



**In the matter of Anaconda Nickel Limited 01
[2003] ATP 02**

Catchwords:

*Conditional offer for shares and rights – underwritten rights issue – exercise of rights – frustration of offer
Corporations Act 2001 (Cth), section 606 and item 10 section 611*

**ANACONDA NICKEL LIMITED – APPLICATION 01
PANEL’S REASONS FOR DECISION**

These are the Panel’s reasons for consenting to the withdrawal of an application by MatlinPatterson Global Opportunities Partners LP for interim orders restraining Glencore from acquiring Anaconda Rights. The decision was based on undertakings given by MP Global and Glencore to the Panel that neither would acquire Anaconda Rights other than under a full offer for all of the Anaconda Rights.

1. We refer to the application by MatlinPatterson Global Opportunities Partners LP (**MP Global**) under sections 657C and 657E of the *Corporations Act 2001* (Cth) (**Act**) which we received on 21 January 2003. MP Global applied for interim orders from the Panel in relation to Anaconda Nickel Limited (**Anaconda**).

The Panel & Process

2. The Panel was constituted by Brett Heading (sitting President), Tro Kortian (sitting Deputy President) and Peter Scott. On 23 January 2003 the Panel decided to conduct proceedings in relation to the application. The Panel issued a brief on 23 January seeking submissions and rebuttals the next day.

Definitions

3. Unless indicated to the contrary, terms used in these reasons have the same meaning as in the Panel’s reasons for decision in the Anaconda 02 to 05 applications. A copy of the Anaconda 02 to 05 reasons can be found at <http://www.takeovers.gov.au/Content/Decisions/2003/anaconda02-05.asp>. Annexure C of those reasons sets out a glossary of the terms defined in the reasons.

SUMMARY

Background

4. The following is a brief summary of some aspects of the background, taken from various application documents. The Panel has published a separate document which sets out the course of events, applications, decisions, course of the various offers, and other information useful to understand the Anaconda takeovers and proceedings. The document is titled ‘Anaconda Nickel Limited – Chronology of Applications’ and is available at http://www.takeovers.gov.au/Content/Decisions/2003/ANL_chronology.asp.

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Application

5. The application was based on MP Global's proposed offers¹ for all of the shares in Anaconda on issue at the date of the offers (**Old Shares**) and all of the rights (**Rights**) created under a fully underwritten 14-for-1 pro rata renounceable rights issue (**Rights Issue**) made by Anaconda under a prospectus (**Rights Issue Prospectus**) dated 20 January 2003.
6. Glencore International AG (**Glencore**) was the sole underwriter of the Rights Issue. Glencore was also a 34% shareholder in Anaconda prior to the Rights Issue and would therefore be entitled to 34% of the Rights as shareholder. MP Global was concerned that Glencore would only need to acquire a further 17% of the Rights to frustrate the MP Global Offers (which were to be conditional on MP Global being entitled to acquire at least 50.1% of the voting power in Anaconda).
7. MP Global said that this frustration of its offers would be unacceptable given Glencore's status as underwriter of the Rights Issue. MP Global said that Glencore buying Rights would only be acceptable where it was offering Anaconda shareholders similar offers to those made by MP Global.
8. MP Global sought an interim order preventing any acquisitions of Anaconda Rights by Glencore unless accompanied by, or part of, a full offer for all Rights and all Anaconda shares by Glencore, or were otherwise consented to by the Panel.
9. The Panel invited Glencore to give an undertaking in terms similar to the interim order requested.

Settlement

10. As part of a settlement, both MP Global and Glencore gave undertakings to the Panel under section 201A of the ASIC Act that neither would acquire Rights other than under a full offer for all of the Rights accompanied by a full offer for all of the Anaconda shares. The Panel accepted the undertakings and consented to the withdrawal of the application. A copy of the undertaking is annexed to these reasons.

APPLICATION

11. MP Global sought orders to restrain Glencore and its associates from acquiring a relevant interest in any Rights, other than:
 - (a) in respect of any Rights attaching to Glencore's shareholding in Anaconda as at the record date under the Rights Issue;
 - (b) with the prior consent of the Panel; or
 - (c) under an off-market offer to acquire all Rights (other than Rights attaching to Glencore's shareholding in Anaconda as at the record date) made on the same

¹ The offers were made by MP Global through its wholly owned subsidiary, Mongoose Pty Ltd (**Mongoose**). References in these reasons to MP Global should be read as including references to Mongoose.

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terms to each holder of Rights, which was made in conjunction with an offer to acquire all Anaconda shares.

12. MP Global also foreshadowed that if Glencore was not restrained from acquiring Rights by interim order or undertaking, MP Global may apply for a declaration that one or more of the following:
 - a) Glencore's failure to give an undertaking;
 - b) any acquisition of Rights by Glencore or its associates which would not be in accordance with the terms of that undertaking; or
 - c) any acquisition by Glencore or its associates of Rights which the acquirer did not exercise,

constituted unacceptable circumstances in relation to the affairs of Anaconda. MP Global indicated that it may also apply for orders designed to protect MP Global's interests and ensure that its bid proceeded as far as possible as if those unacceptable circumstances had not occurred.

Background

13. The following is a brief summary of some aspects of the background to the application.
14. The applications and submissions by parties in the various Anaconda applications set out background material concerning the Murrin Murrin mine project and operating plant (the **Murrin Murrin Project**). Anaconda (through its subsidiaries Anaconda Nickel Holdings Pty Ltd (**ANH**) and Murrin Murrin Holdings Pty Ltd (**MMH**)) is the 60% majority joint venture party in the Murrin-Murrin Project.
15. MP Global's application set out details of two schemes of arrangement (the **ANH/MMH Schemes**) that the two primary subsidiaries of Anaconda which operate the Murrin Murrin Project, ANH and MMH, proposed between themselves and their major creditors².
16. At the same time as the ANH/MMH Schemes, Glencore Nickel Pty Ltd and Glenmurrin Pty Ltd agreed schemes of arrangement (**Glencore Nickel/Glenmurrin Schemes**) to restructure the debts of their creditors secured over the companies' 40% interest in some or all of the Murrin-Murrin Project assets. The Glencore Nickel/Glenmurrin Schemes were on the same or similar terms as the ANH/MMH Schemes. The approval of the Glencore Nickel/Glenmurrin Schemes was a condition precedent to the ANH/MMH Schemes. In essence, pursuant to the Glencore Nickel/Glenmurrin Schemes, the Glencore Nickel/Glenmurrin Scheme Creditors accepted approximately 25.6 cents in the dollar for their debts by virtue of accepting

² Holders of fixed rate notes and floating rate bonds, and counterparties to various foreign exchange hedging contracts.

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approximately USD\$76 million in full and final satisfaction of their total debts of approximately USD\$300 million.

17. Final court approval of the ANH/MMH Schemes was given under orders granted by the Supreme Court of Western Australia on 17 January 2003. These orders were lodged with ASIC on Monday 20 January 2003.
18. On 25 September 2002 Anaconda announced that it would undertake the Rights Issue. This represented an issue of a total of 6,461,031,402 Anaconda shares (**New Shares**). The Anaconda share price on the day prior to the announcement of the Rights Issue was approximately 31 cents which dropped to approximately 18 cents on the day following that announcement. Anaconda issued the Rights Issue Prospectus in relation to the Rights Issue on 20 January 2003.
19. The issue price of the New Shares to be issued under the Rights Issue was at a substantial discount (approximately 80%) to the then market price and was likely to have a substantial dilutive effect on existing Anaconda shareholders who did not take up their shares under the Rights Issue. This is acknowledged by Anaconda and its directors in the Rights Issue Prospectus (refer chairman's letter and paragraphs 2.1, 3.1, 7.1, 8.1 and 8.4).
20. According to the Rights Issue Prospectus, at the date of the Rights Issue Prospectus Glencore was the largest shareholder in Anaconda, holding approximately 34% of the Old Shares, and was the sole and full underwriter of the Rights Issue (**Underwriting Arrangements**). Funds raised under the Rights Issue were to be used to repay debts of ANH and MMH under the ANH/MMH Schemes and to provide working capital, including for improvements to Anaconda's Murrin Murrin mine.
21. On 21 January 2003, MP Global announced that it proposed to make offers for Anaconda comprising:
 - a) an off-market bid under Chapter 6 of the Act for all of the Anaconda Shares existing at the date of the offer i.e. Old Shares (**Share Offer**); and
 - b) off-market offers to acquire all of the Anaconda Rights (**Rights Offer**), which would not be made under Chapter 6 of the Act (together the **MP Global Offers**).
22. Prior to making the MP Global Offers, MP Global had entered into a pre-bid agreement (**Anglo Agreement**) with Anglo American Investments (Australia) Limited (**Anglo**) (which at that time was the holder of approximately 24% of the Old Shares) under which (subject to certain rights of release) Anglo agreed to accept:
 - a) the Rights Offer in respect of all of its Rights; and
 - b) the Share Offer in respect of approximately 19.9% of all Old Shares (Anglo held approximately 24% of all Old Shares at the time).

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23. The Share Offer and Rights Offer were (amongst other things) conditional on MP Global being entitled to acquire more than 50% of Anaconda's diluted capital (**Minimum Acceptance Condition**) and on obtaining relief from ASIC to allow MP Global to exercise all of the Rights it acquired under the Rights Offer.
24. ASIC granted conditional relief to MP Global on 29 January 2003 which allowed MP Global to acquire New Shares in Anaconda issued on conversion of Rights acquired under the Rights Offer. The conditions required MP Global to apply the principles and many requirements of Chapter 6 of the Act to the Rights Offer. The relief did not require MP Global to make an offer for any New Shares, or to exercise any or all of the Rights it acquired under the Rights Offer.

Dates

25. The main dates that are relevant (some of which were estimates at the time of the application) include the following:

Rights Issue announced	15 January 2003
Share Offer and Rights Offer announced	21 January 2003
MP Global Bidder's statement for Share Offer lodged	22 January 2003
Rights Offer documents to be dispatched	30 January 2003
Rights trading on ASX to end	7 February 2003
Rights Offer to close	13 February 2003
Rights Issue to close	14 February 2003
Last day for Anaconda target's statement	19 February 2003
Allot and issue shares and dispatch holding statements	25 & 26 February 2003
Payment to Scheme Administrator for distribution to MMH and ANH Secured Creditors ³	26 February 2003
Scheme Administrator to make payments to MMH and ANH Secured Creditors	28 February 2003

Submissions in Favour of Application

26. MP Global submitted that the interim order for which it applied was required in order to prevent unacceptable circumstances from occurring, since, if the order was not made:

³ Subject to satisfaction of all conditions precedent to the schemes.

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- a) Glencore may be able to acquire sufficient Rights to frustrate the Rights Offer and Share Offer and thereby deny Anaconda shareholders the opportunity to participate in benefits accruing under the MP Global Offers; and
 - b) Glencore may be able to acquire Rights before Anaconda shareholders were properly informed concerning the MP Global Offers (with the result that Anaconda shareholders would be denied reasonable time and sufficient information to consider the MP Global Offers).
27. MP Global submitted that the occurrence of either of these situations would constitute unacceptable circumstances because of the combined effect of the following factors alleged by MP Global, as well as those set out in paragraphs 28 and 29:
- a) the terms of the Rights Issue meant that those Anaconda shareholders who did not exercise their Rights would have their proportionate interest in Anaconda vastly diluted;
 - b) to retain their proportionate interest in Anaconda, Anaconda shareholders were required to subscribe A\$0.70 under the Rights Issue (almost 3 times the then market price for Anaconda shares) for each Old Share they held;
 - c) the sum required to be subscribed created a significant disincentive for Anaconda shareholders to exercise their Rights and was likely to lead to the failure by Anaconda shareholders to exercise a large number of Rights;
 - d) any Rights that were not exercised would lapse and Glencore would (subject to the terms of the Underwriting Arrangements with Anaconda) be required to subscribe for the Anaconda New Shares to which those Rights related;
 - e) accordingly, it was likely that Glencore's obligation would extend to a significant number of Anaconda New Shares and that Glencore would obtain an overwhelming controlling interest in Anaconda through the Underwriting Arrangements; and
 - f) under the exception to section 606 of the Act in item 10 of section 611, Glencore would be able to acquire this controlling stake without making a takeover bid for the Old Shares held by Anaconda shareholders and, in particular, without providing any compensation (especially in the form of a premium for control) to the other shareholders of Anaconda for this transfer of control. This was because if it acquired any Rights and allowed them to lapse, it would nevertheless acquire the New Shares issued in relation to those Rights under the Underwriting Arrangements. MP Global contrasted this to MP Global's bid which, it said, offered Anaconda shareholders the opportunity to dispose of all of their investment in Anaconda at fair value.
28. MP Global said that the opportunity to acquire control of Anaconda that was available to Glencore under the Underwriting Arrangements was not available to any other person. The result is that the Underwriting Arrangements may have the

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effect of denying Anaconda shareholders a reasonable opportunity to participate in benefits accruing under MP Global's offers.

29. In addition, MP Global submitted that Glencore would be able to frustrate the MP Global Offers by acquiring about 17% of the Rights (in addition to those it will receive in respect of its existing holding) and letting them lapse. The additional New Shares which Glencore would acquire under the Underwriting Arrangements in respect of these lapsed Rights, together with those it could acquire by exercising the Rights which it received by virtue of its shareholding in Anaconda, would have been sufficient to defeat the MP Global Offers, by ensuring that the Minimum Acceptance Condition could not be met. MP Global submitted that action of this kind would also deny Anaconda shareholders a reasonable time and sufficient information to make an informed decision whether to accept the MP Global Offers.
30. MP Global said that the balance of convenience was in favour of granting the interim order, unless the Panel received undertakings from Glencore which made such relief unnecessary. MP Global said that any minimal prejudice which Glencore might suffer was outweighed by the danger that holders of Anaconda shares may be deprived of the opportunity to participate in the benefits offered under the MP Global Offers. MP Global submitted that the grant of interim relief, to ensure that shareholders of Anaconda had a reasonable opportunity to participate in the benefits accruing to them under MP Global's bid, was in the public interest.
31. MP Global offered to the Panel to undertake that it would not acquire a relevant interest in any Rights other than as a result of:
 - a) acceptances received pursuant to the Rights Offer;
 - b) entering into the Anglo Agreement; or
 - c) entering into any agreement with a holder of Rights under which that holder agreed to accept the Rights Offer in respect of some or all of their Rights.

DISCUSSION

Issues

32. The Panel considered that item 10 section 611 would not apply to any acquisition of New Shares by Glencore on exercise of any Rights (other than those issued to Glencore as a shareholder of Anaconda). It was therefore likely that Glencore would not be permitted by section 606 of the Act to acquire New Shares in such a manner. On that basis, unless Glencore could use any other of the exceptions in section 611 of the Act, such as the "Creep" entitlement under Item 9, it was likely that any Rights that Glencore acquired and held at the closing date of the Rights Issue would lapse.
33. Any Rights that Glencore acquired and allowed to lapse would add to any shortfall in the Rights Issue and Glencore would be required to acquire the corresponding number of New Shares under its underwriting obligations.
34. At the same time, any Rights which Glencore acquired would reduce the prospect of the MP Global Offers succeeding and reduce the prospect of any Anaconda

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shareholder who had wished to accept the MP Global Offers actually selling their Old Shares or Rights to MP Global.

35. The Panel considered that these issues gave some basis for concern if Glencore had decided to undertake such a strategy. There was no evidence that Glencore was so intending.

Jurisdiction & Process

36. The Panel was concerned to ensure that it had jurisdiction to make interim orders in the circumstances of the application. It asked parties to consider whether the existence of the ANH/MMH Schemes gave rise to any issues concerning the jurisdiction of the Panel in this matter. The Panel took the view that it did have jurisdiction, but the issue was not tested.

OUTCOME

37. Both MP Global and Glencore offered, and the Panel accepted, undertakings under section 201A of the ASIC Act that they would not acquire Rights other than under a full offer for all of the Rights and the Anaconda shares, or with the consent of the Panel.
38. On the basis of the undertakings, the Panel consented to the withdrawal of the application.
39. The application was withdrawn before parties were required to make their submissions in relation to it in response to the Panel's brief on 23 January 2003. Consequently no parties made submissions in relation to the application, other than the submissions included by MP Global in the application.
40. The Panel consented to the parties being represented by their commercial solicitors. It made no order for costs.

Brett Heading
Sitting President
Anaconda 01
14 July 2003

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Annexure A - Undertaking by Glencore

Undertaking in respect of Anaconda Nickel Limited (“Anaconda”)

Undertaking to the Takeovers Panel

Glencore International AG (“Glencore”) undertakes to:

- (a) MP Global Opportunities LP (“MP Global”); and**
- (b) the Takeovers Panel (“Panel”) under section 201A of the ASIC Act,**

that it will not acquire (and will ensure that none of its related bodies corporate acquires, will use its best endeavours to ensure that none of its other associates acquires and will not cause any of its other associates to acquire) a relevant interest in any renounceable rights created under the 14 for 1 pro rata renounceable rights issue to be made by Anaconda (“Rights”) other than:

- (a) the Rights attaching to Glencore’s shareholding in Anaconda as at the record date for the Rights Issue;
- (b) pursuant to an off-market offer to acquire all of the Rights (other than those referred to in paragraph (a) above) made as far as practicable on a basis that would comply with Chapter 6 if the Rights were voting shares (having regard to the time constraints applying in the Rights Issue) and made in conjunction with an offer to acquire all Anaconda shares, and is announced to ASX at the same time that the offer for shares is announced; or
- (c) with the prior consent to the withdrawal or variation of the undertaking by the Panel under section 201A of the ASIC Act or if Glencore has provided an undertaking to ASIC under section 93AA of the ASIC Act in identical terms to this undertaking by ASIC under section 93AA of the ASIC Act (which consent will only be taken to be given by ASIC after consultation by ASIC with MP Global).

This undertaking is conditional on MP Global undertaking to

- (a) Glencore;
- (b) the Panel under section 201A of the ASIC Act; and

that it will not acquire (and will ensure that none of its related bodies corporate acquires, will use its best endeavours to ensure that none of its other associates acquires and will not cause any of its other associates to acquire) a relevant interest in any Rights other than:

- (a) pursuant to an off-market offer to acquire all of the Rights made on the same terms to each holder of rights as far as practicable on a basis that would comply with Chapter 6 if the Rights were voting shares (having regard to the time constraints applying in the Rights Issue) which is made in conjunction with an offer to acquire all Anaconda shares;
- (b) under the Pre-Bid Agreement between Mongoose Pty Limited and Anglo American Investments (Australia) Limited dated 21 January 2003; or

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- (c) with the prior consent to the withdrawal or variation of the undertaking by the Panel under section 201A of the ASIC Act or if MP Global has provided an undertaking to ASIC under section 93AA of the ASIC Act in identical terms to this undertaking, with the prior consent to the withdrawal or variation of that undertaking by ASIC under section 93AA of the ASIC Act (which consent will only be taken to be given by ASIC after consultation by ASIC with Glencore).

Accepted by

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Glencore International AG

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Takeovers Panel under section 201A of the ASIC Act

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Annexure B - Undertaking by MP Global

Undertaking in respect of Anaconda Nickel Limited ("Anaconda")

Undertaking to the Takeovers Panel

MatlinPatterson Global Opportunités Partners LP ("MP global") undertakes to:

- (a) Glencore International AG ("Glencore"); and
- (b) the Takeovers Panel ("Panel") under section 201A of the ASIC Act,

that it will not acquire (and will ensure that none of its related bodies corporate acquires, will use its best endeavours to ensure that none of its other associates acquires and will not cause any of its other associates to acquire) a relevant interest in any renounceable rights created under the 14 for 1 pro rata renounceable rights issue to be made by Anaconda ("Rights") other than:

- (a) pursuant to an off-market offer to acquire all of the Rights made on the same terms each holder of rights as far as practicable on basis that would comply with Chapter 6 if the Rights were voting shares (having regard to the time constraints applying in the Rights Issue) which is made in conjunction with an offer to acquire all Anaconda shares,
- (b) under the Pre-Bid Agreement between Mongoose Pty Limited and Anglo American Investments (Australia) Limited dated 21 January 2003; or
- (c) with the prior consent to the withdrawal or variation of the undertaking by the Panel under section 201A of the ASIC Act or, if MP Global has provided an undertaking to ASIC under section 93AA of the ASIC Act in identical terms to this undertaking by ASIC under section 93AA of the ASIC Act (which consent will only be taken to be given by ASIC after consultation by ASIC with Glencore).

This undertaking is conditional on Glencore undertaking to:

- (a) MP Global; and
- (b) the Panel under section 201A of the ASIC Act;

that it will not acquire (and will ensure that none of its related bodies corporate acquires, will use its best endeavours to ensure that none of its other associates acquires and will not cause any of its other associates to acquire) a relevant interest in any Rights other than:

- (a) the Rights attaching to Glencore's shareholding in Anaconda as at the record date for the Rights Issue;
- (b) pursuant to an off-market offer to acquire all of the Rights (other than those referred to in paragraph (a) above) made as far as practicable on a basis that would comply with Chapter 6 if the Rights were voting shares (having regard to the time constraints applying in the Rights Issue) and made in conjunction with an offer to acquire all

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Anaconda shares, and is announced to ASX at the same time that the offer for shares is announced; or

- (c) with the prior consent to the withdrawal or variation of the undertaking by the Panel under section 201A of the ASIC Act or, if Glencore has provided an undertaking to ASIC under section 93AA of the ASIC Act in identical terms to this undertaking, with the prior consent to the withdrawal or variation of that undertaking by ASIC under section 93AA of the ASIC Act (which consent will only be taken to be given by ASIC after consultation by ASIC with MP Global).

Accepted by

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MatlinPatterson Global Opportunities Partners LP

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Takeovers Panel under section 201A of the ASIC Act