



**In the matter of Anaconda Nickel Limited 09
[2003] ATP 08**

Catchwords:

Review of Panel decision – conditional offer for shares and rights – underwritten rights issue – competing principles – discriminatory bids – efficient, competitive and informed market – risk for an underwriter – failure to protect from discrimination

Corporations Act 2001 (Cth), sections 602, 606, item 3 section 611 and 617

These are the Panel's Reasons for declining the application by Glencore for a review of the decision by the Anaconda 08 Panel to decline to make a declaration of unacceptable circumstances in relation to the affairs of Anaconda. Glencore requested the Review Panel to make the same declaration that it had requested of the Anaconda 08 Panel i.e. that MP Global's refusal to:

- a) **extend the Share Offer to the shares to be issued under the Rights Issue; and**
- b) **exercise under the Rights Issue, at a minimum, sufficient of the Anaconda rights it holds to maintain its percentage voting power in Anaconda at the level it has immediately before the close of the Rights Issue;**

constituted unacceptable circumstances.

1. These reasons relate to the application made at 10.22 a.m. on Tuesday 11 February 2003 in relation to the affairs of Anaconda Nickel Limited (**Anaconda**).

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 review application (the **Panel**).
3. The sitting President of the Anaconda 08 Panel granted consent under section 657EA of the Act for the application for review to proceed. The Panel met in the late morning of Tuesday 11 February 2003 to consider the **Anaconda 09** application.
4. The Panel decided to conduct proceedings in relation to the application. The Panel decided that given the time pressures of the application in relation to the offers and the Rights Issue it should treat the application as setting out the issues for submissions by the parties. It therefore advised the parties that they should treat the application as the Panel's brief issued under Regulation 20 of the ASIC Regulations. The Panel gave parties until 5.00 p.m. on 11 February to provide submissions and 6.00 p.m. that same day to provide rebuttal submissions. The Panel then met at 7.00 p.m. to determine the application.

Takeovers Panel

Reasons for Decision – [Anaconda Nickel Limited 09]

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 and Anaconda 08 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. A copy of the Anaconda 08 reasons can be found at <http://www.takeovers.gov.au/Content/Decisions/2003/anaconda08.asp>.

SUMMARY

6. The Panel decided to decline Glencore's application and affirmed the Anaconda 08 decision.
7. However, although the Panel came to broadly the same outcome as the Anaconda 08 Panel, the two Panels arrived at their decisions by different policy and reasoning paths.
8. The Panel did not consider that the MP Global Rights Offer and Share Offer (**MP Global Offers**) together could be discriminatory against Glencore¹. Therefore the Panel did not consider it necessary to ameliorate any potential effects on Glencore of MP Global's Offers, and it did not consider that the undertaking given to the Anaconda 08 Panel by MP Global that it would exercise all of its rights up to 65% of the diluted capital of Anaconda was required.
9. The Panel continued MP Global's undertaking to conduct the Rights Offer as if the conditions of the original ASIC Relief still applied.

APPLICATION

Background

10. The Anaconda 02-05 Panel's reasons set out a brief summary of some aspects of the background, taken from various application documents. The Anaconda 08 Panel's reasons set out the facts surrounding this application. 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', 'Anaconda Nickel Limited 08' 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/anaconda08.asp>

http://www.takeovers.gov.au/Content/Decisions/2003/ANL_chronology.asp

¹ See the Anaconda 02-05 reasons for a discussion of why the MP Global Offers might be discriminatory against Glencore.

Takeovers Panel

Reasons for Decision – [Anaconda Nickel Limited 09]

Anaconda 08 Decision

11. The Anaconda 08 Panel declined Glencore's application. Although the Anaconda 08 Panel still considered that the MP Global Offers together could be discriminatory against Glencore, it considered that as Glencore had declined the Anaconda 08 Panel's offer to protect itself Glencore no longer had a basis to assert that it was in the public interest for the Panel to make a declaration that unacceptable circumstances existed.
12. The Anaconda 08 Panel had invited Glencore to make an offer to all Anaconda shareholders to acquire their Shares at \$0.06 per share (including both Old Shares² and New Shares³). The Anaconda 08 Panel had advised Glencore that if Glencore agreed to make such an offer, the Anaconda 08 Panel would only allow the MP Global Offers to proceed if MP Global undertook to make an offer for all New Shares. The Anaconda 08 Panel considered that this would put Glencore and MP Global on an equal footing. Glencore declined the invitation.
13. The Anaconda 08 Panel accepted undertakings volunteered by MP Global during the course of the proceedings, that it would:
 - a) exercise as many Rights as it was legally entitled, up to a maximum of 65% of the Rights; and
 - b) ensure that the Rights Offer complied, as far as practicable, with the conditions set out in the original ASIC Relief.
14. The Panel considered that the circumstances of the MP Global Offers are unlikely to be repeated in the future, so the precedent value of this decision will be small.

APPLICATION

Declaration requested

15. Glencore applied for the same declaration that it requested of the Anaconda 08 Panel i.e. a declaration that MP Global's refusal to:
 - a) extend the Share Offer to the shares to be issued under the Rights Issue; and
 - b) exercise under the Rights Issue, at a minimum, sufficient of the Anaconda rights it holds to maintain its percentage voting power in Anaconda at the level it has immediately before the close of the Rights Issue;constituted unacceptable circumstances.

Orders requested

16. Glencore requested that the Panel make the same final orders that it had requested of the Anaconda 08 Panel i.e.:

² **Old Shares** are the 461,502,243 shares on issue at the time of MP Global's Share Offer and before the Rights Issue.

³ **New Shares** are the 6,461,031,402 shares issued on 21 February under the 14 for 1 Rights Issue.

Takeovers Panel

Reasons for Decision - [Anaconda Nickel Limited 09]

- a) that MP Global either be required to withdraw, or be restrained from proceeding with, the Share Offer and the Rights Offer unless MP Global undertook and announced to ASX that:
 - i) MP Global would extend its Share Offer to all Anaconda shares issued under the Rights Issue, at a price to be determined after submissions had been received from all relevant parties; and
 - ii) if all conditions to the Rights Offer were fulfilled and/or waived, MP Global would exercise that number of rights that it acquired or received, whether as acceptances under the Rights Offer or otherwise (including, but not limited to, all rights it received from Glencore) at any time prior to 8 pm on 14 February 2003 (**Rights Issue Closing Time**) as would maintain MP Global's percentage voting power (as defined in the Act) in Anaconda at the same level immediately after the issue of all shares under the Rights Issue (including all shares issued under the Underwriting Arrangements relating to the Rights Issue) as the level immediately before the Rights Issue Closing Time; and
- b) such further or other orders as the Panel considered appropriate, including orders to enable MP Global's bids to be varied so as to proceed on the basis described above.

Submissions

17. The Panel received submissions from MP Global, ASIC, Anaconda and Glencore. Most parties largely repeated, or referred to, their earlier submissions in the Anaconda 08 proceedings (which, given the time limits, and the very similar nature of the application was perfectly sensible).

Glencore Submissions

18. Glencore submitted that the Anaconda 08 Panel was correct in finding that the MP Global Offers were discriminatory. However, it said that the Anaconda 08 Panel's condition for imposing any restriction on MP Global, i.e. that Glencore undertake to make the Glencore Bid, was extraordinary and inconsistent with the policy and history of takeovers regulation in Australia. It said that it was "even more extraordinary for the Panel to dictate the commercial terms of the 'acceptable takeover bid'".
19. Glencore asserted that the Anaconda 08 Panel had erred in trying to keep the "egregiously non-complying MP Global Offers" alive at any price.
20. Glencore repeated its assertions that MP Global was only making a partial bid for Anaconda and that the law required MP Global to bid for all of the Old Shares and also for all of the New Shares, not just all of the Rights, and that on this basis the Panel should not allow the MP Global Offers to proceed, or require MP Global to offer for all of the New Shares.
21. Glencore also repeated its assertions that the policy underlying section 617 was only applicable for issues of convertible securities in small proportions, not for issues of the magnitude of the 14 for 1 Rights Issue of Anaconda.

Takeovers Panel

Reasons for Decision - [Anaconda Nickel Limited 09]

22. Glencore also asserted that despite Glencore being issued the New Shares after the MP Global offers had commenced, MP Global should be required to extend its Share Offer to the New Shares Glencore acquired as underwriter.
23. Glencore asserted that the additional cost to which the Anaconda 08 Panel had required Glencore to expose itself was \$61.064 million, being an increase of 28.57% of Glencore's total exposure to \$274.79 million from \$213.72 million. The Panel considered that Glencore had overestimated and overplayed the increased exposure. Rather, the Panel was of the view that Glencore would only be required to offer for an extra 4.4% of the fully diluted shares in Anaconda (Glencore had already accepted the risk of the entire Rights Issue failing). If Glencore had made such a bid at \$0.06 per Share, the Panel was of the view that Glencore's exposure would have been increased by the following amounts:

- a) \$18,339,176 for the Old Shares currently held by persons other than Glencore;⁴ plus
- b) \$42,791,410 for the New Shares to be issued on exercise of the Rights.⁵

Under the Underwriting Arrangements, Glencore already faced the risk of being required to acquire all of the New Shares (including the New Shares to be issued on exercise of the Rights held by Glencore) at \$0.05. Glencore's maximum exposure under the Underwriting Arrangements was therefore already \$323,051,570.⁶ Making the Glencore Bid would therefore have increased Glencore's maximum exposure to \$384,182,156, an increase of a relatively lower 19%, although still a significant sum.

24. Glencore asserted that the Anaconda 08 Panel had also failed to take into account the fact that the difficulties which arose from and in relation to MP Global's bid arose solely from choices and decisions made by MP Global. Glencore did not mention any difficulties it faced as underwriter arising from its choices in settling the terms of the Underwriting Arrangements.
25. Glencore's main argument was that the MP Global Offers were discriminatory, in that they allowed MP Global the opportunity (if MP Global acquired sufficient Rights (and following the revocation of the ASIC Relief, sufficient Old Shares)) to gain control of Anaconda (i.e. 50.1%) while shedding those Rights it chose not to exercise onto Glencore in its position as underwriter. Glencore argued that it was thus being treated differently to other shareholders, against the principles in section 602(b) of the Act.

⁴ There were a total of 461,502,243 Old Shares on issue at the time of the Rights Issue. Of these Old Shares, 305,652,936 were held by persons other than Glencore. The \$18,339,176 figure was calculated by multiplying the number of Old Shares held by persons other than Glencore by the \$0.06 to be offered for the Old Shares under the Glencore Bid.

⁵ A total of 6,461,031,402 Rights were created under the Rights Issue. Of these Rights, 4,279,141,098 were held by persons other than Glencore. The \$42,791,410 figure was calculated by multiplying the number of Rights held by persons other than Glencore by \$0.01, which was the difference between the \$0.05 that Glencore would have been required to pay for the New Shares issued in relation to these Rights if it acquired them under the Underwriting Arrangements and the \$0.06 to be offered for the New Share under the Glencore Bid.

⁶ The \$323,051,570 figure was calculated by multiplying the 6,461,031,402 Rights in existence by the \$0.05 issue price under the Rights Issue for the New Shares corresponding to those Rights.

Takeovers Panel

Reasons for Decision – [Anaconda Nickel Limited 09]

26. Glencore said, essentially by way of alternative argument, that it constituted unacceptable circumstances that Glencore, as underwriter, would not have the opportunity to sell into MP Global's Share Offer any New Shares Glencore was obliged to take up as underwriter pursuant to its obligations under the Underwriting Arrangements i.e. Glencore's inability to exit.

ASIC's Submissions

27. ASIC did not agree with the Anaconda 08 Panel's view that the MP Global Offers were discriminatory. It said that any 'unfairness' to Glencore arose out of the terms of the Underwriting Arrangements, and not under the terms of the MP Global bids. Glencore could have protected its position in this regard, or taken other action (such as making a bid itself) to improve its position.
28. ASIC said that it did not consider that the undertaking by MP Global to exercise any percentage of the Rights was required. ASIC argued that section 617 of the Act clearly contemplated a bidder bidding for all of the shares on issue in a target and not for any shares which might be issued during the bid on the exercise or conversion of convertible securities.

MP Global Submissions

29. MP Global submitted that the Anaconda 08 Panel had been wrong in deciding that the MP Global Offers were discriminatory. It repeated its view that it was offering all shareholders and rights holders in Anaconda a full offer for all of their securities and its offers were therefore not discriminatory. It submitted again that Glencore's discomfort with the MP Global Offers was a function of its decisions in settling the terms of the Underwriting Arrangements.
30. MP Global also repeated its assertion that it was unacceptable for Glencore to seek to deny Anaconda shareholders the opportunity to accept the MP Global Offers. MP Global said that it had always been open for Glencore to make a higher rival bid, and if it did not want to become a major minority shareholder after agreeing to the Underwriting Arrangements it should make such a higher offer and ensure that it was the controlling shareholding in Anaconda if that was its concern.
31. MP Global sought undertakings from Glencore that it did not know of any basis for Glencore to withdraw from the Underwriting Arrangements, and that Glencore would not seek to withdraw from the Underwriting Arrangements on the basis of any Panel applications or decisions by the Panel. The Panel did not ask for, and Glencore did not give, such undertakings.

DISCUSSION

Competing players

32. The Panel considered that MP Global and Glencore were two large and sophisticated parties competing for control of Anaconda. The Panel looked at its job as being to treat the two "bidders" equally while ensuring that the interests of the smaller shareholders of Anaconda were not materially adversely affected.
33. The Panel considered that if Glencore was not worried about another person, other than itself, gaining control of Anaconda then the Panel would not have received this

Takeovers Panel

Reasons for Decision – [Anaconda Nickel Limited 09]

application. Therefore, it was clear that Glencore was interested in achieving, or remaining in, control of Anaconda. It would be disingenuous to say otherwise, or even not to admit that as a fact.

34. The Panel considered that Glencore had committed to a contract (the Underwriting Arrangements) in which it might be left in a minority position, but it had not considered that possibility when it had settled the terms of the contract, and had always assumed it would remain in control of Anaconda. Glencore had not made that contract subject to no-one else gaining control of Anaconda. The MP Global Offers were evidence of another sophisticated commercial entity taking advantage of the “flaw” in the Underwriting Arrangements.

Market for control of Anaconda

35. The Anaconda 08 Panel considered that under Chapter 6 of the Act the Panel is charged with ensuring that the acquisition of control of voting shares takes place in an efficient, competitive and informed market. The Anaconda 08 Panel did not believe that it would uphold this principle if it merely determined to declare that the Rights Offer constituted unacceptable circumstances and thereby deprived ANL shareholders of the only available offer to acquire their rights and shares in ANL.
36. The Anaconda 08 Panel considered that the Rights Offer and Share Offer were a potentially attractive alternative outcome for Anaconda shareholders compared to the alternative of merely deciding whether or not to subscribe for New Shares or allow their Rights to flow through to Glencore as underwriter. The Anaconda 08 Panel was very reluctant simply to grant Glencore’s application and thus remove from Anaconda shareholders the opportunity to accept the MP Global Offers.
37. The Panel agreed with the Anaconda 08 Panel in this. It was concerned that to impose conditions which would have caused the MP Global Offers to be withdrawn would leave Anaconda shareholders with no offer for their shares or Rights and with an almost certain outcome of Glencore being in absolute control of Anaconda through the combined effects of the Rights Issue and the Underwriting Arrangements. The Panel was very reluctant to come to a decision that would harm the competition for control of Anaconda, to the detriment of the minority shareholders of Anaconda.

Opportunity for Glencore to protect itself

38. Given its different approach to the issue, the Panel did not consider it necessary or appropriate to offer Glencore an opportunity to protect itself as part of its decision to decline Glencore’s application. However, it noted that it was always open to Glencore to take up the opportunity to protect its interest in remaining in control of Anaconda by making a rival Chapter 6 offer for control of Anaconda. It was Glencore’s choice whether or not it chose not to make such an offer, regardless of the outcome of these proceedings.
39. The Panel considered that Glencore’s opportunity to protect itself was when it had been negotiating the Underwriting Arrangements, and that the Panel was under no obligation to assist Glencore from circumstances of its own making.

Takeovers Panel

Reasons for Decision – [Anaconda Nickel Limited 09]

MP Global Undertakings

40. The Panel decided that it should decline the application without finding that the MP Global Offers were discriminatory to Glencore. Therefore, it did not see a basis for accepting the first part of the undertakings which MP Global had volunteered through the proceedings, i.e.
- to exercise, if it was legally entitled under section 606 of the Act to do so, all of the Rights that it acquired up to a maximum of 65% of the total Anaconda shares on issue immediately following the completion of the Rights Issue.*
41. Therefore the Panel consented to MP Global varying its undertaking to remove that part.
42. However, the Panel considered that the second part of MP Global's undertaking, i.e.
- to ensure that the Rights Offer complied, as far as practicable, with the conditions set out in the relief instrument granted by the Australian Securities & Investments Commission to MP Global on 29 January 2003;*
- increased the protection for Anaconda shareholders and increased the prospect of an efficient, informed and competitive market for control of Anaconda shares, at little cost to MP Global, so it decided that it should retain that part of MP Global's undertakings.

Precedent value

43. The Panel is concerned to emphasize that its decision in relation to the Anaconda 09 application is specifically related to the unusual facts of the application, the Rights Issue, the Underwriting Arrangements, and the MP Global offers, including the timing, and heavy dilution of existing shareholdings, associated with the Rights Issue. It considers that these circumstances are unlikely to arise again.

DECISION

44. The Panel considered that the weight given by the Anaconda 08 Panel to ensuring that its decision did not adversely affect the market, and competition, for control of Anaconda was correct.
45. The Panel considered that it was materially in the interests of the Anaconda shareholders as a class for the MP Global offers to be allowed to proceed.
46. The Panel did not consider that Glencore should be protected from any discriminatory nature of the MP Global Offers, therefore there was no need to offer the possibility of making a declaration or orders against the MP Global Offers. Furthermore, there was no need to seek any undertaking from Glencore as to a Glencore Bid.
47. Given the different weight the Panel gave to any possibly discriminatory effects of the MP Global Offers, the Panel did not see a need to hold MP Global to the undertakings it volunteered to the Anaconda 08 Panel concerning exercise of the Rights that it acquired under the Rights Offer.

Takeovers Panel

Reasons for Decision - [Anaconda Nickel Limited 09]

48. However, the Panel did not release MP Global from its undertaking to ensure that, as far as practical, the conditions imposed under the original ASIC Relief were applied to the conduct of the Rights Offer.
49. On that basis, the Panel agreed with the Anaconda 08 Panel that MP Global was free to proceed with the Rights Offer and its Share Offer as structured.
50. The Panel consented to the parties being represented by their commercial solicitors. It made no order for costs.

Simon McKeon
Sitting President
Anaconda 09 Proceedings
14 June 2003