



In the matter of Anaconda Nickel Limited 02-05
[2003] ATP 04

Catchwords:

Conditional offer for shares and rights – underwritten rights issue – exercise of rights – frustration of offer – termination provision on change of control – scheme of arrangement – related party transactions – underwriting arrangements – disclosure in prospectus for rights issue – convertible securities – equal treatment of rival proposals – equal opportunity to participate in benefits – independent expert condition – uninformed market – exit opportunity – high issue ratio – rights offer and share offer made without ASIC relief – review of ASIC relief – combining proceedings

Corporations Act 2001 (Cth), sections 602, 606, item 10 section 611, 617, 625, 656A and 659B

Goodman Fielder 01 [2003] ATP 1

Pinnacle VRB Ltd (No 3) [2001] ATP 2

These are the Panel's Reasons for declining to make a declaration of unacceptable circumstances in relation to four applications received on 28 - 30 January 2003. They include the Panel's reasons for revoking the relief granted by ASIC to allow MP Global to exercise all of the Rights it acquired under its Rights Offer.

1. These reasons relate to four applications made on 28 - 30 January 2003 in relation to the affairs of Anaconda Nickel Limited (**Anaconda**). The applications (**Applications**) were:
 - a. **Anaconda 02:** an application received on 28 January 2003 from Metal Holdings Pty. Ltd. (**Metal Holdings**) under sections 657A, 657C and 657D of the *Corporations Act 2001 (Cth)* (**Act**);
 - b. **Anaconda 03:** an application received on 29 January 2003 from MatlinPatterson Global Opportunities Partners LP (**MP Global**)¹ under sections 657A, 657C and 657D of the Act seeking a declaration of unacceptable circumstances, and final orders, in relation to the affairs of Anaconda;
 - c. **Anaconda 04:** an application received on 29 January 2003 from Glencore International AG (**Glencore**) under sections 656A, 657A, 657C, 657D and 657E of the Act seeking:
 - a) review of the conditional relief granted by the Australian Securities & Investments Commission (**ASIC**) to MP Global, to allow MP Global to make its offer (**Rights Offer**) for the Anaconda rights (**Rights**)² concurrently with its offer (**Share Offer**) for all 461,502,243 shares in

¹ The Rights Offer and Share Offer were made by MP Global through its wholly owned subsidiary, Mongoose Pty Ltd (**Mongoose**). References in the Panel's reasons in relation to the various Anaconda applications to MP Global should be read as including references to Mongoose.

² The Rights were those rights to be issued by Anaconda pursuant to the terms of a \$323 million 14 for 1 pro rata renounceable rights issue (the **Rights Issue**) to be made by Anaconda under a prospectus dated 20 January 2003 (the **Rights Issue Prospectus**).

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Anaconda existing at the time the Share Offer was made (**Old Shares**), and to acquire the 6,461,031,402 Anaconda shares (**New Shares**) issued on exercise of any Rights it acquired under its Rights Offer;

- b) an interim order restraining dispatch of the Rights Offer document (**Rights Offer Document**); and
- c) a declaration of unacceptable circumstances and interim and final orders in relation to the Rights Offer and Share Offer (together the **MP Global Offers**); and
- d. **Anaconda 05**: an application received on 30 January 2003 from Anaconda under sections 657A, 657C and 657E of the Act seeking a declaration of unacceptable circumstances, and final orders, in relation to the affairs of Anaconda and the MP Global Offers.

The Panel

- 2. The President of the Panel appointed Brett Heading (sitting President), Tro Kortian (sitting Deputy President) and Peter Scott as the sitting Panel for the four applications (**Panel**).
- 3. On 30 January 2003 the Panel decided to conduct proceedings in relation to the applications and therefore issued a brief under Regulation 20 of the ASIC Regulations.
- 4. The Panel determined, given the time pressures involved in the Rights Issue, the Rights Offer and the underwriting of the Rights Issue by Glencore, to consider each of the applications under one combined set of proceedings.

SUMMARY

Applications

- 5. The applications, and the orders sought by the different applicants are set out in Annexure A.

Background

- 6. The following is a brief summary of some aspects of the background, taken from various application documents. The Panel has published a separate document which sets out the course of events, applications, decisions, course of the various offers, and other information useful to understand the Anaconda takeovers and proceedings. The document is titled 'Anaconda Nickel Limited – Chronology of Applications' and is available at http://www.takeovers.gov.au/Content/Decisions/2003/ANL_chronology.asp

Anaconda

- 7. Anaconda is a major nickel mining company. Its primary ore resource is the Murrin Murrin mine project and the operating plant in which it owns a 60% interest (the

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Murrin Murrin Project). The remaining 40% interest in the Murrin Murrin Project is owned by Glencore through its wholly owned subsidiary Glenmurrin Pty Ltd (**Glenmurrin**).

8. The Murrin Murrin mine contains laterite nickel. Laterite nickel has been difficult to process. The Murrin Murrin operating plant was built by Fluor Australia Pty Ltd (**Fluor**) a subsidiary of the international Fluor Daniel group. The plant which Fluor built operates on a “pressure acid leach” system which has been developed to extract the nickel metal from the laterite ore. The pressure acid leach technology was provided by a Canadian company, Sherritt International Corporation (**Sherritt**).
9. The Murrin Murrin Project had experienced significant difficulties. It had been the subject of long delays and failures to perform to the initial specifications of the plant. As a consequence, Anaconda had commenced litigation against Fluor, which in turn had commenced litigation against Sherritt. The litigation by Anaconda against Fluor has been split into two sets of arbitration. The first has been completed. Under it, Fluor was required to pay \$54.6 million to Anaconda and a share of this was paid to the secured creditors under the ANH/MMH Schemes and the Glencore Nickel/Glenmurrin Schemes as referred to below in 11 onwards.
10. Because of the difficulties with the Murrin Murrin Project, Anaconda had run into financial difficulties. Anaconda had undergone some material management changes in 2002 as part of its response to the Murrin Murrin Project’s problems. One of the actions that the new management initiated was a debt restructure.

Schemes of Arrangement

11. The debt restructure was achieved by way of two schemes of arrangement that the two primary subsidiaries of Anaconda³ which operate the Murrin Murrin Project proposed between themselves and their major creditors⁴ (**ANH/MMH Schemes**). Anaconda was to provide approximately \$207 million to ANH and MMH to fund a payment to the creditors under the ANH/MMH Schemes in settlement for debts of approximately \$823 million (i.e. approximately 25 cents in the dollar). The date for payment of the monies was set under the ANH/MMH Schemes to be **28 February 2003**.
12. At the same time, schemes of arrangement with the secured creditors of Glencore Nickel Pty Limited (**Glencore Nickel**) and Glenmurrin were agreed (**Glencore Nickel/Glenmurrin Schemes**) to restructure the debts of their creditors secured over their 40% interest in some or all of the Murrin Murrin Project assets. The Glencore Nickel/Glenmurrin Schemes were on the same or similar terms as the ANH/MMH Schemes. Under the Glencore Nickel/Glenmurrin Schemes, Glencore was to provide approx. \$138 million in satisfaction of debts of approximately \$546 million. This equated to a payment of around 25 cents in the dollar for the debts owed by Glencore Nickel and Glenmurrin.

³ Anaconda Nickel Holdings Pty. Ltd (**ANH**) and Murrin Murrin Holdings Pty. Ltd. (**MMH**).

⁴ Holders of fixed rate notes and floating rate bonds, and counterparties to various foreign exchange hedging contracts.

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13. Metal Holdings asserted that the interlinked nature of the two pairs of schemes (that is, the ANH/MMH Schemes and the Glencore Nickel/Glenmurrin Schemes which are together referred to as the **Schemes**) resulted in a significant financial benefit to Glencore. Metal Holdings asserted that there was no apparent reason why it would benefit Anaconda or its shareholders for approval of the Glencore Nickel/Glenmurrin Schemes to be a prerequisite to the ANH/MMH Schemes. Whereas, Glencore benefited substantially from the Glencore Nickel/Glenmurrin Schemes (ie, reduction in its creditors by approximately USD\$224 million, ie AUD \$380 million) and as such benefited by making the success of the ANH/MMH Schemes conditional upon the approval of the Glencore Nickel/Glenmurrin Schemes.
14. Final court approval of the Anaconda Schemes was given pursuant to orders granted by the Supreme Court of Western Australia on 17 January 2003. These orders were lodged with ASIC on Friday 17 January, 2003 in respect of the Glencore Nickel/Glenmurrin Schemes – and Monday 20 January 2003 for the ANH/MMH Schemes.
15. When the preconditions in the Schemes had been satisfied and the Rights Issue successfully completed (i.e. 6,461,031,402 New Shares have been issued for value (at A\$0.05 per share)), the Scheme Administrator gave notice to all relevant parties and two Business Days later, the Schemes took effect.

Rights Issue

16. On 25 September 2002 Anaconda announced that it would undertake a fully underwritten renounceable Rights Issue of 14 New Shares for every one issued share at an issue price of five cents per share to raise a total of approximately \$323 million. The Rights Issue was to fund the payments to be made by ANH/MMH under the ANH/MMH Schemes, and to provide Anaconda with sufficient working capital to bring the Murrin Murrin Project into profitability. The Rights Issue would issue a total of 6,461,031,402 New Shares.
17. Anaconda would use the funds from the Rights Issue as follows:
 - a) \$207 million payment to the ANH/MMH Scheme creditors; and
 - b) \$101 million for costs of the Rights Issue, working capital and repayment of \$10 million debt priority secured debt (at full face value) due to Glencore.
18. The Anaconda share price on the day prior to the announcement of the Rights Issue was approximately 31 cents, and dropped to approximately 18 cents on the day following that announcement. Metal Holdings annexed a copy of the Rights Issue Prospectus to the Anaconda 02 application.
19. The issue price of the New Shares under the Rights Issue (\$0.05 per share) was at a substantial discount (approximately 80%) to the then market price per Old Share. However, for an Anaconda shareholder to maintain their existing voting power in Anaconda they needed to subscribe for 14 New Shares under the Rights Issue, at a total cost of \$0.70, which was several times the market value of each Old Share.

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20. Consequently, the Rights Issue would have a substantial dilutive effect on existing Anaconda shareholders who did not take up their New Shares under the Rights Issue. This was acknowledged by Anaconda and its directors in the Rights Issue Prospectus (refer chairman's letter and paragraphs 2.1, 3.1, 7.1, 8.1 and 8.4).
21. According to the Rights Issue Prospectus, Glencore was the largest shareholder in Anaconda, holding approximately 34% of Anaconda's Old Shares, and had fully underwritten the Rights Issue (**Underwriting Arrangements**).

The vulnerability in the Underwriting Arrangements

22. It has been argued that the MP Global Rights Offer and Share Offer, and the whole set of Anaconda proceedings were founded in the fact that the Underwriting Arrangements did not contain a clause allowing Glencore to withdraw from the Underwriting Arrangements if another person gained control of Anaconda, or even acquired greater voting power in Anaconda than was held by Glencore. In many ways, the structure of MP Global's offers capitalised on the opportunity that the omission of such a clause presented. It allowed MP Global to offer for all of the Rights, but to exercise only so many as were required to give it control of 50.1% of Anaconda's fully diluted voting power. It was a condition of the Share Offer that MP Global acquire sufficient Rights and Old Shares to be entitled to achieve 50.1% fully diluted. Thus MP Global could acquire Rights at \$0.01 and allow any excess Rights to lapse, leaving Glencore to subscribe for up to 50% of the Rights (approximately \$160 million worth) but without acquiring control of Anaconda.
23. The apparent failure of Glencore to protect itself from this sort of bid structure, and MP Global's clever tactical use of the vulnerability in Glencore's position, was the subject of some concern and deliberation by the Panel.
24. Glencore asserted that it could not reasonably have been expected to protect itself from an eventuality which was entirely inconsistent with takeover practice and policy in Australia. In entering into the Underwriting Arrangements, Glencore said that it did not (and was not reasonably required to) put its mind to the possibility that an unprecedented bid for Rights without a bid for shares to be issued on exercise of Rights could be made. To suggest that Glencore should have protected itself from an eventuality which is entirely inconsistent with takeover practice and policy in Australia was placing an unreasonable and unrealistic burden on an underwriter as a contracting party.
25. In discussions with the parties, Glencore at times suggested that it had been disinclined to include a condition in the Underwriting Arrangements that no other person gain control of Anaconda. Glencore's advisers suggested that such a condition would make the Panel more likely to infer that the Rights Issue and the Underwriting Arrangements were intended to bring about a situation where Glencore acquired control of Anaconda without making a takeover bid.
26. The Panel does not consider that such a condition would have been unacceptable in itself. Like all of the considerations of the Rights Issue and the Underwriting Arrangements, if Glencore had included such a condition in the Underwriting Arrangements the Panel would have considered it in light of:

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- a) Anaconda's need for the money to be raised;
 - b) Anaconda's efforts to find alternative sources of the funds;
 - c) the terms and conditions of the Rights Issue; and
 - d) all of the other things which might have been indicators of a bona fide rights issue to return the company to solvency.
27. The Panel considers that in these circumstances it would have been reasonable for Glencore to say that while it was prepared to agree to subscribe a very large amount of money if the current board and management were in place, and Glencore was in a position to maintain its level of ownership and control, it was not prepared to commit to subscribing such large amounts of money in circumstances where the ownership and management of Anaconda might be materially different.

MP Global Offers

28. On 21 January 2003, MP Global announced that it proposed to make a bid for Anaconda comprising:
- a) the Share Offer - an off-market bid under Chapter 6 of the Act for all of the Old Shares; and
 - b) the Rights Offer- an unregulated off-market offer to acquire all of the Rights. The Rights Offer was not regulated by Chapter 6 of the Act because the Rights were not securities for the purposes of Chapter 6.
29. The Share Offer was conditional on (amongst other things) MP Global being entitled to acquire (or subscribe for) more than 50% of Anaconda's diluted capital, and on obtaining relief from ASIC to allow MP Global to exercise all of the Rights acquired under the Rights Offer. The Rights Offer was conditional the conditions of the Share Offer being satisfied or waived before the last day of the offer period under the Rights Issue.
30. On 22 January 2003, MP Global gave a bidder's statement for its Share Offer to Anaconda. MP Global did not give the Rights Offer document to Anaconda until 30 January 2003.

ASIC Relief

31. ASIC granted conditional relief (the **ASIC Relief**) to MP Global on 29 January 2003 which allowed MP Global to exercise all of the Rights acquired under the Rights Offer and to acquire the corresponding New Shares. Among other things, the conditions required MP Global to apply the principles and many requirements of Chapter 6 of the Act to the Rights Offer, but it did not require MP Global to make an offer for any New Shares issued on exercise of the Rights, or to exercise any or all of the Rights it acquired under the Rights Offer. The ASIC instrument is at Annexure B.

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Anglo American Agreement

32. Prior to announcing the Rights Offer or Share Offer, MP Global entered into a Pre-Bid Agreement with Anglo American Investments (Australia) Limited (**Anglo**), an approximate 24% shareholder in Anaconda. Anglo agreed to accept the Rights Offer in respect of all of its Rights and to accept the Share Offer (subject to certain rights of release) in respect of that number of its Old Shares which represented approximately 19.9% of all Old Shares (**Anglo Agreement**). Other than as a result of the Anglo Agreement, MP Global advised that it was then not aware that it or any of its associates had a relevant interest in any Anaconda Rights or Old Shares. Anglo fulfilled the terms of the agreement.

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33. The termination events in the underwriting agreement (the **Underwriting Agreement**) between Anaconda and Glencore dated 24 September 2002, as described on page 38 of the Rights Issue Prospectus, stated that the circumstances in which Glencore could terminate its obligations under the Underwriting Agreement included where:

"the Takeovers Panel makes a declaration that circumstances in relation to the affairs of Anaconda are unacceptable circumstances under Pt 6.10 of the Corporations Act, or an application for such a declaration is made to the Takeovers Panel to make [sic], and that application is not dismissed within 30 days of being made or such longer period as the Underwriter may agree".

34. The Panel was acutely aware throughout the Anaconda proceedings of the precarious position of Anaconda unless and until the Rights Issue, the Underwriting Arrangements and the Schemes were completed. The Panel was concerned in all of its deliberations that its decisions or actions not inadvertently cause one or more elements to fail and thus expose Anaconda shareholders to losing whatever value remained for them as shareholders of Anaconda. That said, if circumstances had required the Panel to take action, and that action triggered a defeating condition or otherwise placed the funding at risk, the Panel would have done so and allowed all of the persons involved to then take their own commercial decisions thereafter. Such a result would have been most undesirable, and would only have been taken by the Panel if no other options were feasibly open to it.

Dates

35. The main dates⁵ that were relevant included the following:

Rights Issue announced	15 January 2003
Share Offer and Rights Offer announced	21 January 2003
MP Global bidder's statement for Share Offer lodged	22 January 2003
Rights Offer documents dispatched	30 January 2003
Rights trading ends	7 February 2003

⁵ The dates for the Rights Issue were estimates given in the Prospectus.

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Rights Offer to close	13 February 2003
Rights Issue to close ⁶	14 February 2003
Last day for Anaconda target's statement	19 February 2003
Allot and issue New Shares and dispatch holding Statements	25 & 26 February 2003
Payment to Scheme Administrator for distribution to MMH and ANH Secured Creditors ⁷	26 February 2003
Scheme Administrator makes payments to MMH and ANH Secured Creditors	28 February 2003

ANACONDA 02

36. Anaconda 02 was an application by Metal Holdings, a 4% shareholder in Anaconda and a company associated with Mr. Andrew Forrest, a former CEO of Anaconda.
37. Metal Holdings alleged that the combination of aspects of the Schemes, the nature of the Rights Issue and the Underwriting Arrangements combined to constitute unacceptable circumstances. It submitted that:
- Glencore would receive benefits not open to other Anaconda shareholders;
 - the Rights Issue had been structured to be a disincentive to other Anaconda shareholders to subscribe for the New Shares, thus ensuring that Glencore, under the Underwriting Arrangements, gained control of Anaconda;
 - that the Rights Issue was in fact a takeover, without proper disclosure and without any proper market or contest for control of Anaconda, to the detriment of Anaconda shareholders.
38. The Panel considered that, in light of Anaconda's circumstances, there was no basis for Metal Holdings' central assertion that the Rights Issue had been proposed, or resulted in, an opportunity for Glencore to make a takeover, or secure control, of Anaconda, without proper disclosure and without equal treatment of Anaconda shareholders.
39. The Panel accepted Anaconda's submissions, and therefore the Anaconda directors' business judgement, that Anaconda had been in severe and urgent need of a very significant amount of money and that Anaconda's very existence depended on raising that money in a relatively short period. The Panel accepted Anaconda's submissions that it had searched diligently for sources of finance, that it had approached all of Anaconda's major shareholders, that it had engaged proper advisers to search for sources of funds, and that Glencore's underwriting offer was the only viable source it had been able to find.

⁶ Subject to change, but only in accordance with ASX Listing Rules.

⁷ Subject to satisfaction of all conditions precedent to the Schemes.

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40. The financial arrangements between Glencore and Anaconda had been very complex and interlinked for some period. It would have been impossible for Glencore and Anaconda to have conducted the debt reconstruction, the Rights Issue and the Underwriting Arrangements without Glencore having a materially different set of interests to those of essentially every other Anaconda shareholder. That, of itself, did not constitute unacceptable circumstances. The Panel did not consider that in those complex debt and other restructurings, Glencore appeared to have been materially advantaged in any way that disadvantaged Anaconda shareholders.

MP Global As Rival Bid

41. Metal Holdings asserted that the Panel should treat the MP Global Offers as rival takeover offers to Glencore's "takeover" by way of the Rights Issue and Underwriting Arrangements. On that basis, Metal Holdings argued, the Panel should consider revoking, or varying, large parts of the Rights Issue or Underwriting Arrangements to place the two "takeovers" on equal footings. The Panel declined to treat the Underwriting Arrangements as a takeover offer by Glencore, and declined to vary the arrangements that Anaconda had put in place for its survival solely because MP Global chose to make its Rights Offer and Share Offer.

Timing

42. ASIC asserted that as the Underwriting Arrangements were announced on 25 September 2002, and the Anaconda 02 application was made on 28 January, Metal Holdings' application appeared to have been made out of the 2 months allowed under section 657C(3).
43. Metal Holdings countered that until the Rights Issue Prospectus had been issued it had not had access to the essential documents and that it was unclear whether unacceptable circumstances would come about. Therefore its time for making an application should run from the date the Rights Issue Prospectus was lodged. The Panel accepted the Metal Holdings application without determining the issue.

Relationship with the Schemes

44. The Panel is always conscious of the relationship between itself and the courts where applications to it overlap, or interact with, schemes of arrangement which are being supervised by the courts.
45. The Court had approved the Schemes of the Anaconda and Glencore subsidiaries. The Rights Issue Prospectus, the Underwriting Arrangements and the terms of the Rights Issue were integral to the ANH/MMH Schemes of Arrangement, in that the funds from the Underwriting Arrangements were essential conditions of the ANH/MMH Schemes. Those documents were annexed to the ANH/MMH Scheme documents submitted to the court and to ASIC. The Panel considered that ASIC and the Court would have looked at the documents.
46. On that basis, the Panel assumed that those documents provided adequate disclosure in relation to the Schemes and the Rights Issue. No material submissions were made that that was not the case. In the absence of specific concerns and evidence relating to them, the Panel will generally not look to second guess the Court in relation to documents that it has approved or considered.

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47. Metal Holdings disputed Anaconda's assertions that the Court's attention had been adequately drawn to the control issues inherent in the funding arrangements proposed to fund the ANH/MMH Schemes. Anaconda argued that the Rights Issue and the Underwriting Arrangements were clearly set out in the documents that went to the Court and formed part of the ANH/MMH Schemes. Anaconda also submitted that it had held meetings with ASIC prior to the public announcement to discuss the specific issue and ASIC had not raised any objections.
48. ASIC advised that it had not considered the various documents related to the ANH/MMH Schemes and Rights Issue in terms of the question of control of Anaconda. ASIC said, however, that if the Panel was satisfied that Anaconda both needed the money, and had made diligent enquiries for alternative sources of funds, the Panel should not make any declaration of unacceptable circumstances. It said that NCSC Policy Statement 112 expressly contemplated the type of urgent funding that Anaconda said was the basis for the Rights Issue and the Underwriting Arrangements.
49. The Panel accepted Metal Holdings' concerns that it had not had access to the Rights Issue Prospectus until after the Schemes had been considered. However, the Panel considered that Metal Holdings had had an adequate period (from 25 September 2002 to the first court hearing of the Schemes on 18 November 2002, and further time to the confirmatory court hearing on 17 January 2003) to consider submissions to the Court, and had decided not to. By and large, the Panel considers that the appropriate time and forum to consider the issues raised by Metal Holdings in this application was at the time that the Court was considering the Schemes of Arrangement.

Related Party Transactions

50. Metal Holdings asserted that Glencore was a related party to Anaconda and that therefore the Underwriting Arrangements should have been approved by shareholders not associated with Glencore.
51. Anaconda initially suggested that the Panel had no jurisdiction to consider the question as the related party transaction provisions are in Chapter 2E of the Act. The Panel considered the fact of Chapter 2E governing related party transactions to be irrelevant, in that the Panel's jurisdiction clearly lies only within Chapter 6, and even within Chapter 6 the Panel bases its decisions on whether or not the circumstances which have occurred are unacceptable. The Underwriting Arrangements clearly had the potential to affect the control of Anaconda and as such fell within section 657A(2)(a)(i) and (ii). Therefore the Panel considered the underwriting in light of those provisions and principles. While the specific provisions of Chapter 2E were not relevant, it is highly likely that the considerations that the Panel would take into account in determining whether a transaction which related to a substantial interest in, or to potential control of, a company, should be considered by the non-associated shareholders of the company would include policy and other considerations very similar to those on which the related party transactions provisions are based.

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52. Metal Holdings cited the decision of the WA Supreme Court in the Westgold Resources case⁸ as a basis for asserting that the Underwriting Arrangements should have been put to the non-associated shareholders of Anaconda. The Panel acknowledged some similarities of the circumstances in the Westgold Resources case to the current matter. However, it considered that the differences, especially in the offsetting arrangements that were present in the Westgold case meant that the case was of limited use to the Panel. The Panel acknowledged that Glencore was repaid approximately \$10 million out of the amount raised by the Rights Issue, and the position of debt worth \$90 million owing to Glencore was enhanced, from being subordinate to the \$823 million worth of debt discharged at 25.6 cents in the dollar, to being effectively Anaconda's sole debt.
53. In some of the early announcements by Anaconda directors concerning the refinancing, they stated that Anaconda would seek shareholder approval for the Rights Issue⁹. Anaconda submitted that it decided not to put the Underwriting Arrangements to Anaconda shareholders for approval because it decided that it was not required to do so.
54. The Panel considered that in the absence of any evidence that Anaconda would have suffered any detriment by seeking shareholder approval for arrangements that could result in a material change in the ownership structure of the company, it would have been much better practice for Anaconda to have sought shareholder ratification for the directors' decision to proceed with the Rights Issue and the Underwriting Arrangements. The Panel considered that the size of the capital raising required, compared to the market capitalisation of Anaconda at the time, and the potential for Glencore to become a 90% plus shareholder meant that it would have been preferable for shareholders to have affirmed the decision.
55. In saying this, the Panel recognises that Anaconda shareholders would likely have been faced with a choice of agreeing to the Underwriting Arrangements or facing Anaconda being liquidated, and in many ways that is not a choice at all. However, it would be preferable for the shareholders to have made it, rather than the directors of Anaconda make it for them.

Underwriting Arrangements as Abuse of Item 10 or 13

56. Metal Holdings argued that the Rights Issue was in fact a placement because the amount of dilution and the sum of money Anaconda shareholders would be required to subscribe to maintain their voting power ensured that a major shortfall would occur. The Panel did not accept that the Underwriting Arrangements were a placement. It accepted Anaconda's submissions that the sum of money to be raised was reasonable, given the amount required to settle with its creditors and finance the company until the Murrin Murrin Project could support it. In such cases the Panel will normally be inclined to accept the business judgement of the directors of a company unless reasonable evidence is produced to overturn such acceptance. Metal Holdings did not produce sufficient evidence to warrant such a finding.

⁸ Westgold Resources NL -v- Precious Metals Australia Ltd [2002] WASC 85.

⁹ For example, the announcements of 31 August and 11 September 2002.

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57. Anaconda pointed out that another underwriting offer it had received was at the same price as the Glencore Underwriting Arrangements (although different in other respects). Given the size of the fundraising compared to the market capitalisation of Anaconda, the Panel considered that the Rights Issue ratio and the subscription price per New Share to achieve the total sum were not highly relevant.
58. Metal Holdings also asserted that the Rights Issue was unprecedented in Australia given the ratio and discount to market price. The Panel has previously said that novelty is not of itself determinant of unacceptable circumstances. The Anaconda directors have advised that the Underwriting Arrangements were the only arrangements that they could find to pay the amounts required to reach settlement with ANH and MMH's Secured Creditors. The Panel accepted that the dilution and discount were most unusual, but accepted the Anaconda board's evidence that the only alternative open to it appeared to be the failure of Anaconda as a company. There was no large body of evidence produced to rebut this proposition.
59. Although it has said above that it considers that it would have been preferable for the Underwriting Arrangements to be approved by shareholders, the Panel does not accept that the Underwriting Arrangements were a device to pass control to Glencore, were a placement, or were not in the best interests of Anaconda shareholders.

ANACONDA 03

60. Anaconda 03 was an application by MP Global asserting that the Rights Issue and the Underwriting Arrangements constituted unacceptable circumstances because of their likely effect on the control of Anaconda. Its arguments were largely similar to those of Metal Holdings in respect of these issues.
61. MP Global also complained of specific aspects of Anaconda's response to its offers and terms which MP Global asserted were unacceptable:
 - a) Anaconda's refusal to give an independent expert access to the Murrin Murrin Project to satisfy a defeating condition in the MP Global Share Offer;
 - b) Anaconda's refusal to accept a compromise proposed by MP Global to resolve the issues concerning the independent expert, without Anaconda insisting that MP Global guarantee Anaconda's future solvency and taking on various roles and obligations then held by Glencore as underwriter (Anaconda asserted that MP Global ought to give these types of guarantees because the MP Global proposal risked the collapse of the Schemes); and
 - c) Anaconda's failure to give equality of access to information between MP Global and Glencore.

Underwriting Arrangements

62. MP Global put forward many of the same arguments against the Rights Issue and the Underwriting Arrangements as Metal Holdings did, and the Panel similarly decided that the Underwriting Arrangements did not constitute unacceptable circumstances for the reasons set out in paragraphs 38 to 40 and 56 to 59.
63. MP Global also asserted that because of the 14 : 1 ratio of the Rights Issue:

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- a) those Anaconda shareholders who did not exercise their Anaconda Rights would have their proportionate interest in Anaconda very significantly diluted; while
 - b) to retain their proportionate interest in Anaconda, Anaconda shareholders would have to subscribe \$0.70 under the Rights Issue (almost 3 times the current market price for Old Shares) for each Anaconda share they held. MP Global submitted that this created a significant disincentive for Anaconda shareholders to exercise their Rights and (in the absence of the MP Global Offers) was likely to lead to the failure by Anaconda shareholders to exercise a large number of the Rights.
64. MP Global cited NCSC Policy Statement 112 as evidence that the Underwriting Arrangements constituted unacceptable circumstances. It also asserted that the Panel should declare the Underwriting Arrangements to constitute unacceptable circumstances, even if it were not Glencore's intention to achieve control, because this may be an effect.
65. The Panel agreed with one of the underlying premises of the NCSC policy, i.e. that there may be cases where companies require material amounts of money and issuing material numbers of new shares may be the only way of achieving this. If the issue is underwritten (as many of them would have to be given the circumstances in which they are needed) a significant shortfall would cause a significant shift in control of the company, but that may be perfectly acceptable, and indeed the best outcome for shareholders as the company is then able to continue trading. The Panel therefore considered that in the absence of evidence against the Rights Issue and Underwriting Arrangements, the NCSC Policy Statement was supportive of the Rights Issue and Underwriting Arrangements rather than a basis for rejecting it.
66. The Panel declined these elements of the Anaconda 03 application for the same reasons as the Anaconda 02 application.

Should the Rights Issue and Underwriting Arrangements meet the takeover tests for disclosure etc

67. MP Global asserted that as the Rights Issue would cause a change of control, the Panel should require the Rights Issue Prospectus to have met the takeovers tests for time, information and equality of opportunity.

Disclosure Content

68. MP Global asserted, in essence, that because the Underwriting Arrangements and the Rights Issue may cause a change of control in Anaconda, Glencore should have given the information to Anaconda shareholders that would be required if Glencore was making a direct takeover bid. Specifically MP Global asserted that Glencore should disclose:
- a) information concerning Glencore's intentions, as required under section 636(1)(c);

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- b) information concerning Glencore's ability to fund its proposal and sources of cash, as required under section 636(1)(f);
 - c) information concerning pre-bid purchases, benefits or inducements, as required under section 636(1)(h)(i);
 - d) other material information known to Glencore, as required under section 636(1)(m).
69. Anaconda and Glencore asserted that the Rights Issue Prospectus had met all ASIC and ASX disclosure requirements. ASIC, Anaconda and Glencore considered that an underwriting prospectus is not required to comply with Chapter 6 level disclosure, and is not required to meet bidder's statement standards.
70. The Panel did not accept that a prospectus for a rights issue with such material potential effects on control of a company should not give similar levels of disclosure to those required for other major control transactions under Chapter 6 of the Act. The principle in section 602(b)(iii) applies to all transactions where there is a potential change of control, despite ASIC Anaconda and Glencore's technical arguments that acquisitions of shares under the underwriting exception of Item 10 of section 611 allow such acquisitions other than via a takeover.
71. The Panel considered that the Rights Issue Prospectus had given reasonable disclosure to Anaconda shareholders, and that Anaconda had adequately informed Anaconda shareholders about the Rights Issue and the consequences for Anaconda if the Rights Issue succeeded or failed, and the consequences to Anaconda shareholders of subscribing for their Rights or not.
72. In the circumstances of the Rights Issue and timing of the Schemes, there were not sufficient deficiencies in the Rights Issue Prospectus to warrant putting the underwriting and Schemes at risk. However, the Panel accepted MP Global's arguments that issues such as Glencore's intentions for Anaconda should have been included in the Rights Issue Prospectus given the clear potential for a material change of control under the Rights Issue and Underwriting Arrangements.
73. Although not determinative of the decision, the Panel considered that the Court, in approving the Schemes, had not been required to, nor did it, consider the adequacy of disclosure in the Rights Issue Prospectus. In such a case, the Panel would have been showing no disrespect to the court to order further disclosure in the Rights Issue Prospectus.
74. In light of the above, the Panel declined to apply, retrospectively, the standards and detailed requirements of the takeovers Chapter of the Act to the Rights Issue Prospectus.

Timing

75. There were many submissions, from Glencore, Anaconda, Metal Holdings and MP Global concerning timing of the Rights Issue, the MP Global Offers and other aspects of the Anaconda situation. The Panel received strong submissions from Anaconda that there was no flexibility to vary the periods and dates of the Rights Issue. Everything else in terms of the timetable was dependent on the times and dates of

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the Rights Issue. Anaconda advised that the timing of the Rights Issue was immovable because it was tied to the settlement dates for the Schemes which could not be moved without the consent of the Scheme creditors.

76. After some exploration with parties and persons with other roles in the Rights Issue and Schemes processes, the Panel accepted Anaconda's submissions that it was not viable to extend the Rights Issue timetable. The timing had been set, all of the elements had been squeezed into the time available under the Schemes and there was no flexibility. The Panel therefore rejected the requests by parties to extend the time periods and dates.

Equal Opportunity

77. MP Global asserted that Anaconda shareholders would not have reasonable and equal opportunities to participate in any benefits which may flow to Glencore if there was a substantial shortfall in take-up of the Rights and Glencore acquired a substantial interest in Anaconda as underwriter.
78. The Panel advised the parties in the brief that it considered that, in the absence of any evidence of unacceptable circumstances in the formulation of the Rights Issue and Underwriting Arrangements, the equal entitlement to Rights, and the opportunity to buy or sell Rights on-market provided Anaconda shareholders with a reasonable and equal opportunity to participate in any benefit flowing from the Rights Issue. It invited comment on its position, but received no compelling submissions against its view.

Exit Opportunity

79. MP Global asserted that if Glencore had been seeking to acquire control to the level it might achieve under the Underwriting Arrangements, Glencore would be required to provide all Anaconda shareholders with an opportunity to sell all of their shares, whether Old Shares or New Shares (together the **Shares**). MP Global asserted that the Panel should order Glencore to provide an exit opportunity for Anaconda shareholders to sell all of their Shares in Anaconda if it wished to underwrite the Rights Issue and potentially gain control of Anaconda.
80. The Panel noted the possibility of control passing under the Glencore underwritten Rights Issue. The Rights Issue was not approved by Anaconda shareholders. The Panel does not consider that the absence of shareholder approval was fatal for the Underwriting Arrangements but this fact was relevant background in considering the Rights Offer and Share Offer as alternatives before the Anaconda shareholders. It was also significant in considering the criticisms Glencore made of the Rights Offer and Share Offer and their documentation. The Panel imputed no improper motive to Glencore but does note that Anaconda shareholders did not have an opportunity to exit under the Rights Issue which they would have if the Rights Offer and Share Offer proceeded.
81. The Panel did not consider this to be a material issue. In part because it accepted that the Underwriting Arrangements were a bona fide financing agreement to ensure the survival of Anaconda, rather than a disguised takeover. The Panel would only have considered it necessary to require an exit opportunity if it had considered that

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Anaconda and Glencore had contrived the Rights Issue and Underwriting Arrangements to pass control to Glencore.

Independent Expert Condition

82. MP Global's offer was subject to a condition (**Independent Expert Condition**) that Anaconda permit an independent expert (of Anaconda's choosing) access to the Murrin Murrin Project to verify various public statements made by Anaconda and its management about the Murrin Murrin Project's capacity and operating performance.
83. Anaconda stated publicly that it would not grant the access requested. It eventuated that Anaconda was unable to grant such access because the various information and property to which the expert would require access was owned jointly by Anaconda subsidiaries and Glencore subsidiaries. The parties to the joint venture were subject to confidentiality agreements which Glencore declined to waive.
84. MP Global asserted that the rejecting by Anaconda constituted "triggering action" (as defined in the Panel's Draft Frustrating Actions Guidance Note of May 2002 (**Frustrating Actions Guidance**)).
85. The Panel did not accept MP Global's arguments.
86. The Panel accepted the submissions of the Anaconda directors that there were a number of factors which they may have been obliged to take into account when making their decision. Those issues included: contractual obligations to third parties as to Anaconda's operations, confidentiality and other undertakings proffered by a bidder, as well as the value that may be lost to the shareholders if the offers failed because the directors decline to provide access or information to MP Global.
87. Consistent with the decision in relation to the "Accounting Conditions" in the *Goodman Fielder 01* proceedings, the Anaconda Panel decided that while MP Global was entitled to make the Share Offer and Rights Offer conditional on access being given to an independent expert, there was no obligation on Anaconda to provide the relevant access, and no obligation on Glencore to consent to access to its subsidiaries' property or information. Also consistent with the Panel's decisions in *Goodman Fielder*, the Anaconda Panel considered that Anaconda's right not to disclose in its target's statement information which MP Global might have required to satisfy the Independent Expert Condition was subject to section 638 which requires a target company to include in the target's statement all information which shareholders would reasonably require, and expect, to be in the target's statement, to assess the merits of the offer.
88. The Panel considered that there was a reasonable prospect of MP Global acquiring sufficient information to ascertain the objectives underlying the Independent Expert Condition in ways other than strictly in accordance with the wording of the Independent Expert Condition. This was despite the statements made by the Anaconda board thus far.
89. The Panel advised parties that if MP Global did acquire such sufficient and reliable information, and did not then proceed to waive the Independent Expert Condition, Anaconda would be entitled to make an application to the Panel.

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90. In the end, MP Global decided to waive the Independent Expert Condition.

Equal Treatment of Rival Proposals

91. MP Global asserted that the Underwriting Arrangements were a rival proposal for control of Anaconda and therefore it should have equality of access to confidential information on Anaconda with Glencore.
92. The Panel did not consider that MP Global should as of right have equality of access to Anaconda's confidential information as Glencore may have had. The Panel considered that Glencore as underwriter would likely have significant information which would have been reasonable for it to have sought in the position of taking the type of commercial risk that underwriters take i.e. the risk of being required to make a significant investment in the relevant company with no guarantee of control. In addition, Glencore would have had access to a significant amount of information in its role as joint venture partner.
93. Consistent with the Panel's decision in Goodman Fielder, the Panel considered there is no legal or policy requirement in Australia for a target company to give equal information access to all bidders, for similar reasons as it determined the Independent Expert Condition issue. However, in considering whether to provide competing bidders with equal access to target company information, target company directors should make their decision based on the best interests of the company's shareholders and with a view towards creating an efficient, competitive and informed market for the acquisition of control of the company. Unless there are good reasons to the contrary, these objectives will not generally be fulfilled if one bidder is provided with less information than another bidder where providing equal information could have facilitated an auction for the target company.
94. No evidence was provided to the Panel that Anaconda had been unreasonably favourable to Glencore compared to MP Global.

ANACONDA 04

95. Anaconda 04 was a multi part application by Glencore. Glencore applied for:
- a) a review of the ASIC decision to grant the ASIC Relief to MP Global allowing it to exercise all of the Rights it acquired under the Rights Offer;
 - b) interim orders restraining the dispatch of the Rights Offer documents and bidder's statement for the Share Offer until the Panel determined the application for a review of the ASIC decision and a declaration of unacceptable circumstances;
 - c) a declaration of unacceptable circumstances in relation to the structure of the Rights Offer and the Share Offer.

Interim order

96. On Thursday 30 January 2003, the Panel declined to grant Glencore's application for an interim order restraining the documentation underlying the Rights Offer and Share Offer. The Panel considered that Anaconda shareholders would be better off

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initially receiving arguably insufficient information which was later updated (if this was found to be necessary), and having less time than desirable, to consider the full details of the Rights Offer, rather than not receiving the offer and not having an opportunity to accept even though the information provided might be insufficient. There was very little assertion on either side that the disclosures actually made by parties to Anaconda shareholders were false or actually misleading, as opposed to simply being insufficient.

97. However, the Panel advised MP Global that it was concerned that Anaconda shareholders be promptly informed of the large degree of uncertainty then facing the shareholders of Anaconda, the MP Global Offers and the Rights Issue. MP Global agreed to the Panel's request to write to Anaconda shareholders that day (30 January) with its Rights Offer document, advising them of the existence of the various applications before the Panel and advising them that Panel decisions may potentially affect the offers etc.
98. In its letter MP Global advised Anaconda shareholders that as at the date of the letter:
 - a) none of the applications before the Panel had been finally dealt with;
 - b) the Panel could make orders in relation to any of these applications which could affect any or all of MP Global's Offers for the Old Shares and Rights, the Rights Issue, and the underwriting of the Rights Issue by Glencore;
 - c) Anaconda shareholders should monitor ASX's website for further updates on these applications, as if any orders are made or if any other important developments occur in relation to these applications, they would be made public through ASX.

ANACONDA 04 REVIEW OF ASIC RELIEF

99. The relief granted by ASIC on 29 January 2003 was an exemption from the 20% threshold in section 606 of the Act to allow MP Global to exercise all of the Rights it acquired under the Rights Offer. The relief was conditional on the satisfaction of a number of matters (see Annexure B for a copy of the ASIC Relief and the conditions to which it was subject).
100. ASIC had sought submissions from Anaconda and Glencore prior to granting the relief. The Panel received copies of MP Global's application, Anaconda and Glencore's submissions, and ASIC's reasons for its decision.
101. ASIC granted the relief to MP Global but made it subject to various conditions. In those conditions, ASIC attempted to ensure that the Rights Offer proceeded as closely as possible to how it would have proceeded if it had been a takeover for voting shares on a normal timetable. The Panel considered that the conditions which ASIC had imposed on the relief were sensible and appropriate.
102. However, difficulties associated with the relief included the fact that the Rights Offer would open and close within the period that Chapter 6 would normally allow for the preparation and dispatch of a target's statement, so Anaconda shareholders were

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unlikely to gain detailed information from the Anaconda directors. Throughout the Rights Offer the Anaconda directors did not give their shareholders detailed information in response to the Rights Offer, nor any recommendation based on the value offered under the Rights Offer and Share Offer. The Panel notes elsewhere that this was regrettable.

Control Change where not efficient informed competitive market

103. Glencore asserted that the Relief would allow control of Anaconda to pass to MP Global in circumstances where Anaconda shareholders, Rights holders and directors would not be given either:
 - a) a reasonable time in which to consider the Rights Offer (as required by section 602(b)(ii) of the Act); or
 - b) enough information to enable them to assess the merits of the Rights Offer (as required by section 602(b)(iii) of the Act).
104. The Glencore complaints about the disclosure issues and timing issues for the Rights Offer (supported by Anaconda in the Anaconda 05 application) largely mirrored the complaints made by MP Global in the Anaconda 03 application about the disclosure and timing issues for the Rights Issue and Underwriting Arrangements. The Panel considered that the same considerations for timing for the Rights Issue and the Underwriting Arrangements should be applied to the Rights Offer and to the Share Offer (to the extent that the Share Offer was affected by the timetable for the Schemes). On that basis, the Panel did not accept this part of Glencore's argument.
105. In passing, the Panel considered it somewhat disingenuous for Glencore to have asserted in this application that control of Anaconda may pass under the MP Global Rights Offer and Share Offer in circumstances where the Anaconda shareholders had inadequate time and information. It seems to the Panel that the amount of time that Anaconda shareholders had to consider the MP Global offer was essentially the same, and the amount of information was arguably more (because of the MP Global Offer documents), than they had to consider the Rights Issue and the Underwriting Arrangements. That time and information was presumably adequate for Anaconda shareholders to make decisions about whether or not to subscribe for the Rights Issue. Under the Rights Issue it was possible for Glencore's voting power to increase to over 90%, clearly a change of control. However, the Panel considered Glencore's application on its face.

Timing

106. Glencore asserted that MP Global had engineered its announcements to shorten the time available for consideration of the Rights Offer by delaying the time of its announcement, compared to Anaconda and Glencore being bound by the timing of the Schemes.
107. The Panel did not find the latter arguments credible. In relation to the former, the Panel considered that it was too late in the process for such issues to reasonably be considered

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108. Glencore argued that it had been unacceptable for MP Global to delay the announcement of its Share Offer and Rights Offer until after MP Global had secured the Anglo Agreement. While it did exacerbate the time pressures facing all parties, the Panel does not consider that MP Global was obliged to announce its intention to make the Rights Offer and the Share Offer prior to the time that it did. There does not seem to be any statutory or regulatory policy requirement for it to disclose its offers any earlier than it did.
109. The Panel considered that although the time constraints that applied in relation to the Rights Issue and MP Global Offers were less than ideal, Anaconda shareholders and rights holders did have a reasonable opportunity to make a decision regarding their investment in Anaconda. See paragraphs 75 and 76 above for a discussion of the issues involved in changing the timing of any of the elements of the Rights Issue, Underwriting Arrangements, Rights Offer and Share Offer.
110. Glencore also argued that the Anaconda target's statement for the Share Offer would not be available for Anaconda shareholders until after the Rights Offer closed. The Panel considered that that was within the control of the Anaconda directors. The Panel discusses the information provided to Anaconda shareholders by the Anaconda board below (see paragraphs 161 and following). Having recently conducted the enquiries necessary for the debt reconstruction and the Rights Issue Prospectus, the Panel considered that the Anaconda directors would have the material information (other than any relating to MP Global itself) required to prepare a form of information statement for Anaconda shareholders prior to the closure of the Rights Offer, even if it were not a complete target's statement. The Panel did not consider that Anaconda's unwillingness to do so should deny Anaconda shareholders the benefit of being able to consider the MP Global Offers, albeit without a reasoned and fact based argument from both sides.
111. To give Anaconda shareholders some degree of flexibility and to reduce some amounts of pressure on them, MP Global included as an alternative in its Rights Offer a facility for Anaconda shareholders to indicate that they wished to accept the Rights Offer, but in the event that the Rights Offer did not meet its minimum acceptance condition, or failed for some other reason, they wished to subscribe for the New Shares to which they were entitled. The Panel considered that this was a sensible alternative given the time pressures facing Anaconda shareholders. While not eliminating them in any way, it did mitigate some of the unreasonable time pressures facing Anaconda shareholders.

Unfairness to Glencore

112. A central issue in the proceedings was the fact that the Rights Offer was for all Rights, but not for any of the New Shares issued on exercise of those Rights. The Share Offer only applied to Old Shares. The scenario was put to the Panel that MP Global might receive acceptances for, say, 66.23% of the Rights (i.e. all those that were not issued to Glencore¹⁰) but that MP Global only wished to obtain 50.1% of the

¹⁰ Glencore had announced publicly its intention to subscribe for all of the Rights it was issued, and that statement was repeated in the Rights Issue Prospectus. However, Glencore's submissions indicated that this statement simply confirmed the obligation that Glencore had under the Underwriting Arrangements to

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voting power in Anaconda. In that scenario, Glencore submitted that MP Global would be able to acquire control of Anaconda by exercising 50.1% of the Rights (neglecting the percentage of Old Shares acquired under its Share Offer). MP Global could then allow 16.13% of the Rights to lapse. Under the Underwriting Arrangements, Glencore would be required to take up the New Shares issued in relation to those Rights that MP Global allowed to lapse.

113. When added to the 33.77% of Rights that Glencore would be issued and which it had committed to exercise as shareholder (or would be required to take-up if it did not exercise them directly), the scenario would have Glencore being required to subscribe for up to 49.9% of the New Shares without gaining control.
114. Therefore, Glencore submitted that once MP Global had received more Rights than it required for control, it could, depending on the level of acceptances to its Share Offer and Rights Offer, determine the number of New Shares that Glencore was required to subscribe for as underwriter. On that basis, the Panel considered, the structure of the MP Global offer was unacceptable, unless MP Global extended its Share Offer to all of the New Shares, or undertook to exercise all of the Rights it acquired under the Rights Offer.

Unfair to Glencore as Underwriter as Opposed to Shareholder?

115. Balanced against this was the argument that Glencore had placed itself into this exposed position by failing to make its underwriting commitments subject to a condition that no person acquire control of Anaconda or at least that no person had a greater voting power in Anaconda than Glencore. On that basis, MP Global argued, there was nothing unacceptable in the structure of its offers.
116. MP Global argued that the only "unfair" exposure that Glencore had was as underwriter, not as shareholder. MP Global argued that its Share Offer was for all of the Old Shares and that its Rights Offer was for all of the Rights, therefore Glencore was treated exactly the same as all Anaconda shareholders. It argued that Glencore could, if it wanted to, sell the entire economic interest it owned as shareholder in Anaconda, and that the only exposure that Glencore had was as underwriter, on terms that Glencore had itself set in negotiating the terms of the Underwriting Arrangements.
117. On that basis, MP Global argued there was nothing unfair about its offers, there was nothing that discriminated against Glencore as shareholder, and Glencore (as shareholder) had exactly the same opportunities as all other Anaconda shareholders.
118. In addition, it was arguable that a position of being exposed to the risk of being required to subscribe for a large number of shares with no guarantee of retaining an existing position, or gaining control, is the natural position for a risk bearing underwriter to be in. Glencore, having decided to bear the risk of underwriting, had no cause for complaint that the decisions of other shareholders in Anaconda would

subscribe for the relevant New Shares. Glencore asserted that it was nevertheless free to sell its Rights entitlement, and drew attention to the fact that there were termination events in the Underwriting Arrangements which could be triggered and which might therefore cancel its obligations to subscribe for those New Shares.

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determine the number of New Shares it must subscribe for in fulfilling its underwriting obligations. Again, this is the usual position for an underwriter of a rights issue.

Rescuing a Sophisticated Investor

119. The Panel considered whether any decision against MP Global would in effect, be rescuing Glencore from a commercially uncomfortable position of its own making and taking away from MP Global a strategic commercial advantage that it had identified by its investigations.

MP Global Offers - for Control of Anaconda

120. The Panel decided that the Rights Offer was essentially an offer for control of Anaconda by way of acquiring the New Shares issued on exercise of the Rights and that the Panel should therefore apply the principles of section 602 to both the Rights Offer and the Share Offer.

The Naked Offer

121. During discussions of the applications, it became apparent to the parties and the Panel that in fact, if it was prepared to carry some extra risk, MP Global could make its Rights Offer and Share Offer without the ASIC Relief. This was the so called "Naked Offer" i.e. the Rights Offer and Share Offer made concurrently without the benefit of any ASIC relief.
122. The Naked Offer depends for its success on another concept which was dubbed the "Rising Tide Principle". The Rising Tide allows a person to acquire voting shares in a company, in circumstances where it might otherwise be prohibited by section 606 of the Act, if:
- a) the shares are new shares being issued by the company;
 - b) other person/shareholders in the same company are issued similar new shares at exactly the same time; and
 - c) the percentage of new shares that the person acquires is the same as the percentage of voting shares that the person owned immediately prior to the acquisition.

On that basis, although the person may acquire a significant number of new shares, the acquisition would not cause their percentage voting power to change and the acquisition would not be prohibited by section 606 of the Act, even where the person would be prohibited by section 606 from purchasing a similar number of existing shares. The Rising Tide is most commonly seen where shareholders take up pro-rata rights issues.

123. The extra risk that MP Global would bear was that the Rights Offer might be more successful than the Share Offer, leaving MP Global unable to exercise all of the Rights it acquired under the Rights Offer.

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Decision

124. Following this realisation, it was argued to the Panel that if the Naked Offer would potentially allow MP Global to place Glencore in a similar position as under the ASIC Relief, there was little basis for the Panel to revoke the ASIC Relief on the basis of unfairness to Glencore when the unfairness was open under the Act in its unmodified form.
125. The Panel did not agree. While the discriminatory nature of the Naked Offer might exist under the unmodified law, the Panel considered it was inappropriate for ASIC to facilitate the Rights Offer given its discriminatory nature.
126. The Panel decided that despite Glencore having itself largely constructed the set of circumstances in which it found itself, the fact that MP Global could determine (within the constraints set out above) how many New Shares Glencore was required to subscribe for, in circumstances where MP Global was clearly bidding for control of Anaconda, meant that the ASIC Relief should be revoked.

Glencore's Proposed Conditions

127. Glencore proposed that if the ASIC Relief was affirmed, the Panel should impose various additional conditions. The Panel's decision obviated the need for such conditions. For completeness, the conditions proposed by Glencore were:

MP Global must exercise all of the rights it acquires under the Rights Bid

The "Conditionality Day" must be on or before the day which is 3 trading days before the last day of rights trading on the ASX

MP Global must give details of acceptances of Rights Bids on each day during the Rights Bid period

The last date for payment of consideration under the Rights Bid must be the earlier of 21 days after the end of the Rights Bid period, and the later of the date which is 1 month after the Rights Bid is accepted and the date on which the Rights Bid becomes unconditional

The pre-bid agreement should be amended such that Anglo agrees to accept the Rights Bid only in respect of 19.9% of its rights

The Share Bid should relate to all Anaconda shares, including those arising from exercise of rights or issued pursuant to the underwriting

All of the Shares, All of the Rights

128. One of the alternatives proposed in the application was that MP Global should only be granted the ASIC Relief if it was prepared to offer for all the New Shares issued pursuant to the Rights Issue¹¹. In essence this was part of two different arguments. The first was the "unfairness" to Glencore in MP Global being able to offload any excess Rights it acquired under the Rights Offer. The second was an argument that MP Global was actually bidding for control of Anaconda and that fairness to all shareholders required that MP Global actually offer for all of the Shares in Anaconda

¹¹ Including any shares issued to Glencore as underwriter of the Rights Issue.

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if it wished to acquire control and if it wished to be prepared to acquire 100% of the economic interests of some Anaconda shareholders.

129. Based on the view set out above, the Panel considered that a bid for all of the New Shares, or a commitment from MP Global to exercise all of the Rights that it acquired under the Rights Offer, would be an acceptable outcome. It offered this to MP Global as a basis for affirming the ASIC Relief. MP Global declined to accept the proposition.

MP Global's Alternative Proposals

130. At about the same time, MP Global offered a number of other alternative undertakings to allow it to go forward. Largely they revolved around MP Global undertaking to subscribe for sufficient numbers of Rights to ensure that Anaconda could meet its obligations to the bondholders under the ANH/MMH Schemes. Anaconda rejected MP Global's proposals as not being workable, because it believed they would trigger conditions of the Underwriting Arrangements and may therefore put the success of the Schemes at risk. MP Global rejected the variations to its proposals that Anaconda said were necessary to allow the proposals to go forward. Given the time constraints, Anaconda's financial position, and the terms of the ANH/MMH Schemes that the court had approved, Anaconda's position was fully understandable.

Section 617 of the Corporations Act

131. Section 617 of the Act was cited as evidence that there was no legislative intent that a bidder must bid for all of the shares that might come into existence during a bid period.
132. Section 617 specifies the shares to which a takeover bid must relate, and sets the time at which the bidder may determine which shares form part of the bid class. It expressly allows a bidder in an off-market bid (MP Global's Share Offer was an off-market bid) the choice of whether or not to include shares which come into the bid class due to a conversion of convertible securities or exercise of rights.
133. MP Global argued that its bid followed this aspect of the legislation. It said that all it was doing was bidding for the Old Shares on issue at the time of the bid, and following the express position of the legislature that it was not obliged to offer for New Shares which were issued during its bid period under the Rights Issue.
134. The Panel is concerned to emphasise that its decision is specifically related to the facts of the Anaconda situation. It is not a proposition in conflict with section 617 of the Act. The Panel is not proposing any general rule that a bidder must bid for all of the shares that may be issued by a target company i.e. an extended equal opportunity principle.
135. The Panel considers that there is a reasonable argument that section 617 was not drafted in contemplation of a 14:1 rights issue. In general, rights issues are made on materially lower ratios and are unlikely to have the potentially overwhelming effect on control that the Rights Issue had. On that basis, the Panel's decision in these proceedings is unlikely to be a useful precedent in matters where the rights issue ratio is a more usual one.

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136. Rather, the Panel's decision is a decision on the principle that selective treatment of different persons is unacceptable (albeit in this case a person who may only have acquired their shareholding after the bid commenced).

Item 3 of Section 611

137. Anaconda argued that the Panel should look to Item 3 of section 611 as the more appropriate indicator of legislative intent when considering the ASIC Relief and whether it followed legislative policy. Item 3 allows an acquisition of shares due to conversion of *convertible securities* (rather than rights) where the acquisition of the convertible securities is made on-market, the acquirer is also making a full bid for securities to which the convertible securities may convert, and the bid is essentially unconditional.
138. Anaconda argued that the relief was inconsistent with Item 3. It argued that the exception in Item 3 only applies where the concurrent bid extends to all shares in the bid class at any time during the bid (i.e. the same as section 618, rather than section 617). The Panel did not accept the argument.
139. In its application to ASIC, MP Global drew a positive analogy to the decision by the Panel in Pinnacle 03 to vary relief granted by ASIC. The Panel's decision in Pinnacle 03 varied the prohibition in section 606 to allow the bidder to exercise options it had acquired in an offer for the options which was made concurrently with a takeover offer for the voting shares of the target. Glencore submitted a range of reasons why the two decisions were not analogous.
140. The Panel considered that the two sets of circumstances were sufficiently different that its decision in Anaconda 04 was not comparable to, and therefore was not inconsistent with, the decision in Pinnacle 03. In the Pinnacle matter, the options would constitute only one third of the diluted capital and the options were not underwritten. Therefore, control of Pinnacle was less likely to be determined by the outcome of the offer for the options and no person was in the unfair position in which Glencore found itself.

Glencore Withdrawal

141. The Panel was concerned to understand the consequences to Anaconda of MP Global's offers and any decisions made by the Panel. This was especially important given the condition in the Underwriting Arrangements that entitled Glencore to withdraw from the Underwriting Arrangements if the Panel made a declaration of unacceptable circumstances in relation to the affairs of Anaconda. It therefore asked what potential there was for Glencore to withdraw from the Underwriting Arrangements in the event of the Share Offer and the Rights Offer being made, and in the event of them being successful. The Panel also asked what were the determinants of, or preconditions to, Glencore being able to withdraw in these circumstances.
142. The Panel did not receive satisfactory answers to these questions.

Anglo Agreement

143. Prior to MP Global announcing its Rights Offer and Share Offer, MP Global and AngloAmerican Investments (Australia) Ltd had agreed with MP Global to sell all of

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its Rights (23.7% of the Rights) and 19.9% of the Old Shares. Glencore asserted that the Panel should limit the percentage of the Rights to which the pre-bid agreement related to 19.9%, the same level as would be permitted if the Rights were voting shares.

144. Given that the Rights gave no relevant interest in any existing voting shares, and MP Global's acquisition of shares on the exercise of any Rights would be regulated by section 606, the Panel did not see any basis for such conditions.

ANACONDA 05

145. The Anaconda 05 application was made by Anaconda. Anaconda sought a declaration of unacceptable circumstances and both interim orders and final orders.
146. Anaconda asserted that the Share Offer and Rights Offer constituted unacceptable circumstances because:
- a) by virtue of the Rights Offer, MP Global had the ability to manipulate its ultimate shareholding level in Anaconda;
 - b) the Rights Offer offended several of the "Eggleston Principles" in section 602 of the Act;
 - c) the disclosure of MP Global's intentions in the MP Global bidder's statement was inadequate and thereby contravened section 670A(1) and/or section 643(1) of the Act; and
 - d) of the inclusion of the Independent Expert Condition and/or the failure by MP Global to announce whether or not it intended to rely on the non-satisfaction of the Independent Expert Condition.

MP Global Intentions Concerning Exercise Of Rights It Acquires

147. Anaconda asserted that it constituted unacceptable circumstances that MP Global had not stated the percentage of voting power that it wished to control after the Rights Offer and Share Offer. It asserted that:

MP Global's post-takeover bid shareholding level is material to the decision of rights-holders and shareholders whether or not to accept the Rights Offer or the Share Offer. For example, a rights-holder may be prepared to accept the Rights Offer if they know that MP Global's post-takeover bid shareholding will be a specified percentage, but may not be prepared to accept the Rights Offer if that shareholding will be a different percentage."

148. As it was always clear that MP Global was seeking control of Anaconda, the Panel did not attach much weight to this argument.
149. Anaconda also went on to criticise the MP Global Offers for the unfairness to Glencore, using similar arguments to those submitted by Glencore in relation to MP Global's ability to determine the number of New Shares for which Glencore would be required to subscribe. The Panel had decided that aspect of Anaconda's

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application in terms of Glencore's application i.e. it revoked the ASIC Relief, on the basis that ASIC relief should not facilitate discriminatory behaviour, so it did not need to consider that aspect of Anaconda's application.

Anaconda's Solvency

150. As noted above, MP Global made various offers to exercise Rights up to 65% of the Rights Issue. Anaconda, in the Panel's view justifiably, rejected these offers because of their conditional and partial nature.

Rights Offer Terms

151. Anaconda criticised the terms of the Rights Offer in relation to:

- a) *Timing*: Anaconda's complaints were similar to Glencore's, and the Panel had already decided that the timing of the MP Global Offers was dependent on, and largely determined by, the Rights Issue. Anaconda and Glencore found the timing of the Rights Issue acceptable for Anaconda shareholders, so applying the same timing to the MP Global offers seemed reasonably consistent with the time frame which both Anaconda and Glencore implicitly found perfectly acceptable for Anaconda shareholders;
- b) *Conditionality Day*: MP Global had set Thursday 13 February 2003 as the date on which it would determine whether or not to declare the Share Offer and Rights Offer free of conditions. Anaconda asserted that this was unfair to its shareholders as the trading of Rights on ASX closed on 07 February 2003 (having commenced on 21 January 2003, 14 days of trading). Anaconda asserted that Anaconda shareholders who chose to accept MP Global's conditional offer prior to 7 February 2003 would be disadvantaged if it subsequently failed to satisfy the applicable defeating conditions.

The Panel considered that if Anaconda shareholders were given full disclosure of the timing of the Rights Issue, the Rights Offer and Rights trading on ASX they could make their own informed choice, in the clear knowledge of the various risks that they were taking by selling on market, accepting the conditional Rights Offer, exercising their Rights, selling their Rights off market, or allowing their Rights to lapse. In the Panel's view, the time pressure was due to the timing of the Rights Issue and the Scheme dates rather than the MP Global Offers.

- c) *Disclosure*: Anaconda noted that it was not required by the statute to give a target's statement to its shareholders in response to the Share Offer until 19 February 2003, well after the Rights Offer had closed, and that it was not required under the statute to give a response to the Rights Offer at all. Anaconda asserted that it was "*unlikely to be in a position to prepare and dispatch its target's statement in response to the Share Offer prior to the statutory deadline by reason of the complicated nature of the Share Offer and the Rights Offer.*"

Anaconda asserted that the absence of a document in the form of a target's

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statement, or indeed Anaconda's target's statement itself, at all times during the Rights Offer period fails to satisfy the "Eggleston Principle" embodied in section 602(b)(iii) of the Act that security-holders be given enough information to enable them to assess the merits of a takeover proposal. The Panel agreed that it would have been preferable for Anaconda to provide information to its shareholders. However, the Panel decided not to order Anaconda to provide its shareholders with such an information document in response to the Rights Offer document that MP Global provided to Anaconda on 30 January;

- d) *Details of Acceptances:* Anaconda complained that MP Global had not given any undertaking to inform Anaconda shareholders of the progress of its Rights Offer. Anaconda acknowledged that the ASIC Relief (which MP Global undertook to abide by after it decided to proceed with the Naked Offer) required MP Global to "give substantial holding information as if Part 6C.1 of the Act applied to its holding of Rights".

The Panel considered that ASIC and MP Global had already adequately addressed the issues that Anaconda raised.

Intentions

152. Anaconda asserted that MP Global's bidder's statement suggested that MP Global had detailed plans for the reorganisation of Anaconda which MP Global had not disclosed in its bidder's statement.
153. The Panel did not find any evidence to support Anaconda's concerns.

Independent Expert Condition

154. Anaconda asserted that the Independent Expert Condition was an unacceptable condition for a bidder to impose. The Panel disagreed and accepted MP Global's right to impose such a condition if it considered it necessary to do so.
155. In its submissions, Anaconda argued that the condition was unacceptable because Anaconda did not have the power to disclose the information. Anaconda said:
- "In any event, the satisfaction of the IE Condition is not within the control of Anaconda. The Murrin Murrin Project is owned 60% by MMH and 40% by Glenmurrin Pty Ltd, an indirectly owned subsidiary of Glencore International AG. The Murrin Murrin Project is operated by Anaconda Operations Pty Limited.*
- Furthermore, Anaconda's ability to procure access to the Murrin Murrin Project is constrained by confidentiality obligations owed by MMH to Glenmurrin Pty Ltd under the joint venture agreement between those parties and Anaconda Operations Pty Ltd dated 28 August 1997.*
- In short, access to the Murrin Murrin Project is not Anaconda's to give."*

Anaconda also said:

"All material information relating to the Murrin Murrin Project which is known to Anaconda and which is sufficiently certain to warrant disclosure is already in the market, both by way of continuous disclosure and in the Rights Issue prospectus. To the extent that

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the existence of MP Global's takeover bid necessitates disclosure of further or other information relating to the Murrin Murrin Project, that information will be disclosed in the target's statement which is to be prepared by Anaconda and despatched (on the current timetable) on 19 February 2003."

156. Consistent with other Panel decisions, the Panel decided that the fact of the condition in MP Global's offer did not automatically place any obligation on the Anaconda directors to give any response. The Anaconda directors remained obliged to consider what information they were required to provide to their shareholders in the target's statement under section 638 of the Act. The concerns raised by MP Global would be one factor to consider when the Anaconda directors were considering what information their shareholders reasonably required when considering whether or not to accept the MP Global offer.

Anaconda's Solvency

157. MP Global made several offers to Anaconda to take up certain percentages of the Rights it acquired under the Rights Offer. The Panel accepted the arguments of the Anaconda directors that their obligations to the company, and the requirements of the ANH/MMH Schemes made MP Global's offers for any less than 100% of the amount required under the underwriting of little value to Anaconda and not capable of acceptance by Anaconda.

Market Uncertainty

158. By the time the Panel was considering the Anaconda 02-05 applications, it had become clear that the Independent Expert Condition would not be satisfied. The Panel considered that this meant that a defeating condition of MP Global's offers had been permanently triggered. The Panel considered that in the unique circumstances of the MP Global Offers (in particular the short period of the Rights Offer and the impending cessation of Rights Trading on the ASX) the interests of an efficient competitive and informed market, MP Global should disclose its intentions regarding the Independent Expert Condition i.e. either that it would rely on it and allow its offers to close with a defeating condition unfulfilled, or waive the condition.
159. Therefore, the Panel made an interim order under section 657E that by 6.00 p.m. on Monday 10 February MP Global make a firm statement concerning how it would treat the Independent Expert Condition. Given the timing issues in the Rights Offer at that stage, the Panel considered its requirement of MP Global was by then closely analogous to the requirement of a bidder under a takeover offer to disclose the status of conditions in its offer under section 630(2) of the Act.
160. The Panel considered it did not have sufficient time to make a determination of the adequacy of the intentions statements made by MP Global in its Rights Offer document. That should not be taken as any implication that MP Global's intentions statements were, or were not, acceptable.

ANACONDA INFORMATION TO ITS SHAREHOLDERS

161. The Panel was concerned about the type and quantity of information provided to Anaconda shareholders by Anaconda. The Panel was concerned whether, given the

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short time for the Rights Offer, the Anaconda shareholders had adequate advice from their company in relation to the Rights Offer prior to the close of the Rights Offer and Rights trading. In particular, the Panel compared this situation to the situation in the Share Offer where the Anaconda shareholders would have the benefit of the Anaconda target's statement.

162. The Panel recognises and acknowledges the very real and legitimate concerns that the board of Anaconda had to ensure the success and completion of the Rights Issue and the Underwriting Arrangements to ensure the solvency and ongoing viability of Anaconda. The Panel agrees that that was entirely proper for the Anaconda directors to address, and to advise their shareholders to address, at first instance.
163. However, the Panel is concerned that beyond that first line issue, the Anaconda directors did not provide the Anaconda shareholders with adequate information to assess the value of the MP Global Rights Offer. On that basis, the Panel was concerned that the information provided by Anaconda was not enough to allow its shareholders to make an adequately informed decision on the value of the MP Global offers.
164. Neither the short letter which Anaconda provided to its shareholders on 03 February 2003, or the longer letter on 11 February 2003 made any assessment of the merits of the MP Global Offers in terms of the value offered, or Anaconda shareholders' alternatives. The Panel considers that Anaconda shareholders were entitled to such advice from their directors.
165. In a fast moving situation such as a Rights Offer, the Panel considered that Anaconda's advice merely that the offer was "highly conditional", and that Anaconda directors would provide further information if circumstances changed, fell short of the standard required. By the time the MP Global offers became unconditional, if they were to, it was highly unlikely that Anaconda would have any time to write to its shareholders, let alone for them to consider such advice.
166. On that basis, the Panel considered that the Anaconda directors should have been writing to their shareholders during the period of the Rights Offer, and preferably during the period of trading of the Rights on ASX, advising, as best they could, on valuation issues, accepting the limitations on the advice that could be provided in that time frame.
167. Once the Independent Expert Condition was determined or waived, the MP Global offers was, rather than being "highly conditional", subject to only a small number of conditions which were reasonably common in takeovers in Australia.
168. In the letter dated 11 February 2003, the directors of Anaconda raised the prospect of the MP Global Rights Offer and Share Offer jeopardising the Schemes. No evidence was produced to the Panel to substantiate this.

ORDERS

169. On the basis that it made no declaration of unacceptable circumstances, the Panel declined to make any final orders.

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ALTERNATIVE ROUTES

170. The Panel sought to reach a sensible commercial resolution between the parties in the few days leading up to its decision in the Anaconda 02-05 matters. That was not achievable, despite exploring a number of alternatives with parties at different times.
171. One resolution which the Panel would have been prepared to accept was an agreed resolution where, amongst other things, MP Global had undertaken to exercise all of the Rights it acquired under the Rights Offer. That would have resolved the Panel's concerns about the selectivity of the way the Rights Offer and the ASIC Relief operated. It would not have required an offer for all of the New Shares Glencore received as underwriter. However, for various reasons, the parties were unable to reach agreement.
172. The Panel recognised at the end of the Anaconda 02-05 proceedings that it was open for MP Global to proceed with its Rights Offer and Share Offer without the ASIC Relief i.e. the Naked Offer. On that basis, MP Global would be entitled under the provisions of the Act to acquire Old Shares in Anaconda under its Share Offer and exercise sufficient Rights to maintain its percentage holding in the fully diluted capital of Anaconda. The Panel recognised that this would be much less certain for MP Global, although potentially achieving the same result and effect. To go via this route, MP Global would have to decide at the close of the Rights Issue on 14 February, how many Rights it would be entitled to exercise, based on what percentage of the Old Shares in Anaconda it had received acceptances for at that date. In contrast, under the relief, MP Global would be entitled to exercise all Rights it received under the Rights Offer. The Panel expressed no views on such a course of action.

DECISION

Decision

173. The decision of the Anaconda 02-05 Panel was as follows:
- a) to revoke the ASIC Relief provided to MP Global, on the basis that MP Global's Rights Offer and Share Offer were discriminatory against Glencore;
 - b) to make an interim order requiring MP Global to advise the market of its intentions with respect to the Independent Expert Condition by 6.00 p.m. on Monday 10 February 2003;
 - c) to decline the other aspects of the applications.
174. The Panel consented to the parties being represented by their commercial solicitors. It made no order for costs.

Brett Heading
Sitting President
Anaconda 02-05 Proceedings
14 July 2003

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Annexure A - Declarations and Orders Requested in Anaconda 01-05

Anaconda 01 - MP Global

1. MP Global sought interim orders to restrain Glencore and its associates from acquiring a relevant interest in any Anaconda Rights, other than:
 - a) in respect of any Anaconda Rights attaching to Glencore's shareholding in Anaconda as at the record date under the Rights Issue;
 - b) with the prior consent of the Panel; or
 - c) under an off-market offer to acquire all of the Anaconda Rights (other than Anaconda Rights attaching to Glencore's shareholding in Anaconda as at the record date) made on the same terms to each holder of Anaconda Rights, which was made in conjunction with an offer to acquire all of the Anaconda Shares.

Anaconda 02 - Metal Holdings

1. Metal Holdings sought a declaration that entering into of the Underwriting Agreement and the Underwriting of the Rights Issue by Glencore constitutes *unacceptable circumstances* under Section 657A of the Act and should not be permitted
2. Metal Holdings sought orders that:
 - a) Glencore not be permitted to Underwrite the Rights Issue pursuant to the Underwriting Agreement without the prior approval of the Anaconda shareholders in accordance with the requirements of Chapter 2E and Section 611 of the Act;
 - b) No shares be issued to Glencore under the Rights Issue until the matters the subject of this Application have been considered by the Panel; and
 - c) Glencore not be permitted to acquire any *Rights* under the Rights Issue other than:
 - (i) *Rights* attaching to Glencore's shareholding in Anaconda as at the *record date* shown in the Prospectus;
 - (ii) Pursuant to an off-market offer to acquire all of the *Rights* (other than those referred to in paragraph (a) above) made on the same terms to each holder of *Rights* which is made in conjunction with an offer to acquire all Anaconda shares; or
 - (iii) with the prior consent of the Panel.

Anaconda 03 - MP Global

1. MP Global applied for a declaration under section 657A of the Act that the following circumstances (or one or more of the following circumstances) constituted unacceptable circumstances in relation to the affairs of Anaconda:

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- a) the terms of the Rights Issue;
 - b) the underwriting arrangements with Glencore in relation to the Anaconda Right Issue;
 - c) the likely effect of the Anaconda Rights Issue and Underwriting Arrangements on control of Anaconda in the event that the MP Global Offers did not become unconditional;
 - d) the effect of the Anaconda Rights Issue and Underwriting Arrangements on Anaconda's response to the MP Global Bid;
 - e) Anaconda's refusal to give an independent expert (of its own choosing) access to the Murrin Murrin Project so as to enable the satisfaction of the Independent Expert Condition;
 - f) Anaconda's refusal to accept the compromise offered on behalf of Mongoose (**Compromise**) in paragraph 1.4 of the letter by Blake Dawson Waldron to Clayton Utz Lawyers dated 28 January 2003 (**BDW Letter**);
 - g) Anaconda's refusal to agree to the Compromise without an unqualified commitment by Mongoose to ensure the ongoing solvency of Anaconda (as opposed to the commitment offered on page 3 of the BDW Letter) and Anaconda's insistence that Mongoose take on certain roles and obligations currently the responsibility of Glencore, as underwriter;
 - h) Anaconda's failure to offer any reasonable alternative to the Compromise so as to redress the effects of the Anaconda Rights Issue and Underwriting Arrangements on the market for control of Anaconda and avoid the frustration of the MP Global Bid;
 - i) Anaconda's failure to be even-handed between MP Global and Glencore (as competing bidders for control of Anaconda);
 - j) Anaconda's refusal to allow MP Global to have access to information (or the opportunity to obtain information) available to Glencore
2. In the event that the Panel made a declaration of unacceptable circumstances in relation to any one or more of the circumstances referred to in paragraph 1, MP Global sought final orders that:
- a) Anaconda be required to:
 - (i) give an independent expert (of its own choosing) access to the Murrin Murrin Project so as to enable the satisfaction of the Independent Expert Condition; or
 - (ii) agree to the Compromise.
 - b) Glencore be required to give any consent that may be required to permit Anaconda to:

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- (i) give an independent expert access to the Murrin Murrin Project and all relevant information relating to it, so as to enable the satisfaction of the Independent Expert Condition; or
- (ii) agree to the Compromise.

Anaconda 04 - Glencore

Review of ASIC decision to grant relief

1. Glencore applied under section 656A of the Act for a review of ASIC's decision under section 655A of the Act.

Interim order to restrain dispatch

2. Glencore also applied under sections 657C and 657E of the Act for an interim order to restrain MP Global from dispatching offers under the Rights Offer and the Share Offer until the Panel:
 - a) determined Glencore's application under section 656A of the Act for review of ASIC's decision to grant MP Global an exemption from section 606 of the Act; and
 - b) determined Glencore's application for a declaration of unacceptable circumstances and consequential orders.

Declaration of unacceptable circumstances

3. Glencore also applied for a declaration of unacceptable circumstances under section 657A of the Act in relation to the structure of both the Rights Offer and the Share Offer.

Orders following declaration

4. Glencore sought the following orders if the Panel made a declaration of unacceptable circumstances:
 - a) that MP Global be restrained from dispatching to Anaconda shareholders or Rights holders any offer documents under the Rights Offer and the Share Offer;
 - b) in the alternative to (a), or if MP Global had already despatched offer documents under the Rights Offer, that:
 - (i) MP Global be restrained from proceeding with the Rights Offer;
 - (ii) any agreement formed by acceptance of the Rights Offer be cancelled; and
 - (iii) MP Global refund within 2 business days any consideration received from Anaconda shareholders or Rights holders under the Rights Offer; and
 - c) in the alternative to (a) and (b), that MP Global be restrained from proceeding with the Share Offer and the Rights Offer unless:

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- (i) MP Global undertook to exercise in accordance with the requirements of the Rights Issue all Rights received by MP Global including, but not limited to, any Rights transferred to MP Global by Glencore; and
 - (ii) MP Global undertook to extend the Share Offer to any shares issued pursuant to the Rights Issue, including shares issued to Glencore under the underwriting agreement; and
- d) such further or other orders as the Panel considered appropriate.

Anaconda 05 - Anaconda

1. Anaconda applied for:
 - a) a declaration under section 657A of the Act that the following circumstances (or one or more of the following circumstances) constituted unacceptable circumstances in relation to the affairs of Anaconda:
 - i) the failure by MP Global to give the undertakings requested by Anaconda in the letter by Blake Dawson Waldron to Clayton Utz Lawyers dated 28 January 2003;
 - ii) the making of the Rights Offer on the terms complained of in Anaconda's application;
 - iii) the insufficiency of the disclosure of MP Global's intentions in MP Global's bidder's statement; and
 - iv) the inclusion of the Independent Expert Condition in the Share Offer; and
 - b) interim orders under section 657E of the Act to compel MP Global to announce, as soon as practicable:
 - i) whether or not it intended to rely on the non-satisfaction of the Independent Expert Condition; and
 - ii) that it would exercise all of the Rights that it acquired under the Rights Offer or otherwise.
2. Anaconda sought final orders under section 657D of the Act to:
 - i) compel MP Global to withdraw the Rights Offer and extend the Share Offer to all Anaconda shares on issue after the completion of the Rights Issue;
 - ii) compel MP Global to waive the Independent Expert Condition; and
 - iii) require MP Global to prepare and dispatch a supplementary bidder's statement which satisfied Anaconda's concerns with the extent of the disclosure of MP Global's intentions.

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Annexure B - ASIC Relief Instrument

Australian Securities and Investments Commission

Corporations Act 2001 - Paragraph 655A(1)(a) -Exemption

Pursuant to paragraph 655A(1)(a) of the Corporations Act 2001 ("Act"), the Australian Securities and Investments Commission ("ASIC") exempts the person specified in Schedule A from subsection 606(1) of the Act in the case referred to in Schedule B on the conditions set out in Schedule C.

Schedule A

Mongoose Pty Limited ACN 103 410 297 ("Mongoose") and its associates.

Schedule B

Acquisitions of fully paid ordinary shares in Anaconda Nickel Limited ACN 060 370 783 ("Anaconda") resulting from the exercise of renounceable rights to acquire fully paid ordinary shares in Anaconda ("Rights"), which Rights were acquired pursuant to an offer in respect of which an offer document ("Offer Document") was given to Anaconda and the Australian Stock Exchange ("ASX") on or about the date of this instrument ("Rights Offer"), and where Mongoose also makes a takeover bid for all the issued fully paid ordinary shares of Anaconda ("Share Offer") at the same time as, or as soon as practicable after, the Rights Offer is made.

Schedule C

The terms and conditions of the Rights Offer, the information provided to Rights Holders, the procedure followed in making the Rights Offer and the conduct of Mongoose in respect of the Rights Offer shall comply as far as practicable with Chapters 6 and 6C of the Act as if the offer were an off-market takeover bid, and in particular:

1. Mongoose must, as far as practicable, afford all Rights Holders a reasonable and equal opportunity to participate in any benefits accruing to the Rights Holders through the Rights Offer.
2. The Offer Document must provide all information that is material to the making of a decision by a Rights Holder whether or not to accept an offer under the Rights Offer.
3. The Rights Offer must remain open for at least 14 days, but end on the day before the last day on which the Rights are exercisable.
4. Mongoose must conduct the Rights as if sections 621 and 623 of the Act applied.
5. Any increase in consideration offered or paid to any rights Holder in respect of Rights, either under the Rights Offer or otherwise must be offered to all Rights Holders.
6. The Rights Offer must include a term under which an accepting Rights Holder may indicate at the time of acceptance whether, if the Rights Offer does not proceed, he or she wishes to exercise all or a proportion of the Rights the subject of the acceptance and make payment for the exercise of those Rights and, if such an election is made, payment for exercise of the relevant **Rights** is received by Mongoose and the Rights Offer does not proceed, Mongoose must exercise the Rights on behalf of the relevant Rights Holder.

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7. The Offer Document must clearly and prominently disclose that, if the offer is accepted, the accepting Rights Holder loses the right to trade the Rights on the ASX.
8. Mongoose must give substantial holding information as if Part 6C.1 of the Act applied to its holdings of Rights.
9. The Offer Document must set out Mongoose’s intentions in relation to the exercise of Rights it acquires.
10. The Rights Offer must be conditional on the Share Offer first becoming unconditional.
11. The Offer Document must disclose that Mongoose has received this relief from ASIC and provide a brief description of the terms of the relief.

Dated this 29th day of January 2003.

Signed by:

Jeremy Pearson as a delegate of ASIC.

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Annexure C - Definitions used in the Anaconda 02 to 05 Reasons

Defined Term	Location Of Definition
Act	Paragraph 1(a)
Anaconda	Paragraph 1
Anglo	Paragraph 32
Anglo Agreement	Paragraph 32
ANH	Footnote 3
ANH/MMH Schemes	Paragraph 11
Applications	Paragraph 1
ASIC	Paragraph 1(c)(i)
ASIC Relief	Paragraph 31
BDW Letter	Paragraph 1(f) under the heading 'Anaconda 03 - MP Global' in Annexure A
Compromise	Paragraph 1(f) under the heading 'Anaconda 03 - MP Global' in Annexure A
Fluor	Paragraph 8
Frustrating Actions Guidance	Paragraph 84
Glencore	Paragraph 1(c)
Glencore Nickel	Paragraph 12
Glencore Nickel/Glenmurrin Schemes	Paragraph 12
Glenmurrin	Paragraph 7
Independent Expert Condition	Paragraph 82
Metal Holdings	Paragraph 1(a)
Mongoose	Footnote 1
MMH	Footnote 3
Murrin Murrin Project	Paragraph 7
MP Global	Paragraph 1(b)
MP Global Offers	Paragraph 1(c)(iii)
Naked Offer	Paragraph 121
New Shares	Paragraph 1(c)(i)
Old Shares	Paragraph 1(c)(i)
Panel	Paragraph 2

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Rights	Paragraph 1(c)(i)
Rights Issue	Footnote 2
Rights Issue Prospectus	Footnote 2
Rights Offer	Paragraph 1(c)(i)
Rights Offer Document	Paragraph 1(c)(ii)
Rising Tide Principle	Paragraph 122
Schemes	Paragraph 13
Share Offer	Paragraph 1(c)(i)
Shares	Paragraph 79
Sherritt	Paragraph 8
Underwriting Arrangements	Paragraph 21
Underwriting Agreement	Paragraph 33