



**In the matter of Anaconda Nickel Limited 12  
[2003] ATP 11**

**Catchwords:**

*Review of ASIC decision – timing of Panel application – application at the end of bid period – providing sufficient time for shareholders to consider offer*

*Corporations Act 2001 (Cth), sections 655A and 656A*

**These are the Panel's Reasons for declining an application by MP Global under section 656A of the Corporations Act to vary a decision by ASIC to refuse to grant relief to MP Global to allow it to exercise all the Anaconda Rights it acquired under its Rights Offer, regardless of the number of Old Shares acquired under MP Global's Share Offer.**

1. These reasons relate to the application received at 11.57 a.m. on Thursday 13 February 2003 under section 656A of the Corporations Act (**Act**) for a review of a decision by ASIC under section 655A of the Act to decline an application from Matlin Patterson Global Opportunities Partners LP (**MP Global**) for a modification of section 606 of the Act in relation to the affairs of Anaconda Nickel Limited (**Anaconda**).

**The Panel & Process**

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 application (the **Panel**).
3. The Panel met in the early afternoon of Thursday 13 February 2003 to consider the **Anaconda 12** Application. The Panel decided to conduct proceedings in relation to the application. The time available did not allow it to prepare a brief, as the Rights Offer was due to close that evening. The Panel advised all parties that they should make submissions based on the issues raised in the application of that morning. It advised that submissions were due by 4.00 p.m. and rebuttal submissions by 5.00 p.m. that afternoon. The Panel met at 5.30 p.m. on Thursday 13 February 2003 to consider the submissions.

**Definitions**

4. 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>.

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Annexure C of those reasons sets out a glossary of the terms defined in the reasons.

## SUMMARY

5. This was another application relating to the closing hours of the MP Global Rights Offer. The issues related to whether MP Global should be allowed to exercise all of the Rights<sup>1</sup> it acquired under its Rights Offer<sup>2</sup>, regardless of the number of Old Shares<sup>3</sup> it acquired under its Share Offer<sup>4</sup>. The Rights Offer was due to close at midnight that day and the Rights Issue was due to close at 5.00 p.m. (Perth time) the next day, Friday 14 February 2003.
6. The Panel declined MP Global's application. It considered the application had been made too late in the course of the various offers to allow the Panel reasonably to make a material change in the competitive positions of the parties.

## BACKGROUND

### General

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

### Facts Relating To This Application

8. At the time of the application, MP Global had not yet declared the Share Offer and the Rights Offer to be free from all conditions, although it did so during the course of the day and had done so by the time the Panel came to consider this application. Previously the MP Global Offers had been conditional on MP Global having received acceptances under the Rights Offer and Share Offer

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<sup>1</sup> **Rights:** the rights issued under a fully underwritten renounceable Rights Issue of 14 shares for every one issued share at an issue price of \$0.05 per share to raise a total of approximately \$323 million, announced on 25 September 2002 and issued under a prospectus dated 20 January 2003.

<sup>2</sup> **Rights Offer:** an unregulated off-market offer to acquire all of the Rights, announced on 21 January 2003, at a price of \$0.01 per Right (alternative consideration arrangements were also offered).

<sup>3</sup> **Old Shares** are the 461,502,243 shares on issue at the time of MP Global's Share Offer and before the Rights Issue.

<sup>4</sup> **Share Offer** an off-market bid under Chapter 6 of the Act for all of the Old Shares, announced on 21 January 2003, at a price of \$0.12 per share.

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which would entitle it to acquire more than 50% of the fully diluted capital of Anaconda. MP Global had been due to declare the status of that Minimum Acceptance Condition (as discussed in the Panel's reasons in the Anaconda 10 decision) in the MP Global Share Offer by 8.30 p.m. Sydney time on Thursday 13 February 2003, with the bid due to close at midnight that night.

9. MP Global had received acceptances for about 32% of the Old Shares and about 38% of the Rights, as at 8.00 p.m. on the previous evening. Originally MP Global had received relief from ASIC (**ASIC Relief**) that allowed it to acquire the New Shares<sup>5</sup> that it acquired on exercise of all of the Rights it had acquired under the Rights Offer.
10. The Anaconda 04 Panel had revoked the ASIC Relief on 06 February 2003, on the basis that it had facilitated the discriminatory aspect of MP Global's Offers<sup>6</sup>. The Anaconda 08 and 09 Panel's had determined, for slightly different reasons, that the discriminatory nature, if any, of the MP Global Offers was no longer material. MP Global applied, on Wednesday 12 February for ASIC effectively to regrant the ASIC Relief. ASIC advised MP Global that it had declined MP Global's application on the morning of 13 February.
11. After the Anaconda 04 Panel revoked the ASIC Relief, MP Global decided to continue with the Rights Offer without the ASIC Relief (**Naked Offer**). However, under the Naked Offer MP Global was only entitled to exercise as many Rights as would keep its percentage voting power in Anaconda after the issue of the New Shares the same as immediately before the issue of the New Shares.

## APPLICATION

12. MP Global applied under section 656A of the Act for a review of the decision of ASIC to refuse the relief sought by MP Global on 12 February 2003. MP Global applied to the Panel to set aside ASIC's decision and substitute a decision granting the relief it had requested of ASIC.
13. The relief which MP Global had requested was:

*an exemption under section 655A of the Act from section 606 to permit MP Global to acquire ANL Shares on the exercise of any Rights acquired by MP Global under the Rights Offer. The exemption would:*

  - a) *only apply where, as at the end of the offer period under the Rights Issue, MP Global had voting power in ANL of less than 51%; and*
  - b) *be conditional on MP Global making an announcement declaring the Share Offer (and therefore the Rights Offer) free of all outstanding conditions by 8.30 p.m. (Sydney time) on Thursday 13 February 2003.*
14. MP Global had submitted to ASIC on 12 February that:

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<sup>5</sup> **New Shares** are the 6,461,031,402 shares issued on 21 February under the 14 for 1 Rights Issue.

<sup>6</sup> **MP Global's Offers:** the Rights Offer and Share Offer together.

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- a) there had been enormous confusion in the market in connection with the Share Offer;
- b) the Share Offer and the Rights Offer had been the subject of a large number of applications to the Takeovers Panel to stop the MP Global Offers;
- c) in their announcement of 11 February 2003, the independent directors of ANL advised holders of Rights not to accept the Rights Offer due to what they perceived to be the highly conditional nature of the Rights Offer; and
- d) it was in the interests of the market (and, in particular, holders of ANL Shares and Rights) for the MP Global Offers to be declared unconditional as soon as possible and that the grant of the limited relief contemplated by its application to ASIC was justified in order to achieve this end.

15. The terms of the relief which MP Global requested are set out at Annexure A.

## SUBMISSIONS

16. The Panel received submissions from MP Global. It also received submissions from Anaconda that it would take what ever reasonable steps it could to facilitate the extension of time and Anaconda shareholders' acceptances if they chose to do so.

### Anaconda Submissions

17. Anaconda said:

- a) the Anaconda 12 application was really an application for review of the decision under section 656A in Anaconda 04 to revoke the ASIC Relief, and that there was no provision in the Act for review by the Panel of section 656A decisions;
- b) there was insufficient time for Anaconda shareholders to assimilate the information if the Anaconda 12 Panel decided to grant the application (it cited the Anaconda 07 and 10 decisions in support of this); and
- c) MP Global had unnecessarily delayed in bringing the application.

18. Anaconda also reasserted its arguments from the Anaconda 04 proceedings that the relief would facilitate the discriminatory aspects of the MP Global Offers.

### ASIC's Submissions

19. ASIC said in its reasons for decision, and in its submissions (which it provided on the morning of 13 February after its decision of that morning), that it considered that Anaconda shareholders and the market would have insufficient time to assimilate the material information for granting the relief requested

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(either primarily by ASIC or on review by the Panel) and that that would not promote an efficient informed and competitive market.

#### Glencore's Submissions

20. Glencore put forward similar submissions to those of Anaconda. It also noted that one of the primary reasons for the relief in MP Global's application to ASIC, the desire by MP Global to declare the MP Global Offers free from conditions had passed when MP Global had decided to declare the MP Global Offers free from conditions even without the relief requested.
21. Glencore asserted that the low level of acceptance of the Share Offer was evidence that the shareholders of Anaconda had rejected MP Global's attempt to win control of Anaconda and that MP Global should not be allowed to increase control of Anaconda beyond the level of Old Share acceptances.
22. Glencore asserted that it had, in part, made its decision on whether or not to make a takeover offer based on the Panel's decisions in Anaconda 04 and 08. It said that it would be unfair to Glencore to change the regulatory basis on which the MP Global Offers operated on the last day leaving Glencore insufficient time to review its earlier decision and take any action for a takeover offer in response.
23. Glencore also rejected MP Global's assertions about possible market manipulation or warehousing.

#### MP Global Submissions

24. MP Global's primary submission was that the reason for revoking the ASIC Relief in Anaconda 04 had passed, either because of the Panel's decision in Anaconda 08 that Glencore had failed to protect itself against any discriminatory aspect of the MP Global Offers, or because the Anaconda 09 Panel had determined that Glencore had not required protection against any discriminatory aspects of the MP Global Offers.
25. MP Global asserted that the buying on-market during 12 and 13 February 2003 indicated that a party was acquiring Old Shares, at above any rational price given the impending dilution by issue of the New Shares at \$0.05, and that this was evidence that MP Global was being harmed in its attempts to gain control and the relief being applied for was a reasonable counter to that harm.
26. MP Global submitted that:
  - a) Anaconda Shares traded in the market on the morning of 13 February, before MP Global went unconditional, as high as 12.5 cents, 0.5 cents above the Offer price, when Anaconda shares trading on a deferred settlement basis (shares not subject to the Offer) were trading at approximately 6 cents i.e. shareholders risked losing approximately 6 cents per share if MP Global's Offers were not declared unconditional;
  - b) during the 2 days market trading since the Anaconda 09 Panel decision to allow MP Global to proceed, there was a high volume in trading of Old

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Shares, at a much higher price than the trading of New Shares (5-6 cents). The volume of the 2 days market trading of Old Shares, plus volume of trading on 13 February 2003 (of 5.8% at average price of 13 cents as of 15.30 p.m.) was 14.7%; and

- c) Anaconda Shares had since traded as high as 16 cents (as at 15.20 p.m. 13 February).
- 27. MP Global submitted that this might be prima facie evidence of warehousing or trading designed to defeat MP Global's offer even if it acquired a majority of the Rights, and therefore provided another reason why the relief should be granted.
- 28. MP Global asserted that the decision would not be relevant to Anaconda shareholders' decisions in relation to the MP Global Offers, that they would be actually only interested in the consideration offered so the time available for them to be advised was not a relevant consideration for the Anaconda 12 Panel.

## DECISION

- 29. The Panel declined MP Global's application, saying that it agreed with ASIC's reasons for declining MP Global's application.
- 30. The Panel considered that the shareholders of Anaconda would not have sufficient time to consider the potentially significant effect on MP Global's Rights Offer and the future control of Anaconda that the relief may cause. In addition, the short timeframe may mean that only some Anaconda shareholders would become aware of the information before the close of the MP Global Rights Offer which is scheduled for 12.00 midnight tonight.
- 31. The Panel considered that these two reasons were enough to weigh against granting the relief.
- 32. The Panel consented to the parties being represented by their commercial solicitors. It made no order for costs.

**Brett Heading**  
**Sitting President**  
**Anaconda 12 Proceedings**  
**14 July 2003**



**Annexure A - Requested ASIC relief**

**Australian Securities and Investments Commission**

**Corporations Act Subsection 655A(l) - Exemption**

Pursuant to paragraph 655A(l)(s) of the Corporations Act 2001 ("Act"), the Australian Securities and Investments Commission ("ASIC") exempts the person specified in Schedule A from subsection 606(l) 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 shares in Anaconda ("Rights") under Anaconda's 14 for 1 pro-rata renounceable rights issue ("Rights Issue"), which Rights were acquired pursuant to an offer in respect of which an offer document was given to Anaconda and the Australian Stock Exchange on 30 January 2003 ("Rights Offer").

**Schedule C**

1. Mongoose's voting power in ANL as at the end of the offer period under the Rights Issue is less than 51%.
2. Mongoose has declared the offers under its off-market bid for all of the fully paid ordinary shares in Anaconda, and all takeover contracts resulting from acceptances of any of those offers, to be free of all defeating conditions by 8.30 p.m. (Sydney time) on 13 February 2003 in accordance with section 650F of the Act.

Dated this.....day of February 2003.

Signed:

a delegate of the Australian Securities and Investments Commission