



**In the matter of Anaconda Nickel Limited 08
[2003] ATP 07**

Catchwords:

*Conditional offer for shares and rights – underwritten rights issue – competing principles – discriminatory bids – efficient, competitive and informed market – risk for an underwriter – failure to protect from discrimination
Corporations Act 2001 (Cth), sections 602, 606, item 3 section 611 and 617*

These are the Panel's Reasons for declining the application by Glencore for a declaration of unacceptable circumstances in relation to the affairs of Anaconda. Glencore sought that the Panel declare that MP Global's refusal to:

- a) **extend the Share Offer to the shares to be issued under the Rights Issue; and**
- b) **exercise under the Rights Issue, at a minimum, sufficient of the Anaconda Rights it held to maintain its percentage voting power in Anaconda at the level it had immediately before the close of the Rights Issue;**

constituted unacceptable circumstances.

1. These reasons relate to the application made at 4.30 p.m. on Friday 07 February 2003 in relation to the affairs of Anaconda Nickel Limited (**Anaconda**).

The Panel & Process

2. The President of the Panel appointed Brett Heading (sitting President), Tro Kortian (sitting Deputy President) and Peter Scott as the sitting Panel for the application (the **Panel**).
3. The Panel met in the late afternoon of 07 February 2003 to consider the **Anaconda 08** Application. The Panel decided to conduct proceedings in relation to the application and therefore issued a brief under Regulation 20 of the ASIC Regulations. At 8.15 p.m. that evening it gave a brief to parties and gave them until 6.00 p.m. the next day (Saturday 08 February) to provide submissions and 1.00 p.m. the next day (Sunday 09 February) to provide rebuttal submissions. The Panel met late on Sunday 09 February to determine the application.

Definitions

4. 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 <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

Application

5. Glencore applied for a declaration that MP Global's refusal to:
 - a) extend the Share Offer to the New Shares to be issued under the Rights Issue; and
 - b) exercise under the Rights Issue, at a minimum, sufficient of the Rights it held to maintain its percentage voting power in Anaconda at the level it had immediately before the close of the Rights Issue;

constituted unacceptable circumstances. It applied for consequential orders in the same vein.

Decision

6. The Panel decided to decline Glencore's application. Although the Panel still considered that the Rights Offer and Share Offer (**MP Global Offers**) together might be discriminatory against Glencore¹, Glencore declined the Panel's offer to protect itself, so no longer had a basis to assert that unacceptable circumstances existed.
7. The Panel invited Glencore to make an offer to all Anaconda shareholders at \$0.06 per share (including both Old Shares² and New Shares³). The Panel advised Glencore that if it agreed to make such an offer, the Panel would put Glencore and MP Global on equal footing and only allow the MP Global Offers to proceed if MP Global undertook to make an offer for all New Shares. Glencore declined the invitation.
8. The Panel accepted undertakings offered by MP Global during the course of the proceedings that it would:
 - a) exercise as many Rights as it was legally entitled to, up to a maximum of 65% of the Rights; and
 - b) ensure that the Rights Offer complied, as far as practicable, with the conditions set out in the original ASIC Relief.

APPLICATION

Background

9. The Anaconda 02-05 Panel's reasons set out a brief summary of some aspects of the background, taken from various application documents. The Panel has also

¹ See the Anaconda 02-05 reasons for a discussion of why the MP Global Offers might be discriminatory against Glencore.

² **Old Shares** are the 461,502,243 shares on issue at the time of MP Global's Share Offer and before the Rights Issue.

³ **New Shares** are the 6,461,031,402 shares issued on 21 February under the 14 for 1 Rights Issue.

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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 documents are titled 'Anaconda Nickel Limited 02 to 05' and 'Anaconda Nickel Limited - Chronology of Applications'. They are available at <http://www.takeovers.gov.au/Content/Decisions/2003/anaconda02-05.asp> http://www.takeovers.gov.au/Content/Decisions/2003/ANL_chronology.asp

Rights Issue

10. On 25 September 2002 Anaconda had announced a \$323 million \$0.05/share, 14 for 1 renounceable rights issue (**Rights Issue**). The Rights Issue was to fund a compromise with Anaconda's⁴ creditors, and to fund bringing the Murrin Murrin Project into profitability. Glencore, a 34% shareholder, had agreed to underwrite the Rights Issue fully for no fee (**Underwriting Arrangements**).

MP Global Offers

11. On 21 January 2003, MP Global had announced that it proposed to make:
 - a) **Share Offer** - an off-market bid under Chapter 6 of the Act for all of the Old Shares; and
 - b) **Rights Offer**- an unregulated off-market offer to acquire all of the Rights issued under the Rights Issue. The Rights Offer was not regulated by Chapter 6 of the Act because the Rights were not securities for the purposes of Chapter 6.
12. The Share Offer was conditional on (amongst other things) ASIC granting the ASIC Relief (the **ASIC Relief Condition**) and MP Global being entitled to acquire (or subscribe for) more than 50% of Anaconda's diluted capital. The Rights Offer was conditional on the conditions of the Share Offer being satisfied or waived before the last day of the offer period under the Rights Issue.
13. On the evening of 6 February 2003, MP Global announced in a media release that the MP Global Offers would proceed, despite the Anaconda 02-05 Panel revoking the ASIC Relief.

Dates

14. To place the Anaconda 08 application in context, at the time of the Anaconda 08 application on Friday 07 February 2003:
 - a) trading in the Rights on ASX had closed that day;
 - b) the Rights Offer was due to close four business days later;
 - c) the Rights Issue was due to close one week later;

⁴ The creditors were actually creditors of two of Anaconda's subsidiaries.

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- d) control of Anaconda remained very uncertain;
- e) the Anaconda 02-05 Panel had revoked the ASIC Relief;
- f) the Anaconda 06-07 Panel had told MP Global that it must disclose to the market by 10 February 2003 whether or not MP Global would rely on, or waive, the Independent Expert Condition and the ASIC Relief Condition to which the Share Offer (and therefore the Rights Offer) was subject;
- g) MP Global had declared that it would continue with the MP Global Offers without the ASIC relief (i.e. the Naked Offer, with the number of Rights MP Global could exercise limited by the number of Old Shares that it acquired under the Share Offer); and
- h) the Share Offer was not due to close until 5 March 2003.

Anaconda 02-05 Decision

15. In revoking the ASIC relief for MP Global to exercise as many Rights as it acquired under its Rights Offer the Anaconda 02-05 Panel said:

*“The Panel considers that the relief, combined with the terms of the MP Global off market offer for the Anaconda Rights (**Rights Offer**) and MP Global’s off market takeover bid for shares in Anaconda (**Share Offer**), would allow MP Global to decide, selectively, the number of new shares in Anaconda it would acquire and the number of new shares that it could require Glencore to subscribe for as underwriter. The Panel on that basis decided that the ASIC relief should be revoked.”*

16. The Anaconda 02-05 Panel also said that whilst it recognized that it was potentially open for MP Global to proceed with its Rights Offer and Share Offer without the ASIC relief, acquire shares in Anaconda under its Share Offer and exercise sufficient Rights to maintain its percentage holding in the fully diluted Anaconda (i.e. make a **Naked Offer** in reliance on the **Rising Tide** principle – see s 121 to 123 of the Panel’s reasons in the Anaconda 02 to 05 decision), the Panel expressed no views on such a course of action for the moment.
17. This application commenced because MP Global did just that, proceeded with the Naked Offer, to which Glencore objected.

Application

18. Glencore applied for a declaration that MP Global’s refusal to:
- a) extend the Share Offer to the shares to be issued under the Rights Issue; and
 - b) exercise under the Rights Issue, at a minimum, sufficient of the Anaconda Rights it held to maintain its percentage voting power in Anaconda at the level it had immediately before the close of the Rights Issue,

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constituted unacceptable circumstances.

Orders

19. Glencore requested that the Panel make final orders that:
- a) MP Global either be required to withdraw, or be restrained from proceeding with, the Share Offer and the Rights Offer unless MP Global undertook and announced to ASX that:
 - (i) MP Global would extend its Share Offer to all Anaconda shares issued under the Rights Issue, at a price to be determined after submissions have been received from all relevant parties; and
 - (ii) if all conditions to the Rights Offer were fulfilled and/or waived, MP Global would exercise that number of Rights that it acquired or received, whether as acceptances under the Rights Offer or otherwise (including, but not limited to, all Rights it received from Glencore) at any time prior to 8 pm on 14 February 2003 (**Rights Issue Closing Time**) as would maintain MP Global's percentage voting power (as defined in the Act) in Anaconda at the same level immediately after the issue of all shares under the Rights Issue (including all shares issued under the Underwriting Arrangements relating to the Rights Issue) as the level immediately before the Rights Issue Closing Time; and
 - b) such further or other orders as the Panel considered appropriate, including orders to enable MP Global's bids to be varied so as to proceed on the basis described above.

Brief

20. In the Panel's brief it raised the following issues, amongst others:
- a) Was Glencore placed in a position where MP Global could determine the percentage of Anaconda shares that Glencore was required to take up under the Underwriting Arrangements?
 - b) Could Glencore be locked in as a minority shareholder?
 - c) Was this a natural position for a risk bearing underwriter to be in, and did Glencore, having decided to bear the risk of underwriting, have any cause for complaint that the decisions of other shareholders in Anaconda would determine the number of shares it must subscribe for in fulfilling its underwriting obligations?
 - d) Was it unreasonable for Glencore to complain about the possibility of MP Global structuring its bid to allow it to manage its eventual percentage shareholding if Glencore had not sought to protect itself from such a

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position by making its Underwriting Arrangements subject to conditions to protect itself from such an event?

- e) Should MP Global be required to offer for all the New Shares to be issued pursuant to the Rights Issue⁵? If so, why?
- f) Should MP Global be required to exercise all of the Rights it acquired under the Rights Offer, subject to the limits of the takeovers provisions? If so, why?
- g) What relevance was the apparently deliberate public policy decision of the legislature as evidenced in section 617 of the Act that a bidder is not required to offer for shares that may be issued pursuant to convertible securities during the bid period?
- h) What elements of the relevant circumstances meant that the policy of section 617 should not apply to the Panel's decision (or should apply in modified form)?
- i) Does the analogy with item 3 of section 611 imply that MP Global should be required to offer for all of the shares in the bid class (including all the New Shares issued pursuant to the Rights Issue⁶)?
- j) Should MP Global be required to bid for, and acquire, Rights it would not be able to exercise due to restraints of section 606 of the Act?

SUBMISSIONS

21. The Panel received submissions from MP Global, ASIC, Anaconda and Glencore. Most parties largely repeated, or referred to, their earlier submissions in the Anaconda 04 proceedings (which, given the time limits, and the very similar nature of the application was perfectly sensible).

Glencore Submissions

22. Glencore submitted that MP Global was bidding for control via the Rights Offer and that this was inconsistent with the policy and history of takeovers regulation in Australia.
23. Glencore asserted that the MP Global Offers were discriminatory against Glencore (in the terms set out by the Anaconda 02-05 Panel) and it was therefore unacceptable for MP Global's bid to be structured so that:
 - a) MP Global could decide, selectively, the number of New Shares in Anaconda it would acquire and the number of New Shares that Glencore would be required to subscribe for as underwriter; and

⁵ Including any shares issued to Glencore as underwriter of the Rights Issue.

⁶ Including any shares issued to Glencore as underwriter of the Rights Issue.

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- b) Glencore would not be able to require MP Global to acquire the New Shares that Glencore acquired in Anaconda under the Underwriting Arrangements, because MP Global was not making, and was not required to make, offers for those New Shares.
24. Glencore's main argument was that the MP Global Offers were discriminatory, in that they allowed MP Global the opportunity (if MP Global acquired sufficient Rights (and following the revocation of the ASIC Relief, sufficient Old Shares)) to gain control of Anaconda (i.e. 50.1%) while shedding those Rights it chose not to exercise onto Glencore in its position as underwriter. Glencore argued that it was thus being treated differently to other shareholders, against the principles in section 602(b) of the Act.
25. Glencore said, essentially by way of alternative argument, that it constituted unacceptable circumstances that Glencore, as underwriter, would not have the opportunity to sell into MP Global's Share Offer any New Shares Glencore was obliged to take up as underwriter pursuant to its obligations under the Underwriting Arrangements i.e. Glencore's inability to exit.
26. Glencore also repeated its assertion that the MP Global Offers were not normal, acceptable offers, because although they offered for all of the securities in Anaconda on issue prior to the allotment of the New Shares, the lack of an offer for the New Shares made the MP Global Offers less than a full offer for Anaconda.
27. Glencore asserted that not all Anaconda shareholders would have an opportunity to exit their entire holding in Anaconda by selling their Old Shares and their Rights to MP Global.
28. Glencore repeated its arguments that as underwriter, it had made a very significant financial commitment to Anaconda, and that without its financial commitment Anaconda would likely have been placed in external administration and Anaconda shareholders would have received no return on their investment.
29. Glencore asserted that the MP Global Offers did not provide a reasonable period of time for Anaconda shareholders to assess the merits of the MP Global Offers.

MP Global's Offer when seeking ASIC relief

30. Glencore asserted that MP Global had offered in its original application to ASIC for relief to exercise all of the Rights it acquired under the Rights Offer:

'It is crucial to bring to the notice of the Panel the commitments made on behalf of MP Global in the letter of Blake Dawson Waldron dated 13 January 2003 applying for the modifications to Item 3 of section 611 of the Corporations Act.

(a) The relevant statements were made on page 7 of the letter and were as follows.

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- "5. *The bidder should promptly announce its intentions regarding exercise of the convertible securities*
- *"This will be satisfied. The documentation for both the Rights Bid and the Takeover Bid will clearly state **that MP Bidder will exercise all rights [bold added] acquired pursuant to the Rights Bid.**"*
6. *Exercise of the convertible securities should not be unduly deferred.*
- *This will be satisfied. If the conditions to the Rights Bid are satisfied (or waived), **MP Bidder will exercise all rights [bold added] acquired prior to the close of the offer period under the ANL Rights Issue.**" '*
31. It is relevant to note that ASIC did not require MP Global to give such an undertaking, nor make it a condition of its relief. ASIC said that it did not consider that the condition was required.

Natural Position of Risk for an Underwriter

32. The Panel asked whether the position in which Glencore now found itself was the normal position of an underwriter, i.e. committed to invest significant sums of money into the target, with uncertainty as to whom would control the target at the end of the underwriting. Glencore advised that it had reasonably assumed, if a takeover bidder appeared, it would be a bid for all shares and Glencore could accept the bid for the shares it acquired as underwriter. It did not expect and could not have expected that its underwriting position could be used by another party to effectively underwrite a bid for Anaconda on a partial basis.
33. Glencore asserted that it could not reasonably have been expected to protect itself from an eventuality which was entirely inconsistent with takeover practice and policy in Australia. In entering into the Underwriting Arrangements, Glencore said that it did not (and was not reasonably required to) put its mind to the possibility that an unprecedented bid for Rights without a bid for shares to be issued on exercise of Rights could be made. To suggest that Glencore should have protected itself from an eventuality which is entirely inconsistent with takeover practice and policy in Australia was placing an unreasonable and unrealistic burden on an underwriter as a contracting party.

Anaconda Submissions

34. Anaconda supported all of Glencore's submissions.

Metal Holdings Submissions

35. Metal Holdings submitted that Glencore was being disingenuous in complaining of MP Global's offers, because every Right that MP Global exercised was a Right that Glencore did not have to subscribe for under the Underwriting Arrangements so Glencore was in fact better off because its risk was reduced. On this basis, Metal Holdings questioned how Glencore had any basis for complaining about any of MP Global's offers.

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MP Global Submissions

36. MP Global submitted that it was unacceptable for Glencore to seek to deny Anaconda shareholders the opportunity to accept the MP Global Offers, and that it had always been open for Glencore to make a higher rival bid, and if it did not want to become a major minority shareholder after agreeing to the Underwriting Arrangements it should make such a higher offer and ensure that it was the controlling shareholding in Anaconda if that was its concern.
37. MP Global asserted that it was making a full offer for **all** of each of Anaconda's shareholders' holdings (Old Shares and Rights) in Anaconda, section 617 was clear that it was not required by the legislature to offer for all of the New Shares, it was Anaconda shareholders who would decide where the Rights went not necessarily MP Global, and that Glencore should not have entered into the Underwriting Arrangements if it was now unhappy with the terms it had agreed to.
38. MP Global submitted that requiring it to offer for all New Shares would in fact turn the tables entirely and offer Glencore a fully risk free underwriting, in that Glencore could determine how many New Shares it took under the Underwriting Arrangements and how many it could offload onto MP Global, when Glencore was the one who had failed to protect itself and MP Global had been careful to ensure that its offers did not expose it to the risk that Glencore had voluntarily accepted.

Section 617

39. The parties largely repeated the submissions made in relation to section 617 of the Act that had been made in the Anaconda 02-05 proceedings.

Orders

40. Glencore suggested that the Panel should direct MP Global to offer for all of the shares in Anaconda, Old Shares and New Shares, on the following bases:
 - a) **Old Shares** - 12 cents per share;
 - b) **Rights shares** - New Shares issued pursuant to the exercise of Rights - 6 cents per share (ie the aggregate of the price for Rights under the Rights Offer and the exercise price of the Rights under the Rights Issue); and
 - c) **Underwritten shares** - New Shares issued to Glencore as underwriter - a price of not more than the price paid for shares issued pursuant to the exercise of Rights under paragraph (b) i.e. 6 cents per share but not less than the exercise price under the Rights Issue (5 cents per share) with the final price for the underwritten shares to be determined by the Panel.

DISCUSSION

Competing Principles

41. The Panel considered that two competing principles of takeovers policy were relevant to determining whether to grant the relief sought by Glencore in the Application.
42. The first principle (**No Discrimination Principle**) was that discriminatory bids are unacceptable. The Panel has, in its decision in relation to the Anaconda 02 to 05 applications, set out its views in relation to the discriminatory nature of the MP Global bid as structured at the time of the Anaconda 08 proceedings. The Rights Offer (when considered in light of the Share Offer and Rights Issue) was still structured in such a way that would allow MP Global to decide, selectively, the number of New Shares it would acquire and the number of New Shares that it could require Glencore to subscribe for as underwriter. MP Global could therefore still discriminate against Glencore under the Rights Offer in the same manner discussed under the heading 'Discriminatory Acquisition' in the Panel's decision in the Anaconda 02 to 05 applications. However, as set out below, the Panel considered that the unacceptability of the discrimination passed when Glencore declined the Panel's offer to protect itself from this discrimination.
43. The second principle (**Market Principle**) that the Panel considered in this application was that under Chapter 6 of the Act the Panel is charged with ensuring that the acquisition of control of voting shares takes place in an efficient, competitive and informed market. The Panel did not believe that it would uphold this principle if it merely determined to declare that the Rights Offer constituted unacceptable circumstances and thereby deprived ANL shareholders of the only available offer to acquire their Rights and Old Shares in ANL.
44. The Panel considered that the Rights Offer and Share Offer were a potentially attractive alternative outcome for Anaconda shareholders compared to the alternative of merely deciding whether or not to subscribe for New Shares or to allow their Rights to flow through to Glencore as underwriter. The Panel was very reluctant simply to grant Glencore's application and thus remove from Anaconda shareholders the opportunity to accept the MP Global offers.

Opportunity for Glencore to Protect Itself

45. The Rights Offer was only discriminatory in its application to Glencore as underwriter, but not to Glencore as shareholder, or to any other Anaconda shareholders. It was only discriminatory because Glencore had not required a condition in the Underwriting Arrangements that no person gain control of Anaconda during the underwriting period⁷.

⁷ See the Anaconda 02-05 reasons for Glencore's advice to the Anaconda 02-05 Panel as to why it did not seek to make such a condition a termination clause of the Underwriting Arrangements.

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46. To address the Panel's concerns in relation to the Market Principle, the Panel invited Glencore to undertake to the Panel to make a takeover bid (the **Glencore Bid**) for all of the shares in ANL (the **Shares**), being both the Old Shares and the New Shares. The Panel invited Glencore to make a bid that:
- a) offered holders of Shares a minimum of \$0.06 per Share, regardless of whether the Shares were Old Shares or New Shares⁸;
 - b) was conditional only on:
 - (i) no person other than Glencore acquiring more than 50.1% of the voting power in ANL on a fully diluted basis; and
 - (ii) approval of the Glencore Bid being obtained from the Australian Foreign Investment Review Board (subject to Glencore taking all reasonable steps to obtain that approval).
47. The Panel advised Glencore that if it gave this undertaking to the Panel the Panel would decide that the MP Global offers, as currently structured, should not be allowed to proceed unless MP Global undertook to make an offer for the New Shares, as well as its Share Offer for the Old Shares.
48. The Panel considered that this would ensure that Glencore was not discriminated against (i.e. the MP Global Offers must allow Glencore to exit all of the New Shares it was required to subscribe for as underwriter under the Underwriting Arrangements), but still ensure that Anaconda shareholders were not deprived of an alternative to subscribing for New Shares or allowing their Rights to lapse, and give MP Global an opportunity to decide whether it wanted to stay in the competition for control of Anaconda.

Balance Between The Market Principle And The No Discrimination Principle

49. The announcement of such a bid by Glencore would have created an opportunity for shareholders to realize a value for their investment in ANL, and thereby promote the Market Principle.
50. The Panel was of the view that an appropriate balance could have been created between the Market Principle and the No Discrimination Principle if:
- a) Glencore had undertaken to make the Glencore Bid; and

⁸ Initially the Panel had invited Glencore to make the bid at \$0.064 cents per share, being the theoretical value of New Shares given the \$0.12 Old Share bid price, the 14 Rights Issue, the \$0.05 exercise price for the Rights and the \$0.01 Rights Offer value for each Right. Glencore responded that its offer, if it made one, would be much less conditional than MP Global's offers and therefore the value of the MP Global Offers to which it said the Panel was notionally comparing the requested Glencore Bid should be discounted for the uncertainty. Glencore suggested that the proper price would be something less than \$0.05 per New Share. In order to advance the process, the Panel was prepared to compromise with an offer from Glencore of \$0.06, being the simple \$0.05 per Rights exercise price plus the \$0.01 foregone by any Anaconda shareholder who chose to exercise their Rights.

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- b) the Panel had advised MP Global that if it wished to proceed with the Share Offer and Rights Offer, it must also make a takeover bid for all of the New Shares. This requirement would have cured the discriminatory nature of the Rights Offer, because Glencore would have had an opportunity to sell all of its Shares (including those obtained as underwriter of the Rights Issue) to MP Global.

51. The Panel considered that it was not unreasonable for Glencore to assume the additional risk associated with making the Glencore Bid in order to protect itself from the discriminatory nature of the Rights Offer. Glencore was already the underwriter of the Rights Issue, and was already at risk, following completion of the Rights Issue, of holding as much as 95.58% of the issued shares of Anaconda.
52. On that basis, Glencore would only be required to offer for an extra 4.4% of the fully diluted shares in Anaconda (Glencore had already accepted the risk of the entire Rights Issue failing). If Glencore had made such a bid at \$0.06 per Share, the Panel was of the view that Glencore's exposure would have been increased by the following amounts:
- a) \$18,339,176 for the Old Shares currently held by persons other than Glencore;⁹ plus
 - b) \$42,791,410 for the New Shares to be issued on exercise of the Rights.¹⁰

Under the Underwriting Arrangements, Glencore already faced the risk of being required to acquire all of the New Shares (including the New Shares to be issued on exercise of the Rights held by Glencore) at \$0.05. Glencore's maximum exposure under the Underwriting Arrangements was therefore already \$323,051,570.¹¹ Making the Glencore Bid would therefore have increased Glencore's maximum exposure by approximately 19%.

Refusal by Glencore to Protect Itself

53. However, Glencore advised the Panel that it would not provide an undertaking to make the takeover bid suggested by the Panel.

⁹ There were a total of 461,502,243 Old Shares on issue at the time of the Rights Issue. Of these Old Shares, 305,652,936 were held by persons other than Glencore. The \$18,339,176 figure was calculated by multiplying the number of Old Shares held by persons other than Glencore by the \$0.06 to be offered for the Old Shares under the Glencore Bid.

¹⁰ A total of 6,461,031,402 Rights were created under the Rights Issue. Of these Rights, 4,279,141,098 were held by persons other than Glencore. The \$42,791,410 figure was calculated by multiplying the number of Rights held by persons other than Glencore by \$0.01, which was the difference between the \$0.05 that Glencore would have been required to pay for the New Shares issued in relation to these Rights if it acquired them under the Underwriting Arrangements and the \$0.06 to be offered for the New Share under the Glencore Bid.

¹¹ The \$323,051,570 figure was calculated by multiplying the 6,461,031,402 Rights in existence by the \$0.05 issue price under the Rights Issue for the New Shares corresponding to those Rights.

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54. By Glencore declining to make the Glencore Bid, the Panel was of the view that Glencore had declined to protect itself from any discrimination against it under the Rights Offer in its capacity as underwriter. Under the proposal which the Panel invited Glencore to consider, Glencore had the opportunity to ensure that MP Global would have to offer for any New Shares Glencore might have been obliged to take up as underwriter, by MP Global being required to offer for all Anaconda Shares (new and existing). That would have eliminated the discriminatory nature of the MP Global offers.
55. Consequently, the Panel considered that there was no longer any basis for making a declaration of unacceptable circumstances in relation to the MP Global Offers. The Panel considered that in light of this the MP Global Rights Offer would not prevent the acquisition of control of voting shares in Anaconda taking place in an efficient, competitive and informed market.

MP Global Undertakings

56. During the course of the proceedings MP Global volunteered undertakings to the Panel to:
- a) exercise, if it was legally entitled under section 606 of the Act to do so, all of the Rights that it acquired up to a maximum of 65% of the total Anaconda shares on issue immediately following the completion of the Rights Issue; and
 - b) ensure that the Rights Offer complied, as far as practicable, with the conditions set out in the relief instrument granted by ASIC to MP Global on 29 January 2003.
57. The undertakings that MP Global offered to the Panel ensured that the Rights Offer would proceed in the manner intended by the conditions attached to the ASIC Relief (although the relief itself remained revoked) i.e. in accordance with the principles of Chapter 6 of the Act. The Panel decided to accept the undertakings offered by MP Global as well as decline the application by Glencore.

Glencore Submissions

58. The Panel did not accept Glencore's submissions:
- a) **Inconsistency with Takeovers Principles:** The Panel considered that although the 14 for 1 nature of the Rights Issue made this set of circumstances unlikely to fit normal principles, the MP Global Offers, for Old Shares but not for New Shares issued on exercise of the Rights, was consistent with the current legislation and therefore current takeovers principles;
 - b) **Discrimination:** The Panel agreed with the basic principle Glencore propounded, but found it no longer applied when Glencore declined to protect itself;

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- c) **Exit Opportunity:** The Panel considered that the MP Global Rights Offer and Share Offer, when taken together, offered all Anaconda shareholders an opportunity to exit fully from their investment in Anaconda. The Panel acknowledged that this did not apply to Glencore as underwriter;
- d) **Insufficient Time:** The Panel did not accept that Anaconda shareholders had had insufficient time to consider the MP Global Offers when the Rights Offer period was longer than the trading period of Rights on ASX and was only slightly less than the period Glencore appeared to assert was acceptable for Anaconda shareholders to assess the merits of allowing their Rights to be take up by Glencore.

Precedent Value

- 59. The Panel is concerned to emphasize that its decision in relation to the Application is specifically related to the unusual facts of the Application, the Rights Issue, and the MP Global offers, including the timing, and heavy dilution of existing shareholdings, associated with the Rights Issue.

Process

- 60. Like many of the Anaconda proceedings, the Anaconda 08 proceedings were conducted in a fairly time pressured manner:
 - a) Friday 07 February, 4.29 p.m.: application received;
 - b) Friday 07 February, 8.14 p.m.: brief to parties;
 - c) Saturday 08 February, 6.00 p.m.: submissions due;
 - d) Sunday 09 February, 1.00 p.m.: rebuttals due;
 - e) Sunday 09 February, 10.30 p.m.: Panel decision given to parties, Glencore offered opportunity to give undertaking to make a bid for all the Anaconda shares at \$0.064 per share;
 - f) Monday 10 February, 4.26 p.m.: Panel advises parties that in response to oral submissions to the Panel Executive, the Panel would be prepared to accept an undertaking from Glencore to make a takeover bid at \$0.06 per share, time for giving the undertaking extended to 8.00 p.m. that evening;
 - g) Tuesday 11 February, 9.51 a.m.: Panel publishes decision that it has declined the application, Glencore having declined to give the undertaking requested.
- 61. The Anaconda 08 Panel also wrote to parties at 9.08 p.m. on Thursday 06 February, noting the impending close of the Rights Offer and Rights Issue. It said that parties should take note of the decision of the Review Panel in

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Anaconda 07 that there had not been sufficient time for that Panel to consider the information before it, give parties a sensible case on which to provide comments, allow parties a reasonable time to make comments and rebuttals, consider those submissions and rebuttals, make a decision and then publish it with sufficient time for Anaconda shareholders to be made aware of the decision, consider it and take any meaningful action. The Panel placed parties on notice that it may decline to conduct proceedings for similar reasons if the issues, time and circumstances warranted that action.

MP GLOBAL'S ANNOUNCEMENT CONCERNING THE INDEPENDENT EXPERT CONDITION AND ASIC RELIEF CONDITIONS

62. The Anaconda 02-05 Panel made an interim order requiring MP Global to make an announcement on the ASX Company Announcements Platform, by no later than 6.00pm (Melbourne time) on 10 February 2003, whether the condition (the **Expert Condition**) set out in section 7.6(b)(iii) of MP Global's Bidder's Statement relating to the Share Offer had been satisfied. If it had not been satisfied, MP Global was required to announce whether or not it would waive the condition or rely on it.
63. The Anaconda 06-07 Panel affirmed that part of the interim order made by the Anaconda 02-05 Panel and also required MP Global to make a similar announcement concerning the ASIC Relief Condition in MP Global's Share Offer.
64. On 10 February, MP Global published its 2nd supplementary bidder's statement. In respect of the Panel's interim order, MP Global stated:

Commitment to waive conditions

Mongoose {MP Global's bidding company} will free the Share Offer from all the conditions of the Share Offer by giving notice to Anaconda (and ASX) before 8.30 p.m. (Sydney time) on Thursday 13 February 2003 if, by 8.00 p.m. (Sydney time) on Thursday 13 February 2003, Mongoose has:

- (a) relevant interests in that number of Anaconda Shares which is at least 51% of Anaconda Shares; and*
- (b) received sufficient acceptances under the Share Offer and the Rights Offer, so that:*
- (c) if the Rights accepted under the Rights Offer were exercised by Mongoose and Anaconda Shares were issued to Mongoose on exercise of them in accordance with the terms of the Rights Issue; and*
- (d) Mongoose held the number of Anaconda Shares for which Mongoose has received acceptances under the Share Offer,*

Mongoose would hold at least 51% of the Anaconda Shares then on issue.

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65. MP Global announced in the supplementary bidder's statement that it would be bound by the statement that it made about the Independent Expert Condition and ASIC Relief Condition.
66. The Panel considered that the announcement gave effect to the Panel's orders in that it made it clear to Anaconda shareholders exactly the terms on which the Independent Expert Condition and ASIC Relief Condition would operate. It also, more importantly, removed from MP Global any discretion as to whether or not to rely on the Independent Expert Condition and the ASIC Relief Condition. On that basis, the Panel accepted that its order had been complied with by MP Global. The circumstances of the announcement were unusual, given that it related primarily to an unregulated offer for the Rights but the conditions were effectively imposed and regulated under the Chapter 6 Share Offer. On that basis, the Panel considers that it is unlikely that similar circumstances will arise again.

DECISION

67. The Panel decided that, in light of Glencore's decision (as described above) not to accept the Panel's offer to protect itself from the discriminatory aspects of the Rights Offer, it was not in the public interest to make a declaration of unacceptable circumstances in relation to the Rights Offer.
68. On that basis, the Panel considered that MP Global was free to proceed with the Rights Offer and its Share Offer as structured.
69. The undertakings given by MP Global are set out at Annexure A.
70. The Panel consented to the parties being represented by their commercial solicitors. It made no order for costs.

Brett Heading

Sitting President

Anaconda 08 Proceedings

14 July 2003



Annexure A - MP Global Undertaking

TAKEOVERS PANEL

IN THE MATTER OF ANACONDA NICKEL LIMITED 08

Undertaking by MatlinPatterson Global Opportunities Partners LP under section 201A of the Australian Securities and Investments Commission Act 2001 (Cth)

UNDERTAKING

1. MatlinPatterson Global Opportunities Partners LP (“MP Global”) undertakes to the Takeovers Panel under section 201A of the *Australian Securities and Investments Commission Act. 2001* (Cth) that MP Global will:
 - a) subject to paragraphs 2 and 3, exercise all of the Rights that it acquires under the Rights Offer that it is legally entitled to exercise under section 606 of the *Corporations Act 2002* (Cth), up to that number of Rights that would give MP Global ownership of 65% of the shares in Anaconda immediately following the completion of the Rights Issue; and
 - b) ensure that the Rights Offer complies, as far as practicable, with the conditions set out in schedule C of the exemption instrument granted by the Australian Securities and Investments Commission to MP Global’s subsidiary (Mongoose Pty Limited (“Mongoose”)) on 29 January 2003, which was subsequently revoked by the Takeovers Panel.
2. For the purposes of the undertaking in paragraph 1(a):
 - a) in calculating the 65% ownership, MP Global may take into account any Anaconda shares acquired by it under the Share Offer; and
 - b) the number of Anaconda shares which MP Global is legally entitled to exercise is to be determined at midnight (Sydney time) on the night of Thursday 13 February 2003.
3. The undertaking in paragraph 1(a) does not prevent MP Global from choosing to exercise Rights that would give it ownership of more than 65% of the shares in Anaconda immediately following the completion of the Rights Issue.
4. In this Undertaking:

“**Anaconda**” means Anaconda Nickel Limited ACN 060 370 783;

“**Rights**” means the renounceable rights created under the Rights Issue;

“**Rights Issue**” means the 14-for-1 pro rata renounceable rights issue the subject of the prospectus dated 20 January 2003 issued by Anaconda;

“**Rights Offer**” means the offer by Mongoose to acquire all of the Rights contained in the Rights Offer Document dated 30 January 2003 issued by Mongoose, as varied in accordance with the Rights Offer Document; and

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“Share Offer” means the offer by Mongoose to acquire all of the fully paid ordinary shares of Anaconda on issue as at 28 January 2003 contained in the Bidder’s Statement dated 22 January 2003 issued by Mongoose, as varied in accordance with the *Corporations Act 2001 (Cth)*.

Dated: 11 February 2003

Signed on behalf of MatlinPatterson Global Opportunities Partners LP by:

Gregory Eng

Partner