



**In the matter of Anaconda Nickel Limited 10  
[2003] ATP 09**

**Catchwords:**

*Panel President exercising power without appointing sitting Panel – timing and method of disclosure as to whether conditions under rights offer have been fulfilled*

*Corporations Act 2001 (Cth), section 657E(1)*

**These are the Panel's Reasons for declining an application by Anaconda for an interim order bringing forward the time at which MP Global had to declare its offer to be unconditional, or to have failed, from 8.00 p.m. on Thursday 13 February, Sydney time, by two hours, to 6.00 p.m. on that day (all times are Sydney time).**

1. These reasons relate to the application received at 6.10 p.m. on Tuesday 11 February 2003 from Anaconda Nickel Limited (**Anaconda**) for an interim order in relation to the affairs of Anaconda.

**The Panel & Process**

2. Section 657E of the Corporations Act (**Act**) under which the application for an interim order was made allows the Panel, or the President of the Panel to make an interim order. The President of the Panel considered the timing issues involved in the application (which are set out below) and considered that it was unlikely that the Panel would be able to assemble a Sitting Panel to consider the application within the time required. He therefore determined the proceedings sitting as the substantive Panel President.
3. The substantive President of the Panel sat to consider the **Anaconda 10** Application in the late evening of Tuesday 11 February 2003.
4. The President decided to consider the application because it raised significant issues concerning the final resolution of the MP Global Rights Offer and Share Offer (together the **MP Global Offers**).
5. The President decided that given the time pressures of the application in relation to the offers and the Rights Issue he should treat the application and correspondence between the parties through that day as setting out the issues which were in contention. The Panel did not give a brief to the parties given the period available for decision and the clear discussion by both sides of the relevant issues in the correspondences between them which had been copied to the Panel. The President sat at 8.00 p.m. on Tuesday 11 February 2003 to determine the application.

**Definitions**

6. 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

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<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

7. This was an application relating to the closing hours of the MP Global Rights Offer. The issues related to when and how MP Global should disclose whether the conditions to the Rights Offer (indirectly through the Share Offer) had been met. That disclosure related to the close of the Rights Offer (at 12 midnight in the evening of 13 February 2003) and the close of the Rights Issue which was due the day after the close of the Rights Offer.
8. The President declined Anaconda's application.
9. The President considered that the time left between the scheduled close of the Rights Offer and the time at which any decision in relation to the application could be given to Anaconda shareholders was too short to be comfortable bringing the closure time earlier.
10. The President considered that extending the time for acceptances would have far less of a detrimental effect on Anaconda shareholders, and might be considered at a late stage, but shortening the time required more notice to ensure that Anaconda shareholders had had a reasonable time to consider the change and to make any necessary adjustments to their own decision making plans.

## BACKGROUND

### General

11. 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 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](http://www.takeovers.gov.au/Content/Decisions/2003/ANL_chronology.asp)

### Facts relating to this application

12. At the time of the application, the MP Global Rights Offer was conditional on the conditions in the MP Global Share Offer being satisfied by 8.00 p.m. Sydney time on Thursday 13 February 2003. The Share Offer was originally made on the basis of MP Global having received the ASIC Relief. It was originally subject to a condition that

*on or before the Conditionality Day, Mongoose {Mongoose being the company through which MP Global conducted its offers} has received sufficient acceptances under this Offer and the Rights Offer so that:*

- *if the ANL Rights acquired by Mongoose under the Rights Offers were exercised by Mongoose and ANL Shares were issued to Mongoose on exercise of them; and*

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- *Mongoose held the number of ANL Shares for which it has received acceptances under this Offer,*

*Mongoose would hold more than 50% of the ANL Shares on a fully diluted basis*

13. On 10 February 2003, following the decisions in Anaconda 4, 6&7 and 8, MP Global had issued a Second Supplementary Bidder's Statement in relation to its Share Offer and its Rights Offer.
14. Section 1.1 of the Second Supplementary Bidder's Statement stated:  
*"Mongoose will free the Share Offer from all the conditions of the Share Offer by giving notice to ANL (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 ANL Shares which is at least 51% of ANL Shares; and*
  - (b) received sufficient acceptances under the Share Offer and the Rights Offer,*

*so that:*

  - (c) if the ANL Rights accepted under the Rights Offer were exercised by Mongoose and ANL Shares were issued to Mongoose on exercise of them in accordance with the terms of the ANL Rights Issue; and*
  - (d) Mongoose held the number of ANL Shares for which Mongoose has received acceptances under the Share Offer,*

*Mongoose would hold at least 51% of the ANL Shares then on issue."*

15. MP Global's stated intention in section 1.1 of the Second Supplementary Bidder's Statement was to free the Share Offer (and hence the Rights Offer) of all defeating conditions subject only to the satisfaction of the revised minimum acceptance condition ("MAC") by 8.00 p.m. (Sydney time) on Thursday 13 February 2003.<sup>1</sup>
16. MP Global's stated intention in section 8.2 of the Rights Offer Document was to close the Rights Offer at midnight (Sydney time) on 13 February 2003.

## APPLICATION

17. Anaconda applied for an interim order under section 657E of the Act to:
  - a) compel MP Global to notify Anaconda and ASX at or before 6.30 p.m. (Sydney time) on 13 February 2003 whether:
    - (i) the MAC has been satisfied; and
    - (ii) the Share Offer has been freed of all conditions;
  - b) restrain MP Global from freeing the Share Offer (and hence the Rights Offer) of its conditions after 6.30 p.m. (Sydney time) on 13 February 2003; and

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<sup>1</sup> The issue of MP Global's announcement concerning the freeing of its offers from the Independent Expert Condition and ASIC Relief conditions is discussed in the Anaconda 08 decision and reasons.

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- c) restrain MP Global from extending the close of the Rights Offer beyond midnight on 13 February 2003.
18. Anaconda advised that it intended to apply to the Panel for a declaration under section 657A of the Act for a declaration of unacceptable circumstances in relation to the affairs of Anaconda if MP Global:
- a) failed to give an undertaking requested by Anaconda to similar effect to the interim order requested by Anaconda; and/or
  - b) extended the closing time for the Rights Offer beyond midnight on 13 February 2003; and/or
  - c) freed the Share Offer (and hence the Rights Offer) of its conditions after 6.30 p.m. (Sydney time) on 13 February 2003.
19. Anaconda reserved the right to seek final orders in the event that the Panel made a declaration of unacceptable circumstances in relation to the circumstances referred to above.
20. Prior to the application being lodged, Anaconda sent a request to MP Global for undertakings in the same effect as the application. Anaconda also sent MP Global a copy of the draft application. Anaconda attached subsequent e-mail correspondence to the Application as reference material for the Panel in the application.
21. Anaconda agreed to facilitate the timely dissemination of information relating to MP Global's bid. It agreed to post on its Web site a link to a site nominated by MP Global on which MP Global could post notices lodged with the ASX in relation to the bid, to ensure that those notices were available to shareholders and rights holders seeking information on the Anaconda Web site despite any delays in posting by the ASX.

## **SUBMISSIONS**

22. The Panel received submissions from Anaconda and copies of correspondences between MP Global and Anaconda. The issues discussed related to the hours of opening of the various offices for lodgement of offer acceptances, Rights Issue acceptances etc and the form of acceptances and transfers for the Rights Offer and Rights Issue from MP Global which would be acceptable to Anaconda and its share registrar.

### **Anaconda Submissions**

23. Anaconda asserted that MP Global had effectively unilaterally reduced the "sacrosanct" period of 7 days at the end of the offer period to 3.5 hours, being the time between the proposed notification of the status of the defeating conditions at 8.30 p.m. (Sydney time) on 13 February 2003 and the close of the Rights Offer at midnight on 13 February 2003. Anaconda accepted that the Rights Issue timetable required some compression of the statutory time frames. However, Anaconda submitted that an immutable time for certainty as to the conditions attaching to the Share Offer (and hence the Rights Offer) must be fixed and that this time must be an adequate period prior to the close of the Rights Offer. Anaconda submitted that 6.30

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p.m. (Sydney time) (at the latest) on 13 February 2003 would be an appropriate deadline.

24. Anaconda said it was concerned to maximise the period during which rights-holders:
  - a) had access to full information by having MP Global notify Anaconda and ASX of the status of the defeating conditions at a time when some dissemination of the information provided by MP Global remained possible i.e. ASX's Company Announcements Platform was open; and
  - b) still have time to know whether the Share Offer (and hence the Rights Offer) was unconditional or whether the offers would lapse.
25. Anaconda gave the following as an example of why MP Global should be required to give the undertakings, or the Panel make the interim order, requested:
  - a) If the Minimum Acceptance Condition at clause 7.6(b)(ii) in the Share Offer (and therefore indirectly in the Rights Offer) (**Minimum Acceptance Condition**)<sup>2</sup> is not satisfied, MP Global would not free the Share Offer (and thus the Rights Offer) of all conditions at 8.30 p.m. (or 6.30 p.m. as requested by Anaconda). Nevertheless, there is nothing preventing MP Global from failing to make an announcement as to the status of the conditions and then declaring the Share Offer (and Rights Offer) unconditional immediately prior to the close of the Rights Offer period. In the period between 8.30 p.m. and the close of the Rights Offer period, MP Global may receive sufficient acceptances to satisfy the MAC, and then waive all conditions and thereby form binding contracts. In the absence of an announcement of the status of the defeating conditions however, rights-holders may decide not to accept the Rights Offer while suffering under the misapprehension that defeating conditions had not been satisfied and thereby be deprived of an opportunity to accept the Rights Offer while in possession of full information.
  - b) If the Minimum Acceptance Condition is satisfied, MP Global may nevertheless refuse to free the Share Offer of all defeating conditions so as to limit any further acceptances. Then, having deterred further acceptances, it could declare the offer unconditional at a time immediately before the close of the offer period and at a time when rights-holders have no opportunity to accept the Rights Offer. Anaconda notes that it is impossible for anyone except MP Global to determine, retrospectively, whether the Minimum Acceptance Condition was, in fact, satisfied at the time fixed for making that determination.

#### MP Global

26. MP Global, in its correspondences with Anaconda, had pointed out that the Share Offer was regulated by Chapter 6 of the Act, and section 650F required MP Global to give a notice freeing the Share Offer of any condition to ASX. Under ASX's operating

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<sup>2</sup> The Minimum Acceptance Condition provided that on or before the Conditionality Day (being the day before the last day for transfer of the Rights other than on ASX, which in this case meant that the Conditionality Day was 13 February 2003) MP Global must have received sufficient acceptances of the Share Offer and the Rights Offer that, if MP Global exercised all of its Rights, it would hold more than 50% of the Shares on a fully diluted basis.

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rules, a notice may only be given to ASX on a day, prior to the close of the hours of operation of its Companies Announcement Platform. MP Global argued that if it gave the notice to ASX after the close of ASX's company announcements office (8.30 p.m. Sydney time) the waiver of the Minimum Acceptance Condition in the Share Offer would not be effective on Thursday 13 February 2003. The waiver would take effect the next day when the notice was received by , but the Rights Offer would have closed with the Share Offer condition unfulfilled and not waived.

27. It was also an unwaivable term of the Rights Offer that the Rights Offer could not become unconditional unless the Share Offer had also been declared unconditional. Therefore, MP Global could not waive the conditions of the Rights Offer once the ASX Companies Announcements Platform had closed.

#### Resolutions between the Parties

28. Over the course of the day and into the evening of 11 February 2003, MP Global and Anaconda reached agreement on a number of issues to resolve the disagreements over receiving and settling acceptances and transfers.

#### DECISION

29. The decision is in response to an application by Anaconda for an interim order bringing forward the time at which MP Global had to declare its offer to be unconditional, or to have failed, from 8.00 p.m. on Thursday 13 February, Sydney time, by two hours, to 6.00 p.m. on that day. Anaconda made the application late on Tuesday 11 February, 2003. (all references to times are to Sydney time).
30. The President considered that shortening the time for acceptances to be lodged and counted towards the success of the bid was a serious decision to make. Given the time available to advise those Anaconda shareholders who may have been considering waiting until the latest possible time to accept the Rights Offer, in order to see if any improved offers are made, the President did not think it was appropriate to shorten that time. He considered there remained some material risk that not all of the Anaconda shareholders would be appropriately informed of the shortened time.
31. If the application had been made with several days in which to write to Anaconda shareholders informing them of the shortened time the application may have been different, especially as the time between the announcement by MP Global at 8.30pm on Thursday evening if its offers had become unconditional and the close of the Rights Offer at 12.00 midnight was very short.
32. The President was assisted by the advice from MP Global and Anaconda of the arrangements that they had agreed to facilitate acceptance by Anaconda rights holders in that short period. They included:
  - a) MP Global would ensure that the registry for lodging applications under its Rights Offer remained open for rights holders until 12 midnight on the evening of Thursday 13 February;
  - b) Anaconda would post MP Global's announcement as to the status of its offers onto the Anaconda website by 8.30 p.m. for Anaconda rights holders to be informed of the status of MP Global's offers;

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- c) MP Global would ensure that its announcement was posted by ASX on the ASX Company Announcements Platform (with the assistance of Anaconda as a Listed Entity if required);
  - d) Anaconda would assist MP Global by accepting faxed copies of acceptances for MP Global's Rights Offer as MP Global's notice of exercise of the Anaconda Rights. This would allow, in turn, MP Global to accept facsimile acceptance of its Rights Offer. However, these provisions were subject to the acceptor providing an original acceptance within a short period after, to allow Anaconda to verify and reconcile original acceptances against the facsimile versions.
33. The President consented to the parties being represented by their commercial solicitors. He made no order for costs.

**Simon McKeon**  
**Sitting President**  
**Anaconda 10 Proceedings**  
**14 June 2003**