



**In the matter of Anaconda Nickel Limited 06-07
[2003] ATP 06**

Catchwords:

Review of Panel decision – conditional offer for shares and rights – underwritten rights issue – independent expert condition – ASIC relief condition – announcement of attitude to triggered condition – market uncertainty

Corporations Act 2001 (Cth), sections 624(2), 629, 630 and 650F

These are the Review Panel's Reasons for:

- i. affirming the decision of the Anaconda 02-05 Panel to make an interim order requiring MP Global to advise the market of its intentions concerning the Independent Expert Condition in its Rights Offer and Share Offer; and**
 - ii. requiring MP Global to make a similar announcement to the market concerning the ASIC Relief Condition in its Rights Offer and Share Offer.**
1. These reasons relate to two applications made on 06 February 2003 in relation to the affairs of Anaconda Nickel Limited (**Anaconda**). The applications (the **Applications**) were:
 - a) **Anaconda 06:** an application sent at 5.51 p.m. on 06 February 2003 from MatlinPatterson Global Opportunities Partners LP (**MP Global**) under sections 657EA of the *Corporations Act 2001 (Cth)* (**Act**) seeking a review of the decision by the Anaconda 02-05 Panel to make an interim order (**Interim Order**) requiring MP Global to advise the market of its intentions concerning the Independent Expert Condition in its Rights Offer and Share Offer;
 - b) **Anaconda 07:** an application sent at 7.35 p.m. on 06 February 2003 from Anaconda under sections 657EA of the Act, similarly seeking a review of the decision by the Anaconda 02-05 Panel to make the Interim Order. Anaconda sought that the time be brought forward, and the Interim Order extended to the ASIC Relief Condition (see the definition of this term in paragraph 16 of these reasons) in the MP Global Offers.

The Panel & Process

2. The President of the Panel appointed Simon McKeon (sitting President), David Gonski (sitting Deputy President) and Ian Ramsay as the sitting Panel for the two review applications (the **Panel**).
3. The Panel met in the late afternoon of 06 February 2003 to consider the **Anaconda 06** Application. The Panel decided to conduct proceedings in

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relation to the application and therefore issued a brief under Regulation 20 of the ASIC Regulations. At 6.45 p.m. that evening it advised parties of MP Global's application and gave them until 12 noon the next day to provide submissions and 2.00 p.m. that same day to provide rebuttal submissions. The Panel then met at 3.00 p.m. on 07 February 2003 to determine the application.

4. The Panel met in the evening of 06 February to consider the **Anaconda 07** application. The orders Anaconda sought would require MP Global to make an announcement by 9.00 a.m. the next morning. The Panel decided that it could not make an informed and considered decision given the time available and the small amount of information on the matter which it could feasibly consider in that time. The Panel therefore decided not to commence proceedings in relation to the Anaconda 07 application.

Definitions

5. Unless indicated to the contrary, terms used in these reasons have the same meaning as in the Panel's reasons for decision in the Anaconda 02 to 05 applications. A copy of the Anaconda 02 to 05 reasons can be found at <http://www.takeovers.gov.au/Content/Decisions/2003/anaconda02-05.asp>. Annexure C of those reasons sets out a glossary of the terms defined in the reasons.

SUMMARY

Decision

6. The Panel decided :
 - a) to affirm the Anaconda 02-05 Panel's decision to require MP Global to advise the market by 6.00 p.m. (Melbourne time) Monday, 10 February 2003, of the status of the Independent Expert Condition in its offers and whether or not MP Global would waive the condition or rely on the defeating condition having been triggered; and
 - b) to require MP Global to make similar disclosure in relation to the ASIC Relief Condition in the MP Global Offers.

Background

7. The Anaconda 02-05 Panel's reasons set out a brief summary of some aspects of the background, taken from various application documents. The Panel has also 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 documents are titled 'Anaconda Nickel Limited 02 to 05' and 'Anaconda Nickel Limited – Chronology of Applications'. They are available at:
<http://www.takeovers.gov.au/Content/Decisions/2003/anaconda02-05.asp>
http://www.takeovers.gov.au/Content/Decisions/2003/ANL_chronology.asp

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Rights Issue

8. On 25 September 2002 Anaconda announced a 14 for 1 renounceable rights issue at an issue price of five cents per share to raise a total of approximately \$323 million (**Rights Issue**). The Rights Issue was to fund a compromise with Anaconda's¹ creditors and to provide Anaconda with sufficient working capital to bring the Murrin-Murrin Project into profitability. Glencore, which owned 34% of Anaconda's Old Shares, had agreed to underwrite the Rights Issue fully for no fee (**Underwriting Arrangements**).

MP Global Offers

9. On 21 January 2003, MP Global had announced that it proposed to make the following offers:
 - a) **Share Offer** - an off-market bid under Chapter 6 of the Act for all of the Old Shares; and
 - b) **Rights Offer**- an unregulated off-market offer to acquire all of the Rights issued under the Rights Issue. The Rights Offer was not regulated by Chapter 6 of the Act because the Rights were not securities for the purposes of Chapter 6.
10. The Share Offer was conditional on (amongst other things) MP Global being entitled to acquire (or subscribe for) not less than 51% of Anaconda's diluted capital. The Rights Offer was conditional on the conditions of the Share Offer being satisfied or waived before the last day of the offer period under the Rights Issue (the Rights Issue closed on Friday 14 February 2003).

Independent Expert Condition

11. The Share Offer (and therefore the Rights Offer) was conditional on:
 - a) an expert (of Anaconda's choosing if it wished) being provided with access to information, Anaconda's staff and the Murrin Murrin Project by no later than **24 January 2003** to verify various public statements made by Anaconda and its management about the Murrin-Murrin Project's capacity and operating performance; and
 - b) based on those investigations, that expert confirming to MP Global certain matters by no later than **13 February 2003 (Independent Expert Condition)**.
12. The Murrin Murrin Project had had a troubled life up to that point, missing many of its management's projected milestones and performance levels, and MP Global said that such confirmations were necessary given the problems of the past.

¹ The creditors were actually creditors of two of Anaconda's subsidiaries Anaconda Nickel Holdings Pty Ltd (**ANH**) and Murrin Murrin Holdings Pty Ltd (**MMH**).

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13. By the time of the Anaconda 02-05 and the Anaconda 06-07 applications, the first deadline had passed, and there was real doubt as to whether an expert could assimilate all of the information required to give the required confirmations in the time left before the Rights Offer and Rights Issue closed.
14. By that time Anaconda had also stated publicly that it would not grant the access requested. It eventuated that Anaconda was unable to grant such access because the 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.
15. Eventually MP Global decided to waive the condition, but that was after the determination of the Anaconda 02-05 and Anaconda 06-07 matters.

ASIC Relief Condition

16. The Share Offer was also conditional on ASIC granting relief to MP Global to allow MP Global to acquire all of the shares in Anaconda issued on conversion of Rights (**New Shares**) that MP Global acquired under the Rights Offer (**ASIC Relief Condition**).
17. ASIC granted conditional relief to MP Global (**ASIC Relief**) on 29 January 2003. 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 A.

Dates

18. The main dates 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
Rights Offer to close ²	13 February 2003
Rights Issue to close	14 February 2003
Last day for Anaconda target's statement	19 February 2003
Allot/issue shares and dispatch holding statements	25 & 26 February 2003
Payment to Scheme Administrator for distribution to MMH and ANH Secured Creditors ³	26 February 2003

² Subject to change, but only in accordance with ASX Listing Rules.

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Scheme Administrator makes payments to
MMH and ANH Secured Creditors

28 February 2003

Share Offer to close

06 March 2003

Anaconda 02-05 Decision

19. In the Media Release announcing its decision, the Anaconda 02-05 Panel said:

“The Panel has made an interim order directing MP Global to advise the market by 6.00 p.m. AEST Monday, 10 February 2003, the status of the condition and whether it will waive the condition or not. Given the timing issues in the Rights Offer the Panel considers its requirement of MP Global now is 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 Corporations Act.”

20. A copy of the Anaconda 02-05 Panel’s interim order is at Annexure B.

21. To place the Anaconda 02-05 Panel’s interim order decision in context, at the time the Anaconda 02-05 Panel made its decision on Thursday 06 February 2003:

- a) trading in the Rights on ASX was due to close the next day;
- b) the Rights Offer was due to close one week later;
- c) the Rights Issue was due to close one week and a day later;
- d) control of Anaconda was very uncertain;
- e) the Anaconda 02-05 Panel had just revoked the ASIC Relief;
- f) Anaconda had publicly stated it would not grant the access requested by MP Global under the Independent Expert Condition.

APPLICATIONS

Anaconda 06

22. In Anaconda 06 MP Global requested the Panel to:

- a) make a further interim order extending the time MP Global had to make the announcement referred to in the Interim Order until the review application was determined.
- b) announce that any person wishing to object to MP Global proceeding with its Rights Offer and Share Offer without ASIC relief should apply to the Panel before 12 noon AEST on Friday 7 February 2003.

³ Subject to satisfaction of all conditions precedent to the Schemes.

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- c) vary the Interim Order by substituting the date "Thursday, 13 February 2003" for "Monday, 10 February 2003".

Anaconda 07

23. In the Anaconda 07 application, Anaconda requested the Panel to vary the Interim Order by:
 - a) substituting the time and date "9.00am Friday, 7 February 2003" for "6.00pm AEST Monday, 10 February 2003"; and
 - b) extending the Interim Order to include the status of the "ASIC Relief Condition" (see section 7.6(b)(i) of the Bidder's Statement) and whether MP Global will waive the ASIC Relief Condition or not (in all respects in addition to MP Global's obligations relating to the Independent Expert Condition).

SUBMISSIONS AND DISCUSSION

24. The Panel received submissions from MP Global, ASIC, Anaconda and Glencore.

The Independent Expert Condition had been Triggered

25. It was generally conceded that the Independent Expert Condition had been triggered, in its published form, by the time of the Anaconda 06-07 applications. On that basis, there was a reasonable basis for saying that MP Global should have made up its mind as to whether or not it would rely on the Independent Expert Condition. MP Global argued that because Anaconda (at the insistence of the Glencore subsidiaries) had not given any expert the access required to give the confirmations required under the conditions, it was forced to try to assess the risks externally, and that it was reasonable, and in the best interests of Anaconda shareholders, for it to be given as much time as possible to gather any information which it might be able to decide if it might continue its offers without the benefit or assurance of the Independent Expert Condition.
26. MP Global argued that if it was forced to decide precipitately it would likely decide to rely on the Independent Expert Condition, to the detriment of the opportunity to Anaconda shareholders.

Close of Rights Trading

27. All but MP Global asserted that it was preferable that MP Global should declare the status of the Independent Expert Condition before the close of the Rights trading on ASX. However, although ideally desirable, that was unlikely to occur, as the Rights trading was due to close the next day. The Panel considered it was not feasible to give the parties a reasonable opportunity to consider the applications and make submissions, and give the information to Anaconda shareholders, in the time remaining until the trading period for the Rights would close.

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Market Circumstances

28. On the basis of information which was available to the Panel concerning the level of on-market trading in the Rights, there did not appear to be material trading volume which would be adversely affected by not knowing MP Global's position on the two relevant conditions prior to ASX trading closing.

Last Week of Bid – Sections 630 and 650F

29. Under sections 630 and 650F of the Act, a bidder may not waive or vary a defeating condition in a takeover bid during the last week of the bid. Anaconda and Glencore asserted that MP Global should be held to a similar timetable in respect of the Rights Offer.
30. However, the Rights Issue and therefore the Rights Offer periods were a lot shorter than a normal takeover bid. Like the Anaconda 02-05 Panel, the Panel did not consider that it was appropriate to apply the time limits of a Chapter 6 offer to the Rights Offer. However, it agreed with the submissions and the Anaconda 02-05 Panel that it was desirable to give Anaconda shareholders and rights holders the maximum amount of time and certainty possible.
31. ASIC acknowledged that under the terms of its relief, MP Global would not be required to determine the status of the conditions in its Rights Offer until the day before the close of the Rights Issue. On that basis, it conceded that the period set in sections 630 and 650F of the Act were inappropriate to apply to the Rights Offer.

Crossing 50% - section 624(2)

32. Glencore argued, not unreasonably, that the Rights Offer was the real determinant of whether MP Global would gain control of Anaconda. It argued that the Act allows at least a week, if not two, for target shareholders to consider an offer if the bidder achieves more than 50% of the voting power in the target⁴. It used this argument to say that the period proposed by the Anaconda 02-05 Panel for MP Global to determine whether or not to waive the Independent Expert Condition left inadequate time for Anaconda shareholders to consider the result, but the period proposed by MP Global was very much worse and would have left Anaconda shareholders an unreasonably short period.
33. The Panel acknowledged Glencore's arguments but considered that the time period imposed by the Rights Issue and Rights Offer, and the amount of time left until their expiry dates meant it was infeasible to apply normal takeover bid time periods to the Rights Offer.

⁴ If the bidder's voting power in the target increases to more than 50% in the last week of the offer period, the bid is automatically extended by two weeks, under section 624(2). If the bidder's voting power increases to more than 50% immediately before that period, Target shareholders will have at least one full week to consider the offer in the knowledge that the bidder has, if it wishes, control of the target.

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Subjective Condition – Section 629

34. ASIC and Glencore submitted that the fact that the terms of the Independent Expert Condition and the ASIC Relief Condition had been breached allowed MP Global a defeating condition which depended on the bidder's opinion, belief, or other state of mind.
35. The Panel does not accept that a triggered condition is identical to a condition whose terms would be voided by section 629 of the Act. However, it accepts that there is a very close policy analogy. On that basis it agreed with ASIC's submissions that in the circumstances of the Anaconda 06-07 proceedings, not to require MP Global to declare its reliance on the conditions would allow MP Global to maintain an option whether or not to proceed with its bid, and shareholders would be exposed to increased risk that the bid would not proceed.
36. The Panel does not consider that this argument applies equally to all bidders and all conditions. In many circumstances a condition may be triggered more than once during a bid, in which case it would likely be unreasonable to require the bidder to decide whether or not it would rely on the condition being triggered while there was still a chance that the condition might be triggered again in more or less commercially significant ways or circumstances.
37. Similarly, the Panel is not adopting a policy position that bidders must declare their position on one-off conditions (i.e. conditions that can be determined with certainty prior to the close of the bid) at the first date at which the condition can be determined.
38. However, given the time pressures of the Rights Issue and the Rights Offer, and the analogy with the policy in sections 630 and 650F, the Panel considered it would be appropriate, and reasonable, to require MP Global to disclose to the market, by the time determined by the Anaconda 02-05 Panel, whether or not it would rely on the breach of the Independent Expert Condition.

Market Uncertainty

39. 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. ASIC submitted, and the Panel agreed, that this meant that a defeating condition of MP Global's offers had been triggered. The Panel considered that in the interests of an efficient competitive and informed market, given the short period of time remaining until the close of the Rights Offer, 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.

ASIC Relief Condition

40. Anaconda had raised the issue of the ASIC Relief Condition in its application (Anaconda 07). Although the Panel declined to commence proceedings in

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relation to the Anaconda 07 application, it considered that the issue raised by Anaconda was valid. It would do little to relieve the uncertainty for Anaconda shareholders to require MP Global to declare its position on the Independent Expert Condition while still allowing the ASIC Relief Condition to remain as a triggered condition at MP Global's discretion to rely on.

41. On that basis, the Panel decided it would be appropriate to require MP Global to make a similar announcement to the market concerning its reliance on the ASIC Relief Condition as the Anaconda 02-05 Panel had required in respect to the Independent Expert Condition.

MP Global's ability to discover more information

42. MP Global sought either an extension of the time to make its decision on the Independent Expert Condition until midnight on Thursday 13 February, 2003, or, in the alternative, 10.00 a.m. Tuesday 11 February 2003. It argued that it was in the best interests of Anaconda shareholders for the MP Global offers to have the maximum possibility of going forward and that the alternatives for Anaconda shareholders would be reduced materially if MP Global was forced to withdraw its offers.
43. The Panel agreed that Anaconda shareholders were likely to be better off retaining the option of accepting the MP Global offers rather than the Panel requiring MP Global to make a premature decision and state that the condition had been triggered. On that basis, the Panel was prepared to allow MP Global a good deal of leeway to facilitate MP Global affirming its bid if possible, but only to a point. The Panel considered that the later date proposed by MP Global was very unlikely to be acceptable, and MP Global did not present sufficient evidence to demonstrate why the Panel should, in the interests of an efficient, competitive and informed market, vary the decision of the Anaconda 02-05 Panel in regards to the timing of the public announcement.
44. The Panel took into account the fact that Anaconda had announced soon after becoming aware of the Independent Expert Condition that it would not afford MP Global or its expert the access required, and that the condition had technically been triggered since 24 January 2003 given that the Independent Expert Condition provided that the expert must commence work by the day two days after MP Global's bidder's statement (which was dated 22 January 2003).

DECISION

45. The Panel decided :
 - a) to affirm the Anaconda 02-05 Panel's decision to require to require MP Global to advise the market by 6.00 p.m. AEST Monday, 10 February 2003, the status of the Independent Expert Condition and whether it would waive the condition or not; and

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- b) to require MP Global to make similar disclosure in relation to the ASIC Relief Condition.
46. The Panel consented to the parties being represented by their commercial solicitors and made no costs orders.

Simon McKeon
President, Anaconda 06-07 Panels
Anaconda 06-07 Proceedings
14 June 2003



Annexure A
ASIC Relief Instrument - Revoked Under Anaconda 04 Proceedings

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.

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ASIC Instrument - Anaconda 04

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.
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.



**Annexure B
Interim Order of the Anaconda 02 to 05 Panel**

**Takeovers Panel
Corporations Act 2001
Section 657E
Interim Order**

Pursuant to section 657E of the Corporations Act, the Takeovers Panel hereby makes the following interim orders in relation to the affairs of Anaconda Nickel Limited (*ANL*).

- a) Mongoose Pty Limited (**MPL**), a wholly owned subsidiary of MatlinPatterson Global Opportunities Partners LP, must cause an announcement to be made on the Company Announcements Platform operated by Australian Stock Exchange Limited by no later than 6.00pm (Melbourne time) on 10 February 2003 as to whether the condition (the **Expert Condition**) set out in section 7.6(b)(iii) of MPL's Bidder's Statement relating to its offer to acquire all of the ordinary shares in ANL has been satisfied.
- b) The announcement must state that the Expert Condition is relevant to the offers made by MPL under both the Bidder's Statement and MPL's Rights Offer Document relating to the MPL's offer to acquire all of the renounceable rights in ANL.
- c) If the Expert Condition has not been satisfied prior to the time that MPL makes the announcement required by paragraph (a) of this interim order, the announcement must state whether MPL waives, or will waive, as a defeating condition the satisfaction of the Expert Condition.

This interim order has effect until 13 February 2003.

Dated 7 February 2003

For and on behalf of
Brett Heading
Sitting President
Anaconda 02 - 05 Proceedings