



Wednesday, 5 July 2006

Andean Resources Limited – Panel Declines to Commence Proceedings

The Takeovers Panel advises that yesterday it declined to commence proceedings in response to an application from Kingsgate South America Pty Ltd (**Kingsgate**) dated 30 June 2006 in relation to Kingsgate’s off-market takeover offer (**Offer**) for Andean Resources Limited (**Andean**).

Kingsgate’s application submitted that Andean failed to update the market and Andean shareholders on the status of its discussions with possible competing bidders in accordance with paragraph 51 of ASIC Policy Statement 25 “Takeovers: false and misleading statements” (**PS 25**). PS 25 requires a target that has stated it is in discussions with a possible competing bidder to:

- (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.

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. (Kingsgate’s Offer is currently due to close on 11 July 2006 and accordingly, Andean was required under PS 25 to update the market by no later than 4 July 2006, which was 7 days before the end of the Offer.)

The Panel decided not to commence proceedings after:

- (a) Andean provided the Panel with a draft announcement (**Announcement**) which it proposed to make to the ASX on 4 July 2006 regarding the status of parties interested in Andean;
- (b) Andean offered to undertake to send all Andean shareholders a copy of the Announcement; and
- (c) the independent directors of Andean offered to undertake 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 Panel notes that previous Panel decisions have endorsed the general policy of PS 25 on several occasions. The Panel considers 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 *Corporations Act 2001 (Cth)* (**Act**) relating to the last 7

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

Andean provided the Panel with a draft of the Announcement, which its independent directors considered to comply with paragraph PS 25.51. The Panel was not in a position to determine whether the Announcement complied with paragraph 25.51.

The Panel does, however, assume and works 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 notes that the statements made by Andean in relation to the status of its discussions with possible competing bidders 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 those 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.

Accordingly, in the absence of any probative material to suggest that the independent directors of Andean are 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. Of course this decision would not preclude further application to the Panel or proceedings in another forum if those obligations were not observed.

The sitting Panel in these proceedings was Irene Lee, Marie McDonald (Sitting President) and Simon Withers.

The Panel will publish its reasons for decision on its website in due course.

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