Takeovers Panel

In the matter of Normandy Mining Limited (No 4)
[2001] ATP 31

Catchwords:

Competing takeover bids – acquisition of interposed entities – lock-up agreement – agreement between major shareholder and bidder – collateral benefit – equality of opportunity to share in benefits – break fee – restriction on disposal following exercise of option – shareholders in two companies – benefit to directors – treatment of royalty interests – tax benefits – defeating conditions – publicity of Panel applications

Corporations Act 2001 (Cth), sections 602, 621, 622 and 623

City Code on Takeovers and Mergers

ASIC Policy Statement 71 – "Downstream Acquisitions"

Intercapital Holdings Ltd v NCSC (1987) 12 ACLR 684, distinguished

These are our reasons for refusing an application by AngloGold Limited (AngloGold) for a declaration of unacceptable circumstances and orders in relation to the takeover bid announced on 14 November 2001 by Newmont Mining Corporation (Newmont) for the issued shares in Normandy Mining Limited ABN 86 009 295 765 (Normandy), resulting from the interaction between that bid and a Plan of Arrangement under Canadian law under which it is proposed that Newmont will acquire Franco-Nevada Mining Corporation Limited (Franco-Nevada).

Background

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.

2. Normandy is an Australian company listed on Australian Stock Exchange Limited. AngloGold Limited (**AngloGold**) is a South African company listed on the Johannesburg Stock Exchange. Newmont is incorporated in Delaware and listed on the New York Stock Exchange. Franco-Nevada is a Canadian company listed on the Toronto Stock Exchange.

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). (On 12 December, Newmont announced that it would increase its bid for Normandy by 40 cents per share cash);

   (b) conditional on Newmont reaching 50.1% relevant interest in Normandy, Newmont agreed to acquire Franco-Nevada by a Plan of Arrangement under Canadian law pursuant to which Franco-Nevada shareholders will receive 0.8 Newmont shares for each Franco-Nevada share (**Plan of Arrangement**). (The consideration under the Plan of Arrangement was not affected by the 12 December announcement);

   (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 original exchange ratios under its proposed bid for Normandy;

   (d) Newmont has offered senior management positions in the enlarged Newmont to certain directors and shareholders in Franco-Nevada and Normandy, subject to the relevant transactions being completed; and

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

Application

5. AngloGold applied on 27 November 2001 for a declaration and orders in relation to Newmont's bid for Normandy, as follows:

   (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 of Arrangement by:

[1] Payment of the 20 cents additional consideration is subject to approval by AngloGold's shareholders in accordance with Johannesburg Stock Exchange requirements. That meeting is scheduled for 19 December. If that approval is not forthcoming, acceptances may be withdrawn.

(i) requiring offers under the bid for Normandy to be made no earlier than 4 months after the Plan of Arrangement is implemented; or

(ii) requiring Newmont remove the condition under the Plan of Arrangement that Newmont obtains 50.1% of Normandy and requiring Newmont and Franco-Nevada complete the Plan of Arrangement prior to Newmont dispatching its offers for Normandy;

(c) an order cancelling the lock-up agreement dated 14 November 2001 between Franco-Nevada and Newmont;

(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.

Submissions

6. AngloGold's principal submissions in respect of the application were as follows:

(a) Newmont is proposing to give, under the proposed Plan of Arrangement, special benefits to certain Normandy shareholders (ie Franco-Nevada, its associates and shareholders) that are not available to all Normandy shareholders under its bid. This differential treatment breaches the fundamental policy of equality of opportunity outlined in section 602(c) of the Corporations Act.

(b) It is apparent from the terms of the Lock-Up Agreement that the benefits offered under the Plan of Arrangement proposal induced Franco-Nevada to commit its 19.9% shareholding in Normandy to Newmont. Furthermore, the Plan of Arrangement is conditional on Newmont acquiring at least 50% of Normandy. This provides a very strong incentive for Franco-Nevada shareholders who are also Normandy shareholders to accept Newmont's bid for Normandy, even if it is inferior to AngloGold's bid. The cross-shareholdings between Franco-Nevada and Normandy are significant, both directly and indirectly.

(c) The true consideration, direct and indirect, Newmont has agreed to pay for control of Franco-Nevada's shareholding in Normandy is well in excess of the value Newmont is proposing to offer other Normandy shareholders under its bid.

(d) The offer conditions announced by Newmont are unacceptable and must be amended immediately, during the currency of the AngloGold bid for Normandy, so

the market for Normandy shares is fully informed regarding the prospects of Newmont's bid proceeding.

7. The principal argument was about benefit to Franco-Nevada and its shareholders. It concerns the policy of paragraph 602(c) and sections 621, 622 and 623 of the Act. While parties argued at length which provision was contravened, we accept ASIC's submission that these provisions form a legislative scheme with a clear policy of requiring bidders to treat offerees equally both under a bid and immediately before bidding. This scheme is limited by reference to time and to classes of securities, but none of those limitations was relevant to these facts. Unacceptable circumstances could result if the policy of this scheme was avoided.

8. The argument concerning collateral benefit to Franco-Nevada was put on two different bases, which we may call the **see-through price argument** and the **collateral benefit argument,** both relating to the fourth Eggleston Principle of equality of opportunity to share in benefits arising under a bid. There were additional arguments concerning collateral benefit to persons who hold shares in both Normandy and Franco-Nevada and to executives of both of those companies.

See-Through Price

9. The see-through price argument is that under the Plan of Arrangement, Newmont is in effect offering Franco-Nevada shareholders a higher price for the Normandy shares held by Franco-Nevada than it is offering to Normandy shareholders direct under its bid for Normandy. By doing so, Newmont is avoiding the policy of sections 621 and 623 that holders of bid class shares be treated equally under a bid and under certain transactions related to the bid.

10. Specifically, AngloGold submits that Newmont has in effect agreed to acquire the Normandy shares held by Franco-Nevada at one price, less than four months before bidding for Normandy at a lower price. Had the acquisition of Franco-Nevada's shares been a direct acquisition, the bid for Normandy would contravene section 621, because the consideration under the Normandy bid is less than the consideration being effectively offered to Franco-Nevada shareholders for Normandy shares in the bid class. To comply, Newmont would be required to raise its offer price for Normandy shares to the price it indirectly offered the Franco-Nevada shareholders for their interests in Normandy: Newmont should not be able to avoid complying with section 621, because it is acquiring the Franco-Nevada parcel indirectly.[2]

11. This submission was supported by a paper from Deutsche Bank, the gist of which is set out below. That paper compares the overall consideration being offered by Newmont to shareholders in Franco-Nevada under the Plan with the value of the Normandy parcel and other assets of Franco-Nevada. In effect, it treats shareholders

[2] We note in passing that *Intercapital Holdings Ltd v NCSC* (1987) 12 ACLR 684; 6 ACLC 243 is not relevant in this application. In the particular facts of *Intercapital*, the Victorian Supreme Court held that a purchase of a trust which held shares in the bid class was one acquisition of a substantial interest and an ensuing bid was a separate acquisition of another substantial interest, but we are unable to apply that analysis to these facts, as it is apparent that the Plan and the bid for Normandy are linked.

in Franco-Nevada as indirect holders of shares in Normandy, notionally apportions the consideration under the Plan between Franco-Nevada's various assets and thus isolates the terms of a notional offer to acquire the Normandy shares.

12. AngloGold submits that it is appropriate to dissect the Plan in this way, that no premium should be allocated for Franco-Nevada's cash and liquid assets, and that any excess of the overall price for Franco-Nevada over its net asset backing should be treated as a premium being offered for its other assets, particularly the Normandy parcel.

13. The Deutsche Bank analysis is as follows, in millions of Canadian dollars:

Value of Newmont's bid for Franco-Nevada		4516
Net Asset Value of Franco-Nevada's assets, including the Normandy parcel:		
Cash	939	
Bullion and Securities Royalties	775	
Royalties	628	
Total	2342	
Less Value of Normandy Parcel at market	501	
NAV of Franco-Nevada, excluding Normandy parcel		1841
Implied value of the Normandy parcel		2674

14. The value ascribed to the royalties by Deutsche Bank was taken from an analyst's report issued by Merrill Lynch. None of the other parties disputed this analysis or the values ascribed to the assets in the balance sheet but neither did they accept the Deutsche Bank analysis.

15. We note, however, that these numbers appear to be based on the audited balance sheet as at March 2001, before Franco-Nevada acquired the Normandy parcel, although a later unaudited balance sheet as at September 2001 includes the Normandy parcel and reflects other consequences of the acquisition. The amount of $C775 million for bullion and securities is not reconciled with either balance sheet and the item for resource and capital assets in the balance sheet appears not to be reflected at all.

16. Apart from these reservations, the issue is simply whether this is the right way to analyse the Plan and the consideration proposed to be paid under it. In our view, it is not.

17. The policy mentioned in paragraph 7 is relevant to Newmont's bid for Normandy and proposed merger with Franco-Nevada, if the principal effect of the merger between Newmont and Franco-Nevada is that Newmont acquires Franco-Nevada's parcel of Normandy shares. AngloGold argued that Franco-Nevada should be treated as if it were a mere holding company or shell, and that its assets and business other than the Normandy shares should be disregarded, except to offset the assets against the bid price, as being of no commercial consequence to Newmont. We are unable to agree.

Proportion

18. In the Panel's view, the Normandy parcel does not represent a sufficient proportion of the value of the consideration under the Plan of Arrangement or of Franco-Nevada's assets to justify characterising the merger as essentially the acquisition of that parcel.

19. We have tested AngloGold's submission that the Normandy parcel is Franco-Nevada's main asset by calculating the value of the Normandy parcel as a percentage of Franco-Nevada's assets and of the consideration under the Plan of Arrangement. Again, all numbers are millions of Canadian dollars.[3]

Value of Normandy Parcel	Value of Franco-Nevada or its Assets	Normandy Parcel as a percentage	Comments
501	2342	21.4%	All of Franco-Nevada's assets, as calculated by Deutsche Bank.
501	1403	35.7%	Assets other than cash, based on Deutsche Bank's analysis.
501	1317	38.0%	The resource and capital assets from the September 2001 balance sheet, plus the royalties and the Normandy parcel.
629	1445	43.5%	Same as previous line, but valuing of the Normandy parcel using the 14 November price of Newmont shares.
629	4516	13.9%	Same value for the Normandy parcel, compared to value of Plan consideration.

20. On this issue of proportion, our decision is consistent with both the City Code on Takeovers and Mergers and ASIC policy, which permit indirect acquisitions resulting from upstream takeovers, where the downstream parcel is a minority of the assets of the upstream target. Both the City Code and ASIC only linked the upstream and downstream acquisitions where the downstream shares made up the predominant value of the upstream company, or the main purpose of the upstream acquisition was to acquire the downstream shares. We quote the relevant part of the City Code.

Rule 9.1 The Mandatory Offer and its Terms

…

[3] In testing AngloGold's submission, we have used only the assets recognised by Deutsche Bank and the values used by Deutsche Bank. Had that submission been supported by Deutsche Bank's analysis of Franco Nevada's balance sheet, we would have considered whether that analysis adequately represented Franco-Nevada's value to Newmont. In the event, it was unnecessary to take that next step. Newmont submitted that Franco-Nevada has intangible assets of considerable value to Newmont, which are not reflected in its balance sheet or in the Deutsche Bank analysis.

Note 7 The Chain Principle

Occasionally, a person or a group of persons acting in concert acquiring shares resulting in a holding of over 50% of the voting rights of a company (which need not be a company to which the Code applies) will thereby acquire or consolidate control, as defined in the Code, of a second company because the first company itself holds, either directly or indirectly through intermediate companies, a controlling block of shares in the second company, or holds shares which, when aggregated with those already held by the person or group, secure or consolidate control of the second company. The Panel will not normally require an offer to be made under this Rule in these circumstances unless either:-

(a) the shareholding in the second company is significant in relation to the first company. In assessing this, the Panel will take into account a number of factors, including, as appropriate, the assets and profit of the respective companies. Relative values of 50% or more will normally be regarded as significant; or

(b) one of the main purposes of acquiring control of the first company was to secure control of the second company.

The rules of the City Code dealing with the consideration to be offered under a bid do not incorporate the chain principle.

21. ASIC Policy Statement 71 on *Downstream Acquisitions* is also relevant, although it is partly superseded by new item 14 of section 611. At paragraph 4 ASIC points out that Australian takeover regulation should not become an impediment to *bona fide* and otherwise lawful bids for foreign companies which happen to hold shares in Australian companies. At paragraphs 15 - 17, it states that a compliance bid will generally not be required, where the downstream shares constitute under 50% of the assets in the upstream company. The issue is whether the upstream bid "affords a benefit to upstream shareholders in relation to the shares in the downstream company". As under the City Code, both objective criteria and purpose are taken into account. If the assets of the upstream company, other than the shares in the downstream company, are highly liquid, this will be relevant to the assessment of the bidder's purpose (paragraph 18). It may also be relevant to the assessment of a "see-through price" under paragraph 25.

The Royalty Interests

22. In this connection, we have rejected AngloGold's submission that the royalty interests should be treated in the same way as the cash and liquid assets, since they "are essentially contractual rights that produce an income stream for Franco-Nevada. Accordingly, a rational investor would simply pay the net present value of the income stream and would not pay a premium for these assets." However, the market price of Franco-Nevada shares includes a premium part of which (if it is to be allocated over assets at all) must be allocated to the royalties.

23. In addition, accepting for the sake of argument AngloGold's contention concerning the cash and liquid assets, it would not be appropriate to treat the royalties in the same way, because they are not fungible and there is no liquid market in them.

While Franco-Nevada has in the past invested profitably in royalties, the value of the company's present royalty interests to any purchaser depends on the purchaser's views about the future price of gold, production from the relevant mines and appropriate discount rates.

Analysis Uncommercial

24. It would be irrational of Newmont to buy Franco-Nevada at this price for the sake of the Normandy shares. Again using Deutsche Bank's analysis and allowing no premium for the cash and liquid assets, in order to secure Normandy shares worth about $C501 million and other marketable securities worth about a further $C134 million, Newmont would also acquire royalty interests worth $C628 million at a substantial premium, although it could not be sure of selling the royalties for that amount, let alone of recovering the premium.

Collateral Benefit to Franco-Nevada

25. The collateral benefit argument relates to the consideration given by Newmont to Franco-Nevada for the grant of the option under the Lock-Up Agreement. The argument is that while the exercise price of the option is the same as the consideration under the bid for Normandy (as originally announced, other than the 5 cents per share cash payable if Newmont obtained 90% acceptances), Newmont also agreed to acquire Franco-Nevada under the Plan of Arrangement, and the benefit being received by Franco-Nevada for the shares includes this benefit, as well as the exercise price of the option.

26. AngloGold asserts that this was an additional benefit given to the Franco-Nevada shareholders in exchange for the Normandy parcel, as shown by the fact that the Plan is conditional on the success of Newmont's bid for Normandy, by the recital in the Lock-Up agreement that Franco-Nevada granted the option to induce Newmont to enter into the Plan and similar statements of the parties, and by the fact that the market value of the scrip Newmont is offering for Franco-Nevada greatly exceeds Franco-Nevada's net asset backing.

27. This argument is open to the same objections as the last. If the merger between Newmont and Franco-Nevada cannot be characterised as the acquisition of the Normandy parcel by Newmont, then benefits given by Newmont to the Franco-Nevada shareholders under the merger cannot be characterised as collateral to that acquisition.

28. In addition, the merger and exercise of the option are effectively alternatives, and it makes no sense to add together the benefits from both. On the one hand, if the merger does not proceed, Franco-Nevada shareholders will derive no benefit from it. In that case, if Newmont exercises the option over the Normandy parcel, all that Franco-Nevada or its shareholders will receive is the exercise price under the option. On the other hand, if the merger proceeds, it makes no difference to the shareholders in Franco-Nevada whether Newmont exercises the option over the Normandy parcel. The parcel and the consideration for it will remain within the enlarged Newmont.

Collateral Benefit - Shareholders in both Companies

29. AngloGold submits that the attractive terms being offered by Newmont under the Plan and the fact that the Plan is conditional on 50.1% acceptances for Newmont's bid for Normandy will operate as an inducement for persons who hold shares in both companies to accept the bid for Normandy, in order to support the Plan. This, they say, offends against the letter or policy of section 623.

30. That section prohibits a bidder from offering benefits to holders of bid class shares during its bid, if those benefits are not offered under the bid and may induce the holders to accept the bid. It stands for a basic policy of Chapter 6, and avoidance of it would be unacceptable. Again, however, we do not consider that the policy is relevant to these facts.

31. This submission is not relevant, in view of our conclusions in paragraphs 17 and 28 above, that the Plan of Arrangement should not be characterized as the acquisition of the Normandy parcel. In addition, there was no evidence to indicate that the Plan was on anything other than arm's-length terms, and therefore no evidence that it was collateral to the Normandy bid. In particular, the condition in the Plan that Newmont obtain 50.1% acceptances for the Normandy bid need mean no more than that Newmont is unwilling to acquire Franco-Nevada on these terms, while it has a minority position in Normandy. We note that Franco-Nevada also has the benefit of the condition, however.

32. While this is enough to dispose of the collateral benefit argument, we considered also the level of cross-shareholding, although the available information is incomplete and unreliable. There is reason to believe that 16% or more of the shares in Normandy may be held by persons who also hold shares in Franco-Nevada. This involves a fairly large number of fairly small parcels of Normandy shares, no more than 8 parcels exceeding 0.5% and the largest being about 3%.[4]

33. It would be irrational of Newmont to offer such a premium to Franco-Nevada shareholders. The premium supposedly being paid for Normandy shares would be largely wasted. Most of it would be taken by shareholders in Franco-Nevada who held no shares in Normandy, and it would not be particularly effective in constraining the behaviour of those shareholders who did also have shares in Normandy.

34. It would also be irrational of shareholders who held both Franco-Nevada and Normandy shares to accept the Normandy bid in order to support the Plan. The Plan is conditional on 50.1% acceptance of the Normandy bid and Newmont has already signalled that it is prepared to pay more for 100% of Normandy than for bare

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[4] These numbers are based on a submission by Normandy, based on analysis of its register. AngloGold's submission suggested a greater overlap. While the parties have provided this information in good faith, they had only a short time to compile it and company registers are not designed to provide information about cross-holdings. In particular, they do not support inferences about beneficial ownership. Accordingly, these figures are not to be relied upon. They could be too high or too low, but we take them as an indication of the possible extent of cross-holdings.

control, so any one shareholder may be better off retaining his shares and the prospect of a mop-up bid for Normandy.

Offers to Directors of Franco-Nevada and Normandy

35. AngloGold is concerned that Newmont has announced that, if and when the Plan of Arrangement is completed, it will offer positions on its Board to directors of Franco-Nevada (Messrs Lassonde and Schulich) who between them hold 9.5% of its shares. It has also announced that it will offer a Board seat to Robert Champion de Crespigny, chairman of, and shareholder in, Normandy, if and when its takeover of Normandy has succeeded.

36. Messrs Lassonde and Schulich appear not to hold shares in Normandy. Accordingly, Newmont's dealings with them will not affect equal access to benefit of Normandy shareholders or the market in shares in Normandy. The only way of arguing the contrary would be to suggest that they could and would corruptly deliver control of Franco-Nevada (with its parcel of Normandy shares) to Newmont, in exchange for collateral benefits. AngloGold did not submit that we should conclude that they would do so. It is unlikely that they would be able to exert the necessary control over a process requiring approval at a general meeting, under the supervision of the Court.

37. The benefit to Mr Champion de Crespigny of appointing him to the Newmont board is irrelevant if it is given to him as an executive and not as a shareholder (*Gantry Acquisition Corporation v Parker & Parsley Petroleum Australia Pty Ltd* (1994) 12 ACLC 628). AngloGold has shown no reason why this principle should not apply to Mr Champion de Crespigny. On the contrary, the value of his shareholding in Normandy is such that the monetary value of a seat on the Board of Newmont is unlikely to influence his decision.

Other Issues

Break Fee from Newmont to Franco-Nevada

38. AngloGold points out that a break fee of US$10 million is payable by Newmont to Franco-Nevada if Newmont shareholders do not give necessary approvals for the relevant transactions, by which they appear to mean the Plan of Arrangement and perhaps also the Newmont bid for Normandy. It says that this fee discriminates between Franco-Nevada and other Normandy shareholders. This fee is not an additional benefit being given by Newmont to Franco-Nevada in exchange for its parcel of Normandy shares. Whether the fee is payable depends on the outcome of the Plan of Arrangement, and not on whether Franco-Nevada accepts Newmont's bid. The fee is also reasonably commensurate with the costs Franco-Nevada has indicated it will incur in connection with the Plan.

Tax Benefit to Franco-Nevada

39. AngloGold also submits that Franco-Nevada will benefit by avoiding crystallizing a liability to capital gains tax if it does not sell its Normandy shares to Newmont by accepting Newmont's bid for Normandy or Newmont does not exercise the option,

but Franco Nevada instead holds them while it is acquired by Newmont. Accepting for the sake of argument that capital gains tax would be payable if Franco-Nevada accepted the Newmont bid for its parcel of Normandy shares, the tax benefit will not lead to Franco-Nevada disposing of its shares on advantageous terms, or at all.

40. Obviously, Newmont itself may derive that benefit, if it acquires Franco-Nevada with the Normandy shares and with fewer liabilities than it otherwise might have done. Nobody other than Newmont will derive that benefit, directly or indirectly, unless Newmont provides a consequential benefit to the present shareholders in Franco-Nevada, as improved terms under the Plan of Arrangement. But we have already concluded that those terms are not relevant.

Escalator in favour of Franco-Nevada

41. AngloGold also points out that if Newmont exercises the call option over Franco-Nevada's parcel of Normandy shares, the terms of the Lock-Up Agreement may prevent it from reselling that parcel for two years without Franco-Nevada's agreement. Since Franco-Nevada may prevent Newmont from reselling, it may be in a position to demand a share of any profit on resale as a condition of allowing the sale. This could apply, in particular, to an acceptance by Newmont of a later bid by a third party. AngloGold submitted that this possibility means that the clause restricting resale may operate as an escalation clause, contrary to the letter or policy of section 622.

42. We are unable to accept this submission. Section 622 applies to adjustments between a bidder and a person who sold to the bidder (and their respective associates). It is intended to prevent a bidder from "topping up" a vendor shareholder, potentially giving them more advantageous terms than other shareholders. This clause will only apply to a later bid if Newmont is a seller into the later bid, not where Newmont (or an associate) is the bidder under the later bid. Accordingly, any adjustment between Newmont and Franco-Nevada will not involve the bidder under the later bid. Neither the letter nor the policy of section 622 is relevant.

Issues Concerning Conditions of Newmont's Bid

43. AngloGold raised a number of concerns with conditions in Newmont's announcement that it would bid for Normandy. These submissions had some force, but Newmont has dealt with them by varying its proposed conditions. Specifically, Newmont's bid was to be conditional on:

    (a) any conditions to approval of the bid under the Foreign Takeovers Act being acceptable to Newmont, which may contravene section 629. The reference to conditions being acceptable has been dropped;

    (b) any necessary approvals being given by Newmont shareholders, which was said to be too vague. This has now been changed to require approval to an increase in Newmont's authorized capital and approval to issue shares to accepting Normandy shareholders;

(c) there being no intervention by, or any application to, and "no action or investigation is instituted, or threatened by" the Court the Panel or another public authority, which "seeks to restrain or prohibit" the bid. This was said to be contrary to public policy and to lead to uncertainty. We reached no concluded opinion on this clause before Newmont agreed to remove the words quoted.[5]

ASIC Relief Condition of Newmont's Bid

44. Newmont's announcement was also conditional on certain ASIC relief being granted. AngloGold submitted that the grant of this relief would be objectionable for policy reasons. For us to intervene on this ground would be to engage in collateral review of a decision by ASIC, which has not been made, and some of which would not be subject to review by the Panel under section 656A even when it was made. If and when AngloGold seeks review of ASIC's decisions on these applications, that should be done under section 656A.

Whether Option Breaches Foreign Takeovers Act

45. Finally, AngloGold submitted that the option granted by Franco to Newmont over 19.9% of Normandy shares breached the *Foreign Acquisitions and Take-overs Act 1975*, because it was not subject to approval under that Act. AngloGold said that the market should be told that the option could not be exercised. The market is already aware that under the Lock-Up Agreement Franco-Nevada's obligation to transfer the shares on exercise of the option is subject to the requirements of that Act.

Publicity and Management of Applications

46. AngloGold made three applications concerning the proposed bids by Newmont for Normandy, as well as one concerning Normandy's target's statement. There were media reports concerning each of them. Normandy is concerned that the matters of concern to AngloGold have been split into several applications, which have been made over a period, attracting fresh publicity for each application. They say that by these means, the Panel and its proceedings have been used as part of a media campaign to raise doubt as to whether Newmont's bid will proceed, at a time when AngloGold's bid is the only bid which is open, and that the Panel's rules have been breached by that campaign.

47. We do not accept this analysis, although we do think that AngloGold should have applied to us on all the matters of substance as soon as possible, and that its applications have included a number of matters of small merit. There were really only two applications, and they principally concerned separate issues. On the one hand, Normandy (No. 2) and Normandy (No. 4) concerned collateral benefits arising from the Plan of Arrangement, and on the other hand, Normandy (No. 3) concerned break fees. The application concerning the Plan of Arrangement was initially made as one application, but it fell into two parts, at least partly because Newmont was

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[5] The text of the original and amended conditions is in an appendix.

reluctant to allow AngloGold's advisers access to the Plan itself. We do not think that AngloGold are at fault in not having finalized their application concerning the Plan until they had access to the Plan.

Conclusion

48. Accordingly, we decline to make the declaration and orders sought. We gave leave for the parties to be represented by their solicitors. There having been no declaration under section 657A, there can be no order for costs.

David Gonski
President of the Sitting Panel
Decision dated 12 December 2001
Reasons published 11 January 2002

Note: An application for review of this decision was dismissed on 21 December 2001: Normandy Mining Ltd (No. 6).

APPENDIX – THE INTERFERENCE CONDITION (Paragraph 42(c))

This is the wording announced on 14 November:

"During the period from the date of the announcement of Newmont's Bid to the end of the offer period:

1) *there is not in effect any preliminary or final decision, order or decree issues by a Public Authority;*
2) *no action or investigation is instituted, or threatened by any Public Authority with respect to Normandy; or*
3) *no application is made to any Public Authority (other than by Newmont),*

in consequence or in connection with the Bid, which restrains or prohibits or threatens to restrain or prohibit, or otherwise materially adversely impacts upon, the making of Offers under the Bid or the completion of any transaction contemplated by the Bid or the Normandy-Newmont Deed of Undertaking or the rights of Newmont and its associates in respect of Normandy and the Normandy Shares to be acquired under the Bid or otherwise.

For the purpose of this condition:

*"**Public Authority**" means any government or any governmental, semi-governmental, statutory or judicial entity or authority (including without limitation the Takeovers Panel), whether in Australia or elsewhere. It also includes any self-regulatory organisation established under statute or any stock exchange.*

*"**Normandy-Newmont Deed of Undertakings**" means the Deed dated the date of this Announcement between Newmont and Normandy, a copy of which was lodged by Normandy with ASX following this announcement."*

This is the wording as now amended:

During the period from the Announcement Date to the end of the Offer Period:

A. *there is not in effect any preliminary or final decision, order or decree issued by a Public Authority; or*

B. *no application is made to any Public Authority (other than by Newmont) or commenced by a Public Authority against either Newmont or Normandy,*

in consequence of, or in connection with the Offer, which restrains or prohibits, or otherwise materially adversely impacts upon, the making of the Offer or the completion of any transaction contemplated by the Offer or the Deed of Undertaking or the rights of Newmont and its associates in respect of Normandy and the Normandy Shares to be acquired under the Offer or otherwise.

For the purpose of this condition:

*"**Public Authority**" means any government or any governmental, semi-governmental, statutory or judicial entity or authority (including without limitation the Takeovers Panel), whether in Australia or elsewhere. It also includes any self-regulatory organisation established under statute or any stock exchange.*

*"**Normandy-Newmont Deed of Undertakings**" means the Deed dated the date of this Announcement between Newmont and Normandy, a copy of which was lodged by Normandy with ASX following this announcement."*