



**In the matter of AurionGold Ltd
[2002] ATP 13**

Catchwords:

Allegation of false or misleading statements – broker inducement fee – use of previous expert’s report – consent of previous expert – telephone canvassing – procedural fairness – timing of orders

Corporations Act 2001 (Cth), sections 623(3), 636(3), 657A(1), 657D(1) and (2)

Normandy Mining Ltd (No 7) [2002] 02

Taipan Resources NL (No 10) [2001] ATP 26

These are our reasons for declining to commence proceedings in relation to the application by AurionGold on 5 August 2002. The decision follows undertakings to the Panel by Placer Dome reducing the broker inducement fee offered in its bid for AurionGold from 1.5% with a maximum payment of \$4500 to 0.75% with a maximum payment of \$750. The application in this matter was brought by AurionGold.

INTRODUCTION

1. sitting Panel was comprised of Marie McDonald (sitting President), Simon Mordant (sitting Deputy President) and Elizabeth Alexander AM.
2. This was an application made by AurionGold Ltd. (**AurionGold**), the target company, within three days of the date that the takeover bid by Placer Dome Asia Pacific Ltd (**Placer Dome**) (a wholly owned subsidiary of Placer Dome Inc.) was due to close. The bid documents had been despatched some ten weeks prior. Although the application was made very close to the end of the bid, most of the issues raised had arisen in the quite recent past.
3. AurionGold complained about 5 issues:
 - The first was in relation to a report on the Bloomberg wire service on 31 July 2002 in which Ms. Brenda Radies, a spokeswoman for Placer Dome Inc, had stated that the period for which Placer Dome's offer was open could not be extended from its then closing date of 7 August 2002 (**Bloomberg**).
 - The second was that various statements in the script used by Placer Dome’s telephone canvassing agent were either false or misleading (**Canvassing Disclosure**).

Takeovers Panel

Reasons for Decision - AurionGold Ltd

- The third was that the size of the fee offered by Placer Dome to stock brokers who stamped the acceptance form of accepting offerees (the **Broker Inducement Fee**) was so large that it was likely to induce coercive pressure by brokers on their clients to accept Placer Dome's bid.
 - The fourth was that Placer Dome had inappropriately, and without proper qualifications, referred to valuations of Goldfields Ltd and Delta Gold Ltd, prepared by Grant Samuel & Associates P/L (**Grant Samuel**) in its November 2001 report for the merger between those two companies to form AurionGold, as valuations of AurionGold itself (**Grant Samuel Valuation**).
 - Finally, Placer Dome had referred to the price which a number of US stock brokers had projected for the shares of Placer Dome's parent (and which were being offered as consideration in Placer Dome's bid) (**US Broker Prices**). AurionGold was concerned that Placer Dome had not identified the brokers, gained their consent, nor published the assumptions they had used. In addition, AurionGold stated that there were other brokers who had proffered lower projected prices for Placer Dome's parent's shares.
4. The Panel was concerned that the size of the Broker Inducement Fee had the possibility of inducing brokers to place undue, and possibly coercive, pressure on their clients to accept the Placer Dome offer. It advised parties of this concern. In response, Placer Dome offered, and the Panel accepted, an undertaking to reduce the percentage rate and the dollar cap of the fee from 1.5% and \$4,500 to 0.75% and \$750.
5. The Panel reviewed the remaining disclosure issues. It considered the action available to it, the degree of harm it considered the matters complained of might cause, the procedures required to afford parties reasonable opportunities to respond to the issues raised, and the time left until the bid was due to close. It decided, having received the undertaking in relation to the Broker Inducement Fee, not to commence proceedings in relation to the application. Had the bid been due to remain open longer, it may have made a different decision.

THE APPLICATION

6. On 5 August 2002, AurionGold applied to the Panel under subsection 657C(2) of the Corporations Act (**Act**) for a declaration of unacceptable circumstances under section 657A of the Act and interim and final orders under sections 657D and 657E of the Act in relation to the Bloomberg, Canvassing Disclosure, Broker Inducement Fee, Grant Samuel Valuation and the US Broker Price issues.

Interim Orders

7. AurionGold requested the Panel, or the President of the Panel, to make the following interim orders, pursuant to s657E of the Act, to the following effect:

Takeovers Panel

Reasons for Decision - AurionGold Ltd

- a. That Placer Dome produce, by 9.30 am on 6 August 2002 to the Takeovers Panel, AurionGold and ASIC¹:
 - i. any scripts used by persons making calls to AurionGold shareholders for, or on behalf of, Placer Dome;
 - ii. any scripts used by persons receiving calls from AurionGold shareholders for, or on behalf of, Placer Dome;
 - iii. the recordings of all telephone calls made to AurionGold shareholders for, or on behalf of, Placer Dome;
 - iv. the index made of the recordings of all telephone calls made to AurionGold shareholders for, or on behalf of, Placer Dome;
 - v. the recordings made of all telephone calls received from AurionGold shareholders to the Placer Dome information line; and
 - vi. the index made of the recordings of all telephone calls received from AurionGold shareholders to the Placer Dome information line,
which scripts, recordings and indexes relate to calls made or received during the period 29 July 2002 to 5 August 2002 (inclusive) and whether made or received inside or outside Australia.
 - b. That Placer Dome must not process any acceptances of its offer until these Panel proceedings have been finally determined.
 - c. That Placer Dome must not pay any broker handling fee in connection with an acceptance of its offer until these Panel proceedings have been finally determined.
 - d. That Placer Dome issue a supplementary bidder's statement clearly stating its intentions as to whether the broker handling fee arrangements will continue to apply in the event that the offer period is extended.
 - e. That Placer Dome must not make any further unsolicited telephone calls to AurionGold shareholders, until these Panel proceedings have been finally determined.
8. Alternatively, AurionGold requested that the Panel make a direction, under s16(1)(d) of the ASIC Regulations or under s192(1) of the ASIC Act, requiring Placer Dome to produce, by 9.30 am on 6 August 2002 to the Takeovers Panel,

¹ The requirements of subdivision D of Division 5 of Part 6.5 of the Act do not allow a person who records telephone calls under that subdivision in relation to a takeover bid to provide copies of the recordings, index or transcripts to any other person than ASIC. If the Panel had felt that the recordings, index or transcripts were necessary for its proceedings it may have requested ASIC to require a copy of those documents to be produced to ASIC and then requested a copy from ASIC under section 127 of the ASIC Act.

Takeovers Panel

Reasons for Decision - AurionGold Ltd

AurionGold and ASIC the scripts, recordings and indexes referred to in paragraph 7 a) above.

9. The final orders AurionGold sought were orders to the following effect:
 - a. That all acceptances received by Placer Dome, from 29 July 2002 until 3 days after the Panel proceedings had been finally determined, be cancelled.
 - b. That Placer Dome notify each shareholder who had purported to make the acceptances referred to in paragraph a) above that their acceptance has been cancelled.
 - c. That Placer Dome lodge and serve a supplementary bidder's statement in which it clearly states:
 - i. that certain acceptances have been cancelled pursuant to the order referred to in paragraph a) above;
 - ii. that, in the event its bid does not result in its 100% ownership of AurionGold, it will not be entitled to purchase AurionGold shares on market for a period of 6 months;
 - iii. that:
 - A. in contravention of s636(3) of the Act, the consent of the North American brokers who were referred to in the 15th Supplementary Bidder's Statement was not obtained;
 - B. (if the Panel forms the view that a consent is not required under s636(3) of the Act) other brokers have projected lesser values for Placer Dome Inc shares;
 - C. that any Placer Dome Inc share price projections are inherently uncertain; and
 - D. that AurionGold shareholders should place no weight on the projections of Placer Dome Inc's share price contained in the 15th Supplementary Bidder's Statement; and
 - iv. that Grant Samuel has never performed a public valuation of AurionGold, that the references made by Placer Dome to a public valuation by Grant Samuel of AurionGold were incorrect and were made without the consent of Grant Samuel in contravention of the Act and that AurionGold shareholders should place no weight on the references by Placer Dome to any purported valuation of AurionGold by Grant Samuel.

Takeovers Panel

Reasons for Decision - AurionGold Ltd

- d. That the broker handling fee be reduced to 0.75% of the implied offer price (based on an implied offer price of A\$3.00 per AurionGold share), up to a maximum of \$750.00.²
 - e. That the broker handling fee arrangements be available for the whole offer period including any extensions of the offer period.
 - f. That Placer Dome pay AurionGold's costs of these proceedings.
 - g. Such further or other orders, or directions as to the conduct of the proceedings, as the Takeovers Panel thinks appropriate.
10. AurionGold advised that it would seek further final orders in relation to the telemarketing campaign after it has had an opportunity to review the scripts, recordings and indexes.

BACKGROUND

11. On 27 May 2002, Placer Dome announced a takeover bid for AurionGold and lodged and served its bidder's statement. Placer Dome initially offered 17.5 Placer Dome Inc shares for every 100 AurionGold shares. The implied offer price on the date of the announcement was A\$4.51 per AurionGold share.³ Placer Dome subsequently issued 15 supplementary bidder's statements (these were dated 27 May 2002, 7 June 2002, 11 June 2002, 17 June 2002, 24 June 2002, 26 June 2002, 27 June 2002, 4 July 2002, 10 July 2002, 12 July 2002, 25 July 2002, 29 July 2002, 30 July 2002, 31 July 2002 and 2 August 2002 respectively).
12. On 26 June 2002, AurionGold lodged and served its target's statement. AurionGold subsequently issued 8 supplementary target's statements (these were dated 2 July 2002, 5 July 2002, 8 July 2002, 12 July 2002, 17 July 2002, 18 July 2002, 31 July 2002 and 2 August 2002 respectively).
13. Placer Dome amended its offer on 29 July 2002 and waived all conditions of the offer. Placer Dome also added a cash component of 35 Australian cents per AurionGold share, but announced that its offer was "final" and the consideration would not be increased any further.
14. The share price of both Placer Dome's parent and AurionGold had suffered during the period since the announcement of Placer Dome's bid. Consequently both the share price of AurionGold and the implied value of Placer Dome's offer had fallen during that period. At the date of the application Placer Dome had voting power of 10.1 percent, 9.8 of which was from an acceptance from

² AurionGold noted that this is the handling fee accepted by the Panel in *Re Normandy Mining Limited (No. 5)*.

³ Calculated using Placer Dome Inc's NYSE close price and converted to A\$ at the RBA quoted 4 pm AUD/USD exchange rate.

Takeovers Panel

Reasons for Decision - AurionGold Ltd

Harmony Gold (Australia) P/L (**Harmony**) pursuant to a pre-bid agreement under which Harmony agreed to accept Placer Dome's offer.

15. In the business day and weekend prior to the application there had been some correspondence between the parties in an attempt to resolve issues without having recourse to the Panel.
16. At the time of the application, Placer Dome's offer was scheduled to close at 7.00 p.m. (Australian Eastern Standard Time (**AEST**)) on 7 August 2002. On 7 August 2002, after the Panel had made this decision, Placer Dome extended its offer period to 16 August 2002, and subsequently to 30 August 2002.

Grant Samuel

17. AurionGold had been formed in December 2001 by the merger of Delta Gold Ltd and Goldfields Ltd by way of a scheme of arrangement. Although not required under the Act, the directors of Delta Gold had commissioned an expert report by Grant Samuel as to whether the proposed merger between the Delta Gold and Goldfields was in the best interests of Delta Gold shareholders.
18. In its report dated 6 November 2001 Grant Samuel advised that in its opinion the proposed merger was in the best interest of Delta Gold shareholders. Grant Samuel provided both market prices for the Delta Gold and Goldfields shares and its own valuation. Grant Samuel also discussed some potential synergies and savings that might be realised by the merger of Delta Gold and Goldfields. However, Grant Samuel did not provide a valuation of AurionGold shares.

Broker inducement fee

19. On 29 July 2002, Placer Dome (in its 12th supplementary bidder's statement) announced that it would be paying Broker Inducement Fees in connection with acceptances of its offer. These arrangements were proposed for the first time 9 days before the scheduled closing date of the offer.
20. The fee would be payable to each stockbroker whose stamp was placed on an acceptance form at the rate of 1.5% of the value of the acceptance. The fee was capped at \$4,500.
21. The supplementary bidder's statement stated that "The broker handling fees will be payable until the scheduled close of the Offer on 7 August 2002." This left open to question whether the Broker Inducement Fee would or would not continue after 7 August in the event that the Placer Dome bid was extended. Following the Panel's initial enquiries, Placer Dome made it clear in its announcement of 6 August that it had not yet decided whether or not to extend its bid, and it had not decided whether or not to offer a fee to brokers if it did extend. Placer Dome's solicitors have since undertaken to the Panel Executive to ensure that the status of broker fees are clear in future extensions by Placer Dome, if any.

Takeovers Panel

Reasons for Decision - AurionGold Ltd

Bloomberg

22. On 31 July 2002, a Bloomberg wire service report quoted Ms Brenda Radies, a Placer Dome spokesperson as follows:

“Placer’s final offer can’t be extended or raised any further under Australian regulations”.

It was generally agreed that the statement as to extension was clearly incorrect at the time the statement was made.

23. Placer Dome submitted that it advised Bloomberg the next day of the misquoting of Ms Radies, and that Bloomberg corrected the report within two days after it had been posted.

US Broker Prices

24. On 2 August 2002 (in its 15th supplementary bidder’s statement), Placer Dome stated:

“A number of North American equity analysts have 12 month share price targets on Placer Dome in the range of US\$13.55 to US\$17.00 in comparison to its current share price of US\$8.57 (at closing on the NYSE on 1 August 2002).”

25. Placer Dome included a similar wording in the script of its telephone canvassing campaign. Placer Dome did not include in its statements the identity of the brokers, the assumptions used by the analysts, or the price range cited by another analyst that fell outside the range quoted by Placer Dome.

Canvassing Disclosure

26. Placer Dome engaged the Georgeson Shareholder Group to conduct a series of telephone calls to AurionGold shareholders. That telephone canvassing campaign appears to have commenced on 2 August 2002. AurionGold advised that it had received a number of queries and complaints from its shareholders suggesting that the calls may be misleading and/or badgering.
27. AurionGold had sought the script used by the callers in the telephone canvassing campaign and the recordings of the calls that had been made. Placer Dome had declined to provide the script or recordings to AurionGold but provided the script in its submission to the Panel and parties.

SUBMISSIONS

28. The time available to both the Panel and parties was very limited. In that time it was unreasonable to expect the Panel to prepare and issue a brief, and for the parties to make considered submissions (Placer Dome in particular would have had difficulties given the Canadian location of its parent, although it had been on notice since Friday 2 August 2002 of the substance of AurionGold's complaints). In the limited time available, parties made the following initial and preliminary submissions.

Takeovers Panel

Reasons for Decision - AurionGold Ltd

AurionGold

Broker Inducement Fee

29. AurionGold submitted that the Broker Inducement Fee gave rise to unacceptable circumstances because:
 - the quantum of the fee was large enough to cause brokers to place coercive pressure on their clients to accept the Placer Dome bid in order for the brokers to be paid the Broker Inducement Fee;
 - the short period for which the Broker Inducement Fee appeared to be open would further increase the probability of brokers placing coercive pressure on their clients.
30. AurionGold submitted that the Broker Inducement Fee placed brokers in an unacceptable position of moral hazard.
31. AurionGold submitted that the uncertainty as to whether or not the Broker Inducement Fee would be extended if the Placer Dome bid was extended was also unacceptable, and that it increased the pressure on brokers to induce their clients to accept the Placer Dome bid.
32. AurionGold further submitted that the quantum of the Broker Inducement Fee was such that there was a risk that larger clients would seek to gain all or a portion of the fee and that this would be against the equality of opportunity principle set out in section 602(c) of the Act and contravene section 623(1) of the Act.
33. 1.AurionGold cited the Panel's decision in the Normandy 05 matter in support of its submissions.

Disclosure

Bloomberg

34. AurionGold submitted that the correction by Bloomberg of the misquoting in its wire service report as to whether Placer Dome could extend the period of its offer was inadequate. It submitted that any AurionGold shareholders who had read the original report would be unlikely to have seen the correction.
35. AurionGold also took exception to statements by Ms Radies which AurionGold said misrepresented Placer Dome's ability to either commence a further takeover offer shortly after the close of its current bid or to acquire AurionGold shares on market after the close of the current Placer Dome bid.
36. AurionGold submitted that Placer Dome should publish a supplementary bidder's statement correcting the misleading elements in Ms Radies' statement.

Canvassing Disclosure

37. AurionGold submitted that a number of the statements in the script of the Placer Dome telephone canvassing campaign were misleading. For example, in

Takeovers Panel

Reasons for Decision - AurionGold Ltd

one section of the script Placer Dome asserted that its offer represented “ a substantial, permanent and immediate premium for AurionGold shareholders”.

38. AurionGold also asserted that the correspondence did not meet the standards set by the Panel in the Pinnacle 09 matter which said that correspondence with shareholders must be presented in a “balanced and non-emotive manner” and that “the assumptions on which any opinions are based are also disclosed”.

US Broker Prices

39. AurionGold contended that Placer Dome should have:
- identified the brokers whose reports it was citing;
 - stated that there were other brokers who projected lower share prices for Placer Dome Inc shares than those selected by Placer Dome (AurionGold cited two examples which it said supported its case);
 - gained the consent of the brokers whose reports it was citing pursuant to section 636(3) of the Act;
 - provided the assumptions on which the forward-looking statements i.e. projections of the market price of Placer Dome Inc shares in 12 months time, were based.

Grant Samuel

40. AurionGold contended that Placer Dome's use of and reference to the valuations from the November 2001 Grant Samuel valuation report were misleading in that:
- Grant Samuel had not provided any valuation of AurionGold shares, only shares in Delta Gold and Goldfields, and that it was misleading for Placer Dome to assert that Grant Samuel had valued AurionGold shares;
 - the Grant Samuel report was no longer current and it was misleading for Placer Dome to represent that it was currently relevant;
 - the Grant Samuel report cited a number of synergy values which might be added to the individual values of Delta Gold and Goldfields shares in determining the value of AurionGold shares; and
 - there had been a large number of significant new developments in AurionGold operations since the report was prepared.
41. AurionGold also asserted that Placer Dome should have gained the consent of Grant Samuel in citing its report in the Placer Dome bidder statement.

Placer Dome

42. As stated above, Placer Dome had received the substance of AurionGold's complaints a few days previously, but it had very limited time to make submissions in response to AurionGold's application and did not have a Panel brief to which to respond. However in that limited time Placer Dome made some preliminary responses.

Takeovers Panel

Reasons for Decision - AurionGold Ltd

Broker Inducement fees

43. Placer Dome asserted that the Broker Inducement Fee was not excessive or coercive and was within market standards for Broker Inducement Fees offered recently in Australia. It cited a number of takeover offers in support.
44. Placer Dome distinguished its Broker Inducement Fee from that offered by Anglo Gold in the Normandy 05 matter:
 - the Anglo Gold fee was uncapped and at a higher rate;
 - the Anglo Gold fee was introduced for a short period before a significant target announcement;
 - the Anglo Gold fee was payable in the period prior to the commencement of an announced counter-bid.
45. Placer Dome suggested that the Panel's decision in the Taipan 10 matter was a more appropriate comparison for its Broker Inducement Fee. In the Taipan 10 matter a broker inducement fee of 1.25 percent (which was only payable for acceptances for the scrip and cash alternative, not for the cash only alternative) was not considered to constitute unacceptable circumstances because it was not considered significant enough to be likely to induce a broker to pressure a shareholder to accept the scrip-cash alternative in that offer.

Undertaking

46. The Panel advised parties on the evening of 5 August 2002 that the Panel's preliminary view was that the fee percentage rate and capped value of the Broker Inducement Fee appeared to be unacceptable. In response, Placer Dome offered an undertaking that it would reduce the rate and capped amount of the Broker Inducement Fee to 0.75 percent and \$750 respectively. This was the rate and amount that the Panel found not unacceptable in the Normandy 05 matter. The Panel advised parties that providing the undertaking in relation to the Broker Inducement Fee would enable the Panel to decline to conduct proceedings. Placer Dome offered its undertaking on this basis.
47. Placer Dome advised that it felt contractually obliged to pay the previously announced higher Broker Inducement Fee to any brokers who had stamped acceptances after Placer Dome's 29 July announcement and before the announcement of the undertaking which the Panel made at 1:30 PM on 6 August. Placer Dome advised the Panel that this would apply to approximately 21 million shares, or something less than 5 percent of the shares in AurionGold.

Disclosure Issues

Grant Samuel

48. Placer Dome argued that AurionGold's complaints in relation to the Grant Samuel report were made in the context of AurionGold declining to provide an independent expert's report on the fairness of the Placer Dome offer to its shareholders. Further Placer Dome said that it had first made the types of

Takeovers Panel

Reasons for Decision - AurionGold Ltd

comments complained about more than five weeks previously on 27 June 2002 and that AurionGold did not object prior to these Panel proceedings.

49. Placer Dome did not dispute that Grant Samuel had not provided a value for AurionGold shares but had only provided valuations for the shares of its merging predecessors Delta Gold and Goldfields.
50. Placer Dome suggested that if there were different assessments as to the current relevance of the Grant Samuel report then it was open to it to have and publish its own opinion and for AurionGold to have and publish its opinion. Placer Dome asserted that its statements in relation to the Grant Samuel report were not false or misleading and that it was under no obligation to gain the consent of Grant Samuel to include information from the report in the Placer Dome bidder statements and other statements.

US Broker Prices

51. Placer Dome advised the Panel's Executive staff that the twelve-month projected price of Placer Dome Inc shares that it had cited fell within the range of 13 out of 14 US equity analysts reports of which it was aware when it made its statements and when it approved the script for the telephone canvassing. Placer Dome asserted that this provided a reasonable basis for it to have made the statements.
52. Placer Dome asserted that as it had not named any of the US analysts it was not required to gain their consent to cite their projected share prices in its documents.
53. Placer Dome offered to provide copies of all current analyst reports held by it on Placer Dome Inc to verify its assertions.

Bloomberg

54. Placer Dome asserted that the Bloomberg report had been corrected so quickly, to both Bloomberg and to ASX, that very few AurionGold shareholders or market analysts would have seen it. Further, Placer Dome asserted that the Bloomberg wire report was not subsequently picked up by any other media organisation, and that there was concurrent prominent press reporting that clearly stated that Placer Dome was fully entitled to extend its takeover bid.

Canvassing Disclosure

55. Placer Dome asserted that all of the statements made in the script for its telephone canvassing campaign were strictly accurate or were reasonably held opinions of its own.

ASIC

56. ASIC was under similar time constraints to the other parties. However, like them it made some initial and preliminary submissions in relation to procedural issues and the merits of commencing proceedings in relation to the Broker Inducement Fee, the Grant Samuel issue and the US Broker Prices issue.

Takeovers Panel

Reasons for Decision - AurionGold Ltd

ASIC submitted that the Panel would benefit from submissions on a number of the issues, which may warrant it commencing proceedings.

57. In relation to the telephone canvassing campaign, ASIC noted the difficulties raised for the Panel by the provisions of sections 648J and 648U of the Act in relation to gaining transcripts of telephone conversations between AurionGold shareholders and Placer Dome's agents. ASIC advised that it was looking at the issue of transcripts and was considering requiring production of certain of Placer Dome's recordings.

DISCUSSION

Broker Inducement Fee

58. The Panel considered that the size of the Broker Inducement Fee offered by Placer Dome had the possibility of inducing brokers to place undue, and possibly coercive, pressure on their clients to accept the Placer Dome offer.
59. The Panel considered that both the percentage rate and the capped amount were above the levels generally offered within Australia.
60. Although any broker inducement fee would be required to be disclosed by brokers to their clients, the Panel remained concerned that the size of the Broker Inducement Fee would adversely impinge upon the proper relationship between broker and client. While the Panel does not consider that broker inducement fees are unacceptable per se, it considers that they should be reasonable recompense for the time and expense that brokers incur in:
- a. processing acceptances (through CHESS or by paper transfer); or
 - b. calling clients to alert them of the takeover offer and discussing the merits of the offer.
61. The Panel considers that the level of the Broker Inducement Fee offered by Placer Dome went beyond this reasonable recompense. It considers that the size of the fee created the distinct potential for:
- a. a broker's interest to be placed before a client's interest; and
 - b. brokers to offer⁴ to share these fees with their institutional clients, which would go against the equality of opportunity principle
- Both of those would be unacceptable.

Possible Remedies

62. The Panel considered the remedies available in relation to the Broker Inducement Fee. It also considered:

⁴ Or alternatively, the large clients may demand that the broker share the Broker Inducement Fee, especially given that it was several times larger than normal institutional brokerage rates.

Takeovers Panel

Reasons for Decision - AurionGold Ltd

- whether the inducement fee was so objectionable and had caused sufficient harm for a declaration to be made;
 - the level of acceptances received in total for Placer Dome's bid and the level of acceptances received during the period when the Broker Inducement Fee was available;
 - the period of time for which the bid was then scheduled to be open;
 - the time it would take to allow parties to make submissions on whether or not the Panel ought to make a declaration of unacceptable circumstances and submissions on any orders that the Panel might make; and
 - the costs and consequences of directing Placer Dome to extend its bid for a sufficient period for the Panel to carry out its processes.
63. Placer Dome advised the Panel that acceptances which would be eligible for the Broker Inducement Fee had been received up to midday Tuesday 6 August for approximately 21 million shares (a little under 5 percent). Given the late stage of the Placer Dome bid the Panel did not consider that that was an unusually large percentage or that it constituted a substantial percentage of AurionGold in terms of the bid at that stage⁵.
64. If the Panel had conducted proceedings, and if it had made a declaration of unacceptable circumstances in relation to the Broker Inducement Fee, it would have considered making orders unwinding all Broker Inducement Fees received under Placer Dome's announcement of 29 July. Further, it would have considered making orders offering each shareholder who had accepted during that period the right to withdraw their acceptance on the basis that it may have been made in response to undue pressure from their broker.
65. However, the relatively small percentage of shares affected, the actual level of payments made, and the short period for which the Broker Inducement Fee had operated led the Panel to decide that accepting Placer Dome's undertaking and allowing the existing contracts made between Placer Dome and brokers to stand, was a more appropriate course of action.

Disclosure Issues

66. When considering the disclosure issues raised by AurionGold the Panel considered the materiality of the items complained of, the period for which these statements had been potentially affecting shareholders' decisions, the period for which the bid was then scheduled to remain open and for which the statements would affect shareholders, the time it would reasonably take to give the parties an opportunity to make submissions on the disclosure issues, and the costs and consequences of requiring Placer Dome to extend its bid.

⁵ On the morning of Monday 5 August 2002, Placer Dome announced to ASX that its voting power was 11.50%. On the evening of Tuesday 6 August, Placer Dome announced to ASX that its voting power was 21.01%.

Takeovers Panel

Reasons for Decision - AurionGold Ltd

67. The Panel decided that given the materiality of those factors, it would not commence proceedings in relation to the application if its concerns in relation to the Broker Inducement Fee were met.

Telephone canvassing

68. The Panel noted that a number of the statements that were raised by AurionGold in relation to the telephone canvassing scripts were statements that Placer Dome had published in one or more of its media releases or supplementary bidder's statements. The Panel considered that the fact that these statements had been published had given AurionGold an opportunity to rebut them in its own communications with its shareholders. That reduced the Panel's concerns about the statements misleading shareholders. However, the Panel considered that the script used by Placer Dome's telephone canvassing agent appeared to be at the boundary of acceptability in terms of aggressive selling of the Placer Dome bid.
69. An issue was raised in the Panel's consideration of the telephone canvassing script. That was the fact that if the application had not been made to the Takeovers Panel, neither AurionGold nor ASIC would normally have seen the scripts being used. This is in material contrast to any written publications sent by a bidder to target shareholders. There is, therefore, some risk that false or misleading statements in telephone canvassing scripts are more likely to go unnoticed and uncorrected than similar statements made in published documents.
70. Given this lack of transparency, the Panel considers that bidders should be considerably more careful in assessing the content of such telephone canvassing scripts (which are unabashedly described as selling tools). Indeed the Panel considers that bidders or targets should only draw from information sent to shareholders in their canvassing. One way of increasing the transparency would be for, bidders or targets routinely to place copies of the scripts on their website. This would appear to be in accordance with good corporate governance disclosure practices.
71. Placer Dome advised the Panel on the morning of 7 August 2002 that it had discontinued its telephone canvassing campaign and that it had no present intention to recommence a telephone canvassing campaign. The Panel asked its Executive to discuss some of the issues which AurionGold had raised in its application concerning the telephone canvassing script with Placer Dome's solicitors. The Panel's understanding following those discussions, is that if Placer Dome recommences a telephone canvassing campaign some of AurionGold's and the Panel's concerns will be addressed.

Grant Samuel Report

72. The Panel considered that AurionGold's concerns in relation to Placer Dome's use of the Grant Samuel report had some merit. The Panel agreed that Grant Samuel had not valued AurionGold shares. It also acknowledged some of AurionGold's concerns that the valuation of Delta Gold and Goldfields shares

Takeovers Panel

Reasons for Decision - AurionGold Ltd

needed some qualification before it should be put forward as a valuation of AurionGold shares.

73. AurionGold expressed concerns that Placer Dome had not reported the \$100 million worth of synergies likely to be gained by Delta and Goldfields in the merger, posited in the Grant Samuel report. That would have given a fuller description of the Grant Samuel Valuation, however Placer Dome did not do so.
74. Finally, the Panel had some sympathy for AurionGold's concern that Placer Dome did not always state that the Grant Samuel report had been produced in November 2001, or that there had been some material changes in AurionGold since that date, when Placer Dome cited it or the values extracted from it. The Panel considered that this tested the boundaries of acceptable behaviour, and if the Placer Dome bid had had more time to run when the Panel considered this application it may have decided to commence proceedings and may have then declared Placer Dome's statements to constitute unacceptable circumstances. However, this is a preliminary view, and, as stated above, is formed without having had the benefit of submissions from parties on the issue.
75. AurionGold's case was not assisted by its failure to take issue with Placer Dome's use of the Grant Samuel report, or point out the limitations of using the Grant Samuel Valuation in the way that Placer Dome had, when Placer Dome first started making similar use of the report and its figures some weeks prior to this application.
76. AurionGold's case also was not assisted by its failure to provide a current valuation of its shares to its shareholders. However, AurionGold's failure in these respects did not make Placer Dome's assertion that the Grant Samuel Valuation had valued AurionGold any less misleading.
77. AurionGold's case was not assisted by its failure to provide a current valuation of its shares to its shareholders or to take issue with Placer Dome's use of the Grant Samuel report when Placer Dome first started making similar use of the report and its figures some weeks prior to this application. However, AurionGold's failure in this respect did not make Placer Dome's assertion that the Grant Samuel Valuation had valued AurionGold any less misleading.
78. There was some argument in submissions concerning whether or not Placer Dome was required to have gained Grant Samuel's consent to cite, or use values extracted from, the Grant Samuel report. The Panel did not determine whether or not Placer Dome was required to gain that consent. However the Panel wishes to state that it considers that the requirement for consent set out in section 636(3) of the Act applies to statements contained in, or which accompany, a supplementary bidder's statement as well as statements in a bidder's statement, or which accompany a bidder's statement (subject to any relevant ASIC class order or declaration). If a contrary view was taken it would appear overly easy to avoid the operation and intention of section 636(3) of the Act. This view is consistent with the Panel's decision in the Ranger Minerals matter.

Takeovers Panel

Reasons for Decision - AurionGold Ltd

Reporting of US Brokers

79. In deciding not to conduct proceedings in relation to the reporting of US brokers by Placer Dome the Panel was concerned that it not set any precedent for selective, and therefore very potentially misleading, reporting by bidders or targets.
80. The Panel considers that by not naming any of the US brokers concerned, Placer Dome may not have been required to have gained the consent of any of those brokers to use their figures as it did.
81. However, in making its statement Placer Dome did have a very clear obligation to have a reasonable basis for that statement before it made it. Placer Dome's advice that the projections of 13 out of 14 US equity analysts who reported on Placer Dome Inc's share price fell within the range cited appears to be a reasonable basis for the statement.
82. However, the Panel considers it would have been good practice for Placer Dome to offer to provide advice to shareholders as to where they could obtain copies of the analysts' reports on which Placer Dome was relying on in making its statement. Alternatively, Placer Dome might have provided some other method for AurionGold shareholders to assess the weight they should place on Placer Dome's statement, for example, place the text of the analysts reports on the bidder's web site.
83. Placer Dome risked its statements being misleading when it decided, subjectively, that one of the analysts' values was an "outlier" in being materially lower than the range cited by Placer Dome. Placer Dome's statement that "*a number of US equity analysts*" had projected the quoted values saved its statement from being misleading in omitting the unwanted "outlier".

Timing issues

84. Much of the Panel's consideration of this application was taken up with timing issues both in relation to its processes and its decision, and in relation to the existing and future existence of the matters complained of.
85. Placer Dome's bid had been declared unconditional at the time AurionGold made its application. The bid was due to close at 7 p.m. on 7 August 2002, two and a half days away. The Panel was aware that under the Act, Placer Dome was entitled to extend its bid at any stage prior to its scheduled close. However, the Panel considered that it was not entitled to assume that Placer Dome might or would extend its bid, and had to make its decision on the basis of the then scheduled closing date.
86. If it had been clear at the time of its decision that there was more time to run in this bid, the Panel might have decided to commence proceedings and potentially make a declaration of unacceptable circumstances and orders in relation to some of Placer Dome's statements. However, the Panel decided that the magnitude of the potential to mislead in the statements complained of in the

Takeovers Panel

Reasons for Decision - AurionGold Ltd

remaining time was not sufficient to warrant commencing proceedings or requiring Placer Dome to extend its bid.

87. In saying this, the Panel acknowledges that the last few days of the takeover bid are potentially the days when misleading statements can have the greatest influence on, and cause the greatest harm to, offerees. Bidders and targets should take particular care in the statements they make in the last days of a bid. Where the Panel considers that materially misleading statements are made in this sensitive period it will not hesitate to take action to protect the interests of target shareholders.
88. One of the considerations of the Panel was how to afford procedural fairness to parties in an application made so close to a bid's scheduled closing date. In the circumstances before this Panel it was able, with the cooperation of the parties, to deal with the application without requiring parties to make submissions on which a declaration and orders might turn.

DECISION

89. On the evening of Monday 5 August, the Panel advised parties that the Broker Inducement Fee announced by Placer Dome appeared excessive to the Panel. The next morning, Placer Dome offered in response, an undertaking to reduce the terms of the Broker Inducement Fee to 0.75%, capped at \$750. The Panel considered that that was an acceptable outcome given the time for which the Broker Inducement Fee had been open and the time left for Placer Dome's bid to run. The terms of the undertaking offered by Placer Dome are also consistent with those in the Normandy 05 matter.
90. Given the Panel's assessment of the capacity of the disclosure issues to mislead, and similarly the time for which AurionGold shareholders had been, and would be, exposed to these issues, the Panel decided not to commence proceedings once it had received Placer Dome's undertaking in relation to the Broker Inducement Fee.
91. The Panel consented to the parties being represented by their commercial solicitors.
92. There having been no declaration of unacceptable circumstances, the Panel made no order for costs.

Marie McDonald

President of the sitting Panel

Decision dated 6 August 2002

Reasons published 13 September 2002

Takeovers Panel

Reasons for Decision - AurionGold Ltd

Annexure A - Placer Dome's undertaking

6 August 2002

Re AurionGold Limited

For the purposes of section 201A of the Australian Securities & Investments Commission Act 2001, Placer Dome Asia Pacific Limited hereby undertakes to reduce the previously announced broker handling fee payable under its takeover offer for AurionGold Limited to the rate of 0.75% up to a maximum fee of A\$750 on acceptances received after 1.30 p.m. Sydney time on 6 August 2002.

For and on behalf of Placer Dome Asia Pacific Limited

[Sgnd]

John Loney, Director

[Sgnd]

Stuart MacKenzie, Director