



Australian Government

Takeovers Panel

**Reasons for Decision
North Queensland Metals Limited 02
[2010] ATP 7**

Catchwords:

Disclosure, efficient, competitive and informed market, decline to make a declaration, failure to disclose, information deficiencies, material omission, section 602 principles, supplementary target's statement, undertaking

Corporations Act 2001 (Cth), section 602

Payne v Adelaide Steamship Co Ltd 14 ACLR 252

InterMet Resources Limited [2008] ATP 17, Programmed Maintenance Services Limited 02 [2008] ATP 9, Programmed Maintenance Services Limited 01 [2008] ATP 7

INTRODUCTION

1. The Panel, Michael Ashforth (sitting President), Peter Day and Francesca Lee, declined to make a declaration of unacceptable circumstances in relation to the affairs of NQM after receiving an undertaking from NQM to release and send to NQM shareholders a supplementary target's statement in response to Conquest's bid correcting information deficiencies in the target's statement.

2. In these reasons, the following definitions apply.

Conquest Conquest Mining Limited

Heemskirk Heemskirk Consolidated Limited

NQM North Queensland Metals Limited

supplementary target's statement the NQM supplementary target's statement dated 11 August 2010 in response to the Conquest bid

target's statement the NQM target's statement dated 20 July 2010 in response to the Conquest bid

FACTS

3. NQM is an ASX listed mining company (ASX code: NQM). It has a 60% interest in the Pajingo joint venture. The assets of the joint venture include the Pajingo gold mine and Twin Hills gold project, as well as other exploration tenements. The other 40% interest in the Pajingo joint venture is owned by Heemskirk.

4. The NQM board comprises 4 non-executive directors. They are Mr Neville Thomas, Mr Michael Tilley, Mr Don Walker and Mr Bruce Kay.

5. Conquest is also an ASX listed mining company. Its main asset is the Mt Carlton gold-silver-copper project located in North Queensland (100% owned).

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6. On 3 June 2010, Conquest announced an off-market takeover bid for NQM. At the time of announcement, the consideration under the Conquest offer was 0.5 Conquest shares plus 10 cents cash for every NQM share, which was later increased to 0.5 Conquest shares plus 15 cents cash for every NQM share. The 3 June announcement also disclosed that Conquest had entered into a pre-bid acceptance agreement with NQM's major shareholder (Mr Don Walker, director of NQM) in respect of 19.9% of NQM's shares.
7. On 5 July 2010, Heemskirk announced a competing off-market takeover bid for NQM. The consideration under the Heemskirk offer is 1.2 Heemskirk shares for every NQM share.
8. NQM lodged its target's statement in response to Conquest's bid on 20 July 2010. The target's statement stated that:
 - (a) Mr Thomas and Mr Tilley recommended rejection of the Conquest offer
 - (b) Mr Walker recommended acceptance of the Conquest offer and had accepted the Conquest offer for the shares that he held and
 - (c) Mr Kay did not intend to make a recommendation in respect of the Conquest offer as he was also a director of the competing bidder, Heemskirk.
9. On 22 July 2010, Conquest's legal advisers sent a letter to NQM's legal advisers setting out Conquest's concerns regarding the target's statement. As issues remained unresolved, Conquest lodged the application.

APPLICATION

Declaration sought

10. By application dated 23 July 2010, Conquest sought a declaration of unacceptable circumstances. It submitted that there were information deficiencies in the target's statement. The issues on which we conducted proceedings are set out in paragraph 13.
11. Conquest submitted that the effect of the circumstances was to:
 - (a) hinder, or likely hinder, the acquisition of control of NQM taking place in an efficient, competitive and informed market contrary to section 602(a)¹ and
 - (b) prevent, or likely prevent, NQM shareholders being given enough information to assess the merits of the Conquest offer and the Heemskirk offer, contrary to section 602(b)(iii).

¹ References are to sections of the *Corporations Act 2001* (Cth) unless otherwise indicated

Final orders sought

12. Conquest sought final orders to the effect that NQM:
 - (a) prepare a replacement target's statement correcting the information deficiencies and
 - (b) lodge the replacement target's statement with ASIC and send a copy to Conquest and ASX, and despatch it to NQM shareholders.

DISCUSSION

13. We conducted proceedings in respect of the following 10 issues relating to the target's statement:
 - (a) the presentation of offer premia
 - (b) the use of the term "*Non-conflicted Directors*" when referring to Mr Thomas and Mr Tilley, implying that Mr Walker had a conflict of interest
 - (c) the failure to afford Mr Walker's recommendation sufficient prominence compared with the recommendation of Mr Thomas and Mr Tilley
 - (d) the reliance on forecast financial information to support the statement that NQM's operations were "*performing strongly*"
 - (e) the representation that forecast financial information included in the target's statement was said to have been approved by all NQM directors, when it had not been
 - (f) the failure to address a number of key risks and other issues for NQM shareholders in relation to the Heemskirk offer
 - (g) the inclusion of statements concerning the dilution of NQM shareholders' interests in the Pajingo joint venture without also disclosing the increased exposure to Conquest's other assets and that the Conquest offer included a cash component
 - (h) assertions relating to the value of Conquest shares being "*uncertain*"
 - (i) the failure to make it clear that the majority of NQM's reserves and resources are at Twin Hills, which remains subject to a feasibility study and
 - (j) the presentation of Pajingo ore reserves and resources.

Issue 1: Presentation of offer premia

14. The offer premia graph on page 13 of the target's statement differed from the text. It compared the implied value of the Heemskirk and Conquest offers using the Heemskirk share price on 2 July 2010² (the trading day before it announced its offer) and the Conquest share price on 15 July 2010 (the trading day before the target's statement went to print). Text accompanying the graph compared the implied values using the respective share prices on 15 July 2010.

² The graph refers to 5 July in error

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15. Conquest submitted that it was not appropriate to graph trading price data at some earlier date where more up-to-date trading prices were available. ASIC submitted that any comparison of the offer premia should be at the same date and that NQM should have provided additional disclosure comparing the offer premia at 2 July 2010 (the pre-announcement date for the Heemskirk offer) and at the date of making additional disclosure. NQM submitted that share prices fluctuate and, accordingly, premia will change regularly. It further submitted that it was not practicable, nor would it assist shareholders, to mandate ongoing premium disclosure during the bid period.

16. In *Programmed Maintenance Services Limited 01*³, the Panel said:

The Panel regards it as better practice to include for shareholders an implied value of a scrip offer based on a share price that is the most up-to-date price reasonably available. The bidder may want to include a pre-bid value as that might reflect a price undisturbed by the announcement of the bid itself. But it should nevertheless include an up-to-date value. (footnote omitted)

17. Although it was open for NQM to describe the value of the Heemskirk offer at the trading day before the Heemskirk bid was announced (2 July 2010), it was appropriate that NQM also include the value of the Heemskirk offer at a more recent practicable date in graphical form. Such information, particularly where offer premia had dissipated to some extent since the earlier date, is relevant for shareholders.⁴ NQM agreed to insert a revised graph and additional disclosure to describe the updated graph, which resolves our concerns.

18. We also consider that where offer premia is used to compare the value of competing scrip offers, they should be calculated using the same dates to ensure the comparison is made on a “like for like” basis.⁵ If the same dates are not appropriate, an explanation as to why should be included. In this case there appears to be no reason not to use the same dates. NQM agreed to include in the revised graph a comparison of the implied value of both the Heemskirk and Conquest offers at 10 August 2010 (the trading day before the supplementary target’s statement was released to ASX and went to print), which resolves our concerns.

Issue 2: Use of the term “Non-conflicted Directors”

19. Mr Thomas and Mr Tilley were referred to in the Chairman’s letter and throughout the target’s statement as “Non-conflicted Directors”. Conquest submitted that this incorrectly implied that Mr Walker had a conflict of interest and that his recommendation should be given less weight than otherwise. It further submitted that it was misleading to refer to Mr Walker as a conflicted director simply because he had accepted the Conquest offer in respect of his NQM shares.

³ [2008] ATP 7

⁴ See *InterMet Resources Limited* [2008] ATP 17 at [21]

⁵ *Programmed Maintenance Services Limited 02* [2008] ATP 9 at [35]

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20. NQM submitted that the term “*Non-conflicted Directors*” was used to denote those NQM directors who did not have a conflict of interest, rather than to indicate that the other directors were conflicted. We do not accept this. The obvious implication of the term is that the other NQM directors (including Mr Walker) are conflicted.
21. NQM further submitted that, in any event, it believed that Mr Walker did have a material conflict of interest on the basis that, at the board meeting to consider Conquest’s indicative offer, before the offer was discussed, Mr Walker informed the board that he intended to accept for his own reasons and opinions. It was not at this stage a binding offer. NQM further submitted that Mr Walker subsequently accepted without further reference to the other NQM directors, being after the Heemskirk offer was announced and Mr Walker’s pre-bid agreement had ended. By doing so he reduced the likelihood of NQM shareholders benefiting from the Heemskirk offer or any other competing proposal.
22. NQM also submitted that “*a reasonable person is likely to consider that these circumstances involve a real or substantial possibility of conflict which it will be difficult for Mr Walker to avoid*”. In rebuttal, Conquest submitted that the reasonable person was likely to consider that “*Mr Walker’s duties as a director and his interests as a shareholder are perfectly aligned – in accepting the Conquest offer he has acted in a manner in which he recommends that all NQM shareholders should act*”.
23. In a letter dated 2 August 2010 from Mr Walker to Conquest, Mr Walker stated that he did not believe he had a conflict of interest. Moreover, there is authority that entering into a pre-bid arrangement by a target director does not of itself give rise to a conflict of interest.⁶ We do not accept that Mr Walker had a conflict of interest. We therefore consider the use of the term “*Non-Conflicted Directors*” when referring to Mr Tilley and Mr Thomas is inappropriate as it wrongly implies that Mr Walker has a conflict.
24. The target’s statement also said that Mr Walker made decisions in relation to accepting the Conquest offer “*without notice or consultation with NQM’s other board members*”. In the 2 August letter, Mr Walker stated that he did in fact inform Mr Thomas on 1 June 2010 (prior to entering into the pre-bid acceptance agreement) that he had been involved in discussions with Conquest to consider an offer for his NQM shares. The letter also indicated that later that day Mr Walker informed the other NQM directors of his views in relation to the Conquest offer and that he was seriously considering accepting it. According to Mr Walker, the “*target’s statement is therefore incorrect where it says that I did not notify the other directors of my intention to accept the offer*”. NQM’s submission on this reflected a distinction between intending to accept the offer and intending to agree to accept the offer (ie by entering into a pre-bid acceptance agreement). We do not think that the distinction can be maintained, nor would a plain reading of the target’s statement suggest such a distinction. We therefore consider that the statement is misleading and we require corrective disclosure.

⁶ *Payne v Adelaide Steamship Co Ltd* 14 ACLR 252

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Issue 3: Prominence given to Mr Walker's recommendation

25. NQM afforded Mr Walker's recommendation less prominence in the target's statement compared with the recommendation of Mr Thomas and Mr Tilley. For example, the front cover of the target's statement included the words in bold "*Reject the Conquest Offer*", and went on to state the recommendation given by Mr Thomas and Mr Tilley, but failed to refer to Mr Walker's recommendation or the fact that he had given one. The first time Mr Walker's recommendation appeared in the target's statement was on page 32. Conquest submitted that it was materially misleading to give prominence to the recommendations of Mr Thomas and Mr Tilley, "*while burying Mr Walker's recommendation at page 32*". We agree with this submission.
26. NQM submitted that "*Mr Walker did not provide his recommendation to NQM until 16 July 2010, which was the day that the typeset version of the target's statement needed to be finalised to ensure printing and dispatch within the necessary timeframe.*" We do not accept this response. Mr Walker's recommendation was known to NQM at the time the document was prepared.
27. Where conflicting director recommendations are made in respect of an offer, we think that disclosure should be balanced. NQM agreed to make sufficiently prominent disclosure of Mr Walker's recommendation on the front cover, as well as in the Chairman's letter and in a separate section headed "*Don Walker's Recommendation*" in the body of the supplementary target's statement.
28. We also required that, in each case where the recommendation of Mr Tilley and Mr Thomas appeared, Mr Walker be given the opportunity to include a statement to the effect that he does not agree with those recommendations or the reasons for them. This was because Mr Tilley and Mr Thomas had made a similar statement wherever Mr Walker's recommendation appeared. This opportunity was given to Mr Walker and NQM agreed to incorporate these statements in the supplementary target's statement. We consider that the further disclosure adequately addresses our concerns.

Issue 4: NQM's operations are "performing strongly"

29. Conquest submitted that it was misleading to say in the target's statement as a key reason for rejecting the Conquest offer that NQM's operations are "*performing strongly*", when one of the key factors relied on by Mr Tilley and Mr Thomas to support this statement was the forecast of NQM's financial performance for the financial year 2010-2011. We agree. NQM agreed to include corrective disclosure to address this issue. We are satisfied with the further disclosure.

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Issue 5: Forecast financial information

30. The forecast financial information contained in the target's statement was said to have been approved by all NQM directors. NQM confirmed in submissions that this was not in fact the case. Rather, the forecast financial information had only been approved by Mr Tilley and Mr Thomas.
31. ASIC submitted that if any of the NQM directors did not participate in approving the forecast then this should be clear in the document. We agree.
32. We required NQM to make corrective disclosure confirming that Mr Walker did not approve the inclusion of the forecast financial information in the target's statement. The corrective disclosure resolves our concerns about the disclosure.

Issue 6: Key risks and other issues relating to the Heemskirk offer

33. Conquest submitted that one of the key reasons Mr Thomas and Mr Tilley had given for rejecting the Conquest offer was that it was inferior to the Heemskirk offer. Conquest also submitted that it was materially misleading that the target's statement did not address the risks and other issues for NQM shareholders in relation to the Heemskirk offer.
34. NQM agreed to include a statement in the Chairman's letter of the supplementary target's statement that explained that the target's statement in response to the Heemskirk offer would include further information about Heemskirk and the risks associated with the Heemskirk offer. We are satisfied with the further disclosure.

Issue 7: Dilution of NQM shareholders' interests in the Pajingo joint venture

35. Conquest submitted that the target's statement omitted to state that NQM shareholders who accept the Conquest offer would also obtain a cash component of \$0.15, as well as exposure to Conquest's other assets and cash reserves. NQM agreed to include further disclosure to clarify this, which resolves our concerns.

Issue 8: Value of Conquest shares described as "uncertain"

36. Conquest submitted that another of the key reasons given by Mr Thomas and Mr Tilley in the target's statement for their recommendation was that the "*value of Conquest Shares is uncertain*". To support this statement, NQM included a chart showing the price of Conquest shares and the price of NQM shares over the 12 month period prior to the date of the target's statement. However, the chart used different scales to show the share prices of Conquest and NQM.⁷ This had the effect of making increases in the NQM share price over the 12 month period appear larger than they were relative to increases in the Conquest share price.

⁷ The scale on the left hand side of the chart for Conquest shares ranged from 25c to 75c, whereas the scale on the right hand side for NQM shares ranged from 20c to 32c

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37. We consider that the use of different scales in this way had the potential to mislead shareholders. NQM submitted that the different scales were used inadvertently. It agreed to include a revised graph in the supplementary target's statement that used consistent scales. The corrective disclosure resolves our concerns.

Issue 9: Break-down of the reserves and resources at Pajingo and Twin Hills

38. Conquest submitted that the graph which appeared on page 23 of the target's statement failed to make it clear that the majority of Pajingo joint venture reserves and resources are located at Twin Hills, some 190km away from Pajingo, and which remained subject to final development approval and completion of feasibility studies. NQM agreed to insert into the supplementary target's statement a new graph which provided a break-down of the reserves and resources at Pajingo and Twin Hills, and also agreed to disclose that the extraction of ore from Twin Hills remained subject to final development approval and completion of feasibility studies. This further disclosure resolves our concerns.

Issue 10: Statement of Pajingo ore reserves and resources

39. Conquest submitted that the table of Pajingo resources on page 42 of the target's statement was incorrect as it failed to state that the resources were only 60% owned by NQM. NQM agreed to reproduce the table in the supplementary target's statement and include a footnote that only 60% of the resources were attributable to NQM. We are satisfied with the further disclosure provided.

Presentation of information in takeover documents

40. It is not uncommon for parties to slant communications in takeover documents. Regardless of whether this general trend is appropriate, we consider that the target's statement in this matter went too far. Indeed some of the information deficiencies might be regarded as slanted only on a generous reading. We consider that the interests of NQM shareholders were not well served by the approach taken by NQM in its target's statement, particularly in relation to matters relating to Mr Walker. We consider that the corrective disclosure needs to be sufficiently strong to overcome the information deficiencies in the target's statement. We are satisfied that it is.

DECISION

Undertaking

41. After considering the submissions and rebuttals, we were minded to make a declaration of unacceptable circumstances. However, we indicated to the parties that if a supplementary target's statement was provided by NQM that addressed our concerns, we would consider not making a declaration.

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42. We consider it important that the supplementary target's statement containing the corrective disclosure be sent to NQM shareholders (in addition to being lodged with ASIC and released to ASX). This is because of the nature of some of the information deficiencies and the fact that the target's statement had been in the hands of NQM shareholders for some time.
43. We also consider it important that the supplementary target's statement include a clear and prominent explanation of why it has been issued and that the corrective disclosure was required by the Panel.
44. NQM offered an undertaking (see Annexure A), which we accepted. Given the undertaking, we decline to make a declaration and are satisfied that it is not against the public interest to do so. We have had regard to the matters in s657A(3).

Orders

45. Given that we make no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Michael Ashforth
President of the sitting Panel
Decision dated 11 August 2010
Reasons published 25 August 2010



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Annexure A

**AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION ACT (CTH) SECTION 201A
UNDERTAKING**

NORTH QUEENSLAND METALS LIMITED 02

Pursuant to section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth), North Queensland Metals Limited undertakes to the Panel that, in respect of the target's statement dated 20 July 2010 in response to the off-market takeover bid by Conquest Mining Limited, it will:

1. prepare a supplementary target's statement, in a form and content approved by the Panel, and lodge it with ASIC and release it to ASX as soon as practicable and despatch it to shareholders by no later than Monday, 16 August 2010 and
2. confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

**Signed by Kylie Anderson
with the authority, and on behalf, of
North Queensland Metals Limited
Dated 11 August 2010**