target of 375Mt had significance under the JORC Code, or had been signed off by a Competent Person.
43. Consequently, the Panel decided not to make a declaration of unacceptable circumstances.

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44. However, the Panel considered in this case that:
- (a) Given the potential to mislead and confuse, aspirational forward looking statements (such as the Project Statements) should not be used in takeover documents unless the aspirational nature and the reasonable basis for the statements (including the underlying assumptions and risks) are clearly and proximately set out.
 - (b) Where the aspirational forward looking statement relates to a “production target” for a project, this implies that the company has a reasonable basis for believing that the ore will be economically viable to extract. Accordingly, in addition to the matters identified in (a) above, financial information should be disclosed. This could, depending upon the stage of development, range from disclosure of underlying financial assumptions to a forecast underpinned by historical information.
45. For this reason, the Panel advised the parties that future disclosures to Midwest shareholders²² should not refer to production targets unless they also include the financial information, assumptions and risks which underlie the stated target.

Teresa Handicott

President of the Sitting Panel

Date of decision 14 December 2007

Date reasons published 30 January 2008

²² The Panel noted that both Murchison and Midwest have referred to production targets in communications to Midwest shareholders.