



**In the matter of Nexus Energy Limited
2006 ATP 17**

Catchwords:

assumption; clarification announcement; corrective disclosure; decline to commence proceedings; forecasts; forward looking statements; hydrocarbon reporting; investor presentation; Merrill Lynch Emerging Companies Conference; misleading statements; reasonable grounds; resource; reserve; target's statement;

Corporations Act 2001 (Cth): sections 602(a); 602(b)(iii); 657A; 657D; 1041E

ASX Listing Rules 5.6 – 5.17

Nexus Energy Ltd; Anzon Australia Ltd

These are the Panel's reasons for declining to commence proceedings in relation to an application that the slides from an investor presentation by Nexus Energy Ltd were false and misleading in the context of a takeover bid by Anzon Australia Ltd. The Panel considered that a clarification statement issued by Nexus, the fact that the Nexus target's statement was due to be delivered within approximately a week, and an analysis of the information in the slides, meant that there was not sufficient basis to commence proceedings.

SUMMARY

1. These are the Panel's reasons for declining to commence proceedings in relation to an application (**Application**) to the Panel from Anzon Australia Limited (**Anzon**) on 19 April 2006 in relation to a presentation document entitled "*Merrill Lynch Emerging Companies Conference April 2006*" that Nexus Energy Limited (**Nexus**) sent to Australian Stock Exchange Limited (**ASX**) on 11 April 2006 (**11 April Announcement**).
2. Anzon had announced its intention to make a takeover offer for Nexus on 20 March 2006 and dispatched its offers on 18 April 2006.
3. On 13 April 2006 Anzon sought a declaration of unacceptable circumstances, interim and final orders.
4. Nexus had presented the 11 April Announcement at the Merrill Lynch conference and sent the slides to ASX the same day. The slides were essentially the same as those sent to ASX by Nexus on 9 March 2006 (save for certain projections). They gave an overview of Nexus' oil and gas assets, all of which are in an appraisal or early development stage and subject to final development decisions. The slides also gave various forward looking statements concerning Nexus' potential financial and production performance if its assets were developed.
5. Nexus advised the Panel that it had been preparing a clarification announcement in response to Anzon's correspondence about the 11 April Announcement. Nexus provided the clarification announcement to Anzon for comment, and the Panel consented to Nexus publishing it, which Nexus did on 21 April 2006.
6. When the Panel considered all of the issues and submissions in the Application, on balance, given the release of the clarification announcement and the fact that the Nexus target's statement was due shortly, there was not a sufficient reason for the

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Panel to commence Proceedings in respect of the 11 April Announcement. The Panel made some observations about disclosure in relation to announcements of the type of the 11 April Announcement and disclosure in takeovers documents.

THE PROCEEDINGS

The Panel & Process

7. The President of the Panel appointed Guy Alexander (sitting President), Hamish Douglass and Brett Heading (sitting Deputy President) as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.

Background

Anzon

8. Anzon is a publicly listed company on ASX. Anzon is an upstream oil and gas company formed to acquire, develop and commercialise defined oil and gas fields.

Nexus

9. Nexus is a publicly listed company on ASX. Nexus' principal activity is oil and gas exploration and production.

Events leading to the Application

10. Anzon announced its intention to make an off-market takeover bid for Nexus on 20 March 2006.
11. On 3 April 2006, Anzon lodged with the Australian Securities and Investments Commission (**ASIC**), sent to ASX and served on Nexus a bidder's statement (**Anzon Bidder's Statement**) in relation to its scrip offer takeover bid.
12. On 11 April 2006, Mr Ian Tchacos, the managing director of Nexus, gave a presentation to the "Merrill Lynch Emerging Companies Conference April 2006". Nexus sent a copy of the slides in respect of that presentation to ASX on 11 April 2006. Those slides gave an overview of Nexus' oil and gas assets, all of which are in an appraisal or early development stage and subject to final development decisions. The slides also gave various forward looking statements concerning Nexus' potential financial and production performance if its assets were developed. The information in the slides was very largely a repeat of an investor update which had been sent to ASX on 9 March 2006 titled "Nexus Update March 2006" (**9 March Announcement**), with a few figures updated to take into account changing share prices and so forth.
13. On 18 April 2006, Anzon despatched the Anzon Bidder's Statement.

Parties correspondence prior to the Application

14. Prior to the Application, Anzon raised its concerns regarding the 11 April Announcement in a letter to Nexus on 13 April 2006.
15. Nexus replied on the same day saying that it did not consider the 11 April Announcement materially misleading and that it would prepare a response to the matters raised and give it to Anzon the following week.

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16. At the time of the Application on 19 April, Anzon had not yet received a further response from Nexus.

Application

17. In the Application, Anzon submitted that that the 11 April Announcement was misleading because it included, among other matters:
- (a) various forward looking statements concerning Nexus' financial and production performances which Anzon submitted Nexus had not disclosed reasonable grounds for making and which Anzon submitted had not been accompanied by sufficient disclosure as to assumptions and risks; and
 - (b) descriptions of Nexus' oil and gas assets which Anzon submitted did not comply with ASX Listing Rules.
18. Accordingly, Anzon sought a declaration under section 657A¹ that unacceptable circumstances existed in relation to the 11 April Announcement having regard to the principles in section 602(a) and (b)(iii).
19. Anzon also sought the following final orders under section 657D:
- (a) that Nexus;
 - (i) immediately correct the defects in the 11 April Announcement identified in the Application, stating clearly and prominently that Nexus irrevocably withdraws the misleading and deceptive statements in the 11 April Announcement with an explanation of the reasons as to why those statements are misleading or defective and setting out prominently an appropriate warning that those statements should not be relied on;
 - (ii) give Anzon and the Panel a draft of the further proposed announcement before it is lodged with ASX and not lodge the further corrective announcement until Anzon and the Panel has informed Nexus that the form of the announcement is considered by Anzon and the Panel to be appropriate and to comply with the order; and
 - (b) such further or other orders as the Panel considers appropriate.

Clarification Announcement

20. On 19 April 2006 following receipt of the Application, Nexus contacted the Panel and stated that it:
- (a) had been preparing a detailed response to Anzon's letter of 13 April 2006; and
 - (b) had prepared a draft of a further announcement (**Clarification Announcement**) for release on ASX that it considered addressed many of Anzon's concerns with the 11 April Announcement.
21. Nexus advised the Panel that the Clarification Announcement:
- (a) was drafted to be an explanatory statement rather than a marketing document;

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

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- (b) included statements of caution in respect of the 11 April Announcement; and
 - (c) assisted to clarify or correct certain matters in respect of the 11 April Announcement that Anzon complained of.
22. As suggested by the Panel, Nexus provided the Clarification Announcement to Anzon for its review. Anzon reviewed the disclosure in the Clarification Announcement but submitted to the Panel that it did not address its concerns and sought an interim order that the Panel restrain release of the Clarification Announcement.
23. The Panel also suggested the inclusion of a statement in the Clarification Announcement to the effect that Nexus shareholders should not make investment decisions in relation to their Nexus shares until they had had an opportunity to consider the analysis of Nexus' projects to be contained in the Nexus target's statement and to review the assumptions underlying any forward looking statements contained in the target's statement.
24. Nexus agreed to include such a statement in the Clarification Announcement.

DISCUSSION

Interim order

25. As mentioned above, on 20 April 2006, the Panel received a request from Anzon for an interim order to restrain Nexus from releasing the Clarification Announcement to ASX.
26. The Panel considered that the Clarification Announcement:
- (a) cautioned the market in respect of the information in the 11 April Announcement;
 - (b) clearly disclosed the absence of detailed assumptions and risk factors in the Clarification Announcement;
 - (c) clarified certain other matters (such as that all references in the 11 April Announcement to Nexus' resources are to "contingent resources") with which the Panel was likely to have concerns in the 11 April Announcement had the Clarification Announcement not been released; and
 - (d) highlighted that a detailed analysis of Nexus' assets and prospects (including assumptions and risks) would be contained in the target's statement and that Nexus shareholders should not make investment decisions in relation to their Nexus shares until they had considered the Nexus target's Statement,
- and therefore that the Clarification Announcement was likely to assist Nexus shareholders, and was not likely to cause or exacerbate any harm, if sent to ASX. The Panel therefore determined not to grant interim orders restraining the release of the Clarification Announcement.
27. Nexus sent the Clarification Announcement to ASX on 21 April 2006.

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Panel consideration whether to commence proceedings in relation to the 11 April Announcement

28. The Panel then considered whether to commence proceedings in relation to the 11 April Announcement in the context of the:
 - (a) Application;
 - (b) correspondence between the parties (which included a further letter from Nexus dated 20 April 2006 which responded to Anzon's 13 April 2006 letter);
 - (c) 9 March Announcement;
 - (d) Clarification Announcement (which referred to Nexus' previous releases to ASX and, in particular, releases such as Nexus' 2005 Annual Report and December 2005 Quarterly Report);
 - (e) Anzon Bidder's Statement; and
 - (f) fact of the forthcoming Nexus target's statement (which was due to be released by 3 May 2006).
29. The Panel considered that the Clarification Announcement addressed the majority of the Panel's concerns for the reasons set out at paragraph 26 above.
30. That said, the Panel had some concerns about:
 - (a) Nexus' description of its oil and gas assets in the 11 April Announcement because of the lack of clarity in the slides as to whether those assets were Reserves or contingent resources only (Nexus has no Reserves); and
 - (b) the projections of future production and financial performance in the 11 April Announcement because of the failure to state adequately the assumptions on which the projections were based.
31. The Panel considered that once a company is subject to a takeover bid, it is required to take even greater care in ensuring that all of its communications to shareholders or the market are not misleading in any way.
32. Nexus stated in the Clarification Announcement that each slide in the 11 April Announcement should be read in conjunction with other releases made by Nexus that provide more fulsome disclosure regarding Nexus' assets, operation and forecasts. The Panel's view, however, was that while it had no reason to believe that the Nexus announcements were not properly made in the context of information disclosed to the market already, it would be unacceptable for Nexus (or other listed companies) to make statements to the market during a takeover period which could only be meaningfully assessed if the reader had read and assimilated large volumes of previous disclosure. A reference to all previous disclosures would not be an excuse for Nexus to make statements that were, on their own, misleading or confusing.
33. Nexus also submitted to the Panel that the 11 April Announcement had been accompanied at the Merrill Lynch Conference by extensive oral commentary which filled in many of the gaps in the published announcement. The Panel considered, however, that if Nexus considered that such commentary was a mitigating factor for the Panel to consider, and participants at the Merrill Lynch

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Conference required, then Nexus shareholders as a whole, were entitled to the commentary as much as the institutional investors who attended the Merrill Lynch Conference.

34. However, when the Panel considered all of the issues and the submissions of Anzon in the Application, on balance, given the release of the Clarification Announcement and the fact that the Nexus target's statement was due shortly, there was not a sufficient reason for the Panel to commence Proceedings in respect of the 11 April Announcement at this time. The Panel considered that it would expect a higher level of disclosure in the Nexus' target's statement (for example, in respect of any forecasts provided and assets and operations descriptions) than that provided in the 11 April Announcement. The Panel considered that if the manner and quality of disclosure provided by Nexus in its target's statement did not cure any perceived deficiencies that remained in respect of the manner and quality of disclosure in 11 April Announcement, Anzon would be free to make a new application to the Panel.

DECISION

Decline to commence proceedings

35. For the reasons set out above, the Panel, under Regulation 20 of the ASIC Regulations 2001, declined to commence proceedings in response to the Application.

Orders

36. As the Panel did not commence proceedings, it made no orders as to costs or otherwise.
37. For the reasons set out above, the Panel did not make interim orders.

Guy Alexander

President of the Sitting Panel

Decision dated 26 April 2006

Reasons published 28 April 2006