



Anaconda Nickel Limited – Chronology of Applications Applications 01 to 19

PARTIES

Anaconda Nickel Limited (**Anaconda**) is a public company listed on the Australian Stock Exchange Limited (**ASX**). Its principal asset is a 60% interest in the Murrin Murrin laterite nickel and cobalt project in Western Australia (the **Murrin Murrin Project**).

The remaining 40% interest in the Murrin Murrin Project is held by a subsidiary of Glencore International AG (**Glencore**), a private Swiss company.

Before the events which were the subject of the Panel proceedings, Glencore held 34% of Anaconda, and was its largest shareholder. Two other substantial shareholders in Anaconda were Anglo American Investments (Australia) Limited (**Anglo**) and Sherritt International Corporation (**Sherritt**) with respective shareholdings of approximately 24% and 8%. Sherritt's Chairman, Mr Ian Delaney, was a past chairman of Anaconda.

Metal Holdings Pty Limited (**Metal Holdings**), a company associated with Mr Andrew Forrest, held 3.9% of Anaconda. Mr Forrest is the founder and was previously chief executive of Anaconda. Mr Forrest ceased to be a director of Anaconda in May 2002.

MatlinPatterson Global Opportunities Partners LP (**MP Global**) is a private investment partnership which operates a global private equity fund specialising in investing in distressed companies.

Australian Investments United Pty Limited (**AIU**) is a small private company associated with wealthy individuals in Indonesia.

DEFINITIONS

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

For ease of reference, some terms used in this document are defined both in this document and in the Anaconda 02 to 05 reasons.

MURRIN MURRIN PROJECT

The Murrin Murrin Project has experienced financial difficulty from its inception, largely caused by it falling short of design production targets. Consequently Anaconda's subsidiaries have not met their obligations to secured creditors, raising doubts about Anaconda's financial solvency.

SCHEMES OF ARRANGEMENT

At the time that the Anaconda proceedings were before the Panel, Anaconda was in the process of seeking to implement schemes of arrangement (the **ANH/MMH Schemes**) with the secured creditors of two of its subsidiaries.¹ Final orders in respect of the schemes were made by the Supreme Court of Western Australia on 17 January 2003 and were made effective on 20 January 2003². The ANH/MMH Schemes were designed to effect a compromise between ANH and MMH and their secured creditors. Under the schemes, creditors would receive approximately \$207 million in settlement for debts of approximately \$823 million along with a share of the benefits arising out of the first phase of arbitration between Anaconda and Fluor Australia Pty Ltd. The date for payment of the cash component of the ANH/MMH Schemes was set to be 28 February 2003. It was generally accepted that unless the schemes became effective, Anaconda would not have been able to continue funding its future operations.

THE RIGHTS ISSUE

On 25 September 2002 Anaconda announced a pro rata renounceable rights issue, to be fully underwritten by Glencore (**Rights Issue**). The purpose of the Rights Issue was to fund part of the payment to be made to creditors under the ANH/MMH Schemes and to provide working capital for improvements to the Murrin Murrin Project.

The Rights Issue was an offer of 14 new shares for every one share held. The issue price of the shares under the Rights Issue of 5 cents per share was at a substantial discount (approximately 80% as calculated at 17 January 2003) to the then market price and was likely to have a substantial dilutive effect on shareholders who did not take up their shares under the Rights Issue.

Under the Rights Issue, rights trading on ASX was due to commence on 21 January 2003 and close on 7 February 2003 with the Rights Issue closing on 14 February 2003³.

MP GLOBAL OFFERS

MP Global entered into a pre-bid agreement with Anglo, under which it acquired a relevant interest in 19.9% of the Old Shares then on issue. On 21 January 2003, MP Global announced an off-market bid under Chapter 6 of the Act for all shares in Anaconda that were then in existence (**Old Shares**) (**Share Offer**) and off-market offers to acquire all of the rights under the Rights Issue (**Rights Offer**), which would not be made under Chapter 6. The Rights Offer was due to close on 13 February 2003. The Share Offer did not extend to shares that were to be issued under the Rights Issue (**New Shares**).

Both offers were conditional, amongst other things, on:

¹ The Anaconda subsidiaries were Anaconda Nickel Holdings Pty Ltd and Murrin Murrin Holdings Pty Ltd.

² The orders in respect of the Glencore Nickel/Glenmurrin Schemes were lodged with ASIC on 17 January 2003.

³ Rights Offer documents were dispatched to shareholders on or around 30 January 2003.

- a) MP Global being entitled to acquire more than 50% of Anaconda's diluted capital by the close of the Rights Offer;
- b) obtaining relief from ASIC to allow MP Global to exercise rights acquired under the Rights Offer (**ASIC Relief**); and
- c) Anaconda granting an independent expert access to confirm the production capabilities of Murrin Murrin (**Independent Expert Condition**).

ASIC RELIEF

ASIC granted the relief requested by MP Global on 29 January 2003. It was conditional on MP Global applying the principles and many requirements of Chapter 6 to the Rights Offer, but it did not require MP Global to make an offer for any shares issued on exercise of the rights, or to exercise any of the rights it acquired under the Rights Offer.

APPLICATIONS

The Panel received 19 applications in relation to the affairs of Anaconda⁴. A brief summary of each along with intervening events is set out below.

Anaconda 1 - On 21 January 2003 MP Global applied to the Panel alleging that if Glencore acquired sufficient Rights and chose not to exercise those Rights then Glencore could acquire control of Anaconda under the underwriting arrangements without making a takeover bid.

On 31 January 2003 MP Global withdrew its application after it and Glencore undertook not to acquire the Rights other than under a general offer, under existing arrangements or with the Panel's consent.

Anaconda 2 - On 29 January 2003 Metal Holdings applied to the Panel asserting that Glencore was a related party to Anaconda and therefore should not be allowed to underwrite the Rights Issue, and potentially increase its control over Anaconda, without the approval of the unrelated shareholders of Anaconda or under a takeover offer.

Anaconda 3 - On 30 January 2003 MP Global applied to the Panel, amongst other things, in relation to the failure of Anaconda and MP Global to reach agreement on satisfaction of the Independent Expert Condition and regarding the treatment by Anaconda of MP Global and Glencore (as competing bidders for control of Anaconda).

Anaconda 4 - On 30 January 2003 Glencore applied to the Panel seeking review of the ASIC Relief and for a declaration of unacceptable circumstances in relation to MP Global's offers.

Anaconda 5 - On 30 January 2003 Anaconda applied to the Panel in relation to various aspects of MP Global's offers (some of which issues were covered by the Anaconda 4

⁴ The Anaconda 11 and 14 applications were either withdrawn or settled without the Panel considering the applications.

application). In particular, it complained about the Independent Expert Condition, and the effect of the overall offer on the future solvency of Anaconda.

On 6 February 2003 the Panel made a decision on the Anaconda 02 – 05 applications.

It revoked the ASIC Relief on the basis that, in conjunction with the Rights Offer and Share Offer, it 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 declined most other aspects of the applications. It held that the Independent Expert Condition was not unacceptable. However, it decided that there was no prima facie obligation on Anaconda's directors to provide access to an independent expert. Once it was clear that the condition would not be satisfied, the Panel made an interim order directing MP Global to advise the market by 10 February 2003 of whether it would waive that condition (**Interim Order**).

The Panel also indicated that Anaconda directors should inform shareholders immediately about the merits of MP Global's offers⁵. It further noted that the parties had not been able to reach a commercial resolution of the issues that was acceptable to the Panel. In particular, the parties were not able to resolve a course of conduct where, amongst other things, MP Global exercised all of the rights it acquired under the Rights Offer.

Anaconda 6 - On 7 February 2003 MP Global applied to the Panel seeking, amongst other things, a three-day extension to the time stipulated in the Interim Order.

On that same day the Review Panel reaffirmed the Interim Order and further required MP Global to advise the market of the status of the ASIC Relief condition which had also been triggered. Following this MP Global announced that it would proceed with its Rights Offer and Share Offer, without an Independent Expert's Report and without the ASIC Relief.

Anaconda 7 - After 7.30 p.m. on 6 February 2003 Anaconda sought a review of the Interim Order and further orders to take effect from 9.00am on 7 February 2003 requiring MP Global to advise of the status of the condition regarding ASIC Relief.

The Review Panel declined to commence proceedings as it had insufficient information to make an informed decision in the time available.

Anaconda 8 - On 7 February 2003 Glencore applied to the Panel alleging that it was unacceptable for MP Global not to confirm:

- a) whether it would extend its Share Offer to include all shares issued under the Rights Issue; and

⁵On 6 February 2003 Anaconda's independent directors issued a statement recommending that rights holders reject MP Global's Rights Offer and shareholders take no action in relation to the Share Offer until further notice.

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- b) if the Rights Offer conditions were satisfied or waived, MP Global would exercise all of the rights it acquired sufficient to maintain its percentage voting power in Anaconda at the level it has at the close of the Rights Offer.

On 11 February 2003 the Panel decided not to make a declaration of unacceptable circumstances after Glencore declined to undertake to make an offer for all of the shares in Anaconda on issue after the Rights Offer, which the Panel considered would have protected Glencore from the discriminatory aspect of the MP Global offers.

Anaconda 9 - On 11 February 2003 Glencore applied for a review of the Anaconda 8 Panel's decision. On 12 February 2003 the Review Panel decided not to vary the decision of the Anaconda 8 Panel.

Anaconda 10 - On 12 February 2003 Anaconda applied for an interim order bringing forward the time at which MP Global had to declare its Rights and Share Offers to be unconditional, or to have failed, from 8.00 p.m. 13 February, to 6.00 p.m. on that same day⁶.

The President declined to make the interim order as it was considered that some shareholders might have been waiting until the latest possible time to accept the Rights Offer and there was insufficient time to advise them of such a material change.

Anaconda 12 - On 13 February 2003 the Panel affirmed ASIC's decision not to grant an exemption to MP Global in relation to its Rights Offer. MP Global had applied to ASIC the previous day for relief to allow it to exercise all of the rights it acquired under its Rights Offer.

Anaconda 13 - On 13 February 2003, following MP Global's decision to free both its offers from all conditions, the Review Panel agreed to a variation of the undertaking given to it by MP Global in the Anaconda 8 and 9 proceedings⁷. Under the varied undertaking, the Panel consented to MP Global extending the closing time for its Rights Offer from 12.00 midnight that night to 2.00 p.m. 14 February 2003. MP Global, however, decided not to extend the Rights Offer and it closed at 12.00 midnight on 13 February. When its Rights Offer closed it had relevant interests in 34.24% of the Old Shares and 41.47% of the Rights.

Anaconda 15 - On 20 February 2003 MP Global applied to the Panel seeking an interim order that Anaconda not allot and issue Anaconda shares under the Rights Issue prior to 25 February 2003⁸. The Panel declined to make this interim order. In addition, MP Global sought a declaration of unacceptable circumstances and remedial orders in relation to:

- a) on-market share acquisitions in Anaconda by Glencore and Sherritt towards the close of the Rights Offer⁹; and

⁶ 6 p.m. 13 February 2003 was the determination time for the Rights Offer.

⁷ At the time the offers were made unconditional MP Global had relevant interests in 32.03% of Anaconda shares and had 39.6% of Anaconda rights.

⁸ This was the date that Anaconda had originally advised when it would allot and issue shares under the Rights Issue.

- b) Sherritt's decision to allow its rights to lapse, rather than selling them to MP Global or exercising them under the Rights Issue¹⁰.

On 9 April 2003 the Panel declined the application. Glencore's acquisition was found to be within the 3% creep¹¹ and not otherwise improper. The Panel accepted Sherritt's explanation of its conduct.

Anaconda 16 and 17 - On 21 February 2003 the Panel received two separate applications from Anaconda and Glencore about substantially the same matters.

The applications related to:

- a) the allotment of shares in Anaconda to MP Global pursuant to the exercise of Anaconda rights which resulted in MP Global holding shares in excess of the proportion that it held at midnight on 13 February 2003, at the close of the Rights Offer (**Excess Shares**)¹²; and
- b) an agreement between MP Global and AIU entered into around this time under which MP Global purported to transfer the Excess Shares to AIU such that its interest in the Excess Shares was a bare trust (**Share Sale Agreement**).

The applicants alleged that the transfer of Excess Shares to AIU may have resulted in breaches of section 606 as MP Global and AIU may be associates.

On 7 March 2003, the Panel decided to make a declaration of unacceptable circumstances. It considered that it was unacceptable for MP Global to exercise all the Rights it had acquired under its Rights Offer, and then seek to determine the identity of the purchaser of the Excess Shares. It provided draft orders requiring dispersal of the Excess Shares.

Anaconda 18 - On 11 March 2003, MP Global applied for a review of the Anaconda 16-17 decision.

On 10 April 2003 the Review Panel affirmed the Anaconda 16-17 Panel's declaration of unacceptable circumstances. It ordered, amongst other things, that the legal and beneficial title to the Excess Shares vest in ASIC, for sale by a stockbroker appointed by ASIC.

Anaconda 19 - On 11 April 2003 MP Global applied for a review of the Anaconda 15 decision.

⁹ Both Sherritt and Glencore commenced buying shares on-market shortly before the MP Global Offers became unconditional. The on-market price of Anaconda shares on 13 February until the close of the MP Global Offers was higher than the bid price offered by MP Global. Consequently, MP Global could not buy any shares on-market at this time without necessitating an increase in the bid price offered by MP Global. After the Rights Issue closed, Glencore lodged a substantial shareholders notice on 24 February advising that it had a relevant interest in approximately 46% of Anaconda.

¹⁰ Sherritt's rights had a value of approximately \$5.1 million under the Rights Issue.

¹¹ See item 9 of section 611 of the Corporations Act.

¹² MP Global exercised 41.47% of the rights, which exceeded its relevant interest in Old Shares. The Excess Shares consisted approximately of 6% of Anaconda's fully diluted capital.

On 12 May 2003 the Review Panel affirmed the Anaconda 15 decision and, in addition, made a declaration of unacceptable circumstances in relation to the on-market acquisitions of Old Shares by Sherritt on 13 February 2003. The Panel decided the acquisitions were intended to create a false market, in that they sought to create an impression in the market of buying pressure from a rival takeover bidder, to reduce the chances of success of the MP Global offers, and to make a higher return on its Anaconda shares.

It ordered that

- a) the Old Shares acquired by Sherritt should be vested in ASIC for sale by a book build; and
- b) MP Global be allowed to retain a proportion of the Excess Shares which the Anaconda 16-17 and Anaconda 18 Panels had ordered be vested in ASIC for disposal. That proportion was based on an approximation of the number of Old Shares that MP Global might have acquired on-market (and the equivalent number of New Shares that MP Global could have acquired under the Rising Tide Principle if it had acquired those Old Shares) if Sherritt had not engaged in the acquisitions on 13 February 2003.