



**In the matter of Normandy Mining Limited (No 3)  
[2001] ATP 30**

**Catchwords:**

*Competing takeover bids – acquisition of interposed entities – lock-up device – break fee – effect of break fee agreed by target directors – directors’ duty – competition for control of target – evidence*

*Corporations Act 2001 (Cth), sections 602 and 606*

*Takeovers Panel Guidance Note 7 – “Lock-up Devices” (draft)*

**An application (Normandy 03) under section 657C of the Corporations Act by AngloGold Limited for a declaration of unacceptable circumstances and an order canceling a deed (or parts thereof) entered into on 14 November 2001 between Normandy Mining Limited and Newmont Mining Corporation. The Deed related to various “lock-up” arrangements which Normandy agreed to in order to induce Newmont to announce its proposed takeover offer for all of the shares in Normandy. On Friday 7 December 2001, the Panel declined to make a declaration or orders.**

1. The sitting Panel in this matter is constituted by Mr. David Gonski (sitting President), Ms Meredith Hellicar (sitting Deputy President) and Ms Ilana Atlas. These are our reasons for declining to make a declaration of unacceptable circumstances or orders in response to AngloGold Limited’s (**AngloGold**) application made on Wednesday 28 November 2001. These reasons do not take account of any of the various developments in the respective bids for Normandy Mining Limited (**Normandy**) which took place after 7 December 2001.
2. On 14 November 2001 Normandy and Newmont Mining Corporation (**Newmont**) entered into a deed of undertaking (**Deed**). The Deed set out certain “lock-up” arrangements agreed between Normandy and Newmont to facilitate the completion of a proposed takeover offer by Newmont for all of the shares in Normandy. The Deed was entered into while the directors of Normandy were aware of the existing takeover offer made by AngloGold for all of the shares in Normandy on 7 November 2001.
3. We have decided that the evidence currently before us is that entry into the Deed does not appear to have deterred competition in the market for control of Normandy. Newmont has made a rival bid for Normandy at a higher price than AngloGold’s initial bid price, and, on

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27 November 2001, AngloGold increased the value of its offer by approximately A\$450 million when it added a cash component of 20 cents per Normandy share. On the basis that the circumstances before us in this case show no evidence that the market for control has been materially inhibited, we do not consider that we should make any declaration of unacceptable circumstances in response to this application.

#### THE APPLICATION

4. AngloGold applied to the Panel under section 657C of the Corporations Act (**Act**) for a declaration of unacceptable circumstances under section 657A of the Act and orders under section 657D of the Act. The application related to aspects of the Deed that AngloGold considered unacceptable.

#### ORDERS

5. AngloGold applied for:
  - a. an order canceling the Deed (or, alternatively, canceling clause 4 of the Deed) and canceling the Security Bond contemplated in clause 4.6 of the Deed (assuming the Security Bond was already in place); or
  - b. alternatively to (a), an order that the amount of any break fee payable by Normandy under the Deed (and the amount that Newmont can call upon under the Security Bond) be reduced by the Australian dollar equivalent of any payment made by Franco-Nevada Mining Corporation (**Franco-Nevada**) under clause 5 or 6 of the lock-up agreement (**Lock-Up Agreement**) dated 14 November 2001 between Newmont and Franco-Nevada or any profit made by Newmont in connection with Franco-Nevada's existing 19.9% shareholding in Normandy.

#### DOCUMENTS TO BE PRODUCED

6. AngloGold requested that a number of documents be produced (either voluntarily or in response to an order from the Panel). The Panel made no orders concerning the requested documents. Given our conclusion on the effect of the Deed on competition for control of Normandy we did not require any of the requested documents to be produced.<sup>1</sup> In other circumstances we might have required production of these and other documents.

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<sup>1</sup> A list of documents requested is set out at Annexure 1.

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#### BACKGROUND

7. This application is the third in a series of applications made in relation to takeover bids by Newmont and AngloGold for Normandy. We set out below some of the factual issues relating to AngloGold's bid that led up to the entry into, and announcement, of the Deed. Previous decisions by the Panel in relation to Normandy set out the wider set of facts relating to the AngloGold and Newmont bids for Normandy.

#### ANGLOGOLD BID

8. On 5 September 2001 AngloGold announced its intention to make a bid for all of the shares in Normandy. AngloGold dispatched the last offers under its scrip bid by 10 November 2001.

#### RIVAL BID

9. On 14 November 2001, in a joint announcement issued by Newmont, Franco-Nevada and Normandy, Newmont announced that it intended to make a bid for Normandy offering 0.0385 Newmont shares for each Normandy share (to increase by 5 cents per share upon reaching 90% acceptance) and that the board of Normandy intended to recommend the bid. Immediately prior to the announcement, the imputed value of the proposed Newmont offer was A\$1.70 per Normandy share (compared to A\$1.47 for the existing AngloGold offer).
10. On the same date, Normandy released a copy of the Deed. The Deed contains certain "no talk/no shop" provisions, a break fee (**Normandy Break Fee**), warranties given by Normandy in favor of Newmont and other provisions.
11. In the same announcements, Newmont also said that it:
  - a. had entered into a Lock-Up Agreement with Franco-Nevada giving Newmont a call option over Franco-Nevada's 19.9% shareholding in Normandy; and
  - b. intended to acquire all of the shares in Franco-Nevada under a plan of arrangement under Canadian law (**Plan of Arrangement**).
12. The Lock-Up Agreement includes a provision requiring Franco-Nevada to pay a fee of US\$20 million to Newmont in certain

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circumstances<sup>2</sup>, primarily where a rival bidder acquires 50% or more of Normandy.

#### INCREASED RESPONSE

13. On 27 November 2001, AngloGold increased the value of its offer by approximately A\$450 million when it added a cash component of 20 cents per Normandy share. AngloGold stated that it had taken the amount of liability under the Normandy Break Fee into account when determining its revised offer. Newmont advised that it was considering its response to the increase in the AngloGold bid.

#### RELEVANT PROVISIONS OF THE DEED

14. In its submissions, AngloGold described the provisions of the Deed relating to the Normandy Break Fee as follows:

“Under clause 4 of the Deed, a break fee of A\$38.33 million is payable by Normandy to Newmont if, in summary, either:

- a bidder (pursuant to a “Competing Takeover Proposal”) acquires more than 50% of Normandy; or
- the Normandy board fails to recommend Newmont’s bid or recommends or supports a competing bid.

The break fee is expressed to cover various costs, including opportunity costs and reputational damages associated with a failed transaction, incurred by Newmont.

Normandy was required to put in place, by 28 November 2001, an unconditional bank guarantee which can be called upon by Newmont if Normandy fails to pay the break fee. The guarantee must remain in place for at least 18 months from the date of the Deed (and potentially longer).

Finally, clause 12.8 of the Deed requires Normandy to “vigorously defend” any action commenced in the Takeovers Panel relating to the Deed.

Normandy put the required bank guarantee in place with ANZ Bank.”

#### SUBMISSIONS

15. The parties made the following submissions.

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<sup>2</sup> The circumstances under which the payment was payable depended on a rival bidder acquiring at least 50.1% of Normandy, Franco-Nevada wanting to tender into the rival bid and the call option not having been exercised by Newmont before this time. Payment did not depend on the amount of consideration offered under the rival bid.

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#### ANGLOGOLD'S SUBMISSIONS

##### *Unreasonableness*

16. AngloGold submitted that the Normandy Break Fee is unreasonable and that this is particularly so taking account of the additional US\$20 million fee, which AngloGold submitted Franco-Nevada is likely to be required to pay to Newmont in the same circumstances as the A\$38.33 million is payable by Normandy. It appears that the only circumstance in which the US\$20 million fee is not likely to be paid to Newmont is if Newmont is able to make a profit exceeding that amount by calling Franco-Nevada's 19.9% shareholding in Normandy and tendering it into a competing bid.
17. On this basis, the total break fee payable to Newmont under the inter-related agreements would be A\$76 million or approximately 2.3% of the initially implied value of Newmont's bid (counting the potential 5¢ top up). AngloGold submitted that this amount would be excessive, would be outside the guidelines suggested by the Panel<sup>3</sup> and would result in windfall gains to Newmont.
18. AngloGold raised a number of issues comparing the Normandy Break Fee against the terms of the Panel's consultation draft Guidance Note on Lock Up Devices in support of its contention that the Normandy Break Fee is too high:
  - a. The value of the Normandy Break Fee is unreasonably high because the Newmont proposal is a "high value bid" therefore a break fee which is 1% of the value of the bid is too high (especially compared to the Panel's (then draft) Guidance Note on Lock-Up Devices);
  - b. The value of the Newmont bid had fallen with the market price of Newmont shares since the Normandy Break Fee was agreed. Therefore it had become more unreasonable because the percentage of the Newmont bid had risen above 1% to around 1.2% (or 1.17% counting the potential additional 5¢).
  - c. Under the Lock-Up Agreement relating to Franco-Nevada's 19.9% shareholding in Normandy, Newmont is likely to recover a break fee of US\$20 million from Franco-Nevada in the same circumstances<sup>4</sup> as the Normandy Break Fee is payable.

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<sup>3</sup> The Panel had published a draft Guidance Note on "Lock Up Devices" for public consultation in August 2001. The final Guidance Note was published after these proceedings were decided and is now available on the Panel's website.

<sup>4</sup> The US\$20 million fee is payable if another bidder acquires 50.1% Normandy (the same event triggers payment of the Normandy Break Fee), Franco-Nevada gives a

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AngloGold asserted that as the payment of the US\$20 million break fee by Franco-Nevada was a commercially certain outcome if another bidder acquires 50% of Normandy, the Panel should add that fee to the Normandy Break Fee of A\$38.33 million when considering the reasonableness of the Normandy Break Fee.

- d. The Normandy Break Fee arrangements also do not take account of the profit that Newmont might make in respect of Franco-Nevada's 19.9% shareholding in Normandy if Newmont calls the Normandy shares under the Lock-Up Agreement and sells them into a higher, rival bid. AngloGold submitted that Normandy should have ensured that any break fee payable by it was offset to the extent of any such profits made by Newmont.
- e. The sum of \$38.33 million is an unrealistically high figure for Newmont's costs in the Normandy bid given that :
- The Newmont bid is a predominantly scrip bid, so the financing commitment costs incurred by Newmont would be small.
  - Newmont only commenced its due diligence review of Normandy in early October 2001 so its expended costs would be insignificant.
  - Many of the costs Newmont will incur in connection with the Normandy bid will also relate directly to the Franco-Nevada merger.
  - There are very few substantial acquisition opportunities in the world gold industry. Therefore a high opportunity cost should not be placed on Newmont being precluded from pursuing other alternative acquisitions or strategic initiatives.
  - The Normandy Break Fee is expressed to cover "reputational damages" that might be incurred by Newmont. This is not a cost that is mentioned in the Guidance Note.

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tender notice that it wishes to accept the other bid and Newmont does not call for Franco-Nevada's 19.9% shareholding in Normandy (clause 5). It is also payable if another bidder acquires 50.1% of Normandy and Franco-Nevada does not give Newmont a tender notice that it intends to accept the other bid (clause 6).

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19. In summary, AngloGold submitted that the total break fees payable to Newmont would be around A\$76 million, being approximately 2.4% of the current implied value of Newmont's bid. AngloGold submitted that this amount is excessive, outside the reasonable costs that would be incurred by Newmont, in excess of the Panel's draft guidelines by the Panel and would result in windfall gains to Newmont.

#### *Normandy Directors' Obligations*

20. AngloGold also submitted that, in the absence of Normandy providing direct evidence as to its process of assessing the reasonableness of the Normandy Break Fee, Normandy's reliance on Newmont's representation concerning costs was, at best, naive on the part of Normandy, or that the Normandy directors had not taken reasonable steps to satisfy their duty to ensure entry into the Deed was in the best interests of shareholders.
21. AngloGold submitted that the directors of Normandy should have required that the Deed contain a fiduciary duty/illegality exception, and should not have agreed to the requirement in the Deed for Normandy to provide the Security Bond.

#### *Fiduciary Duty / Illegality Condition*

22. AngloGold submitted that where there is doubt about the attractiveness of the relevant offer, a break fee agreement should contain a fiduciary duty/illegality exception. AngloGold submitted that this applies in particular to a scrip bid where implied value of the bid will move continuously, unlike a cash bid where the value is certain and therefore the directors can form a firm view on the merits of the bid when it is announced (and the break fee arrangement is entered into).

#### *Bank Guarantee*

23. AngloGold submitted that the provision of a bank guarantee to support Normandy's obligation regarding payment of the Normandy Break Fee means that even if the break fee provision is unenforceable, Newmont may receive the full benefit of the fee. In general terms, the Normandy Break Fee may be unenforceable by Newmont if the Normandy directors entered into it in breach of their fiduciary duties and the Newmont directors were aware of the facts giving rise to that breach (which would be the case). AngloGold asserted that the bank guarantee precludes anyone having a practical opportunity to test the enforceability of the Deed prior to Newmont gaining control of the money.

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#### RESPONSES

24. The other parties' submissions in response are set out in summary form below.

#### *Normandy*

25. Normandy submitted, inter alia:
- a. The purpose (and, it submitted, effect) of entering into the Normandy Break Fee was to encourage competition
  - b. There is no evidence that the Normandy Break Fee had had any anti-competitive effects
  - c. The Normandy Break Fee was necessary to induce Newmont to make a rival bid for Normandy
  - d. Newmont told it, and it had no reason not to believe, that Newmont's costs (including opportunity costs) would exceed A\$38.3 million
  - e. The Normandy Break Fee (including its quantum) was the subject of advice to Normandy from its advisers and the result of arm's length, vigorous negotiations by Normandy
  - f. The Normandy Break Fee was, in the opinion of the Normandy directors, in the best interests of Normandy and its shareholders
  - g. The fee payable by Franco-Nevada under the Lock-Up Agreement and the Normandy Break Fee should not be added together because Normandy negotiated the Normandy Break Fee without knowing of the Lock-Up Agreement
  - h. The second deed of undertaking between Normandy and Newmont (**Second Deed**) addressed AngloGold's concerns about the directors' duties and illegality escape clauses, and the Security Bond (see paragraph 38 below)

#### *Newmont*

26. Newmont submitted, inter alia:
- a. AngloGold's higher offer is evidence that the Normandy Break Fee did not stifle competition for control of Normandy
  - b. The increase in value of the Newmont bid over the then value of the AngloGold bid was many times greater than the amount of the Normandy Break Fee and this was evidence that the

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Normandy Break Fee was a benefit to the Normandy shareholders

- c. The size of the Normandy Break Fee was well below accepted break fee levels internationally
- d. The fee in the Franco-Nevada Lock-Up Agreement was not a break fee but a compensation for lost profit on the call option in the Lock-Up Agreement if Newmont elected to allow Franco-Nevada to accept a rival bid
- e. The type of “fiduciary carve-out” suggested by AngloGold would allow target boards to avoid a break fee simply because a higher offer had arrived, which is exactly when Newmont asserted that break fees would be payable

#### *Franco-Nevada*

27. Franco-Nevada submitted, inter alia:

- a. It supported Newmont’s submissions
- b. It had negotiated the Franco-Nevada Lock-Up Agreement and proposed merger with Newmont on arm’s length terms
- c. It intended to fulfill its part of the agreements it had entered into with Newmont
- d. The Normandy Break Fee was normal international practice

#### *ASIC*

28. ASIC submitted, inter alia:

- a. A rival bidder to Newmont would add the effects of the Normandy Break Fee and the fee payable by Franco-Nevada under the Lock-Up Agreement when considering whether or not to bid for Normandy and the amount it would bid
- b. Normandy should justify the quantum of the Normandy Break Fee and show why it could not have forced a lower fee
- c. Target boards should not enter agreements which allowed one bidder access to non-public information without allowing all bona fide bidders similar access

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#### DISCUSSION

##### EFFECT OF THE NORMANDY BREAK FEE

29. It appears to this Panel that the entry into the Deed by Normandy has not materially adversely affected the market for control of Normandy. Therefore it is not appropriate to make a declaration of unacceptable circumstances.
30. Both Normandy and Newmont assert (with no evidence produced to the contrary) that the Normandy Break Fee was necessary to induce Newmont to announce its intention to make its rival bid (the attributed value of which was 20.9% higher than AngloGold's at the time the Newmont bid was announced). The increment of the Newmont bid over the then AngloGold bid, even with subsequent falls in the price of Newmont shares, was materially greater than the cost to Normandy of paying the fee if required. The Normandy Break Fee represents a cost of 1.3 cents per share, and the Normandy share price rose from \$1.46 to \$1.56 on the day following the announcement.
31. On 27 November 2001, AngloGold announced that it would (subject to a number of relatively minor conditions) increase the consideration offered under its bid by 20 cents per Normandy share (a gross increase of A\$450 million). AngloGold announced that in pricing its increased consideration, it had taken into account the potential liability owing under the Normandy Break Fee. Further, at the time of reaching our decision, Newmont had announced that it was considering a further response to AngloGold's increased offer.
32. AngloGold produced no evidence that, as it asserted, the Normandy Break Fee may have deterred further rival bidders for Normandy (although the Panel recognizes the difficulty, if any such evidence existed, that finding and producing it would pose). There was some media speculation at the time that Barrick Mining of Canada might be considering bidding, however, at the time of our decision, no bid had been made and no reports had been published that Barrick had been deterred by the Normandy Break Fee.
33. In the absence of evidence that the Normandy Break Fee did deter any rival bidder, and with the evidence of AngloGold's higher bid in response, this Panel does not consider that it is likely that the Normandy Break Fee caused unacceptable circumstances by deterring any rival bidder for Normandy. We recognize that this will always be a difficult issue for any Panel to determine with any finality.
34. The immediately preceding paragraphs set out the substance of our decision. We offer comments on other issues raised in this application, without having had to decide them, as the views of this sitting Panel in

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these circumstances for the benefit of the market and promoting thought and discussion on the issues.

#### LARGE BID

35. AngloGold asserted that the bid for Normandy is a “large” bid and that a break fee of 1% is too large. We agree that the Normandy bid is a large bid in Australian terms. The Panel’s Guidance Note on break fees indicates that normally 1% is highly likely to push the boundaries of acceptability for a bid of this size, in the absence of any indications as to the effect the particular break fee has had, or will have, on the market for control of the target company. In this case, we are relatively sanguine in departing from the Guidance Note as there does appear to be evidence that the market has not been materially inhibited.

#### INCREASE OVER 1%

36. Newmont’s bid is proposed to be a scrip bid. The Normandy Break Fee is almost exactly 1% of the value that Newmont’s bid placed on Normandy, based on the market price of Newmont shares, and currency rates, immediately prior to the announcement. However, the price of Newmont shares fell shortly after the Normandy bid and Franco-Nevada merger were announced.
37. This Panel considers that the appropriate time to assess the acceptability of a break fees is when the parties were negotiating it and entered into it. It appears to us that it is likely to be most unusual for a sitting Panel to declare that a break fee constituted unacceptable circumstances due to circumstances which occurred after the break fee had been agreed and entered into, unless those circumstances should reasonably have been foreseeable by the parties at the time they entered into the break fee.

#### DIRECTORS’ DUTY/ILLEGALITY CARVE OUT

38. AngloGold complained in its application that the Deed lacked any carve out if the Normandy Break Fee was found to be illegal, contrary to the Normandy board’s duties or unenforceable. In its submissions, Normandy provided the Panel with a copy of the Second Deed, which had been executed on the same date as the primary deed. It provided Normandy and its directors with a number of protections in the event that the Panel or a court found the Normandy Break Fee illegal or made any order against payment of the Normandy Break Fee. In addition, Newmont undertook not to seek payment of the Normandy Break Fee while any challenge was before the Panel.
39. Disclosure of the Second Deed at the time of the original announcement would have averted a good deal of effort by parties and the Panel. The Panel considers that it would have been better practice

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for Normandy to have disclosed the Second Deed at the time of its 14 November announcements.

40. The Panel does not accept, as AngloGold asserted, that target board directors should require every break fee to be subject to the possibility of target directors changing their minds as to the desirability of the break fee as circumstances unfold. Such a break fee would be so uncertain for the bidder as to be hardly worth having. Target directors cannot foresee all future circumstances. They must make decisions on the basis of the information before them, reasonable enquiry, and a belief that the decision they make is, as far as they can tell, in the best interests of the company.
41. The Panel does not accept that the fact that the Newmont bid was primarily a scrip bid was a reason for the Normandy directors to seek such an additional opt-out. Target directors will necessarily include the volatility of any scrip consideration offered as one of the factors in determining whether or not it is appropriate to enter into a break fee with a prospective bidder. We saw no evidence that the directors of Normandy did not do this.

#### SECURITY BOND

42. AngloGold asserted that the clauses in the Deed which required Normandy to arrange the Security Bond with ANZ Bank in Newmont's favor for the sum of the Normandy Break Fee, and Newmont's ability to call the Security Bond without reference to Normandy, were unacceptable. AngloGold asserted that it would be materially more difficult for Normandy to challenge the validity of Newmont's right to the Normandy Break Fee. AngloGold asserted that once the money had passed, the onus would be on Normandy to prove the fee was not payable rather than on Newmont to show that it was.

#### *Second Deed*

43. Normandy provided a copy of the Second Deed in its submissions to the Panel. It later published the document to the market. The Second Deed, in summary, provides that if the Normandy Break Fee was payable:
  - a. Newmont would not seek payment of the Normandy Break Fee, either from Normandy or under the Security Bond, while a challenge to the Normandy Break Fee was made in the Panel or before a Court;
  - b. Newmont would not seek payment (or substitute damages) if the Normandy Break Fee was found to be unlawful or illegal under such a challenge; and

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- c. Newmont would repay any part of the Normandy Break Fee that was found illegal or unlawful.
44. The provisions of the Second Deed appear to be likely to operate in the event that a Court determined that Normandy directors had breached their fiduciary duties to Normandy in entering into the Normandy Break Fee. AngloGold submitted to the Panel that the Second Deed was therefore the type of fiduciary duty carve-out provision to which its application was directed.
45. We agree that these terms of the Second Deed made most of AngloGold's concerns redundant. Again, public disclosure by Normandy on 14 November of the Second Deed would have obviated this part of the Panel's proceedings.
46. We accepted Newmont's argument that a break fee is normally only payable when a rival bidder has gained control of the target or when the relationship between target and break fee bidder has broken down. In such cases, the payee of the break fee agreement is materially disadvantaged and may well look to added surety of an agreed break fee being paid, such as a security bond. In which case, we think that the protection sought by Newmont in the Security Bond was sensible and reasonable on its part, when balanced by the protections for the target in the Second Deed.
47. Normandy submitted that the Second Deed only provides Normandy with the final remedy it would likely have gained from the Panel or a Court in the event that the Normandy Break Fee was found to constitute unacceptable circumstances, or to be illegal or unlawful. However, we consider that the concessions granted by Newmont would have been to Normandy's strategic benefit in any dispute. We consider that protections for a target similar to those afforded to Normandy under the Second Deed are sensible and advisable in the context of having agreed to provide a security bond.

#### FRANCO-NEVADA BREAK FEE

48. As part of the Franco-Nevada Lock-Up Agreement Franco-Nevada agreed to pay US\$20 million in the event that a rival bidder acquired more than 50% of Normandy and Franco-Nevada wished to accept into the rival bid. The exception being where, before Franco-Nevada had sought to tender into a rival bid, Newmont exercised the call option over Franco-Nevada's 19.9% of Normandy under the Lock-Up Agreement.
49. AngloGold (and to a lesser extent, ASIC) asserted that in considering whether the Normandy Break Fee was unacceptable, this Panel should add the US\$20 million of the Franco-Nevada Lock-Up Agreement and

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the A\$38.3 million of the Normandy Break Fee to give a total break fee value of \$76 million and the Panel should declare this to be unacceptable.

50. AngloGold asserted that the two fees were triggered by the same conditions, and Newmont would receive both fees, and that any rival bidder would take heed of both fees in determining whether to bid for Normandy.
51. Newmont asserted that the Franco-Nevada fee was not a break fee, but rather, a recompense for any lost profit from its call option over Franco-Nevada's 19.9% of Normandy that Newmont would suffer if it allowed Franco-Nevada to accept a higher rival offer.
52. In the circumstances of the AngloGold and Newmont bids for Normandy, the Franco-Nevada Lock-Up Agreement and the Normandy Break Fee do not appear to have had any material adverse effect on the market for control of Normandy, so the question does not play directly on our decision.
53. We think that a rival bidder would consider that the value of Normandy to it had decreased by the A\$38.3 million of the Normandy Break Fee. We also think that any rival bidder for Normandy would consider that it would have to offer at least US\$100 million (i.e. US\$20 million times five) over and above any amount offered by Newmont in order to compensate Franco-Nevada for paying the US\$20 million fee under the Lock-Up Agreement and to induce it to accept a rival bid, or to induce Newmont to forgo the fee from Franco-Nevada, call Franco-Nevada's Normandy shares and accept into a higher rival bid. Therefore the two agreements gave Newmont a \$76 million advantage over a rival bidder. However, in these circumstances, that does not seem to have materially adversely affected the market for control of Normandy.
54. Normandy asserted that it did not know of the Franco-Nevada Lock-Up Agreement until it was disclosed under Newmont's substantial shareholding notice on 19 November 2001 and therefore the Panel should not consider the two fees together. We find this difficult to accept when the terms of the Franco-Nevada Lock-Up Agreement were set out in the joint Normandy, Newmont, Franco-Nevada press releases of 14 November. In any event, the Panel is primarily concerned with the effect on the market of relevant agreements and decisions, rather than on the facts known to specific persons at specific times.

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#### EFFECT OF BREAK FEE ON NORMANDY BOARD'S RECOMMENDATION

55. AngloGold asked the Panel to decide that the Normandy Break Fee constituted unacceptable circumstances because, AngloGold asserted, the existence of the Normandy Break Fee would bias the Normandy board towards the Newmont bid over the AngloGold bid. The Panel recognises that, prima facie, break fees inhibit competition and weigh against rival bids. However, the Panel considers that the 1% cap on break fees will ensure that these inhibiting factors will be too small to have any material effect on target directors or on competition for control of target companies.
56. For the Panel to accept AngloGold's argument that the existence of the Normandy Break Fee would materially affect the Normandy board's decision on which bid to recommend must lead to the conclusion that break fees are, regardless of size, unacceptable. The Panel does not accept that proposition.

#### EVIDENTIARY ISSUES

57. Most of the "evidence" from all parties in these proceedings came in the form of submissions, without affidavits or documented support. Some of that evidence was criticised as being mere assertion. The Panel decided that as its decision was primarily based on uncontested market evidence which was readily observable it did not require evidence to be supported by documentary or affidavit material. The concern raised (by both sides against submissions of the other) is one that is not uncommon in Panel proceedings.
58. The Panel is not an adversarial court of law where discovery and the intricate rules of evidence are of high importance. Sitting Panels are made up of experienced commercial people, and much of the evidence produced by either side will be uncontested. Sitting Panels will generally rely on the honesty and integrity of parties before them and those parties' professional advisers (who are highly likely to participate in Panel proceedings on a repeat basis and should therefore be particularly concerned for their credibility before the Panel) in accepting parties' submissions at face value. The Panel is reassured in this by the fact of criminal liability and sanctions for persons who provide false evidence to the Panel.
59. Where there are material disputes over evidence which is central to a sitting Panel's decision, it will frequently require the party providing or disputing the submissions to provide affidavit or documentary support for assertions in submissions. However, that will not be the case for the majority of submissions and evidence produced before the Panel, and should not be, given the timely and informal nature of Panel proceedings.

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60. Frequently, a sitting Panel will not seek corroboration of submissions unless another party provides reasonable criticism of the basis, logic or veracity of the submission.

#### **PANEL'S BREAK FEES GUIDANCE NOTE**

61. In September 2001, the Panel released a draft Guidance Note for public consultation and discussion, on how it might consider any future applications on the issue of break fees and to give the market guidance on the Panel's thinking on the issue. That Guidance Note was referred to by all parties in submissions. During the Normandy proceedings, the Panel's sub-committee which had been developing the Guidance Note concluded its review of the public comments on the draft and determined to release the Guidance Note in its final form. It was concerned that none of the parties should be seen to have been disadvantaged by the release of the final Guidance Note during the course of the Normandy 03 proceedings.
62. However, on reflection, the sub-committee decided that the views expressed in the final Guidance Note had changed very little in substance in the areas most relevant to the Normandy 03 application and that its release during the proceedings would not have caused adverse effects to any of the parties.

#### **DECISION**

63. We decline to make a declaration of unacceptable circumstances in response to AngloGold's application, on the basis that there appears no evidence that the Normandy Break Fee agree between Normandy and Newmont has materially adversely affected the market for control of Normandy. Indeed, we are reassured in this decision by the higher bid it induced from Newmont and the response by AngloGold in increasing its bid.
64. We consented to parties being represented by their commercial solicitors.
65. There having been no declaration of unacceptable circumstances we make no order for costs.

**David Gonski**  
**President of the Sitting Panel**  
**Decision dated 7 December 2001**  
**Reasons published 28 January 2002**

## Takeovers Panel

### Reasons for Decision – Normandy Mining Limited 03

#### Annexure 1

#### Documents requested by AngloGold.

- a. a full copy of the Deed (including all attachment and exhibits);
- b. a full copy of the Plan of Arrangement dated 14 November 2001 between Newmont and Franco-Nevada;
- c. all documents relating to the negotiation and finalisation of the terms of clause 4 of the Deed, including correspondence between Normandy and Newmont and their respective advisers;
- d. full details (including relevant supporting material) of the costs (including opportunity costs) that Newmont has or will incur in connection with its bid for Normandy (including the reputational costs referred to in clause 4.2(c)(v) of the Deed if the bid fails) and Normandy's review or assessment of those costs;
- e. a copy of the Security Bond contemplated by clause 4.6 of the Deed (assuming it has already been put in place); and
- f. all documents relating to the decision making process of the Normandy directors in resolving that Normandy enter into the Deed, including their assessment of the benefits referred to in recital F of the Deed and legal and other advice given to Normandy or the Normandy directors.