



Monday, 23 June 2008

Midwest Corporation Limited 02 - Declaration of Unacceptable Circumstances and Orders

The Panel today made a declaration of unacceptable circumstances (Annexure A) and final orders (Annexure B) in relation to an application dated 4 June 2008 by Sinosteel Ocean Capital Pty Limited in relation to the affairs of Midwest Corporation Limited (TP 08/53).

Background

Midwest is the subject of an off-market takeover bid by Sinosteel. It is also the subject of a proposed merger with Murchison Metals Limited by way of scheme of arrangement. Murchison has a 9.98% interest in Midwest, which it announced on 26 May 2008. The Harbinger entities¹ have a 19.98% interest in Murchison.

Between 26 and 30 May 2008, the Harbinger entities made on-market purchases of 9.29% of the shares in Midwest. This included purchases of approximately 4.27% of Midwest shares on 28, 29 and 30 May 2008, without giving notice under the *Foreign Acquisitions and Takeovers Act 1975* (FATA). For the purposes of FATA, the interests of the Harbinger entities and Murchison are aggregated as a result of the Harbinger entities having a 19.98% interest in Murchison. Therefore, 4.27% of the Harbinger entities' acquisitions in Midwest were over the 15% threshold in FATA.

Declaration

The Panel considered that the circumstances were unacceptable having regard to their effect on the control or potential control of Midwest, or the acquisition of a substantial interest in Midwest, or were otherwise unacceptable having regard to the principle in s602(a) of the Corporations Act relating to an efficient, competitive and informed market for corporate control. Its reasons included:

- An aspect of an efficient, competitive and informed market is that market participants comply with Australian laws of general application, particularly those relating to the acquisition of securities. This promotes a level playing field for all market participants.

¹ Harbinger Capital Partners Master Fund 1, Limited and other associated entities.

- The Harbinger entities' non-compliance gave them an advantage during the Sinosteel takeover bid which they would not otherwise have had.
- Subsequent approval under FATA of any acquisition by the Harbinger entities does not change the situation in relation to the circumstances with which the Panel is concerned.
- The purchase of the Midwest shares by the Harbinger entities over the 15% FATA threshold appeared to the Panel to:
 - have been a material factor in maintaining the Midwest share price at a level above which it would not otherwise have been, if the Harbinger entities had not purchased those Midwest shares, during the relevant period
 - by reason of the effect on the Midwest share price, have influenced the view that market participants would be likely to take regarding the relative merits of the proposed Murchison/Midwest merger and the Sinosteel takeover offer during the period that the Harbinger entities were purchasing the excess Midwest shares and
 - have materially affected Sinosteel's ability to compulsorily acquire Midwest, by allowing the Harbinger entities to acquire very close to a blocking stake in Midwest when they would not otherwise have been able to do so.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s657A(3).

The Panel did not conduct proceedings on the part of the application by Sinosteel relating to an association for Corporations Act purposes between the Harbinger Entities and Murchison. Sinosteel did not demonstrate a sufficient body of evidence of association to warrant the Panel conducting proceedings on this part of the application.

Orders

The Panel has made orders that the Harbinger entities not vote their 4.27% interest in Midwest while the Sinosteel bid is on foot. If the Harbinger entities fail to obtain FATA approval from the Treasurer by 11 July 2008, they must divest their 4.27% interest in Midwest within 3 trading days. Divestment can cease if FATA approval is received during the 3 day period. The Harbinger entities may apply for a variation of the divestment order in the event that the Sinosteel bid is extended.

The sitting Panel for the proceedings was Graham Bradley (President), Brett Heading and Alastair Lucas.

The Panel will publish its reasons for its decision on its website at www.takeovers.gov.au in due course.

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Annexure A
Corporations Act
Section 657A
Declaration of Unacceptable Circumstances

In the matter of MIDWEST CORPORATION LIMITED 02

WHEREAS

1. Midwest Corporation Limited (**Midwest**) is the subject of:
 - (a) an off-market takeover bid by Sinosteel Ocean Capital Pty Limited (**Sinosteel**), which currently has a 43.62% interest in Midwest, and
 - (b) a proposed merger with Murchison Metals Limited (**Murchison**) by way of scheme of arrangement
2. Midwest has 213,040,818 shares on issue
3. On 24 May 2008, Murchison increased its relevant interest in Midwest from 4.78% to 9.98%, which it disclosed in a substantial holding notice on 26 May 2008. Murchison currently has a 9.98% interest in Midwest
4. Harbinger Capital Partners Master Fund I, Harbinger Capital Partners Special Situations Fund LP, and other affiliated entities as identified in substantial holding notices dated 29 and 30 May 2008 (**Harbinger entities**) collectively have a 19.98% interest in Murchison
5. Under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) Murchison and the Harbinger entities are associates in relation to Midwest
6. The Harbinger entities also currently have a 9.29% interest in Midwest, acquired as follows:

| Date | Shares | % (approx) |
|-----------|-----------|------------|
| 26 May 08 | 2,047,991 | 0.96 |
| | 1,023,966 | 0.48 |
| 27 May 08 | 1,158,345 | 0.54 |
| | 1,751,430 | 0.82 |
| | 579,172 | 0.27 |
| 28 May 08 | 875,715 | 0.41 |
| | 6,542,577 | 3.07 |
| | 3,271,289 | 1.54 |
| 29 May 08 | 782,063 | 0.37 |
| | 649,285 | 0.30 |
| | 391,032 | 0.18 |

| | | |
|--------------|-------------------|-------------|
| | 324,642 | 0.15 |
| 30 May 08 | 266,958 | 0.15 |
| | 133,478 | 0.06 |
| Total | 19,797,973 | 9.29 |

7. In summary, under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) a person is not entitled to enter into an agreement to acquire shares in a corporation if their and their associates' voting power in the corporation is 15% or more unless the person has furnished the Treasurer with a notice stating the person's intention and either:
- (a) 40 days has passed or
 - (b) advice is given that the Commonwealth Government does not object to that person entering into that agreement (with or without conditions)
8. The Harbinger entities acquired some of the shares in Midwest referred to in paragraph 6 otherwise than in compliance with the requirements of the *Foreign Acquisitions and Takeovers Act 1975* (Cth),
(the **Circumstances**).
9. It appears to the Panel that the Circumstances are unacceptable having regard to:
- (a) the effect that the Panel is satisfied that the Circumstances have had, are having, will have or are likely to have on:
 - (i) the control or potential control of Midwest; or
 - (ii) the acquisition or proposed acquisition by Sinosteel of a substantial interest in Midwest; or
 - (b) the purposes of Chapter 6 set out in section 602 of the Act.
10. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances in relation to the Circumstances and the affairs of Midwest.
11. The Panel has had regard to the matters in section 657A(3).

DECLARATION

Under section 657A, the Panel declares that the Circumstances constitute unacceptable circumstances in relation to the affairs of Midwest.

Alan Shaw
Counsel
with authority of **Graham Bradley**
President of the Sitting Panel
Dated 20 June 2008



Annexure B
Corporations Act
Section 657D
Orders

IN THE MATTER OF MIDWEST CORPORATION LIMITED
02

PURSUANT TO

1. A declaration of unacceptable circumstances in relation to the affairs of Midwest Corporation Limited (**Midwest**) on 20 June 2008.
2. Section 657D of the Corporations Act 2001 (Cth).

THE PANEL ORDERS

1. None of Harbinger Capital Partners Master Fund I, Ltd, Harbinger Capital Partners Special Situations Fund, L.P and the other affiliated entities identified in the substantial holding notices dated 29 and 30 May 2008 (**Harbinger entities**) may exercise, or allow the exercise of, any voting rights (directly or by proxy) attached to any excess Midwest shares.
2. The order in paragraph 1 has effect for the duration of the off-market takeover bid by Sinosteel Ocean Capital Pty Limited (**Sinosteel**), including any extension thereof.
3. If the Harbinger entities do not become entitled under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) to acquire the excess shares by 11 July 2008, the Harbinger entities must dispose of the excess shares before the close of the third trading day after that date.
4. If the Harbinger entities become entitled under FATA to acquire or hold the excess shares, the order in paragraph 3 ceases to have effect in respect of any excess shares not finally disposed of.
5. The parties may apply for a variation of these orders, or further orders, if the Sinosteel takeover bid is extended at any time prior to 11 July 2008.
6. In these orders, '**excess Midwest shares**' means 9,108,804 Midwest shares, being:
 - (a) shares acquired on 28, 29 and 30 May 2008 that, when aggregated with shares already held, exceeds the number that could be acquired without notice pursuant to section 26 of FATA, and

- (b) based on the number of Midwest shares that Murchison Metals Limited (**Murchison**) has a relevant interest in as stated in Murchison's substantial holding notice of 26 May 2008.

Alan Shaw
Counsel
with authority of Brett Heading
Deputy President of the Sitting Panel
Dated 23 June 2008