Takeovers Panel

Reasons for Decision
Normandy Mining Limited 02

In the matter of Normandy Mining Limited (No 2) [2001] ATP 28

Catchwords:

Competing takeover bids – acquisition of interposed entities – lock-up agreement – agreement between major shareholder and bidder – substantial shareholder notice – breach of substantial holder provisions
Corporations Act 2001 (Cth), sections 602, 654B and 671B
New Ashwick Pty Ltd v Wesfarmers Ltd (2000) 18 ACLC 742, considered

An application under section 657A of the Corporations Act by AngloGold Limited for a declaration of unacceptable circumstances in relation to Newmont Mining Corporation's bid for Normandy Mining Limited. The Panel decided on Wednesday, 5 November 2001 not to make a declaration of unacceptable circumstances or orders requiring disclosure by Newmont of an arrangement agreement between it and Franco-Nevada Mining Corporation Limited. These are the reasons for the Panel's decision.

The Application

1 On 27 November 2001 AngloGold Limited (**AngloGold**) made an application to the Panel under sections 657A and 657E seeking urgent orders at follows:

(a) an order requiring Newmont Mining Corporation (**Newmont**) to publicly disclose the Plan of Arrangement dated 14 November 2001 between Newmont and Franco-Nevada Mining Corporation (**Franco-Nevada**); or

(b) as an alternative, an order requiring Newmont to disclose the Plan of Arrangement to AngloGold for the purpose of these proceedings.

Background

2 Normandy Mining Limited (**Normandy**) is a listed Australian company. AngloGold is a South African company listed on the Johannesburg Stock Exchange. Newmont Mining Corporation is a corporation incorporated in Delaware. Franco-Nevada Mining Corporation Limited is a Canadian company.

3 AngloGold has made a takeover bid for all of the issued ordinary shares in Normandy. The bid consideration was initially 2.15 shares in AngloGold for each 100 shares in Normandy and the bid was conditional as to 50.1% acceptances, prescribed occurrences, Foreign Acquisitions and Takeovers Act approval and other matters. The bid was originally scheduled to close on 14 December 2001. On 29 November AngloGold announced a revised offer which includes an additional 20 cents (Australian) cash consideration payable to accepting shareholders per Normandy share. AngloGold also declared its

offer to be unconditional[1] and extended the closing date for the bid until 27 December 2001.

4 On 14 November 2001, in a joint announcement issued by Newmont, Franco-Nevada and Normandy (the **Joint Announcement**) to the NYSE and ASX the following matters were announced:

(a) Newmont intends to make a recommended bid for Normandy offering 0.0385 Newmont shares for each Normandy share (to increase by 5 cents per share upon reached 90% acceptance, subject to ASIC approval);

(b) conditional on Newmont reaching 51% ownership of Normandy, Newmont has agreed to acquire Franco-Nevada under a plan of arrangement[2] pursuant to which Franco-Nevada shareholders will receive 0.8 Newmont shares for each Franco-Nevada share (**Plan of Arrangement**);

(c) as an inducement for Newmont agreeing to the Plan of Arrangement, Franco-Nevada has granted Newmont the right to acquire its 19.9% shareholding in Normandy at the exchange ratios under its proposed bid for Normandy;

(d) Newmont has offered seats on its Board to certain directors and shareholders in Franco-Nevada and Normandy;

(e) a break fee of US$100 million is payable by Franco-Nevada to Newmont in certain circumstances;

(f) a break fee of US$20 million is payable by Franco Nevada to Newmont, in certain circumstances, if Franco Nevada tenders its shares in Normandy into a competing takeover offer for Normandy;

(g) a break fee of A$38.8 million is payable by Normandy to Newmont in certain circumstances; and

(h) a break fee of US$10 million is payable by Newmont to Franco-Nevada if Newmont shareholders do not give necessary approvals.

Substantial Holder Notice

5 On 19 November 2001, Newmont released its Substantial Holder Notice which attached a copy of an agreement with Franco-Nevada (**Lock-Up Agreement**). We note that under sub-section 671B(6) and section 654B of the

[1] Payment of the 20 cents additional consideration was subject to approval by AngloGold's shareholders in accordance with Johannesburg Stock Exchange requirements, which was obtained on 19 December 2001. If that approval had not been forthcoming, acceptances could have been withdrawn.

[2] A procedure under Canadian law corresponding with a scheme of arrangement under Part 5.1 of the *Corporations Act*.

Corporations Act, the Substantial Holder Notice was required to be lodged with ASX and with Normandy within one business day of entry into the Lock-Up Agreement and the Joint Announcement. Newmont provided evidence that it had lodged the Substantial Holder Notice on 16 November by facsimile and that an additional notice was lodged on 19 November because ASX indicated it had no record of the original notice lodged.

Lock-Up Agreement

6 The Lock-Up Agreement contains the terms on which Franco-Nevada has granted Newmont the right to acquire its 19.9% shareholding in Normandy at the same exchange ratios announced in respect of its proposed bid for Normandy. The Lock-Up Agreement recites that Franco Nevada entered into it to induce Newmont to enter into the Plan of Arrangement. It was not disputed that the Lock-Up Agreement contributes to the situation giving rise to Newmont's relevant interest in Franco-Nevada's Normandy shares.

7 The Lock-Up Agreement is part of a complex set of agreements and other documents relating to Newmont's bid for Normandy and merger with Franco-Nevada. As mentioned above, the Plan of Arrangement is conditional on Newmont acquiring a relevant interest in 50.1% of the shares in Normandy under its bid (which may include the option shares), but the bid for Normandy will not be conditional on the success of the Plan of Arrangement.

8 Under the Lock-Up Agreement, Franco-Nevada (and certain affiliates of Franco-Nevada) agree not to dispose of their shares in Normandy without Newmont's agreement. They also grant Newmont an option to acquire those shares and agree not to support any rival bid for Normandy. On exercise of the option, Newmont must issue 3.85 shares in itself in exchange for each 100 of the option shares, which is equal to the consideration Newmont announced that it will offer under its bid for Normandy.

9 If Newmont does not exercise the option and permits Franco-Nevada to sell the option shares into a rival bid for Normandy, it must pay Newmont $US20 million. This amount is roughly 1% of the present market value of Normandy and 5% of the present market value of the option shares.

Deed of Undertaking

10 On 15 November, Normandy announced to ASX that it had entered into a Deed of Undertaking with Newmont. Under the Deed, Normandy will not solicit any rival bid, will not support a rival bid, unless it has actually been made and is superior to Newmont's, and will pay Newmont a break fee (equal to 1% of the then current market value of the consideration for the Newmont bid) if its directors recommend a rival bid or if control of Normandy passes under a rival bid.

Plan of Arrangement

11 We understand from Newmont that the Plan of Arrangement is supplemented by an Arrangement Agreement that contains the primary terms on which Newmont and Franco-Nevada will implement the Plan of Arrangement (**Arrangement Agreement**). The Arrangement Agreement was not separately identified in the Joint Announcement or other releases concerning the proposed bid and merger. AngloGold's application mentions the Plan of Arrangement but not the Arrangement Agreement. Since we have learned that there are two connected documents, we have treated the application as relating also to the Arrangement Agreement. In these reasons we will refer to the two documents together as the **Plan**.

Positions for Franco-Nevada and Normandy executives

12 The Joint Announcement mentions that Newmont's intention is to offer Mr Champion de Crespigny (managing director of Normandy) and Messrs Lassonde and Schulich (directors of Franco-Nevada) positions on the board of Newmont after the transactions complete and that Mr Lassonde will become President of Newmont.

Final relief likely to be sought by AngloGold

13 In the Application AngloGold also foreshadowed a request for the following orders. It stated in relation to these orders that the final relief it sought would depend, in part, on an analysis of the Plan and that the orders would be "likely to be sought" for:

(a) a declaration that, if the Newmont takeover bid and other transactions announced on 14 November, proceed on the terms announced, unacceptable circumstances will exist in relation to the affairs of Normandy;

(b) an order breaking the nexus between Newmont's bid for Normandy and Newmont's proposed acquisition of Franco-Nevada under the Plan (by requiring offers under the bid for Normandy to be made no earlier than 4 months after the Plan is implemented or, alternatively, requiring Newmont to remove the condition under the Plan that Newmont obtains 50.1% of Normandy and that Newmont and Franco-Nevada complete the Plan prior to dispatching their offers for Normandy);

(c) an order cancelling the Lock-Up Agreement;

(d) alternatively to (b) an order preventing Newmont from giving benefits to Franco-Nevada and other associates and shareholders which are not provided to other shareholders in Normandy;

(e) alternatively to (b) and (d), preventing Newmont from proceeding with its bid for Normandy until it offers equivalent benefits to other shareholders in Normandy as it has agreed to provide to Franco-Nevada and other associates and shareholders; and

(f) an order declaring that Newmont may not rely on certain conditions of its announced bid for Normandy.

14 The Panel informed AngloGold that it did not consider the matters raised in paragraphs 13 (a) to (f) to form part of this Application since they were conditional on our decision in relation to disclosure of the Plan and were not framed as actual requests for such orders. We decided that only the application for orders requiring disclosure of the Plan would be considered in these proceedings. In response, AngloGold made a separate application setting out its ground for seeking a declaration and orders in relation to the matters set out in paragraphs 13 (a) to (f) above. We have therefore considered those issues in separate proceedings.

Relevant Corporations Act provision relating to substantial holder notices

15 Section 671B of the Corporations Act requires (among other things) a person who begins to have a substantial holding in a company or scheme to give their details and details of the interest they have acquired to the relevant company or scheme and to ASX.

16 Sub-section 671B(4) requires any information lodged in relation to a person's substantial holding to be *"accompanied by a copy of any document setting out the terms of any relevant agreement that contributed to the situation giving rise to the person needing to provide the information…"* (our emphasis).

Brief and submissions

17 The Panel issued a Brief in relation to the Application on 28 November. The Brief invited submissions in relation to the declaration of unacceptable circumstances and the orders sought as set out in paragraph 1 (a) and (b) above only.

18 In summary, we asked the parties for submissions as to whether disclosure of the Plan:

(a) was required by Newmont with its Substantial Holder Notice because it contributed to the information about its relevant interest in Normandy shares within the meaning of s671B;

(b) would provide Normandy shareholders and the market generally with any material new information, the non-disclosure of which would offend against the principles in section 602(a) and (b); and

(c) would cause Newmont, or any other person, any unfair harm or prejudice and if so, what alternative arrangements for disclosure of the document's contents could be made.

AngloGold's submissions

19 AngloGold contended that:

(a) it is evident from the wording of the Lock-Up Agreement that Franco-Nevada entered into that agreement to induce Newmont to agree to the Plan. The Plan therefore "contributed to" the Lock-Up Agreement and should have been released by Newmont with its Substantial Holder Notice;

(b) the market is currently speculating on the terms of the Plan that have not already been disclosed by Newmont (including, for example, whether it might restrict Newmont's ability to revise its bid for Normandy). This speculation is inconsistent with the acquisition of control of Normandy taking place in an informed market. Release of the Plan would remove this speculation and lead to the market being better informed;

(c) the terms of the Plan are material to Normandy shareholders, since they contain details of the benefits conferred on Franco-Nevada, its associates and shareholders, some of which may be attributable to Newmont acquiring its relevant interest and accordingly may be relevant to the market for control of Normandy;

(d) the text of the Plan will eventually need to be released by Franco-Nevada in the course of its implementation or by Newmont in the context of its bid for Normandy, so there is no reason to withhold its release now. The potential harm to Newmont and Franco-Nevada if the Plan is released should be assessed by the Panel in this context; and

(e) even if the Plan is not disclosed generally, it must be disclosed as part of the Panel proceedings in Normandy No.4, so the precise benefits being received by Franco-Nevada (and not other Normandy shareholders) can be ascertained.

20 AngloGold also submitted that the decision in *New Ashwick Pty Ltd & Anor v Wesfarmers & Anor* (2000) 18 ACLC 742 provides support for AngloGold's contention that although the Plan is separate from the Lock-Up Agreement, it is possible for more than one relevant agreement to contribute to the situation giving rise to the need to lodge the Substantial Holder Notice.

ASIC's submissions

21 In its submissions, ASIC took a similar view to AngloGold of the effect of the decision in *New Ashwick*. In ASIC's view, the inter-dependence of the Plan and the Lock-Up Agreement (the latter expressly having been entered into to induce Newmont to enter into the Plan) means that the Plan contributed to Newmont's acquisition of a relevant interest in Normandy shares.

22 ASIC further submitted that compliance with section 671B helps to promote market transparency and integrity through a completely informed market and that therefore any agreement which in any way contributes to a relevant interest arising ought to be required to be disclosed under that section.

Newmont's submissions

23 Newmont submitted that neither the letter of section 671B nor the policy objectives of section 602(a) and (b) require disclosure of the Plan. Newmont also attached to one of its submissions a copy of each paragraph of the Plan that referred directly to Normandy.

24 Newmont argued that its relevant interest in Franco-Nevada's Normandy shares arose only through the Lock-Up Agreement and that the Plan does not contain information that contributes to that relevant interest arising. Rather, it stated that the Arrangement Agreement relates to a statutory plan of arrangement between Franco-Nevada and Newmont which requires the parties to take steps to facilitate consideration of the Plan by Franco-Nevada shareholders. On that basis, Newmont submitted that the decision in *New Ashwick* is distinguishable since in that case the agreement being considered was the same document containing provisions relating to subscription for shares that gave rise to the obligation to lodge the substantial holding notice.

25 Newmont submitted in rebuttal to AngloGold's submissions that Newmont is not required by Chapter 6 of the Corporations Act to make disclosure of the details of the Plan at any point in time earlier than when it issues its bidder's statement concerning its offer for Normandy. It submitted that to require disclosure of the document any earlier would impose an unfair burden on Newmont and would cause prejudice to it by making the Plan available to a competing bidder who may use it for strategic and tactical purposes. It did not describe how the Plan might be used for such purposes, however. Since the Plan is a confidential commercial document, which Newmont is not required to publish in Canada or the United States, Newmont declines to publish it in Australia.

26 Newmont submitted that the Application was neither sufficiently clear nor serious to warrant any further investigation by the Panel. However, it was willing to provide a copy of the Plan to the Panel (and not the other parties to the proceedings) in order for the Panel to verify Newmont's submissions. Newmont did not make any other submissions as to action the Panel and parties could take to minimize the harm to Newmont of disclosure of the Plan.

Normandy's submissions

27 Normandy chose not to make submissions in relation to the issues addressed in the Brief. Rather, it chose to make submissions to the Panel objecting to AngloGold's conduct in these and the related proceedings before the Panel in Normandy 03 and 04. Since we had decided to conduct proceedings in relation to this Application, we did not consider it necessary to consider those submissions from Normandy at this time.

Consideration of the Plan

28 Newmont raised with us its concern that, while the Panel was considering this Application, the Plan not be provided to the other parties to the proceedings since Newmont is not required to disclose the agreement, it is confidential and disclosure could potentially provide a tactical advantage (in particular to AngloGold) and thereby prejudice Newmont's position. Newmont did not elaborate on what that potential prejudice might be.

29 Following some discussion within the Panel, the Panel Executive was provided with a copy of the Plan in confidence for the purpose of advising the Panel whether any information contained in the document should be disclosed in connection with these proceedings.

30 A member of the Panel Executive has read the Plan and, without providing additional details, has advised us that the Plan provides for:

(a) break fees, the quantum and general nature of which have been disclosed;

(b) a no shop/no talk clause (similar to the one agreed between Newmont and Normandy in the Deed of Undertaking) with a fiduciary exception where a higher bid is made; and

(c) extensive but predictable representations, warranties and machinery provisions,

but that it does not provide for:

(d) any price increases or other benefits;

(e) limits on the exercise of the option;

(f) the exercise price of the option; or

(g) the powers of either party concerning the Normandy shares the subject of the option.

31 We considered that it was appropriate for a member of the Panel Executive to review the Plan rather than us review it directly. This is because we were concerned to adopt a process for considering whether the Plan was relevant to the issues in contention in these proceedings that would not prejudice any party or our ability to deal with the substantive issues listed in paragraph 13, which were later dealt with in Normandy No. 4. We therefore did not want to arrive at a decision in circumstances where we had the benefit of reviewing the Plan, while the parties did not, especially if we were to decide that the Plan did not contain further information relevant to the substantive issues before us.

32 We note that since this matter was decided, Newmont has provided access to the Plan to the solicitors for the parties to the Normandy No.4 proceedings,

for the purpose of those proceedings, and on condition that the Plan is not disclosed to their clients.

Decision

Connection between the Plan and the Lock-Up Agreement

33 We considered the link between the Plan and the Lock-Up Agreement evidenced by the recitals in the Lock-Up Agreement that clearly state the purpose of the lock up is:

> *'to induce Newmont to enter into an agreement between Franco-Nevada Mining Corporation Limited….and Newmont providing for, among other things, the acquisition of all of the outstanding common shares of Franco-Nevada and to consummate the transactions contemplated thereby."*

34 For the purposes of this application, it is appropriate to treat the Arrangement Agreement, the Plan of Arrangement and the Lock-Up Agreement as parts of one larger transaction. On that basis, and because of Franco-Nevada's intention that the Lock-Up Agreement induce Newmont to enter into the Plan, an argument could be made that the Plan contributed to the relevant interest disclosed in the Substantial Holding Notice in the sense required by section 671B, although the causal nexus between the Plan and the relevant interest under the Lock-Up Agreement would be indirect and collateral.

35 We do not need to decide that issue, however. The Panel is required to consider whether or not unacceptable circumstances exist and, if they do, whether it is in the public interest to make a declaration. Assuming, without deciding, that the Plan did contribute relevantly to Newmont's relevant interest in the option shares and that Newmont has contravened section 671B by not disclosing the Plan, a technical contravention of the relevant provisions would not give rise to unacceptable circumstances if it had no consequences adverse to the policy of Chapters 6 and 6C.

36 Instead, the Panel was concerned to establish whether failure to disclose the Plan meant that:

(a) Normandy shareholders did not have enough information to enable them to assess the merits of Newmont's proposed bid (section 602(b)(iii)); and

(b) the market for control of Normandy had not been operating in an informed and efficient manner (section 602(a)).

37 In *New Ashwick*, the court held that a document should have been provided with a substantial shareholding notice. We do not think *New Ashwick* is directly in point, because:

(a) only one relevant agreement was considered in that case and that agreement contained both the provisions concerning the subscription

for shares (which subscription gave rise to the relevant interest) which were required to be disclosed and the provisions concerning a proposed merger between the two parties concerned; and

(b) the document setting out that agreement made a direct and substantial contribution to the state of affairs disclosed in the notice, and its disclosure was obviously necessary for compliance with the letter and policy of the section.[3]

38 Publication of the Plan could contribute to an informed market in Normandy shares if it contained information regarding Newmont's relationship with Normandy or other material information that would assist the market. In our view, in the light of the information which has already been released to the market and based on the advice we received as to the content of the Plan, the Plan is unlikely to cast additional light on any of the matters that have already been disclosed.

39 The terms and conditions of the option are fully set out in the Lock-Up Agreement which has been disclosed. The main terms of the Plan and an outline of break fees and the arrangements for dealing with rival bids have been disclosed in the Joint Announcement. Accordingly, we think that at this point in the Newmont bid, sufficient information is before Normandy's shareholders regarding the structure and terms of the bid and that disclosure of the Plan would not materially assist the market in Normandy shares.

40 Given the contents of the Joint Announcement, the remaining details of these matters are of marginal relevance to the main elements of the merger between Newmont and Franco Nevada under the Plan, which is in turn of marginal relevance to Newmont's bid for Normandy and the market in Normandy shares.

41 We therefore consider that, in the light of the publication of the Joint Announcement, the Substantial Holder Notice, other information about the proposed Newmont bid for Normandy and the merger arrangement with Franco-Nevada, the market in Normandy shares and Normandy shareholders were not uninformed because the Plan was not published.

42 Accordingly, we declined to make a declaration of unacceptable circumstances or any orders requiring Newmont to disclose the Plan.

Summons

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[3] See paragraph 54 of the decision where Wicks J observed:

"The heads of agreement link the provisions relating to the placement of shares with a number of provisions relating to or incidental to negotiations for a merger with respect to IAMA and WDL… **If an agreement as to matters relating to the prospective merger were a separate agreement altogether to the intent that neither agreement was in any way dependent on the other, there would be no need to attach the agreement relating to the merger to the Notice.** But that is not the case here. The two subject matters are inter-dependent and both are dealt with in the heads of agreement." (our emphasis)

43 The other matter raised by the Application (and set out in paragraph 1 (b) above) was for production in these proceedings of the Plan. We consider that there was insufficient reason for the document to be produced to the parties. We also note in passing that given the conclusion we have reached, this order cannot be given under section 657D, because that section only empowers us to deal with actual unacceptable circumstances, consequential matters and costs.

44 The Application did not expressly seek the issue of a summons under section 192 of the ASIC Act, but that would be the only way to give effect to the request for production. Newmont has indicated that it will object to the issue of such a summons, or at least seek orders under section 190 confining access to material produced under it. In related proceedings regarding the Normandy No4 application, we have asked the parties for submissions on the benefits and prejudice which would result from production of the Plan under section 192 and whether there are measures (such as orders under section 190) which would effectively palliate any prejudice. We will make no decision on that aspect of the matter, until we have received those submissions.

Costs

45 Since we have not made a declaration of unacceptable circumstances, we made no order as to costs in these proceedings.

David Gonski
President of the Sitting Panel
Decision dated 6 December 2001
Reasons published 18 February 2002