



**In the matter of Andean Resources Limited
[2006] ATP 21**

Catchwords:

Truth in takeovers policy - reasonable time to consider proposal - supplementary target's statement - timing of announcements - "last and final statements" - Panel declining to commence proceedings

Corporations Act 2001 (Cth), sections 644, 657A, 675D, 670A(2)

ASIC Act 2001 (Cth), section 201A

ASIC Policy Statement 25: "Takeovers: false and misleading statements"

Novus Petroleum 02 [2004] ATP 09; Break Free 04(R) [2003] ATP 42; Australian Leisure and Hospitality Group 03 [2004] ATP 25

Kingsgate South America Pty Ltd, Kingsgate Consolidated Limited, Andean Resources Limited

These are the Panel's reasons for declining to commence proceedings in relation to the affairs of Andean Resources Limited in response to an application by Kingsgate South America Pty Limited.

SUMMARY

1. Kingsgate South America Pty Ltd (**Kingsgate**) made an application (**Application**) to the Takeovers Panel on Friday 30 June 2006 under section 657A of the *Corporations Act 2001 (Cth)* (**Act**) for a declaration of unacceptable circumstances and final orders in relation to the affairs of Andean Resources Limited (**Andean**). The Application related to a scrip takeover offer by Kingsgate for all of the ordinary shares in Andean (**Offer**).
2. The Panel decided not to commence proceedings in relation to the Application after:
 - (a) Andean provided the Panel with a draft announcement (**Announcement**) which it proposed to make to the Australian Stock Exchange (**ASX**) on 4 July 2006 regarding the status of parties interested in Andean;
 - (b) Andean offered to undertake pursuant to section 201A of the *Australian Securities and Investments Commission Act 2001 (Cth)* (**ASIC Act**) to send all Andean shareholders a copy of the Announcement; and
 - (c) the independent directors of Andean offered to undertake pursuant to section 201A of the ASIC Act to update the market prior to the close of the Offer if the parties which continue to conduct due diligence in relation to Andean, and have expressed interest in making an offer, withdraw such interest,

(the **Undertakings**).
3. The Panel accepted the Undertakings offered by Andean and its independent directors. The Panel considered that, in the light of Andean's willingness to make the Announcement and the Undertakings, there was not a sufficient prospect of the Panel making a declaration of unacceptable circumstances to justify conducting proceedings.

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THE PANEL & PROCESS

4. The President of the Panel appointed Marie McDonald (Sitting President), Simon Withers and Irene Lee (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
5. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
6. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

APPLICATION

Background

7. On 22 February 2006, Kingsgate Consolidated Limited announced that it would, through a wholly owned subsidiary, make the Offer.
8. During the course of the Offer, various statements were made to the market and to Andean shareholders about possible competing bidders for Andean by the independent directors of Andean, Warren Gilmour, Morrice Cordiner, Ian Hume and Patrick Esnouf (**independent directors**). These statements are set out below (together, the **Statements**):

- (a) The Target's Statement dated 29 March 2006 stated (at page 14):

“Your independent Directors are exploring alternatives to maximise shareholder value. Since the Kingsgate Offer was announced there has been a considerable amount of interest shown by other parties in pursuing opportunities with Andean.

A number of these parties are currently engaged in detailed due diligence, which may result in an alternative offer being made for, or some other opportunity being presented to, Andean either during the course of the Kingsgate Offer or at some later stage. While your independent Directors are taking all steps to explore these opportunities, there is no assurance that this will result in an alternative offer.

Acceptance of the Kingsgate Offer may prevent you from participating in the benefit of any such opportunities.”

- (b) The Chairman's letter in Andean's Supplementary Target's Statement dated 10 April 2006 stated that:

“Significant interest is being shown in Andean and its Cerro Negro Project from a number of the world's major gold companies and this may result in an alternative offer being forthcoming for your Shares.”

- (c) Andean's Quarterly Report to 31 March 2006, released to the ASX on 28 April 2006, stated that:

“The independent Directors are being advised by RBC Capital Markets on all commercial matters related to the Kingsgate Offer, including the evaluation of alternatives designed to maximise returns to Andean shareholders. In this regard, as previously intimated, significant interest has been shown in Andean by

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some of the world's major gold companies who have entered into confidentiality undertakings with Andean."

- (d) The Second Supplementary Target's Statement, dated 1 May 2006, stated that:

"Your independent Directors are not surprised that the results to date have attracted the interest of some of the world's major gold companies. Some of these companies are currently conducting due diligence on Andean and have already visited the Cerro Negro Project, with others still scheduled to visit."

- (e) The Chairman's letter dated 29 May 2006 stated that:

"Your independent Directors continue to enhance shareholder value through the ongoing development of the Cerro Negro Project and are encouraged by the interest shown in Cerro Negro during visits to the project by a number of the world's leading gold companies."

- (f) The Fourth Supplementary Target's Statement, dated 19 June 2006, stated that:

"Considerable interest is being shown in Andean by other miners proceeding with due diligence and site visits ... Acceptance of the Kingsgate Offer may prevent you from participating in the benefit of any such opportunities."

- (g) Andean's statements to the market and to Andean shareholders had been reported in the press on a number of occasions, including in the Australian Financial Review on 3 April 2006, which identified a number of gold companies "expected to show an interest in Cerro Negro."

9. On 16 June 2006, Kingsgate lodged with the Australian Securities and Investments Commission (ASIC) and ASX its Seventh Supplementary Bidder's Statement in which:

- (a) it extended its Offer by a further 25 days, so that it will close at 7:00pm (EST) on 11 July 2006, and declared that there will be no further extensions;¹ and
- (b) it stated that it will increase its bid consideration of 1 Kingsgate share for every 15 Andean shares to 1 Kingsgate share for every 14 Andean shares if Kingsgate acquired a relevant interest in at least 25% of Andean's shares prior to the closing of the Offer, and Kingsgate declared that this will be its final offer.

10. On 27 June 2006, Kingsgate's legal advisers wrote to Andean's legal advisers in relation to the Statements and highlighted Andean's obligations to provide an update to the market under ASIC Policy Statement 25 "Takeovers: false and misleading statements" (PS 25) paragraph 51 which states that:

"A target that has stated it is in discussions with a possible competing bidder must:

- (a) *update the market about material developments in the discussions; and*
- (b) *in any event, update the market about the status of those discussions not more than 14 days and not less than 7 days before the end of the offer period. (This equates with the requirement to give notice of the status of a defeating condition: s630(1))."*

11. On 27 June 2006, Kingsgate requested that Andean confirm (among other things) that it would make certain statements to the market regarding whether there is a

¹ Unless automatically extended by the Act.

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reasonable prospect of a competing bid being made for Andean prior to the close of the Kingsgate Offer.

12. On 30 June 2006, Andean's legal advisers responded that Andean's independent directors believed that they had fully complied with PS 25 and would continue to comply.

Declaration and orders sought in the Application

13. Kingsgate submitted to the Panel that unacceptable circumstances arose because, as at the date of the Application, Andean's independent directors had not updated the market as required by PS 25 and had not provided confirmation to Kingsgate that such disclosure would be made.
14. Kingsgate sought the following orders under section 657D of the Act:
 - (a) that Andean lodge a supplementary target's statement not later than 5:00pm on Tuesday 4 July 2006, and dispatch that supplementary target's statement to Andean shareholders not later than 5:00pm on Wednesday 5 July 2006, in a form approved by the Panel which contains an update on:
 - (i) the status of discussions with possible competing bidders;
 - (ii) whether there is a reasonable prospect of a competing bid being made for Andean prior to the close of the Offer, and that if there is no such reasonable prospect then a warning that Andean shareholders should not rely on the possibility of a competing bid in deciding whether or not to accept the Offer; and
 - (iii) that the visits to the Cerro Negro site by possible competing bidders will now have ceased, given that the onset of winter in Argentina poses operational difficulties at the Cerro Negro site,
(the **Required Disclosures**);
 - (b) that Andean provide a copy of such supplementary target's statement to the Panel prior to lodgement with ASIC and ASX, and prior to dispatch to Andean shareholders, so that the Panel can be satisfied that the supplementary target's statement contains the Required Disclosures; and
 - (c) such further or other orders as the Panel thinks fit.
15. Andean submitted that the Application was premature and noted that its legal advisers had advised Kingsgate that it intended to comply with its obligations under PS 25.

DISCUSSION

16. The Panel noted that previous Panel decisions have endorsed the general policy of PS 25 on several occasions.² The Panel considered that the requirement of paragraph PS 25.51 is consistent with that general policy and also the policy of several provisions of Chapter 6 of the Act relating to the last 7 days of the offer

² See eg *Novus Petroleum 02* [2004] ATP 09 at [30]; *Break Free 04(R)* [2003] ATP 42 at [62] to [65].

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period.³ Accordingly, the Panel considered it to be important that Andean make an announcement as required paragraph PS 25.51.

17. Andean provided the Panel with a draft of the Announcement, which its independent directors considered to comply with paragraph PS 25.51. The Panel noted that it was not in a position to determine whether that was the case.
18. The Panel does, however, assume and work on the basis that the independent directors of Andean are aware of, and will comply with, their responsibilities under the Act, including those regarding supplementary target's statements. The Panel noted that the Statements would almost certainly be material from the point of view of a holder of Andean shares. It follows that, if the independent directors of Andean became aware that those Statements had become misleading or deceptive, they would be obliged under section 644 of the Act to prepare a supplementary target's statement to remedy the defect. Because the Statements concern a future matter, the directors would risk personal liability under Chapter 6B of the Act if they did not have reasonable grounds for making the Statements and leaving them uncorrected in each subsequent supplementary target's statement. The undertaking given by Andean's independent directors with respect to updating the market is consistent with these obligations.

DECISION

19. Accordingly, in the absence of any probative material to suggest that the independent directors of Andean were not acting or proposing to act in accordance with their obligations, the Panel did not consider it appropriate to conduct proceedings to scrutinise the basis for the Announcement more closely. The Panel noted, however, that this decision would not preclude further application to the Panel or proceedings in another forum if those obligations were not observed.

Marie McDonald
President of the Sitting Panel
Decision dated 5 July 2006
Reasons published 12 July 2006

³ See *Australian Leisure and Hospitality Group 03* [2004] ATP 25 at [35] to [41].