Takeovers Panel

Reasons for Decision
Nexus Energy Limited 02

In the matter of Nexus Energy Limited 02
[2006] ATP 25

Catchwords:
False market, bonus options; acquisition of bidder's shares by bidder's parent company; disclosure

Takeovers Code (U.K) Rule 8.1(a)

Corporate Law Economic Reform Program Act 1999

Corporations Act 2001 (Cth), sections 636(1)(m), 643 to 647, 656A, 657C, 671B(1)

Nexus Energy Limited; Anzon Australia Ltd; Anzon Energy Limited

These are the Panel's reasons for concluding proceedings without making a declaration of unacceptable circumstances or final orders. On the basis of the information before it in the proceedings, the Panel did not consider that the effect on the market for Anzon shares by acquisitions of Anzon shares by the parent company of Anzon, and Anzon's announcement of a bonus offer of options during the offer period for Anzon's takeover offer for Nexus, provided a sufficient basis for the Panel to make a declaration of unacceptable circumstances.

SUMMARY

1. These reasons relate to an application (the **Application**) to the Panel dated 27 July 2006 by Nexus Energy Limited (**Nexus**) under section 657C of the *Corporations Act* 2001 (Cth) (**Act**)[1] in relation to the affairs of Nexus. The Application concerned a scrip off-market takeover offer for Nexus by Anzon Australia Ltd (**Anzon**), which closed on 6 June 2006 (**Anzon Offer**).

2. The Application related to:

   (a) the acquisition by Anzon Energy Limited (**AEL**), Anzon's majority shareholder and parent company, of shares in Anzon during the Anzon Offer period, and the lack of disclosure during the offer period of those acquisitions; and

   (b) the announcement by Anzon during the Anzon Offer period of a bonus offer of options (**Bonus Options**) and the subsequent reduction in the exercise price of the options.

3. In summary, Nexus submitted to the Panel that:

   (a) the acquisitions by AEL, and AEL's failure to make timely disclosure of those acquisitions during the Anzon Offer period; and

   (b) the announcement of the Bonus Options,

   led to the creation of a false market in Anzon shares during the Anzon Offer period and a false impression given to the market and Nexus shareholders as to the value or perceived value of the Anzon shares offered as consideration under the Anzon Offer.

4. The Panel considered that Nexus had not established that the Acquisitions had created a material effect on the price of Anzon shares over a significant period of

[1] Unless otherwise specified, all statutory references are to the Corporations Act.

time. Accordingly, the Panel considered that the Acquisitions were unlikely to have influenced materially Nexus shareholders' decision whether or not to accept the Anzon Offer, and thus control of Nexus.

5. The Panel did not consider that it had been presented with evidence to show that the Bonus Option issue had any demonstrated effect on the market for Anzon shares, or that it influenced Nexus shareholders to accept the Anzon Offer.

6. In the light of the Panel's determinations in relation to the Acquisitions and the Bonus Options, the Panel did not consider that the material before it provided a sufficient basis for the Panel to make a declaration of unacceptable circumstances.

7. However, had the effect of either of the circumstances complained of in the Application been greater, the Panel may well have come to a different conclusion. The Panel's conclusion was based on the lack of evidence presented to it of any significant effect of the circumstances, rather than any approval or acceptance by the Panel of those circumstances.

PROCEEDINGS

The Panel & Process

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

9. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.

10. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

Background

11. On 20 March 2006, Anzon announced the Anzon Offer.

12. On 3 April 2006, Anzon lodged its bidder's statement with ASIC (**Bidder's Statement**). The Bidder's Statement disclosed that AEL held a 56.5% interest in Anzon.

13. On 23 May 2006, Anzon announced its intention to issue the Bonus Options. Anzon announced that each option would have an exercise price of $1.45 and an expiry date of 31 August 2006.

14. On 6 June 2006, the Anzon Offer closed. At that time, Anzon had secured acceptances of 17.69% of Nexus.

15. On 21 June 2006, Anzon announced that it had reduced the exercise price of the Bonus Options to $1.24.

APPLICATION

Declaration sought

16. In its Application, Nexus applied to the Panel for a declaration under section 657A that the following circumstances constituted unacceptable circumstances in relation to the affairs of Nexus:

    (a) trading in Anzon shares by AEL during the Anzon Offer period, which led to:

        (i) the creation of a false market in Anzon shares during the Anzon Offer period; and

        (ii) the perception of an increase in the market value of Anzon shares;

    (b) the non-disclosure during the Anzon Offer period by Anzon and AEL that AEL was actively acquiring shares in Anzon on market during the Anzon Offer period and the price AEL was paying for those shares; and

    (c) announcing a Bonus Options during the Anzon Offer period (with supporting commentary) and then reducing the exercise price of the options after the Anzon Offer closed led to the creation of a false impression in the market as to the value or perceived value of Anzon shares.

Orders sought

17. Nexus sought orders, including withdrawal rights for Nexus shareholders who accepted the Anzon Offer during the period when Nexus submitted the market for Anzon shares was uninformed, and freezing of the voting rights over the relevant Nexus shares acquired by Anzon under the Anzon Offer.

DISCUSSION

Discussion

Acquisition of shares in Anzon by AEL

18. During the Anzon Offer period, AEL acquired shares in Anzon on 12 separate days (totalling less than 1% of the shares in Anzon) (**Acquisitions**). The Acquisitions were made by BBY Limited (**BBY**) on behalf of AEL. AEL was not required to lodge a substantial holder notice under section 671B(1) of the Act in relation to the Acquisitions, because its' substantial holding did not change by at least 1%. AEL lodged a substantial holding notice on 14 June 2006, as a result of its percentage voting power in Anzon decreasing by more than 1% following the issue of Anzon shares to Nexus shareholders who had accepted the Anzon Offer. That notice also disclosed the details of the Acquisitions.

19. Nexus submitted that AEL's strategy, and method, of making the Acquisitions was to assist Anzon in attempting to increase and support the perceived market value of its shares with a view to making the Anzon Offer appear more attractive to Nexus shareholders and thereby obtaining control of, or a substantial interest in, Nexus.

20. AEL submitted that the Acquisitions occurred primarily as a consequence of a resolution by the non-executive independent AEL board members on 29 March 2006 that AEL purchase up to $1 million of Anzon shares, in order to reduce the dilution

of AEL's shareholding in Anzon caused by acceptances of the Anzon Offer. AEL wrote to Anzon on 2 May 2006, in a letter released to ASX, stating that it was "keen to maximise its ownership interest in Anzon Australia".

21. Anzon submitted that the Acquisitions by AEL did not affect the market for Anzon shares during the Anzon Offer period as they only constituted approximately 5% of all trading in Anzon shares from 4 May 2006 to the close of the Anzon Offer period. The Panel considered, however, that the volume of trading over the Anzon Offer period is only one of the relevant considerations in assessing the effect of the Acquisitions on the market for AEL shares. The Panel considered that all relevant circumstances, including the timing, prices paid and volume of trading on each day of trading, should be examined.

22. Nexus submitted that AEL's acquisitions on each of the 12 days on which the Acquisitions occurred were unacceptable, but Nexus raised specific issues concerning AEL's trading in relation to only 6 of those days.

23. The Panel was, nevertheless, concerned about some of the issues raised by Nexus as they related to those 6 days. In particular, the Panel was concerned that the Acquisitions on 5 June 2006 were significantly above market, set the closing price for Anzon shares above the average market price for the day, and were made on the day before the close of Anzon's offer. The Panel also considered that AEL did not provide an adequate explanation as to the prices paid, the timing or the process of the Acquisitions on 5 June 2006.

24. The Panel was also concerned that the trading in Anzon shares by AEL on a number of other days was not adequately explained. Overall, the Panel was concerned that the trading on those days had the appearance of being designed to support the share price of Anzon rather than to enable AEL to acquire Anzon shares at the lowest possible prices.

25. However, the Panel took into account that Nexus had not established any specific irregularity with the Acquisitions on the other 6 of the 12 days on which AEL traded Anzon shares, other than the issue of non-disclosure (discussed separately below).

26. Overall, the Panel determined that because of the low total volume of the Acquisitions, and the non-concerning pattern of acquisitions on 6 of the 12 days, Nexus had not established a pattern of material effect on the price of Anzon shares over a significant period of time. Accordingly, the Panel considered that the Acquisitions were unlikely to have influenced materially Nexus shareholders' decision whether or not to accept the Anzon Offer.

Anzon's knowledge of Acquisitions

27. Anzon submitted that it had no involvement in the Acquisitions. It argued that the Anzon board as an entity had not discussed or contemplated the purchase of shares in Anzon by AEL either in meetings or even casually outside formal board meetings before or during the period of the Anzon Offer. This was one of the reasons Anzon gave for why it had no disclosure obligations as to the Acquisitions.

28. Nexus submitted that the inference that Anzon was not only aware of but took an active role in relation to AEL making the Acquisitions, due to the relationship between AEL and Anzon, was supported by the following:

    (a) AEL was Anzon's controlling parent company (56.5%);

    (b) Anzon's Executive Chairman and CEO, Steven Koroknay, was the Chairman and the only executive director on the AEL board (AEL does not identify a CEO or Managing Director);

    (c) three out of the five directors of Anzon (including Mr Koroknay) were also directors of AEL. In addition, Andrew Young (a director of Anzon) was an alternate director of AEL; and

    (d) AEL and Anzon shared the same offices, company secretaries and CFO.

29. AEL submitted that the decision to acquire Anzon shares was made by a resolution of the non-executive independent AEL board members on 29 March i.e. only those directors of AEL who do not sit on the Anzon board. However, AEL also stated that:

    (a) further AEL board discussions about AEL's acquisitions of Anzon shares were not limited to the non-executive independent AEL board members; and

    (b) "*Discussions took place about the Acquisitions between the common directors and officers, but at all times, these discussions were conducted in their capacity as directors and officers of AEL.*" Those officers included Mr Koroknay (chairman and CEO of Anzon, Executive Chairman of AEL) and Mr Strasser company secretary and CFO of both companies.

30. The Panel noted that, although the Acquisitions may not have been discussed formally at an Anzon board meeting, the majority of Anzon directors attended AEL board meetings and (the Panel assumes) must have actively discussed the AEL acquisition strategy. Accordingly, the common directors and officers of AEL and Anzon would at the very least have been aware that AEL was proposing to acquire further shares in Anzon. Also, it was clear that Mr Koroknay participated actively in the initial discussions with BBY concerning the Acquisitions, and AEL stated that Mr Koroknay gave instructions to Mr Strasser to discuss/action purchases on particular days. The Panel considers that, in such circumstances, it would have been unacceptable for Anzon's directors to withhold material information that Anzon would be required to disclose, merely because they obtained that information in their capacity as directors of Anzon's holding company.

31. On that basis, the Panel did not accept Anzon's submissions that the Anzon board, Anzon officers, or Anzon itself, were unaware of AEL's intentions as to purchasing Anzon shares, AEL's strategy and plan of execution. However, the Panel considered that there was insufficient evidence for it to determine that Anzon took an active role in relation to AEL making the Acquisitions.

Disclosure of Acquisitions

32. Nexus submitted that the non-disclosure of the Acquisitions by Anzon inhibited Nexus shareholders' ability to make an informed decision as Nexus shareholders were not given all material information to enable them to assess the merits of the Anzon Offer.

33. The Panel noted that, prior to the amendments made by the *Corporate Law Economic Reform Program Act 1999* (**CLERP**) in 2000, section 750 of the Corporations Law required a bidder to set out in its bidder's statement all acquisitions and disposals of shares in the bidder made by the bidder and its associates in the four months immediately preceding registration of its bidder's statement. However, at the time, there were no statutory requirements for supplementary disclosure as exist now under sections 643 to 647.

34. The CLERP amendments simplified the disclosure requirements for bidder's statements, and introduced the general requirement in section 636(1)(m) which, subject to some exceptions, requires that a bidder's statement contain any other information known to the bidder which is material to a security holder's decision whether to accept an offer under the bid. The CLERP reforms also introduced the statutory supplementary disclosure regime mentioned above.

35. The Panel did not consider that the CLERP reforms provided any basis for concluding that the Acquisitions did not need to be disclosed.

36. The Panel also noted that in the United Kingdom, under Rule 8.1(a) of the Takeovers Code, a bidder is required to disclose all dealings of shares in the bidder made by the bidder and its associates during the offer period.

37. The Panel considered that the common directors of Anzon and AEL should have assumed that disclosure of the Acquisitions, and AEL's intention to make the Acquisitions, would be required given the particular circumstances of this case. Anzon and AEL submitted that the announcement made to ASX by Anzon on 2 May 2006, when it released a letter from AEL to Anzon stating that AEL was "keen to maximise its ownership interest in Anzon Australia", put "*the market on notice that AEL intended to purchase Anzon shares*". The Panel did not accept that submission. If that announcement was intended to avoid the need for further disclosure when the Acquisitions occurred, the Panel considers that it was seriously inadequate.

38. The Panel's view may have been different had the announcement stated an intention on AEL's part to make acquisitions within limits that made it clear that the acquisitions would not be material and would not have any material effect on the market price of Anzon's shares.

39. The Panel was also concerned that AEL instructed its broker expressly not to make acquisitions of Anzon shares which would trigger the substantial holding disclosure requirements. The requirement not to trigger disclosure obligations appeared to the Panel to be at odds with AEL considering it appropriate to put "*the market on notice that AEL intended to purchase Anzon shares*" by its 4 May 2006 announcement.

40. The Panel noted that AEL's instructions to its broker to limit the Acquisitions to less than 1% of the shares in Anzon appeared somewhat inconsistent with AEL's desire to avoid dilution and maximise its holding in Anzon. AEL submitted that its percentage voting power in Anzon would be reduced from approximately 57% to 38% if the Anzon offer for Nexus was fully successful. AEL submitted that its intention was to maximise its holding in Anzon and reduce the dilution of AEL's shareholding in Anzon caused by the issue of Anzon shares to Nexus shareholders who accepted the Anzon offer.

41. The Panel considered that, notwithstanding the concerns set out above, it should decline to make a declaration of unacceptable circumstances with respect to the Acquisitions, given that:

    (a) despite the fact that some aspects of AEL's trading with which the Panel had concerns was not satisfactorily explained by AEL (as discussed in paragraph 23 and 24), no probative evidence was presented to the Panel to establish that the Acquisitions created a false market or a false impression as to the value of Anzon shares;

    (b) the Panel was not satisfied that non-disclosure of the Acquisitions had had any material effect on Nexus shareholders' decisions whether to accept the Anzon Offer; and

    (c) the Panel was not satisfied that the circumstances constituted by AEL's acquisitions of Anzon shares during the Anzon offer period gave rise to a contravention of Chapters 6 to 6C or that they had a material effect on the control or potential control of Nexus or Anzon or the acquisition or proposed acquisition of a substantial interest in Nexus or Anzon.

Bonus Options

42. Nexus submitted that the announcement of an issue of Bonus Options during the Anzon Offer period (with supporting commentary) and the reduction of the exercise price of the options after the Anzon Offer closed led to the creation of a false impression in the market as to the value or perceived value of Anzon shares.

43. Anzon submitted that the Anzon board's decision to offer Bonus Options was motivated by a desire to reward its shareholders after its strong performance during its first year of being listed on the ASX, in circumstances where it could not pay dividends to shareholders.

44. Anzon provided evidence that its board had considered option issues from two other companies as evidence that the terms of the Bonus Options were consistent with normal market practice. There were, however, sufficient differences between the examples set out and the terms of the Bonus Options that the Panel was unable to accept Anzon's submissions that the terms of the Bonus Options were consistent with normal market practice.

45. The Panel also found it difficult to accept that the Bonus Option issue could be regarded as a reward to shareholders given the structure of the issue, including the short exercise period and the premium of the initial exercise price over the underlying Anzon share price on the day the Bonus Options were announced. On that basis, the Panel was concerned that the issue of Bonus Options appeared to have some other motive. The Panel considered that Anzon, as an offeror of scrip during a takeover period, should have been particularly careful not to engage in any capital management which might give the impression that it was seeking to affect the perceived value of the securities it was offering as consideration under its takeover offer.

46. However, ultimately the Panel did not consider that it was presented with evidence that the Bonus Option issue had any demonstrated effect on the market for Anzon

shares, nor did it apparently influence Nexus shareholders to accept the Anzon Offer. Accordingly, the Panel considered that it should not make a declaration of unacceptable circumstances with respect to the Bonus Option issue.

DECISION

47. The Panel did not consider that the material before it in relation to the Acquisitions and the Bonus Options provided a sufficient basis for the Panel to make a declaration of unacceptable circumstances.

48. The Panel did not receive any application for an award of costs, and made no order for costs.

Brett Heading
President of the Sitting Panel
Decision dated 22 August 2006
Reasons published 25 September 2006