



**In the matter of Normandy Mining Limited 07
[2002] ATP 02**

Catchwords:

Competing bids – allegation of misleading statements of intentions by bidder – typographical error in press release

Corporations Act 2001 (Cth), sections 670A, 995, 999 and 1000

On 13 January 2002 Newmont Mining Corporation (Newmont) applied for interim orders, a declaration of unacceptable circumstances and final orders under sections 657A and 657E of the Corporations Act. The application related to AngloGold Limited's (AngloGold) notice of extension of the closing date for its bid for Normandy Mining Limited (Normandy) from 11 January 2002 to 18 January 2002. On 15 January, the parties settled the issues in dispute to the Panel's satisfaction.

Sitting Panel

1. The sitting Panel in this matter was constituted by Mr David Gonski (sitting President), Ms Meredith Hellicar (sitting Deputy President) and Ms Ilana Atlas.

Application

2. Newmont applied for interim orders, a declaration of unacceptable circumstances and final orders in relation to statements by AngloGold immediately prior to it announcing the extension of its bid for Normandy.
3. On 15 January 2002 we dismissed the Application following resolution between the parties of all three issues in dispute. Accordingly, we declined to make a declaration of unacceptable circumstances or orders.

BACKGROUND

4. AngloGold and Newmont each had competing bids open for all of the issued shares in Normandy. The background to each bid is well summarised in our reasons for decision in each of the preceding Normandy matters which can be found on the Panel's website at <http://www.takeovers.gov.au/Content/Decisions/decisions.asp>. We will not repeat them here.

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5. AngloGold's bid was due to close at 7.00pm (AEDT) on Friday, 11 January 2002. Just prior to that time, AngloGold gave notice of extension of its offer to ASIC in accordance with the Corporations Act and posted the notice to Normandy shareholders (**Notice of Variation**). The Notice of Variation and AngloGold's press release contained three statements to which Newmont objected. We set these out in paragraph 9 below.
6. On 10 January (Sydney time, 9 January in the US) Newmont announced that it had set 13 February as the date for its shareholder meeting to approve the issue of shares in Newmont as consideration under its bid for Normandy.
7. On 11 January (Sydney time, 10 January in the US) Newmont announced that the Securities and Exchange Commission in the US had declared effective a registration statement as required under US securities law. This cleared a possible delay in Newmont's ability to make offers to Normandy shareholders located in North America.
8. On 11 and 12 January Newmont's solicitors wrote to AngloGold's solicitors alleging that each of the statements (referred to below) was inaccurate and misleading and requesting AngloGold make an appropriate announcement to the ASX correcting the statements.

The three statements

9. These three statements were the subject of the Application:

First Statement

"Although we have not declared the offer final, we have said that this offer is full and fair and that we have no basis upon which we could justify a further increase in the offer."

(AngloGold Notice of Variation dated 11 January 2002)

Second Statement

"Newmont will not be able to pay you for 6 weeks at the earliest, exposing you to risk of a further drop in Newmont share price."

(AngloGold's Notice of Variation)

Third Statement

"The Newmont stock has fallen by 11% since AngloGold announced its bid for Normandy on 5 September 2001."

(AngloGold press release dated 11 January 2002)

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10. Newmont's Application also relied on statements reported as having been made by Mr Bobby Godsell, Chairman and Chief Executive Officer of AngloGold, in an interview with CNBC on 4 January 2002 and by Reuters on 7 January 2002, on a statement reported by Bloomberg as having been made by Mr Jonathan Best, Executive Director, Finance of AngloGold on 3 January 2002. It also relied on several newspaper reports in similar terms.

Interim Orders

11. Newmont sought interim orders that AngloGold make an immediate announcement to all relevant stock exchanges and publish on the AngloGold website a statement to the effect that, pending the outcome of the Application, AngloGold is:
 - a. restrained from increasing the offer price for its off-market takeover bid to acquire all the ordinary shares in the capital of Normandy;
 - b. restrained from making statements to, or to the effect of, those statements set out in paragraph 10 above; and
 - c. required to immediately publish to all relevant exchanges and publish on the AngloGold website a statement in the same terms as the statement made by Mr B Godsell, referred to in the Application.
12. Mr Godsell's statement was made in an interview on 4 January 2002 with CNBC Australia as follows:

"this is our final bid. And in terms of Australian law, that's a very definitive statement. We will not be raising our bid. We have raised it twice; on both occasions we have taken great care to justify the increased value of the offer cent by cent."
13. On 14 January we declined to make interim orders restraining AngloGold following an undertaking offered by it, and accepted by the Panel, that AngloGold would not increase the consideration offered under its bid for Normandy until the issues raised in the Application are resolved between the parties or determined by the Panel.

Final Orders

14. Newmont sought a declaration of unacceptable circumstances and final orders that AngloGold:
 - a. dispatch to the Normandy shareholders, as soon as practicable, a letter in terms approved by the Takeovers Panel which corrects each of the three statements;

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- b. forthwith make an announcement to all relevant stock exchanges and publish on the AngloGold website a statement in terms approved by the Panel which corrects each of the three statements.

Deliberations

15. On Monday, 14 January we met to consider the Application. We had been advised by AngloGold's advisers that they had arranged to speak with representatives of AngloGold in South Africa to consider the issues raised by Newmont at 4.00pm Melbourne time (early morning in South Africa).
16. We asked AngloGold's advisers to inform us of their client's position in relation to the Application as soon as possible and indicated our view that it may be possible for the parties to reach agreement to resolve at least some of the issues without the need for a formal decision from us.
17. That evening, the Panel received a letter from AngloGold offering a solution in respect of the three statements as follows:

First Statement

18. AngloGold did not concede that statements made by Mr Godsell or reported in various media would necessarily preclude it from increasing its offer for Normandy if there were unforeseen changes in circumstances. However, AngloGold offered to clarify its position by issuing a press release stating that its offer would not be increased.

Second Statement

19. AngloGold submitted that in order to meet the deadline of 7.00pm (AEDT) for posting the Notice of Variation to Normandy shareholders, its printer was required to begin printing those notices on 10 January. At the time printing commenced, AngloGold said, Newmont had not announced either the 13 February general meeting date or that the SEC has declared its registration statement effective. Accordingly, it was in part a logistics issue.
20. In any event, AngloGold denied that the second statement was incorrect. It had stated that Newmont would not be able to pay accepting shareholders for at least 6 weeks from 11 January based on its analysis of the likely timing of Newmont's bid becoming unconditional and closing.¹

¹ AngloGold calculated that 6 weeks from 11 January is 22 February. With the meeting date set for 13 February, AngloGold (correctly) assumed that Newmont's bid cannot become unconditional until after that meeting is determined on 13 February (which is 14 February AEDT). Based on Newmont's bidder's statement, Newmont will pay consideration within 5 business days of its offer becoming unconditional, and counting one weekend and a US public holiday in between, AngloGold therefore estimated payment being made around 22 February.

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21. AngloGold also contended that the second statement had received very little publicity in contrast to the publicity given to Newmont's announcement of the date set aside for the general meeting and the SEC declaring Newmont's registration statement effective. Accordingly, AngloGold did not consider any statement clarifying or retracting the second statement was necessary.

Third statement

22. AngloGold acknowledged a typographical error in the third statement. It should have stated that Newmont's share price had fallen by 11% since **Newmont** (not AngloGold) announced its bid (this was on 14 November 2001 Australian time). AngloGold offered to correct the statement.

The Panel's views

23. We considered that AngloGold's offer to correct the first and third statements would likely deal with any concerns we had about the market remaining adequately informed and not misled as to AngloGold's intentions regarding its offer price and the status and timing of Newmont's offer. We were, however, concerned to ensure that any uncertainty in the market did not continue past the opening of trading the next day – 15 January 2002.
24. We noted AngloGold's position in relation to the second statement. We did not consider that that statement was materially incorrect or such that the market for shares in Normandy would have been affected by it. Accordingly, we did not propose that AngloGold take any further steps in relation to that issue.
25. We asked AngloGold to provide a draft press release to us early on 15 January. We indicated we would be satisfied with the resolution on the first and third statements if AngloGold undertook to issue an announcement to ASX dealing adequately with them before the commencement of trading on ASX on Tuesday 15 January 2001 and make corresponding announcements to the New York, Toronto and Johannesburg Stock Exchanges. We also asked AngloGold to provide a copy of that statement to each Normandy shareholder with its notice of extension, should it again extend its bid.
26. In response to a request from Newmont, AngloGold also agreed to include its clarification of the first statement in a prominent position in the next newspaper advertisement that it ran regarding its bid.

AngloGold announcement

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27. Shortly after the commencement of trading on 15 January 2002, AngloGold made the announcement set out in the Annexure. On 16 January it placed advertisements in major Australian newspapers which stated clearly that its bid would not be increased. We advised the parties that as a result we would decline the Application.
28. In relation to each of the first and third statements, we considered that the solution offered by AngloGold was sufficient to address any concerns the Panel might have that the market was misinformed.
29. The Panel considers that a bidder should take care in making public statements of intention regarding such matters as the likelihood of further increases in consideration or of the bid being extended. Any misinformation or confusion that is allowed to remain in the market is likely to detract from a competitive, efficient and informed market for shares in the target – particularly where there are competing offers for the target that are hotly contested as between Newmont and AngloGold. The Panel would likely consider that unacceptable circumstances exist in a situation where a bidder, in a formal notification to shareholders, purports to leave these options open but has prominently and publicly made statements that contradict that position.
30. The Panel commends and thanks the parties for their cooperation in reaching an effective and timely solution to the issues in question in these proceedings.
31. There being no declaration of unacceptable circumstances we made no orders as to costs.

David Gonski

President of the Sitting Panel

Decision dated 15 January 2002

Reasons published 22 February 2002

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Annexure

AngloGold will not increase its offer

Newmont has raised objections in the Takeovers Panel regarding certain aspects of AngloGold's notice extending the offer period in its bid for Normandy. Following discussions with the Panel, AngloGold has today confirmed that its offer for Normandy will not be increased.

AngloGold's Chairman and CEO, Bobby Godsell said:

"Our offer will not be increased. We have been very disciplined and taken great care to justify our previous increases, but there is no basis on which we could justify a further increase in the offer. The market has already judged AngloGold's offer to be a full and fair price."

In AngloGold's 11 January 2002 press release, it stated that Newmont's stock price had fallen by 11% since AngloGold announced its bid for Normandy (on 5 September 2001). In fact, the Newmont stock price has fallen by 10% since Newmont, not AngloGold, announced its bid for Normandy (on 14 November 2001).

AngloGold's offer is open and available for immediate acceptance, with payment within 3 days of acceptance. The offer is scheduled to close at 7:00pm Sydney time on Friday, 18 January 2001.