



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Nimrod Resources Limited 02  
[2022] ATP 22**

**Catchwords:**

*Decline to conduct proceedings – entitlement offer – s615 nominee – effect on control*

*Corporations Act 2001 (Cth), sections 602, 606, 611(item 10), 615, 657A, 657C(3)*

*Guidance Note 17 – Rights issues*

*GoldLink IncomePlus Limited 02 [2008] ATP 19; Dromana Estate Limited 01 [2006] ATP 4; Emperor Mines Ltd 01 [2004] ATP 24*

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

## INTRODUCTION

1. The Panel, James Burchnall, Anthony Jarvis and Sarah Rennie (sitting President), declined to conduct proceedings on an application by Romell Pty Ltd in relation to the affairs of Nimrod Resources Limited. The application concerned whether an increase in a shareholder’s voting power from 33% to 43.78% under Nimrod’s entitlement offer was outside the exception in item 10 of section 611<sup>1</sup> because Nimrod had not appointed a section 615 nominee. The Panel considered that the proportion of foreign shareholders potentially excluded from the entitlement offer would not have had a material impact on the control of Nimrod and the application had not been made in a timely manner. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.
  - Entitlement Offer** has the meaning given in paragraph 4
  - Excess Shares** has the meaning given in paragraph 12(a)
  - Goldtower** Goldtower Construction Pty Ltd as trustee for the GCT Trust
  - Nimrod** Nimrod Resources Limited
  - Romell** Romell Pty Ltd
  - US Shareholders** has the meaning given in paragraph 19(e)(iii)

## FACTS

3. Nimrod is an unlisted public company with more than 50 members.

---

<sup>1</sup> Unless otherwise indicated, all statutory references are to the *Corporations Act 2001 (Cth)* and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

## Takeovers Panel

### Reasons – Nimrod Resources Limited 02 [2022] ATP 22

4. On 13 May 2022, Nimrod issued a short form prospectus<sup>2</sup> for a pro-rata non-renounceable 3 for 5 entitlement offer at an issue price of \$0.035 per share to raise up to approximately \$3.3 million before issue costs (**Entitlement Offer**).
5. As at 13 May 2022:
  - (a) Nimrod had foreign shareholders in the United States of America and Hong Kong
  - (b) Goldtower had an interest in 33% of the Nimrod shares.
6. Goldtower subscribed for its full entitlement under the Entitlement Offer.
7. As a result of the issue of shares under the Entitlement Offer, Goldtower increased its interest in Nimrod to 43.87%.
8. The new shares under the Entitlement Offer were issued in June 2022.
9. Nimrod did not appoint a section 615 nominee in connection with the Entitlement Offer.

## APPLICATION

### Declaration sought

10. By application dated 23 September 2022, Romell sought a declaration of unacceptable circumstances. Romell submitted that the Entitlement Offer was not offered to Nimrod's foreign shareholders and accordingly, Goldtower had increased its interest in Nimrod invalidly as it was unable to rely on item 10 of section 611.
11. Romell submitted that the effect of the circumstances was that Goldtower had increased its voting power in Nimrod in breach of section 606 and contrary to the principles in section 602.

### Interim orders sought

12. Romell sought interim orders to the effect that, pending determination of its application:
  - (a) Goldtower be restrained from exercising the votes attaching to Nimrod shares held in excess of 36%, calculated by adding its 3% creep entitlement to its pre-Entitlement Offer voting power of 33%, (**Excess Shares**) at any general meeting of Nimrod or any adjournment of that meeting
  - (b) Goldtower be prevented from acquiring any further Nimrod shares or transferring or disposing of their Nimrod shares.

### Final orders sought

13. Romell sought final orders to the effect that:
  - (a) *“Goldtower be required to make a takeover bid for all of the shares in Nimrod other than those held by Goldtower in accordance with the provisions of the Corporations Act”*

---

<sup>2</sup> Under s712

## Takeovers Panel

### Reasons – Nimrod Resources Limited 02 [2022] ATP 22

- (b) the Excess Shares be vested in ASIC for it to sell on terms the Panel sees fit or
- (c) that Goldtower be permanently restrained from exercising the voting rights attaching to the Excess Shares at any general meeting of Nimrod.

## DISCUSSION

14. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.

### Prospectus

15. Item 10 of section 611 allows acquisitions of voting shares exceeding the limit in section 606. In order to rely on the exception, a number of conditions must be satisfied, including that every person has a reasonable opportunity to accept the offer and the terms of all the offers are the same.
16. Section 615 allows an issuer to exclude foreign shareholders and retain the benefit of the rights issue exception if a nominee (approved by ASIC) is appointed.<sup>3</sup>
17. Under section 4.1 of the Prospectus, an eligible shareholder was defined as:
- “... those persons who:*
- (a) are registered as a holder of Shares as at 5.00pm AEST on the Record Date as evidenced by the Register; and*
  - (b) have a registered address in Australia or Hong Kong (in compliance with the criteria set out in Sections 4.9 and 4.11 below) or other jurisdiction determined by the Board as being eligible and only to the extent the Offer may be made in accordance with applicable securities laws; and*
  - (c) are not in the United States and are not acting for the account or benefit of a person in the United States, unless the Board determines otherwise and the Offer can be made in a transaction exempt from, or not subject to, the registration requirements of the US Securities Act and any applicable securities laws of any state or other jurisdiction of the United States (in compliance with the criteria set out in Sections 4.10 below).”<sup>4</sup>*
18. The Prospectus also detailed the potential effects on control of Nimrod the Entitlement Offer may have, including noting that:
- (a) Nimrod anticipated that Goldtower would participate in the Entitlement Offer and
  - (b) subject to the amount of take up, Goldtower could hold an interest between 33.01% and 44.09% in Nimrod.

---

<sup>3</sup> The Panel has previously stated that where foreign shareholders are excluded and s615 has not been complied with, no person acquiring shares under the rights issue could rely on the rights issue exception – see *Emperor Mines Ltd 01* [2004] ATP 24 at [102] and *Dromana Estate Limited 01* [2006] ATP 4 at [37] and that technical non-compliance with s615 does not of itself justify a declaration of unacceptable circumstances – see *Emperor Mines Ltd 01* [2004] ATP 24 at [106]

<sup>4</sup> Sections 4.9, 4.10 and 4.11 contained standard waivers in relation to jurisdictions outside of Australia and specifically Hong Kong and the United States

## Takeovers Panel

### Reasons – Nimrod Resources Limited 02 [2022] ATP 22

#### Preliminary submissions

19. Nimrod made preliminary submissions that, among other things:
- (a) *“Nimrod is a very junior unlisted exploration company. In December 2021, Nimrod advised all shareholders of the need to raise capital to meet the immediate financial requirements of the Company”*
  - (b) *“the Company noted the intention of the substantial shareholders with respect to participating in the Offer in section 2.8 of the Prospectus”*
  - (c) *“the Prospectus for the Offer was accessible to all shareholders (including each of the Foreign Shareholders) from 13 May 2022 on the Company’s website and ASIC Offer Notice Board”*
  - (d) *“the Company received queries from ASIC in relation to the Prospectus on 25 May 2022. ASIC did not comment on the structure of the Offer”*
  - (e) *“...the foreign shareholder exclusions in sections 4.1(c), 4.9, 4.10, 4.11, 4.14(t) and 4.14(u) did not preclude the Foreign Shareholders from participating in the Offer. The Offer was made to all Nimrod shareholders (including the Foreign Shareholders) on the understanding that:*
    - (i) *shareholders on the Record Date with a registered address in Australia and Hong Kong were entitled to participate in the Offer in accordance with section 4.1(b) of the Prospectus;*
    - (ii) *[name of shareholder] is a ‘professional investor’ within the meaning of the Securities and Futures Ordinance (Chapter 571, Laws of Hong Kong) and was an ‘eligible shareholder’ in accordance with applicable securities laws in Hong Kong; and*
    - (iii) *[names of shareholders] (together, the US Shareholders) were eligible to participate in the Offer on the basis that the Offer was exempt from, or not subject to, the registration requirements of the US Securities Act and other applicable securities laws.”*
20. Accordingly, Nimrod submitted that the rights issue exemption in item 10 of section 611 applied on the basis that:
- (a) *“Nimrod offered shares to all ordinary shareholders;*
  - (b) *offers were made to every person who held ordinary shares to issue them with the percentage of shares to be issued that is the same as the percentage of ordinary shares that they hold before the issue;*
  - (c) *all ordinary shareholders had a reasonable opportunity to accept the offers made to them;*
  - (d) *agreements to issue the shares were not entered into until a specified time for acceptances of offers had closed; and*
  - (e) *the terms of the offers to each shareholder were the same.”*
21. Nimrod made further submissions, that even if the Panel determined that the rights issue exception did not apply to Goldtower’s acquisition, there was no prospect the

## Takeovers Panel

### Reasons – Nimrod Resources Limited 02 [2022] ATP 22

claims could give rise to unacceptable circumstances on the basis that (among other things):

- (a) Guidance Note 17 establishes that, in considering whether unacceptable circumstances exist, the Panel should consider the rights issue against the principles in section 602 and a range of factors including a company's situation, the structure of the rights issue and its effect
- (b) Nimrod took all reasonable steps to structure the Entitlement Offer to ensure that its benefits were genuinely accessible to all shareholders and its potential control effects did not exceed what was reasonably necessary for the fundraising purpose
- (c) the US Shareholders held 75,000 shares (comprising 0.04% of the total shares on issue) as at the date of the Prospectus. If the US Shareholders had taken up their entitlement under the Entitlement Offer it would have had a negligible impact on control of Nimrod
- (d) in *Emperor Mines Limited*,<sup>5</sup> the Panel determined that any increase in a party's voting power as a result of excluded foreign shareholders (holding 1.533% of the voting shares) not being offered entitlements under a rights issue would be relatively small, and would therefore not justify a declaration of unacceptable circumstances.

#### **Compliance with item 10 of section 611 and unacceptable circumstances**

22. We were concerned that it was unclear whether persons in the United States or acting for the account or benefit of a person in the United States could actually participate in the Entitlement Offer.
23. While the Prospectus contemplated that the Board could determine that such persons were eligible shareholders, Nimrod did not provide us with any material to evidence such a determination (such as Board minutes) or any communications with the named US Shareholders regarding their eligibility.
24. Accordingly, it was unclear to us whether offers under the Entitlement Offer were made to the US Shareholders (or any other persons in the United States), or that they had a reasonable opportunity to accept the Entitlement Offer if made to them, and accordingly whether the exception in item 10 of section 611 did not apply and section 606 had been contravened.
25. However, even if the exception in item 10 of section 611 did not apply and section 606 had been contravened, we consider that:
  - (a) the US Shareholders (assuming they represented all persons in the United States) hold 0.04% of the Nimrod shares and accordingly their participation, or lack thereof, in the Entitlement Offer would not have had a material impact on the effect on control of Nimrod

---

<sup>5</sup> [2004] ATP [24]

## Takeovers Panel

### Reasons – Nimrod Resources Limited 02 [2022] ATP 22

- (b) there was no evidence to support the inference the shares held by the US Shareholders would be capable of being sold in any shortfall facility or by the nominee and
  - (c) appointment of a section 615 nominee would not have materially changed the outcome of the effect on control or potential control of Nimrod arising from the Entitlement Offer.
26. In conclusion we consider that any contravention that may have occurred is unlikely to constitute unacceptable circumstances<sup>6</sup> (noting that any contraventions of Chapter 6 are subject to possible enforcement action by ASIC, irrespective of whether they are unacceptable).

#### Timing of Romell’s application

27. We consider the relevant circumstances to be the issue of the Nimrod shares under the Entitlement Offer, which occurred in June 2022 approximately 3 months before the date of Romell’s application. Accordingly, we would need to extend time under s657C(3) for Romell to make its application if we were minded to make a declaration of unacceptable circumstances. In the circumstances we do not need to decide this.
28. While Romell would not have been aware of Goldtower’s increase in voting power following the Entitlement Offer until it received Nimrod’s register of members from Nimrod on 26 July 2022, it could still have made an application within the time required by s657C(3) during August 2022. Accordingly, we consider that Romell had not made its application in a timely manner, limiting the Panel’s ability to address the issues.

## DECISION

29. 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

30. 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.

**Sarah Rennie**

**President of the sitting Panel**

**Decision dated 6 October 2022**

**Reasons given to parties 25 October 2022**

**Reasons published 28 October 2022**

---

<sup>6</sup> See for example *GoldLink IncomePlus Limited 02* [2008] ATP 19 at [11]

## Takeovers Panel

Reasons - Nimrod Resources Limited 02  
[2022] ATP 22

### Advisers

Party	Advisers
Romell Pty Ltd	K&L Gates HCG Consulting Pty Ltd
Nimrod Resources Limited	Hamilton Locke