



Australian Government

Takeovers Panel

Reasons for Decision

CuDeco Limited

[2015] ATP 11

Catchwords:

Decline to conduct proceedings – rights issue – association – substantial holder notice – underwriting – control – voting power

Corporations Act 2001 (Cth), sections 12, 602, 606, 657C(3), 671B, 713

Guidance Note 4 Remedies General, Guidance Note 17 Rights Issues

Mount Gibson Iron Limited [2008] ATP 4

| Interim order | IO undertaking | Conduct | Declaration | Final order | Undertaking |
|---------------|----------------|---------|-------------|-------------|-------------|
| NO | NO | NO | NO | NO | NO |

INTRODUCTION

- The Panel, Alex Cartel, James Dickson (sitting President) and Elizabeth Hallett, declined to conduct proceedings on an application by Neville Lowe, a shareholder of CuDeco Limited representing 97 shareholders. The Applicant submitted (among other things) that CuDeco’s proposed rights issue had a control effect and there was deficient disclosure including in relation to the rights issue, its underwriters and the combined voting power of substantial shareholders. The Panel considered that the application was premature because CuDeco had not lodged its rights issue prospectus. CuDeco announced that it would withdraw its rights issue following completion of a share placement with an institutional investor and proceed with a revised rights issue. Following this, the Panel declined to conduct proceedings.

- In these reasons, the following definitions apply.

| | |
|--|---|
| Applicant | Mr Neville Lowe, representing himself and 97 shareholders identified in a schedule to the application |
| CuDeco | CuDeco Limited |
| China Oceanwide | China Oceanwide International Investment Co Ltd |
| Ineligible Foreign Shareholders | Shareholders outside Australia, New Zealand and Hong Kong and those who are not qualified domestic institutional investors in China |
| Infinitus | Infinitus Limited |
| Major Shareholders | China Oceanwide, New Apex and Sinosteel |
| New Apex | New Apex Asia Investment Limited |
| Rights issue | 1 for 2 fully underwritten renounceable rights issue at \$0.60 per share announced on 17 September 2015 |
| Sinosteel | Sinosteel Equipment and Engineering Co Ltd |

Underwriters Infinitus, China Oceanwide and New Apex

FACTS

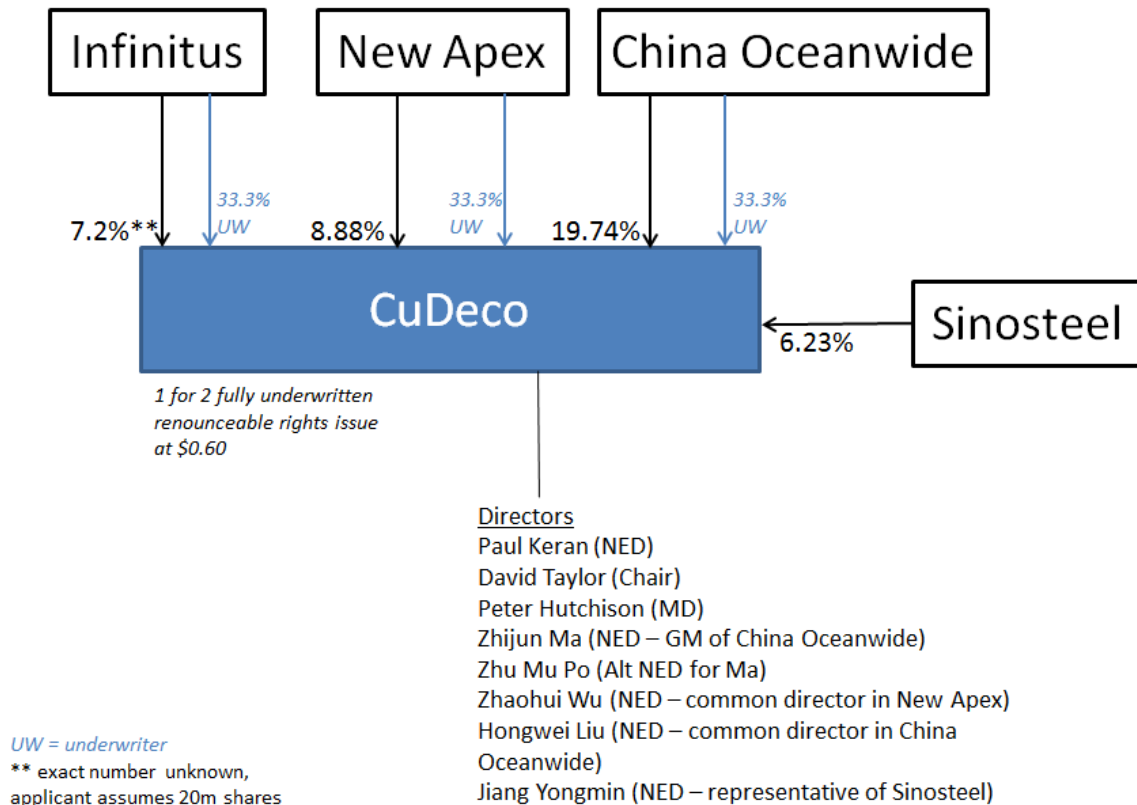
3. CuDeco is an ASX listed mining exploration company (ASX code: CDU). CuDeco has been suspended from trading since 4 August 2015.
4. The top three holders of CuDeco shares are:
 - (a) China Oceanwide International Investment Co Ltd (19.74%)
 - (b) New Apex Asia Investment Limited (8.88%) and
 - (c) Sinosteel Equipment and Engineering Co Ltd (6.23%).
5. CuDeco has attempted to raise funds for its Rocklands project. This included a subscription agreement with Focus Sun Holdings Limited, an investment group from China. On 30 June 2015, shareholders of CuDeco did not approve share and option placements to Focus Sun.
6. On 23 July 2015, the Major Shareholders lodged separate substantial holder notices. All three Forms stated the following with respect to ‘Changes in association’:

Discussions have been held in relation to mutual concerns about the financial performance of CuDeco Limited, with the view to the relevant parties proposing to act in concert in relation to CuDeco Limited’s affairs (namely the provision of funding to CuDeco Limited). Sinosteel, Oceanwide and New Apex are currently in discussion with CuDeco Limited relating to the potential terms of such funding.
7. Also on 23 July 2015, CuDeco announced that the Major Shareholders had agreed to provide a short term loan to CuDeco whilst CuDeco was waiting to drawdown an existing facility. The Major Shareholders had also agreed to furnish the lender with letters of support for the additional drawdowns on condition that CuDeco’s chairman at the time resigned. The chairman, Mr Wayne McCrae, resigned on 24 July 2015.
8. On 17 September 2015, CuDeco announced a 1 for 2 fully underwritten renounceable rights issue at \$0.60 per share. The announcement also stated that:
 - (a) the Major Shareholders intended to participate in the rights issue for their full entitlement
 - (b) the rights issue would be underwritten in equal proportions by the Underwriters and
 - (c) CuDeco would not be extending the rights issue to Ineligible Foreign Shareholders.
9. On 29 October 2015, CuDeco made an announcement stating that:
 - (a) it had signed a term sheet for a \$30 million share placement with a UK institutional investor
 - (b) following the placement, CuDeco would withdraw the rights issue and undertake a new non-renounceable rights issue on the basis of 1 new share for 4 shares held at \$0.80

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- (c) CuDeco had engaged a lead manager for the proposed new rights issue and
(d) CuDeco and the lead manager were seeking an independent underwriter.
10. The structure of holdings and transactions of the various parties are shown in the following diagram:



APPLICATION

11. By application dated 23 October 2015, the Applicant sought a declaration of unacceptable circumstances. The Applicant submitted (among other things) that:
- (a) there had been breaches of the substantial holding provisions because:
- (i) the Major Shareholders had not included aggregated voting power or terms of any underwriting agreement in their substantial holder notices and
 - (ii) Infinitus had not lodged a substantial holder notice
- (b) the exceptions to the prohibition in section 606¹ in items 10 and 13 of section 611 were not available to CuDeco because:
- (i) CuDeco had not indicated that it would appoint a nominee for Ineligible Foreign Shareholders and
 - (ii) no disclosure document had been lodged in relation to the impact of the underwriting on the Underwriters' voting power and

¹ All references are to the *Corporations Act 2001* (Cth) unless otherwise stated

- (c) the rights issue was structured to allow the Major Shareholders to take control of CuDeco.
12. The Applicant submitted that the rights issue was not taking place in a fully informed market because:
- (a) there was insufficient disclosure regarding the effects of the rights issue, including the dispersion strategy, the intentions of the Major Shareholders if they achieved control and the underwriting arrangements
 - (b) shareholders were unaware of the identity of Infinitus and
 - (c) shareholders had not been provided with sufficient disclosure regarding the merits of the rights issue.
13. The Applicant also submitted that the rights issue did not provide a reasonable and equal opportunity to participate because it excluded Ineligible Foreign Shareholders.

Interim orders

14. The Applicant sought interim orders including to the effect that:
- (a) CuDeco not proceed with the rights issue
 - (b) the Major Shareholders not acquire any shares in CuDeco and
 - (c) the status quo should be preserved pending the Panel investigating the circumstances.

Final orders sought

15. The Applicant sought the following final orders in the alternative:
- (a) the rights issue be prevented from occurring.
 - (b) the Major Shareholders make a takeover bid for CuDeco with an applicable control premium.
 - (c) CuDeco only proceed with the rights issue subject to a number of conditions including shareholder approval, further disclosure and formulation of a dispersion strategy.²

DISCUSSION

16. On 15 October 2015, CuDeco announced that, due to an ASIC determination under s713(6), CuDeco could not use a short form prospectus until 9 October 2016, and that it was required to prepare a full prospectus for its rights issue. CuDeco has not yet lodged a prospectus.
17. As the Panel’s Guidance Note on rights issues makes clear, disclosure is of increased importance when shareholders are considering the desirability of making a further investment in a company, the control implications of a rights

² This proposed order also included a 24 month escrow period for any CuDeco shares provided to the Underwriters or the appointment of sub underwriters (or ASIC) to receive and sell underwritten shares to the extent the Underwriters’ holdings exceed 20%

issue and whether to take steps to protect against dilution of their existing holdings.³ We would expect that CuDeco will address such disclosures in any prospectus that it produces in relation to a rights issue.

18. We consider that this application is premature as CuDeco has not lodged a prospectus for the rights issue (i.e. the subject of the application) or for the recently announced proposed rights issue. Concerns in the application regarding disclosure of material information, structure of the rights issue and the underwriting arrangements (including details of Infinitus) would likely have been addressed in such a prospectus.⁴ Moreover, due to the ASIC determination, CuDeco is required to use a full prospectus, which necessitates more disclosure than the usual short-form prospectus used for rights issues under s713.
19. The same might be said for any dispersion strategy employed to mitigate the control effect of the rights issue. This information would usually be detailed in a prospectus.⁵ Therefore, given that the likely remedies, had we conducted proceedings and made a declaration of unacceptable circumstances, would be disclosure and a dispersion strategy, which we would expect to be detailed in any prospectus, we again reach the conclusion that this application is premature.
20. The association disclosed in the Major Shareholders' substantial holder notices on 23 July 2015 is unclear as to its terms or when it arose. This might be a matter that ASIC wishes to take up with the Major Shareholders. We note that the Applicant has raised control and market manipulation concerns with ASIC separately. Clearly, by reason of having made a s713(6) determination, ASIC is already considering the situation of the company. If the association amounts to a voting agreement, it would give rise to concerns. On the face of it, the association appears not to go that far and there is nothing to indicate more than is detailed in the notices. While with more information this aspect of the application might have warranted further investigation, we have not been provided with evidence in relation to any concerning aspect of the association between the Major Shareholders sufficient to justify us conducting proceedings.⁶
21. Of course, more may be uncovered - either by the Applicant, or by ASIC if it investigates further - and a fresh application on the question of association could then be brought. We note in passing that the association issue gives rise to a question about whether it has been raised in time⁷ but we do not need to resolve this. We note also that, in any event, the association issue could be raised in another forum.

Withdrawal of rights issue

22. As noted, on 29 October 2015, CuDeco announced that it would withdraw the rights issue and expects to undertake a new rights issue following an agreement with an institutional investor.

³ Guidance Note 17 *Rights Issues* at [25]

⁴ GN 17 at [25]

⁵ GN 17 at [30] – [32]

⁶ *Mount Gibson Iron Limited* [2008] ATP 4 at [15]

⁷ See s657C(3)

23. We consider the announcement, by withdrawing the rights issue, removed a key ground of complaint in the application. We also note that CuDeco proposed to appoint an independent underwriter for the proposed new rights issue.
24. Following lodgement and ASIC's review of the full prospectus for CuDeco's proposed new rights issue, it is open to ASIC, the Applicant or any other affected person to lodge a new application with the Panel based on specific concerns which arise at that time.

DECISION

25. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

26. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

James Dickson
President of the sitting Panel
Decision dated 2 November 2015
Reasons published 20 November 2015

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Advisers

| Party | Advisers |
|----------------|-------------|
| CuDeco Limited | Moody Legal |
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