



**In the matter of Normandy Mining Limited (No 5)  
[2001] ATP 29**

**Catchwords**

*Broker handling fee – inducing acceptances of offer – efficient, informed and competitive market – reasonable time to consider offer*

*Corporations Act 2001 (Cth), section 602*

An application under sections 657C and 657E of the Corporations Act by Newmont Mining Corporation (Newmont) for a declaration of unacceptable circumstances, interim and final orders in relation to the modified broker handling fee announced by AngloGold Limited (AngloGold) on 3 December 2001 in connection with its takeover offer for Normandy Mining Limited (Normandy). The Panel declined to make a declaration of unacceptable circumstances or orders on Thursday, 6 December 2001 after AngloGold agreed to withdraw the modified broker handling fee.

**THE APPLICATION**

1. Newmont applied to the Panel on 4 December 2001 under sections 657C and E of the Corporations Act for a declaration of unacceptable circumstances, interim and final orders (**Application**).
2. The Application related to an announcement by AngloGold made on 3 December 2001 that, in respect of acceptances under its offer for Normandy received by 11 December, AngloGold would pay a modified handling fee to accepting shareholders' brokers (**Modified Handling Fee**) to encourage brokers to initiate acceptances for AngloGold's offer (**Handling Fee Announcement**). The announcement also stated that under no circumstances would AngloGold extend the Modified Handling Fee to apply beyond 11 December 2001.
3. The original broker handling fee proposed by AngloGold in section 5.8 of its bidder's statement was 0.75% of the value of the consideration payable to an accepting Normandy shareholder, up to a maximum of \$750.
4. The Modified Handling Fee, as described in the Handling Fee Announcement, was to be calculated in accordance with the following table (based on A\$65 AngloGold share price):

<b>Number of Normandy shares accepting AngloGold Bid</b>	<b>Handling Fee Payable</b>
50,000 and below	2.5% of value of consideration
50,001 to 100,000	1.5% of value of consideration
100,001 to 1,000,000	1.25% of value of consideration

1,000,001 and above	1 % of value of consideration
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The Modified Handling Fee arrangement was not subject to a cap.

5. The background to the AngloGold and Newmont offers for Normandy is set out in our reasons for decision in the matters of Normandy No. 1 and No.2:  
<http://www.takeovers.gov.au/Content/Decisions/decisions.asp>
6. The sitting Panel in this matter is constituted by Mr David Gonski (sitting President), Ms Meredith Hellicar (sitting Deputy President) and Ms Ilana Atlas.

## INTERIM ORDERS

7. Newmont applied for the interim orders that:
  - (a) AngloGold make an immediate announcement to all relevant stock exchanges to the effect that, until this Application has been finally determined, AngloGold will not pay broker handling fees on acceptances in connection with its takeover offer for Normandy (**AngloGold Bid**) in accordance with the Handling Fee Announcement; and
  - (b) AngloGold be restrained from making payments pursuant to the Handling Fee Announcement, pending the outcome of this Application.
8. In response to the application for interim orders, the Panel accepted an undertaking from AngloGold not to make any payments under the Handling Fee Announcement until the Panel had had an opportunity to consider the Application. Accordingly, we declined to make the interim orders requested by Newmont. On 4 December, by agreement with us, AngloGold announced to the ASX that it would not make payments under the proposed arrangements until the Application had been resolved by the Panel.

### Declaration and final orders sought

9. Newmont sought a declaration that the Handling Fee Announcement and any action pursuant to that announcement gave rise to unacceptable circumstances in relation to the affairs of Normandy. It sought an order that AngloGold be restrained from paying the Modified Handling Fee, or fees under any arrangement substantially similar to the Handling Fee Announcement, which is designed to limit, or has the effect of limiting, the time in which Normandy shareholders have the opportunity to consider the AngloGold Bid and the recommendation of the Normandy Board of Directors in relation thereto or any announced or competing bid for their Normandy shares, including Newmont's offer (**Newmont Bid**).

**Brief and submissions**

10. We decided to conduct proceedings and issued a brief to parties on 4 December 2001. Given the short time period before the Modified Handling Fee would cease to operate (11 December) we sought submissions and rebuttals on the issues as raised by Newmont in its Application by 12 noon on 5 December 2001.

*Newmont's submissions*

11. Newmont contended that the Modified Handling Fee departed significantly from the original handling fee announced in AngloGold's bidder's statement. It also argued that it was contrary to Australian market practice by reference to the rate at which the fee was payable, the absence of a cap on the fee and the timing of the fee's availability to brokers soliciting acceptances from Normandy shareholders: operating only in respect of acceptances after 3 December and before the close of business on 11 December 2001.
12. Newmont noted that AngloGold's Bid was not due to close until 27 December and that the Board of Normandy had announced on 3 December that it anticipated giving a recommendation in respect of AngloGold's offer approximately 2 weeks prior to the scheduled close of the bid.
13. Accordingly, Newmont submitted that the market for acquisition of control of Normandy could not be efficient, informed or competitive and that Normandy shareholders would not have a reasonable time to consider, and enough information to enable them to assess, all proposals for the acquisition of a controlling interest in Normandy if the Modified Handling Fee was permitted. It submitted that this was so because the effect of the Handling Fee Announcement (whether or not intended) was to induce acceptances of AngloGold's Bid at a time when:
- Normandy shareholders did not yet have a recommendation from their Board in relation to AngloGold's revised bid;<sup>1</sup>
  - the increased price under the revised AngloGold Bid was still subject to the satisfaction of a condition (being shareholder approval in accordance with Johannesburg Stock Exchange requirements);
  - the outcome of AngloGold's challenges to Newmont's announced bid before the Panel was not known;<sup>2</sup> and
  - there was speculation about other parties possibly bidding for Normandy.

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<sup>1</sup> This is the increase in the offer price announced by AngloGold on 29 November 2001 of an additional 20 cents per Normandy share, which was subject to approval by AngloGold shareholders in accordance with requirements of the Johannesburg Securities Exchange.

<sup>2</sup> At the time of this Application, the Normandy No.s 3 and 4 applications, which AngloGold had made to the Panel, had not yet been determined.

Normandy's submissions were along similar lines.

*AngloGold's submissions*

14. AngloGold contended that the Modified Handling Fee was common practice, reasonable in quantum and terms, not contrary to Chapter 6 of the Corporations Act (whether as a collateral benefit or otherwise) and was open for a reasonable period of time. It provided a summary of comparable time periods permitted under Chapter 6 for actions in takeovers such as increasing bid consideration (s624(2)), when notice of the status of bid conditions must be given (s630(3)) and when an offer may be declared unconditional (s650F) (in each case, down to a week before close). AngloGold also said that payment of the Modified Handling Fee to brokers would facilitate brokers becoming more active in a takeover thus assisting the acquisition of shares to occur in a more competitive, informed and efficient market.
15. It submitted that the market for Normandy shares was fully informed about both AngloGold's and Newmont's Bids and that the lack of a recommendation from Normandy's Board was not a reason for shareholders not to accept AngloGold's Bid or to rely on advice from their brokers. Any decision to vary or suspend the Modified Handling Fee, AngloGold argued, would cause unfair prejudice to AngloGold by precluding it from pursuing its legitimate commercial interests.
16. Via its submissions, AngloGold offered to extend the arrangement for payment of the Modified Handling Fee to apply to all acceptances received by 14 December 2001 (one day after the anticipated date for Normandy's Board to give its recommendation).

*ASIC's submissions*

17. ASIC's main contention was that the limited time during which the fee would be available and large quantum of the Modified Handling Fee would, if the fee was split between a broker with its client, be an inducement to the shareholder to accept AngloGold's Bid early. It also submitted that if the fee was split, it would constitute a collateral benefit prohibited under section 623.
18. ASIC also submitted that if the fee were not split between broker and client, it would be an inducement to the broker to persuade the client to accept early, which would be unacceptable. ASIC likened this situation to where a bidder makes a misleading statement to target shareholders to encourage them to accept the bid early.

**Analysis**

19. We do not find persuasive AngloGold's submission that handling fees promote a more competitive, informed and efficient market by encouraging brokers to participate in takeovers. We ultimately decided not to make a declaration and therefore made no orders following AngloGold's agreement to withdraw the Modified Handling Fee.

However, we do not consider that an order directing AngloGold to withdraw and not pay the Modified Handling Fee would have unfairly prejudiced AngloGold.

20. The comparison between the time period for which the Modified Handling Fee would be open and the time periods relating to other actions and provisions of Chapter 6 is not relevant to the Panel's analysis of the effect of the fee on the market for Normandy shares. The other periods relate to the last week of the bid, when the statutory processes and disclosures are reaching completion.
21. In circumstances such as these, the Panel's function is, to the extent possible, to determine whether, consistent with section 602(c), the target's shareholders have all relevant information which they would reasonably expect to have in order to make a decision on an offer and to ensure, within the scope of the Panel's powers, that those shareholders have sufficient time to consider that information to make an informed decision.
22. The drop-dead date of 11 December applicable to the Modified Handling Fee is not a date referable to any other significant date or event under the AngloGold Bid. Given that AngloGold's Bid was due to close on 27 December 2001 and Normandy's Board was unlikely to issue its recommendation to shareholders prior to 13 December, we consider that Normandy shareholders would not have sufficient information or time to consider it in order to make an informed decision whether to accept the AngloGold Bid prior to the expiry of the Modified Handling Fee.
23. AngloGold's offer, during the course of these proceedings, to extend the date applicable to the Modified Handling Fee until 14 December would not have remedied these concerns. Normandy shareholders would have had no more than one day in which to consider the Board's recommendation in relation to AngloGold's Bid and to make and implement a decision whether to accept before the fee ceased to be available.
24. When considered together with the significant increase in the amount of the Modified Handling Fee,<sup>3</sup> the early expiry date for availability of the fee clearly has the potential to induce brokers to pressure their clients who are Normandy shareholders to accept the AngloGold Bid early, before Newmont is in a position to lodge and dispatch its bidder's statement.
25. Based on this analysis, if the Modified Handling Fee were allowed to remain, we consider that the market for shares in Normandy would be less competitive, informed and efficient. Generally, the Panel considers

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<sup>3</sup> The original fee was a flat 0.75% fee of the value of any acceptance, capped at \$750 while the Modified Handling Fee has a sliding scale (1 – 2.5%) depending on the number of shares accepted for and not subject to a cap.

that a broker handling fee proposed by a bidder to encourage brokers to facilitate acceptance of a bid by their clients should be made available to target shareholders for the entire offer period so as to eliminate any possible coercive effect. It may, in certain circumstances, be acceptable for a broker handling fee to apply for a period ending on a date that is prior to the closing date of the bid or in a contested takeover, prior to a rival offer being made, provided that shareholders and the market have received all relevant information that they would require and a reasonable time to consider it. We express no opinion here as to what those circumstances may be.

26. Regarding ASIC's submission that the fee may constitute a collateral benefit in contravention of section 623 (see paragraph 17 above), we do not consider it necessary to decide that question. In light of our analysis and decision concerning the timing and quantum of the Modified Handling Fee, we do not consider it necessary to express a view as to whether the arrangement would have constituted a collateral benefit under the Corporations Act.

### **Decision**

27. The Panel considers that the making of the Handling Fee Announcement by AngloGold gave rise to unacceptable circumstances. The increased quantum of the Modified Handling Fee (having regard to prior market practice), coupled with the limited time within which the fee is available to brokers, would tend to induce brokers to pressure their clients to accept the AngloGold Bid prematurely.
28. For the reasons set out below, however, we declined to make a declaration.

### **Undertakings**

29. On 6 December 2001, AngloGold put a proposal to the Panel to vary the Modified Handling Fees so that a sliding percentage fee would be paid for acceptances of up to 250,000 Normandy shares and 0.75% for acceptances in excess of that number, but with a cap of a maximum fee of \$750 reintroduced.
30. We considered this proposal, however, we were not satisfied that it would address the Panel's concerns. Accordingly, AngloGold offered to undertake to withdraw the Handling Fee Announcement of 3 December and instead revert to the original broker handling fee arrangement in its bidder's statement. AngloGold gave that undertaking to the Panel on 6 December 2001 and made an announcement to the market to that effect the same day. Accordingly, we considered that it would not be in the public interest to make a declaration of unacceptable circumstances.
31. We gave leave for the parties to be represented by their solicitors. There being no declaration of unacceptable circumstances, we made no orders as to costs.

**David Gonski**  
**President of the Sitting Panel**  
**Decision dated 06 December 2001**  
**Reasons published 31 January 2002**