Takeovers Panel

Reasons for Decision Anaconda 16 -17

In the matter of Anaconda Nickel Limited 16-17
[2003] ATP 15

Catchwords:

Conditional offer for shares and rights – underwritten rights issue – acquisition of controlling interest by exercising acquired rights – contravention of section 606 – managing excess shares – association – relevant interest – bare trustee's relevant interest ignored – substantial shareholder's notice – substantial interest

Corporations Act 2001 (Cth), sections 12(2), 53(1), 602, 606, 609 and item 9 section 611

ASIC Policy Statement 31: Acquisitions and Disposals by Broker Acting as Principal

Elders IXL v NCSC [1987] VR 1
NCSC v FAI Investments Pty Ltd (1982) 7 ACLR 152
Boral Energy Resources Limited v TU Australia (Queensland) Pty Limited (1998) 28 ACSR 1

These are our reasons for deciding to make a declaration of unacceptable circumstances in relation to the affairs of Anaconda Nickel Limited following the acquisition of 41.5% of the New Shares in Anaconda by MP Global in circumstances where it was only entitled to acquire 35%. The Panel proposed orders requiring the Excess Shares to be sold by a stockbroker nominated by ASIC, but postponed making the orders pending the outcome of an application made by MP Global for a review of this decision.

1. The President of the Panel appointed Brett Heading (sitting President), Tro Kortian (sitting Deputy President) and Peter Scott as the sitting Panel for the Anaconda 16 and 17 applications together (the **Panel**).

Anaconda 16 and 17

2. Anaconda 16 was an application by Anaconda Nickel Limited (**Anaconda**) and Anaconda 17 was an application by Glencore International AG (**Glencore**) made on 21 February 2003. Each sought a declaration of unacceptable circumstances and orders about the exercise by MatlinPatterson Global Opportunities Partners LP (**MP Global**)[1] of rights to subscribe for Shares in Anaconda and the sale to Australian Investments United Pty Ltd (**AIU**) of some of those Shares, which MP Global could not acquire without contravening section 606 of the *Corporations Act 2001* (Cth) (the **Act**).[2]

3. The Panel on 7 March 2003 decided to make a declaration of unacceptable circumstances and foreshadowed orders requiring the disposal of the Excess Shares. The declaration, and the orders were not made, because MP Global applied for review of the decision on 11 March 2003, when it was advised of the decision.

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[1] References to MP Global include related bodies, and particularly its subsidiary Mongoose Pty Ltd, through which the bids for Anaconda were made.
[2] Statutory references in these reasons are to the *Corporations Act 2001*.

Definitions

4. Unless indicated to the contrary, terms used in these reasons have the same meaning as in the Review 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.

BACKGROUND

General

5. 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

6. Anaconda made a 14 for 1 issue of renounceable rights (**Rights**) at 5 cents per **New Share**[3] (**Rights Issue**) to raise $323 million to fund a debt reconstruction, fully underwritten by Anaconda's 34% shareholder, Glencore. Trading in the Rights commenced on 21 January and ended on 7 February. The Rights Issue prospectus was dated 18 January 2003 and notices of exercise had to be lodged by 5.00 p.m. (Perth time) on 14 February.

7. Each New Share issued under the Rights Issue would carry the same voting power as each Old Share[4]. Since 93% of the shares on issue after the Rights Issue would be New Shares, control of Anaconda after the completion of the Rights Issue depended primarily on control of the New Shares.

8. Through its subsidiary Mongoose Pty Ltd, MP Global made offers to acquire:

   a) all of the Old Shares at 12 cents each, under a takeover bid designed to comply with Chapter 6, with modifications granted by ASIC (**Shares Offer**). Offers under the Shares Offer were posted on 5 February 2003 and closed on 5 March 2003; and

   b) all of the Rights, at 1 cent each, under a similar offer which was not, however, required to comply with Chapter 6 (**Rights Offer**). Offers under the Rights Offer were posted on 30 January and closed on 13 February.

9. Both of the MP Global Offers were conditional on MP Global acquiring enough Old Shares and Rights that on exercise of the Rights it would hold more than 50% of the diluted capital of Anaconda after the Rights Issue. The Share Offer had the condition as a direct condition, and it was an unwaiveable condition of the Rights Offer that the

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[3] **New Shares** are the 6,461,031,402 Anaconda shares issued on 21 February under the Rights Issue.
[4] **Old Shares** are the 461,502,243 Anaconda shares on issue at the time of MP Global's Share Offer and before the Rights Issue.

conditions of the Share Offer be satisfied or waived. On 13 February, however, MP Global declared both offers free of all conditions.

Acquisition Of New Shares

10. MP Global did not offer to purchase any of the New Shares. It intended to acquire a controlling parcel of New Shares by exercising Rights it acquired under the Rights Offer. By exercising the Rights MP Global would likely acquire a substantial number of New Shares in Anaconda and after that acquisition it would have voting power in Anaconda of more than 20%[5]. This raised an issue of how the acquisition was to be made without contravening the 20% threshold in section 606 of the Act.

11. MP Global's acquisition was not covered by any of the exemptions in section 611 of the Act. Initially, MP Global relied on an exemption granted by ASIC, but this exemption was revoked on review in Anaconda 04, on 6 February. MP Global decided to continue with its bids, proposing to acquire New Shares on exercise of Rights under what may be called the Rising Tide principle[6].

12. This is an aspect of the operation of subsection 606(1) of the Act itself. That section only prohibits an acquisition of shares in a company where the acquisition leads to the acquirer or another person having increased percentage voting power in the relevant company. If MP Global acquired New Shares in Anaconda on exercise of the Rights, without any increase in its (or anyone else's) percentage voting power in Anaconda, section 606 of the Act would not prohibit the acquisition. The Panel regards this principle as integral to section 606 of the Act, not a loophole or abuse.

More Rights Than Shares

13. The number of New Shares that MP Global could acquire under the Rising Tide principle depended on the percentage of Old Shares it held at the time the New Shares were issued. The percentage of all New Shares it acquired had to be the same as (or less than) the percentage of Old Shares it held immediately before the issue of the New Shares. Since the Rights Issue was fully underwritten, the number of New Shares to be issued was equal to the number of Rights, and the percentage of New Shares which would be issued to MP Global would be equal to the percentage of Rights it exercised.

14. A conservative way for MP Global to ensure that it did not breach section 606 of the Act was to exercise no higher a percentage of the Rights than the percentage of Old Shares in which it had relevant interests at the time it lodged its notice of exercise. For instance, on 13 February, it could have exercised 35% of the Rights and allowed the remaining 6.5% of the Rights it had bought to lapse. Where Rights lapsed, Glencore, as underwriter, would have been entitled and required to subscribe for the corresponding New Shares.

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[5] If MP Global acquired and exercised less than 20 % of the Rights it would not cross the 20% threshold in section 606. However, this was unlikely as it had acquired 23% of the Rights from Anglo prior to commencing its Offers. If MP Global acquired and exercised all of the Rights it would have a voting power greater than 90%.

[6] In addition to paragraph 13 of these reasons, the Rising Tide Principle is discussed in paragraph 120 of the Panel's reasons for decision in relation to the Anaconda 02 to 05 applications.

15. This approach would not, however, have made best use of MP Global's investment in Rights. Although MP Global's Rights Offer closed on 13 February, its Share Offer was not due to close until 5 March and the issue of New Shares under the Rights Issue was originally planned to occur on 25 February (it actually took place on 21 February). On 14 February, when MP Global had to decide how many Rights it would exercise[7], the Share Offer had been open for barely a week, and so there was a clear potential for acceptances for Old Shares to continue to arrive after MP Global completed its notice of exercise of the Rights and before the New Shares were issued. If MP Global received more acceptances for Old Shares between 14 and 21 February, or if it bought Old Shares on market in reliance on item 2 of section 611, the Rising Tide principle would allow it to acquire correspondingly more New Shares even though the terms of the Rights Issue did not allow it to submit further notices of exercise of Rights.

Issue Of The New Shares

16. Anaconda issued all of the New Shares on 21 February 2003. It advised the Panel that it satisfied all valid applications, despite the possible contravention of section 606 of the Act by MP Global, and called on Glencore to take up the shortfall (not counting the **Excess Shares**[8]), which it did. Anaconda placed the Excess Shares (as it then calculated them) in a separate account in the name of Mongoose Pty Ltd.

DISCUSSION

Calculation Of The Excess Shares

17. The number of Excess Shares (i.e. the number of New Shares in Anaconda which would be issued to MP Global if it exercised all of its Rights, in excess of the number it could take under the Rising Tide principle) has only been determined with precision since the issue took place. At the close of its Rights Offer on 13 February 2003, MP Global had acquired approximately 41.47% of all Rights.[9] On 14 February 2003, MP Global lodged applications with Anaconda, together with subscription monies of A$0.05 per New Share, for all of the Rights it then had acquired. At that date it had relevant interests in 34.24% of the Old Shares and voting power of 34.24% in Anaconda.[10] When Anaconda issued the New Shares on completion of the Rights Issue on 21 February, the percentage of Old Shares in which MP Global had relevant interests had increased to 35.63%.

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[7] MP Global had to decide how many Rights it was going to exercise on 14 February because that was the day exercise notices had to be lodged. The Anaconda 16-17 Panel did not limit the date on which the number of New Shares that MP Global could acquire was to be determined. However, the Anaconda 19 Panel later decided that the number of Rights that MP Global was entitled to exercise should be determined by the number of Old Shares that MP Global had acquired by the close of the Rights Offer at midnight on 13 February. This was based on holding MP Global to a public statement it had made in its Media Release of 6 February 2003.

[8] **Excess Shares** are those New Shares which would cause MP Global's voting power in Anaconda to be in excess of the voting power MP Global had immediately before the New Shares were issued on 21 February 2003

[9] Anaconda advises that MP Global lodged notices of exercise of 2,686,282,760 Rights (41.58% of the total), but that some of those Rights had been exercised already by other people, leaving the notices of exercise valid for 2,679,594,660 Rights (41.47%). In what follows, we have used the lower number.

[10] Announcement to ASX by MP Global on 14 February.

18. The Panel considered that the number of Excess Shares should be calculated by reference to the percentage of Old Shares that MP Global had at the time that the New Shares were issued. On this basis, it was possible for MP Global to exercise more Rights on 14 February 2003 than it would be entitled to have issued to it under the Rising Tide principle, on the assumption that MP Global's holding of Old Shares would increase in the period between 14 February and the issue of the New Shares. The difficulty for MP Global with this approach was predicting the extent of the increase in its holding of Old Shares before the issue of the New Shares (see paragraph 20).

19. In the event, the Panel in Anaconda 18 determined the number of Excess Shares covered by its orders by reference to the percentage of Old Shares MP Global had acquired at close of business on 13 February (i.e. the number shown in its substantial shareholder notice lodged on the morning of 14 February), holding MP Global to its public announcement on 6 February that its ability to exercise Rights would be limited to the maximum shareholding that MP Global had acquired by 13 February 2003 under the Share Offer.

Managing Excess Shares

20. MP Global could not simply exercise all of the Rights it had acquired and hope that it would receive enough acceptances of its Share Offer in the meantime. If the percentage of Old Shares it had acquired by the time the New Shares were issued was still less than the percentage of Rights it had exercised, the issue would increase its percentage voting power, leading to a breach of section 606 of the Act. MP Global could not avoid the breach by selling down the excess shares after the issue, because its voting power in Anaconda would have increased when the New Shares were issued.[11]

21. By an application to the Panel on 20 February 2003 (Anaconda 15) and by application to ASIC to modify section 606 of the Act on the previous day, MP Global sought relief from the potential breach of section 606 of the Act which might be caused by the issue to it of Excess Shares. Neither of these applications was successful.

22. MP Global has provided evidence, which the Panel accepts, that it attempted to arrange for the Excess Shares to be issued to AIU, instead of MP Global, by transferring the relevant rights to AIU or by directing the Anaconda share registry to issue the shares to AIU. However, Anaconda advised that there was insufficient time to make the necessary transfers of Rights entitlement and other paperwork. Therefore, Anaconda declined MP Global's request and said that all New Shares for which MP Global had exercised Rights would be issued to MP Global on 21 February.

The AIU Agreement

23. MP Global addressed this issue by entering into a contract (the **AIU Agreement**) on 19 February designed to ensure that it did not acquire a relevant interest in any Excess Shares when they were issued, while capturing as many New Shares as it was

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[11] MP Global could not deal with the problem by selling Old Shares: it didn't have enough of them; the Rising Tide principle would not have applied, unless it had a relevant interest in Old Shares when the New Shares were issued; and it had a bid open, to which section 654A of the Act applied.

entitled to do[12]. It had previously prevented any of its Rights passing to the underwriter by exercising all of the Rights it had acquired. The AIU Agreement was made with AIU and provided that MP Global:

a) agreed to sell to AIU for 6 cents each any New Shares which were issued to MP Global in excess of the number it could acquire under section 606 of the Act, as set out above;

b) would attempt to procure Anaconda to issue the excess shares direct to AIU;

c) would transfer the Excess Shares to AIU or at its direction, whether or not they had been paid for;

d) would hold the Excess Shares on a bare trust for AIU pending settlement of the sale if MP Global could not arrange for them to be issued direct to AIU; and

e) had no recourse against the shares for the purchase money.

The agreement contained no arrangement or understanding between AIU and MP Global concerning disposal or voting of the shares.

24. No evidence was provided that the AIU Agreement was not a genuine sale of the Excess Shares on the terms set out in the letters by which it was made or that it failed in its purpose. In relation to the association issue, Glencore and Anaconda said that it should be inferred from the circumstances of the AIU agreement that MP Global and AIU were associated, which would have prevented MP Global from being a bare trustee.

25. The Panel was at first concerned that the AIU Agreement appeared to be uncommercial, because AIU is a proprietary company with a small issued capital, and purchase money of $20 million or more was unsecured.

26. At its face value, the AIU Agreement addressed effectively the issue of the relevant interest acquired by MP Global in the Excess Shares when they were issued. If MP Global was a bare trustee for AIU of the Excess Shares from that moment, under subsection 609(2) of the Act, MP Global had no relevant interest in those shares, although it was their registered holder. Correspondingly, AIU acquired a relevant interest in the Excess Shares from the moment they were issued, under subsection 608(1) or (8) of the Act. The effect would have been that AIU acquired a relevant interest in the Excess Shares, and MP Global did not.

Relevance Of Association

27. To avoid contravening section 606 of the Act when it acquired New Shares in Anaconda under the Rights Issue, however, MP Global had to avoid any increase in its percentage voting power. Immediately after the New Shares were issued, MP Global's voting power was made up of the shares in which MP Global had relevant interests and the shares in which its then associates had relevant interests.[13] The AIU Agreement prevented an increase in the percentage of shares in which MP Global itself had a relevant interest, but MP Global's voting power would nonetheless have

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[12] MP Global had entered into an agreement in principle with AIU on 14 February, but not all of the terms were settled on that date, including the price, which was initially specified to be 6.5 cents per share but was resolved to be 6.0 cents per share in the executed AIU Agreement.

[13] This way of putting it oversimplifies, as it treats MP Global as one person, whereas it is a corporate group.

increased if AIU had been an associate of MP Global, because at the same time as MP Global acquired the maximum number allowed by section 606 of the Act, AIU acquired additional shares in Anaconda. In this case, the AIU Agreement would not have prevented a breach of section 606 of the Act.

APPLICATIONS

28. In that context, on 21 February, both Anaconda and Glencore applied to the Panel to prevent implementation of the AIU Agreement.

29. Glencore sought:

    a) an interim order restraining Anaconda from issuing the Excess Shares on MP Global's application;

    b) a declaration of unacceptable circumstances in relation to the proposed acquisition of the Excess Shares by MP Global;

    c) final orders directing that the Excess Shares be issued or transferred instead to ASIC (a sort of vesting order) or the Royal Bank of Canada (to act as broker on their disposal); and

    d) final orders that ASIC or the Royal Bank of Canada sell the Excess Shares to persons not associated or connected with MP Global.

30. Anaconda sought:

    a) an interim order restraining MP Global from disposing of the Excess Shares until the Panel had dealt with the matter;

    b) a declaration that unacceptable circumstances existed because MP Global and AIU had acquired the interests in the Excess Shares set out above; and

    c) a final order that MP Global instruct the Royal Bank of Canada to sell the Excess Shares into the market.

31. On 25 February, the Panel decided not to make any interim order interfering with the issue of the Excess Shares, but instead made interim orders preventing MP Global and AIU from dealing with the Excess Shares and Anaconda from registering transfers of them.

THE EFFECT OF THE AIU AGREEMENT

Excess Shares A Substantial Interest

32. The Panel finds that the Excess Shares, a parcel of 5% or 6%, constituted a substantial interest in Anaconda. A parcel of shares may be a substantial interest, although it would not itself affect control, if it would materially affect control taken together with other parcels in the hands of the same party and its associates.[14]

33. When the parties made the decisions set out above, the shortfall on the Rights Issue and the outcome of the Share Bid were unknown.

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[14] *Elders IXL v NCSC* [1987] VR 1 at 17 – 18.

34. Depending on the outcomes of the various transactions, the Excess Shares could have been added to Glencore's holding (which was known to be not less than 36% and was in the event 46%), to MP Global's holding (which was known to be at least 35%), or to neither of those parcels. In separate proceedings at the same time as these proceedings (*Anaconda (No. 15)*), MP Global was seeking orders that Glencore divest 4% of the shares in Anaconda, which would have reduced its holding from 46% to 42%.

35. In these circumstances, a parcel of 5% was plainly capable of materially affecting the balance of control of Anaconda. Had MP Global not exercised the relevant Rights, Glencore would have been called on to subscribe for the Excess Shares in its capacity as underwriter, and had it done so would have had over 50% of the votes in Anaconda. Had MP Global retained the Excess Shares, not only would Glencore not have obtained them, but MP Global's own interest would have increased to over 40%, within striking range of Glencore's voting power, particularly if Glencore had been divested of shares in *Anaconda (No. 15)*.

Factors Pointing To Association

36. Both Anaconda and Glencore submitted that the circumstances supported an inference that AIU and MP Global were associated, and perhaps that AIU had agreed to warehouse the Excess Shares for MP Global.

37. The Panel makes no finding that MP Global and AIU are, or are not, associated in relation to Anaconda. The principals of AIU, on the one hand, and MP Global, on the other hand, gave evidence that they have been acquainted and have had business dealings for a long time, but nothing sinister should necessarily be read into that. There was no evidence presented to the Panel that AIU agreed to warehouse the shares for MP Global, vote them in ways agreed with MP Global or sell them only to parties acceptable to MP Global.

38. The terms of the AIU Agreement are unusual, but explicable as being required to avoid the breach of section 606 which would have resulted from a sale on more usual terms. The Panel does not find that those terms alone support an inference that the sale was uncommercial, or must have been motivated by an ulterior consideration, such as warehousing. The Panel is, however, concerned that, having decided to sell on terms which would not usually be acceptable to a vendor, MP Global had effectively restricted its choice of buyers to people it knew and could trust to a much greater degree than if it had been able (for instance) to sell the Excess Shares on market to the highest bidder.

39. Anaconda submitted that a presumption of warehousing arose from MP Global's concern that AIU hold the shares, rather than buyers in the ordinary course in the market, and that the existence of such a concern was shown by MP Global having declined to undertake to sell the Excess Shares into the market after they were issued, as Anaconda had invited it to do.

40. The Panel does not agree that MP Global's sale of the shares to AIU was necessarily driven by a concern that AIU acquire the shares. Although MP Global's conduct is consistent with such a concern, it can also be explained by MP Global's need to find a buyer for the Excess Shares, in a short period of time, on unusual terms dictated by the requirements of Chapter 6. As well as the unusual terms of sale, which could not

have been accommodated by a sale on market, MP Global did not want to sell a number of shares determined at the time of entry into the contract of sale, but only as many shares as were in the event in excess.

41. MP Global's refusal to undertake to arrange a sale through a broker acceptable to Anaconda does not strongly support an inference that it was concerned to ensure that AIU would hold the Excess Shares. To perform the undertaking, MP Global would have had to make with the broker an arrangement similar to the AIU Agreement or acquire a relevant interest in the Excess Shares, but had MP Global acquired a relevant interest in the shares when they were issued, it would have breached section 606 of the Act.

42. Glencore submitted that the very existence of the AIU Agreement made AIU and MP Global associates. While the argument was not developed, it required AIU and MP Global to have been acting in concert, or parties to a relevant agreement, in relation to the conduct of the affairs of Anaconda or the composition of its board. The only basis for such a finding in the terms of the agreement is a technical argument that a contract for the sale of shares is a relevant agreement in relation to the affairs of the issuer company.[15] Amendments were made in 1990 to remove associations of that kind. An association of that very technical kind, without more, does not give rise to unacceptable circumstances.

43. Glencore also submitted that the Panel should be concerned that MP Global failed to say whether it had approached any other possible buyers of the Excess Shares, and in fact had not approached any other possible buyers[16]. This fact lends some support to an inference that the sale was uncommercial and that the identity of the buyer mattered more to MP Global than the terms of sale. However, given the time pressure that MP Global was under and that the price agreed with AIU covered the marginal cost to MP Global of the Excess Shares, its failure to approach other buyers does not strongly support the inference that it was associated with AIU.

44. On the other hand, MP Global was clearly on notice from the moment that it decided to continue its Share Offer and Rights Offer without the benefit of the ASIC Relief that it could well face just such a crisis. Over the days between that decision and the date at which it was required to decide how many Rights to exercise, the relative flow of acceptances of the Rights Offer and the Share Offer should have made that risk very much clearer. Its decision to leave it until the last minute to find a buyer for the Excess Shares was little short of reckless, and certainly conducive to unacceptable circumstances.

Declarations Regarding Association

45. Principals of both MP Global and AIU have stated in submissions that there was no association between their respective companies i.e. no relevant agreement or acting in concert in relation to the composition of the Board or the conduct of the affairs of Anaconda. One of them offered to give oral evidence and submit to cross-examination. MP Global has urged the Panel to rely on those statements, in the absence of direct evidence of association.

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[15] Corporations Regulation 1.0.18, applying section 53 for the purposes of subsection 12(2).

[16] MP Global did, however, receive a fax from a broker that day expressing interest in disposing of the Excess Shares for MP Global.

46. The Panel accepts that the statements were made in good faith, but notes that perceptions of what constitutes association vary greatly. It is for the Panel, on the basis of facts found on the basis of evidence, to characterise those facts and determine whether they give rise to an association: it is not the role of witnesses to testify as to that characterisation. In the absence of an account of the relationship between MP Global and AIU which would enable the Panel itself to make a positive finding that the relationship was inconsistent with an association, the Panel is unable to rely on either declaration as establishing that there was no association.

47. Taken together, the considerations set out above are an arguable case that AIU and MP Global were associated at the time the AIU Agreement was made, although none of them is conclusive. Apart from assurances from the principals of MP Global and AIU, there was no evidence presented to the Panel that they were not associated. On balance, the Panel declined to infer an association from those factors.

Relevant Interest

48. Both Anaconda and Glencore submitted that the AIU Agreement did not prevent a breach of section 606 of the Act, arguing that because MP Global was an unpaid vendor of the Excess Shares, it had a relevant interest in the shares, citing *NCSC v FAI Investments Pty Ltd* (1982) 7 ACLR 152. The Panel does not agree. The contract of sale in that case was an ordinary open contract of sale, with no declaration of trust. Unless it was a pretence (and the Panel did not find that it was) the declaration of trust and the exclusion of rights against the shares in the AIU Agreement mean that MP Global did not acquire or retain a relevant interest in the Excess Shares, even before AIU had paid for the shares. However, the fact that MP Global had no right to retain delivery of the Excess Shares against payment was an added indicator towards the allegation that an association between AIU and MP Global existed.

49. Despite the principal of AIU later demonstrating his financial capability to the Panel, granting unfettered ownership over $20 million worth of tradeable shares with no security for payment appears unusual.

50. Glencore argued that there was circumstantial evidence that the sale to AIU was not bona fide, principally that AIU had negligible paid up capital and was unknown in the Australian securities and nickel markets, and in particular as an investor in Anaconda. While the initial information provided about AIU was unsatisfactory, on request the principal of AIU provided evidence of substantial means and of considerable trading in Indonesian financial markets, although not of transactions similar to the acquisition of the Excess Shares[17].

51. Glencore also pointed to the provision of the AIU Agreement that required MP Global to transfer the Excess Shares to AIU, whether or not AIU had paid for them, as evidence that MP Global was financing the transaction, and the sale was therefore a pretence. The Panel finds that MP Global did incur a risk that it would finance the transaction, but it does not necessarily follow that the sale was a pretence or warehousing. This provision was necessary to prevent MP Global obtaining a relevant interest in the shares from the time they were issued until it was paid, which

[17] It should be noted that AIU did not engage legal representation in the Anaconda 16-17 proceedings, but did in the Anaconda 18 proceedings. AIU's initial submissions may have been more satisfactory if prepared by experienced legal advisors.

would have defeated the purpose of the exercise as a device avoid a breach of section 606 of the Act.

Substantial Shareholding

52. Anaconda and ASIC also pointed out that AIU appeared to have contravened the substantial shareholding provisions. Because AIU acquired a relevant interest in the Excess Shares on their issue and those shares were more than 5% of the diluted capital of Anaconda, AIU became a substantial shareholder and was obliged to lodge a substantial shareholder notice within 2 business days of their issue on 21 February 2003, but it did not do so until 4 March i.e. 7 business days after the shares were issued. It did, however, take some time to determine whether the Excess Shares were more than 5% of the voting shares in Anaconda and MP Global advised as late as 20 March that they were less than 5%. Given that the Panel has decided to make a declaration on another ground, there is no need to decide whether to make a declaration of unacceptable circumstances in relation to AIU's delay in giving this substantial shareholder notice.

Choice Of Buyer

53. The Panel's concern is rather that, needing to dispose of shares to avoid contravening section 606 of the Act, MP Global chose to sell them all to one buyer, neither dispersing them in the market nor selling them through a transparently price-driven process, and that the buyer was not a person who was clearly not an associate of MP Global.

54. Although the existence of an association is a matter of fact, proof of it is often elusive, and disproof is usually even more elusive. In many cases, a decision whether an association exists must be based on circumstantial evidence and inference. Yet the confidence of the market that it knows what aggregations of voting power exist depends on (amongst other things) there being no covert associations between substantial shareholders.

55. In the Panel's view, in these unusual circumstances and in the absence of strong factors supporting an inference that there was no association between AIU and MP Global, the market cannot be confident that the aggregation of voting power represented by the Excess Shares has been dispersed by a sale outside the market. And it cannot be confident that the sale to an insubstantial company controlled by an old acquaintance of the vendor, on terms which implied a high degree of personal reliance on that acquaintance is not evidence of an association. The need to demonstrate that the Excess Shares were not being warehoused or sold to an associate is the greater, as there are a number of factors supporting the inference that AIU and MP Global were associated, as discussed above.

Unacceptable Circumstances

56. The Panel decided that, in the particular facts of the Anaconda rights issue and the MP Global bids, it constituted unacceptable circumstances for MP Global to arrange to acquire shares in excess of the number that section 606 allowed, then to avoid a breach of section 606 by arranging for AIU to acquire the excess instead, where MP Global chose AIU for reasons of personal reliance and was unable to satisfy the Panel that it and AIU were not associated, and the parcel of shares was large enough to

materially affect control of Anaconda. The acquisition of control over the Excess Shares took place outside any efficient, competitive or informed market.

57. ASIC rightly commented that the policy of paragraph 602(a) of the Act does not require all share sales to take place on market. The circumstances of this transaction are unusual, and wide inferences should not be drawn from the Panel's finding that the Excess Shares should have been disposed of in a more transparent way. ASIC's own policy on broker disposals, which is a benchmark of what is required in a share divestiture,[18] requires a large parcel to be dispersed as widely as practicable, in parcels of less than 5%, and at the highest price practicable, to persons who are clearly not associated.

58. The distinguishing features of the present case include the narrowly averted breach of section 606, the size of the parcel, the balance of voting power in the company, the highly unusual terms of the transaction and the exclusion of any element of competition for the shares.

Acceptance Of Risk

59. The Panel finds that MP Global made a conscious decision to accept the risks of declaring its Rights and Shares Offers unconditional on 13 February, knowing that it had no assurance of being able to exercise all of the Rights it acquired under the Rights Offer and that it might have to relinquish those Rights, losing part or all of its investment in them.

60. The Panel also finds that MP Global made a conscious decision to accept the risk of exercising all of the Rights it held on 14 February, knowing that it had no assurance of being able to retain all of the New Shares it would be issued and that it might have to sell any Excess Shares on terms which a vendor would not usually regard as acceptable.

61. Particularly given MP Global's acceptance of the risks of this venture, the Panel finds that the public interest in the Excess Shares being disposed of through a transparent process prevails over MP Global's interest in being able to sell the shares when and as it chooses.

Deception Claim

62. The Panel carefully considered evidence given by one of MP Global's officers that he (and MP Global) believed they were misled by Sherritt International Inc into believing that Sherritt (which held 8% of the Old Shares) would accept MP Global's Shares Offer (or exercise its Rights, reducing the number of New Shares which would be acquired by Glencore as underwriter) if the offer was declared unconditional. The witness statements about those discussions are conflicting, and all of them are based on recollections recorded some time after the event. The Panel does not think that any of the witnesses set out to deceive the Panel, but, as it set out in its Anaconda 15 decision, it is not convinced that any of them has an entirely reliable recollection of what was said, or that their evidence would be improved by being given orally.

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[18] *Policy Statement 31: Acquisitions and Disposals by a Broker Acting as Principal*. MP Global argued that this was not a divestiture situation, as it did not acquire a relevant interest in the shares: it is a distinction without a difference, as only the AIU Agreement prevented it from acquiring the shares.

63. On the assumption most favourable to MP Global as to what was said, the Panel does not accept that the words used will bear the construction that MP Global puts on them: on the contrary, it seems clear that Sherritt avoided committing itself and made it clear to MP Global that it reserved its position.

PROPOSED ORDERS

64. Unacceptable circumstances have resulted from the failure to clearly disperse the Excess Shares resulting from the exercise of the Rights acquired by MP Global under the Rights Offer.

65. It is impossible to reverse that transaction, or to recreate the result, had MP Global taken some other decision. In particular, the Panel sees no compelling logic, and some legal difficulties, in transferring the shares to Glencore, on the assumption that MP Global must simply have allowed the excess Rights to lapse. In its position, it may have suited MP Global better to have given the excess Rights away to non-associated parties who intended to exercise them than to allow them to lapse.

66. Accordingly, the circumstances which now exist can best be overcome by dispersing the Excess Shares into the market. A possible alternative is to sell all of them to a person who is clearly not associated with MP Global, although this would involve some of the difficulties of proof mentioned above. The shares need to be sold in a way which minimises the risk of adverse effects on MP Global, AIU, Glencore and Anaconda shareholders generally.

67. The Panel notes that in *Boral Energy Resources Limited v TU Australia (Queensland) Pty Limited* (1998) 28 ACSR 1 ("***Boral***"), the Supreme Court of New South Wales (Santow J) made a remedial order whereby the divestiture of shares ordered by the Court was specifically framed in a manner which precluded the sale or disposal of those shares to anyone *associated with the bidder company*, to protect the interests in the target company (at ACSR 34, 40):

> "*In the event of divestiture, it shall be by lawful means and to a person or persons not associated with TU; this allows selling to Boral by accepting its offer or selling in the ordinary course of trading on the stock market (other than to any associate of TU) in accordance with the Corporations Law*." (at 41)

68. The Panel takes into account that the Excess Shares would be a material addition to the free float of shares in Anaconda: they are 5% of the shares in the company, MP Global holds 35% and Glencore holds another 46%. The Panel decided that a bookbuild would be suitable, as a well-tried method of selling a large parcel into the market, with the ability to control the size of the parcels sold and reject any unsuitable buyers, without unduly depressing the share price (for the vendor, or for other holders), and open to redirection if it was not working out as expected.

69. The Panel believes that the additional risk involved in the bookbuild is the least which can be imposed on MP Global, consistently with achieving its regulatory objective. Given that MP Global accepted a degree of market and regulatory risk in acquiring the Excess Shares as it did, the imposition of the additional risk is not unfair.

DECISION

70. On 7 March, the Panel decided that it would be in the public interest to declare that unacceptable circumstances existed in relation to the affairs of Anaconda, because of the arrangements concerning the Excess Shares, and advised that it proposed to order that the shares be vested in ASIC and that ASIC appoint a broker to sell them under a bookbuild, to persons not associated with any of the parties. The Panel did not make either the declaration or the orders, as MP Global applied for review of the Anaconda 16-17 decision in the period required by the legislation for consultation in relation to any proposed orders. The proposed orders are annexed to these reasons and contain provisions designed to avoid unnecessary prejudice to MP Global and AIU. On MP Global advising that it proposed to seek review of that decision, the Panel abstained from making final orders, leaving its interim order on foot.

71. The Panel consented to parties being represented by their commercial solicitors[19]. The Panel has made no order for costs, and has received no application for costs orders.

Brett Heading
Sitting President
Anaconda 16 - 17 Proceedings
14 July 2003

[19] However, AIU did not seek to be legally represented in the Anaconda 16-17 proceedings. It did have legal representation in the Anaconda 18 proceedings.

Annexure –Draft orders – Anaconda 16-17

Corporations Act
Section 657D(2)
Order

WHEREAS

A. Mongoose Pty Ltd (ACN 103 410 297) (**Mongoose**) (a wholly owned subsidiary of MatlinPatterson Global Opportunities Partners LP (**MP Global**)) and Australian Investments United Pty Ltd (ABN 63 085 984 359) (**AIU**) entered into a letter agreement (the **Agreement**) on 19 February 2003 relating to the sale of **[*364,607,109*]** shares (the **Excess Shares**) in Anaconda Nickel Limited (ABN 23 060 370 783) (**ANL**).

B. The Agreement indicated that Mongoose:

   a) had applied to be issued with shares pursuant to a 14 for 1 pro rata renounceable rights issue (the **Rights Issue**) by ANL; but

   b) was only permitted to acquire a relevant interest in that number of shares which resulted in its voting power in ANL immediately after the issue of the shares under the Rights Issue being equal to its voting power in ANL immediately before the issue of those shares.

C. The Excess Shares were those ANL shares issued to Mongoose in excess of the number of shares determined pursuant to paragraph Bb) of this order.

D. The sale of the Excess Shares by Mongoose to Anaconda was the subject of two applications to the Takeovers Panel.

E. Under section 657A of the *Corporations Act 2001* (Cth) (the **Act**), the Panel has declared circumstances relating to the affairs of ANL resulting from the sale of the Excess Shares to AIU to be unacceptable circumstances.

ORDERS

F. Pursuant to subsection 657D(2) of the Act, the Panel makes the following orders:

   a) Mongoose and AIU must not transfer or deal with the Excess Shares except in accordance with this order.

   b) Mongoose and AIU must not exercise any voting rights attaching to the Excess Shares.

   c) The legal and beneficial title to the Excess Shares is vested in ASIC subject to this order.

d) ANL and Computershare Investor Services Pty Ltd (ABN 48 078 279 277) must:

(i) amend the register of holders of ANL shares to reflect the vesting of the legal and beneficial title to the Excess Shares in ASIC pursuant to paragraph Fc) of this order;

(ii) subject to paragraph Fd)(i) of this order, not register a transfer of the Excess Shares unless the transfer gives effect to the sale of the Excess Shares provided for in this order. This paragraph Fd)(ii) ceases to have effect once the terms of this order have been fully carried into effect; and

(iii) disregard any vote cast in respect of the Excess Shares by Mongoose or AIU.

e) ASIC will appoint a stockbroker (the **Stockbroker**) to sell the legal and beneficial title to the Excess Shares in accordance with paragraphs Ff) to h) of this order.

f) ASIC will provide the Stockbroker with a copy of this order, and instruct the Stockbroker that the sale is to be conducted in accordance with the following conditions:

(i) the sale of the Excess Shares must:

(A) take place by way of a bookbuild, with bids for the Excess Shares being made on an irrevocable basis; and

(B) be in accordance with terms advised to ASIC by the Panel;

(ii) each proposing purchaser (a **Bidder**) of the Excess Shares must warrant to the Stockbroker, the Panel and ASIC:

(A) the identity of the person on whose behalf the relevant Excess Shares are being acquired by the Bidder (whether this is the Bidder itself or someone else); and

(B) that the person referred to in paragraph Ff)(ii)(A) (the **Ultimate Purchaser**) is not an associate (as defined in the Act for the purposes of Chapter 6) of any of ANL, Mongoose, AIU or Glencore International AG (**Glencore**); and

(iii) the Stockbroker must not accept a bid for any Excess Shares from any of Mongoose, AIU or Glencore or any Bidder who does not provide the warranty required by paragraph Ff)(ii).

g) If the Stockbroker considers that any of the terms imposed in relation to the sale of the Excess Shares are likely to have a material adverse effect on either:

(i) the Stockbroker's ability to find sufficient buyers for all of the Excess Shares; or

(ii) the price that the Stockbroker will be able to realise for the Excess Shares,

then the Stockbroker must:

(iii) immediately advise the Panel that the Stockbroker holds that belief and provide reasons supporting its belief; and

(iv) not conduct the sale of the Excess Shares until it has received further instructions from the Panel.

If the Stockbroker is unable to sell some or all of the Excess Shares in accordance with the instructions given pursuant to this order, the Stockbroker must advise the Panel within 1 business day and must not conduct the sale of the remaining Excess Shares until it has received further instructions from the Panel.

h) The proceeds of the sale of the Excess Shares are to be applied first in satisfaction of the costs, fees and other expenses involved in dealing with the Excess Shares in the manner contemplated by this order, including the costs and fees of the Stockbroker. To the extent that the consideration received for the Excess Shares exceeds those costs, fees and expenses, the balance is to be paid to Mongoose to be applied in accordance with the requirements of the Agreement.

i) The Stockbroker must immediately advise ASIC and the Panel when the sale of the Excess Shares has been completed in accordance with this order, and at the same time provide ASIC and the Panel with:

(i) the identity of each Bidder and Ultimate Purchaser which acquires Excess Shares;

(ii) the original warranties provided pursuant to paragraph Ff)(ii) of this order;

(iii) details of the number of Excess Shares acquired, and price paid for those Excess Shares, by each purchaser; and

(iv) any other information requested by ASIC or the Panel.

[#] March 2003

Brett Heading
President of the Sitting Panel