Takeovers Panel

Reasons for Decision
Anaconda Nickel Limited 15

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

Catchwords:

Breach of section 606 – "creep exception" – exercising creep exception during takeover bid – allegation of association between underwriter and major shareholder – major shareholder's failure to accept rights offer or exercise rights – no evidence of association – not unacceptable to protect own interests – confidentiality – media comment

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

Australian Securities and Investments Commission Act 2001 (Cth), section 190(1)

These are the Panel's Reasons for declining the application by MP Global for a declaration of unacceptable circumstances in relation to the affairs of Anaconda. MP Global sought that the Panel declare that:

a) Glencore's buying of Old Shares on market on 12 and 13 February 2003;

b) Glencore's buying of New Shares on 19 to 21 February;

c) Sherritt's decision not to exercise its Rights nor accept MP Global's Rights Offer;

d) Sherritt's decision not to accept MP Global's Share Offer;

e) Sherritt's on market buying of Old Shares on 13 February;

f) Sherritt's alleged misleading of MP Global prior to MP Global declaring its Share Offer free from conditions; and

g) the alleged association between Sherritt and Glencore,

constituted unacceptable circumstances.

1. These reasons relate to the application made on 20 February 2003 by Matlin Patterson Global Opportunities Partners LP (**MP Global**)[1] 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 on 20 February 2003 to consider the **Anaconda 15** Application. The Panel decided to conduct proceedings in relation to the application and therefore issued a brief under Regulation 20 of the ASIC Regulations. It issued a brief on 20 February 2003 in relation to the application for interim orders and a further brief on

[1] MP Global acted through a subsidiary Mongoose Pty. Ltd.

21 February 2003 in relation to the rest of the application concerning unacceptable circumstances and final orders.

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.asphttp://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

Glencore's Acquisition Of Old Shares On 12 And 13 February 2003

5. The Panel determined that the acquisition of **Old Shares**[2] by Glencore International AG (**Glencore**) on 12 and 13 February 2003 did not constitute unacceptable circumstances. It considered that the acquisitions were within the terms of the "Creep" exception set out in item 9 of section 611 of the Corporations Act 2001 (Cth) (the **Act**). The Panel did not accept arguments from MP Global as to why the Creep exemption should not have been available to Glencore in these circumstances.

Glencore's Acquisition Of New Shares Between 17 And 19 February

6. The Panel determined that the acquisition by Glencore, on a deferred delivery basis, of Anaconda shares (**New Shares**[3]) to be issued under the **Rights Issue**[4] was not material in the context of control of Anaconda and did not appear to have contributed to any unacceptable circumstances. The acquisition amounted to approximately 0.2% of the fully diluted shares in Anaconda following the Rights Issue. The Panel was not satisfied that this acquisition contravened section 606 of the Act. Consequently, the Panel declined that part of MP Global's application that related to these purchases.

Sherritt's Failure To Sell Or Exercise Its Rights, Or Accept The Rights Offer

7. The Panel was initially concerned in relation to the motives of Sherritt International Corporation (**Sherritt**) for allowing its Rights to lapse, for no value, in light of the existence of the Rights Offer[5]. However, following the provision of information by Sherritt in response to further questions from the Panel, the Panel accepted that Sherritt's decision was an exercise of the business judgment of its executives, without external pressures, based on commercial imperatives some of which the Panel

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[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 Rights Issue.

[4] The **Rights Issue** was a 14 for 1 renounceable rights issue to raise $323 million dollars. It made under a prospectus issued by Anaconda on 18 January 2003.

[5] The **Rights Offer** was MP Global's offer to acquire all of the renounceable Rights issued by Anaconda as part of the fundraising. Anaconda issued its shareholders 14 Rights for each Old Share they held. MP Global offered $0.01 per Right.

accepted were plausible. Among the explanations put forward by Sherritt for its conduct were:

a) its commercial desire to preserve the current Anaconda management to protect the reputation of Sherritt intellectual property used by Anaconda, and to maximise the possibility, in its opinion, of a settlement of significant litigation with Fluor Australia Pty Ltd (**Fluor**), which involved both Anaconda and Sherritt. The Panel accepted that this explanation was plausible; and

b) that at the relevant time Sherritt was involved in other major transactions and Sherritt executives did not have time to devote to detailed analysis of the Anaconda transaction. Given its concerns about the impact that MP Global obtaining control over Anaconda could have on Sherritt, it argued that it was justified in acting as it did, especially since the investment in Anaconda was, by that time, immaterial to it. The Panel did not accept this "lack of time" explanation as being entirely plausible given the considerable amount of time that it appeared Sherritt executives had devoted to the issue on 12 and 13 February 2003 (in particular, the numerous conversations between the Chairman of Sherritt and representatives of MP Global and Glencore (see paragraph 63(d)) and the time spent developing and implementing the strategy for Sherritt's acquisition of Old Shares on 13 February 2003 (see paragraphs 76 to 81)).

8. Sherritt asserted, and the Panel accepted, that the potential financial impact on Sherritt associated with its concerns regarding MP Global obtaining control of Anaconda outweighed the value that Sherritt could have received from MP Global for selling its Rights under the Rights Offer. Consequently, the Panel decided that Sherritt's actions did not constitute unacceptable circumstances.

Sherritt's Failure To Accept The Share Offer

9. The issues in relation to Sherritt's decision to allow its Rights to lapse were also raised in relation to the failure of Sherritt to sell its Old Shares to MP Global under its offer for the Old Shares (the **Share Offer**[6]). The Panel decided that Sherritt's decision not to accept the Share Offer was not unacceptable for similar reasons to those relevant to its decision in relation to the Rights lapsing.

Sherritt's Acquisition Of Old Shares On 13 February

10. The Panel was initially concerned in relation to Sherritt's acquisition of Old Shares on 13 February 2003 (at the same time as Glencore was also purchasing Old Shares). However, no evidence was presented to the Panel that convinced it that Sherritt and Glencore were associates in relation to the MP Global offers in general or the on-market buying specifically. As there had been no breach of section 606 of the Act, and the Panel did not otherwise believe that unacceptable circumstances had arisen, the Panel also declined this part of MP Global's application.

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[6] The **Share Offer** was MP Global's offer to acquire all the Old Shares for $0.12 per share. MP Global did not offer to acquire the New Shares.

APPLICATION

Background

11. 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

Rights Issue

12. On 25 September 2002 Anaconda had announced the Rights Issue, a $323 million, $0.05/share, 14 for 1 renounceable rights issue. The Rights Issue was to fund a compromise with Anaconda's[7] creditors, and to fund bringing the Murrin-Murrin Project into profitability. Glencore, a 34% shareholder, had agreed to underwrite the Rights Issue fully for no fee (**Underwriting Arrangements**).

MP Global Offers

13. On 21 January 2003, MP Global had announced that it proposed to make:

    a) **Share Offer** - an off-market bid under Chapter 6 of the Act for all of the Old Shares at $0.12 per share; and

    b) **Rights Offer** - an unregulated off-market offer to acquire all of the Rights issued under the Rights Issue at $0.01 per Right. The Rights Offer was not regulated by Chapter 6 of the Act because the Rights were not securities for the purposes of Chapter 6.

14. The Share Offer was conditional on (amongst other things) MP Global being entitled to acquire (or subscribe for) more than 50% of Anaconda's diluted capital. 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 (which was 14 February 2003).

15. On the evening of 6 February 2003, MP Global announced that the MP Global Offers would proceed, despite the Anaconda 02-05 Panel revoking the ASIC Relief.

16. On the afternoon of Thursday 13 February 2003, MP Global announced that it had freed the Share Offer (and effectively therefore the Rights Offer) of all defeating conditions.

Application

17. MP Global applied for a declaration that:

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[7] The creditors were actually creditors of two of Anaconda's subsidiaries.

a) Glencore attempting to gain control of Anaconda by paying a control premium to selected shareholders only through its acquisitions of Anaconda Shares on 12 and 13 February 2003;

b) Glencore acquiring Anaconda Shares on 12 and 13 February 2003 at prices which contributed to the price of Anaconda Shares being artificially maintained above the offer price under the Share Offer;

c) Glencore acquiring Anaconda Shares, without having made a takeover bid, in order to limit the ability of MP Global to exercise its Anaconda Rights and gain control of Anaconda;

d) any measures taken by Glencore to prevent or discourage Sherritt from exercising its Anaconda Rights, or to induce Sherritt to allow its Anaconda Rights to lapse;

e) any acquisition by Glencore of relevant interests in Anaconda Rights (through the exercise of power over Sherritt or otherwise) contrary to undertakings given in the Anaconda 01 proceedings;

f) any refusal by Anaconda or by Glencore to give certain undertakings requested by MP Global; and

g) any action by Glencore or by Anaconda to bring forward the date of issue of New Shares in order to:

(i) reduce the number of Anaconda Rights that Mongoose was able to exercise, thereby frustrating the acquisition of control (or alternatively the acquisition of a substantial interest) in Anaconda;

(ii) assist Glencore to obtain control under the Underwriting Arrangements; or

(iii) manipulate voting power in Anaconda.

constituted unacceptable circumstances.

Interim Orders

18. MP Global applied for an interim order under section 657E, in the terms described in paragraph 19, such interim order to have effect until the earlier of:

a) the Panel making final orders (if any) in this matter; and

b) two months from the date that the interim order was made by the Panel.

19. MP Global sought an interim order in the terms of either (a) or (b) below:

a) that Anaconda must not allot and issue New Shares under the Rights Issue prior to 25 February 2003; or

b) that, in the event that Anaconda allotted and issued New Shares prior to 25 February 2003, MP Global would nevertheless be permitted to exercise all of its Anaconda Rights provided it disposed of any New Shares (**Excess Shares**) which resulted in MP Global's voting power in Anaconda being in excess of the voting power MP Global would have had, if all New Shares were disregarded,

as at the end of 25 February 2003 (any such Excess Shares to be transferred by MP Global to parties who are not associates of MP Global as soon as practicable after 25 February 2003).

20. MP Global requested the Panel to seek an undertaking from Anaconda to the effect that Anaconda would act in accordance with the terms of the proposed order described in paragraph 19(a), and an undertaking from Glencore to permit Anaconda to act in such a manner. In the event that Anaconda or Glencore refused to provide these undertakings, MP Global sought interim orders in the terms described in paragraph 19.

Final Orders

21. MP Global applied for consequential orders that:

    a) Glencore be required to accept the Share Offer in respect of any Anaconda Shares it acquired on 12 or 13 February 2003.

    b) Glencore be required to divest to MP Global the percentage of New Shares equal to the amount by which Glencore increased its voting power through:

        (i) buying Anaconda Shares on 12 or 13 February 2003;

        (ii) preventing or discouraging the exercise of Anaconda Rights by Sherritt; and

        (iii) acquiring relevant interests in Anaconda Rights contrary to undertakings given in Anaconda 01.

    c) Anaconda must not allot and issue New Shares prior to 25 February 2003.

Timing And Mechanics Of Issuing The New Shares

22. The interim order application was largely concerned with the timing by Anaconda of issuing the New Shares following the Rights Issue. As noted before, the Panel had revoked the ASIC Relief which would have allowed MP Global to exercise all of the Rights it acquired under its Rights Offer without breaching section 606 of the Act. MP Global had proceeded with the Naked Offer[8] and therefore the number of Old Shares that MP Global was able to acquire prior to the issue date would determine the number of Rights MP Global could exercise. MP Global had not received the flow of acceptances of the Share Offer that it would have hoped for. It held more Rights than Old Shares. Every day the New Shares were not issued allowed MP Global another day to acquire Old Shares, and essentially 14 New Shares for every Old Share it acquired.

23. The period of the application, between the close of the MP Global Offers and the issue of the New Shares was almost as busy a period as the period leading up to the close of the Rights Offer and Rights Issue. MP Global had decided to proceed with the Naked Offer. At that time it believed that the percentage voting power in

[8] The **Naked Offer** has been described in previous decisions by the Panel (in particular see paragraph 120 of the reasons for decision in relation to the Anaconda 02 to 05 decision) as MP Global's offer after MP Global had decided to proceed without the benefit of the ASIC Relief.

Anaconda at the date of issue of the New Shares was the determinant of how many of the Rights it could exercise and still fall within the safety of the Rising Tide principle[9]. Therefore, the date of the issue of the New Shares was very important to it.

24. MP Global was looking to gain the maximum time in which to acquire more Old Shares to increase the number of Rights it could exercise.

25. The Rights Issue Prospectus had advised that the expected dates for issuing the New Shares were 25 and 26 February 2003. On 17, 18 and 19 February there was correspondence between MP Global and Anaconda about the date of issue of the New Shares. 18, 21 and 24 February 2003 were mentioned as possibilities, with a possibility also being mentioned of the New Shares being issued on two separate days (which would likely have materially harmed the operation of the Rising Tide principle).

26. Anaconda wrote to MP Global on 18 February advising MP Global that it should proceed on the basis that Anaconda would allot the New Shares on Monday 24 February 2003. It later issued the New Shares on Friday 21 February 2003.

27. MP Global also requested that Anaconda allot only those New Shares which MP Global could acquire under the Rising Tide principle to MP Global and to allot the remainder of the New Shares on exercise of the Rights that MP Global had acquired under its Rights Offer but which would increase its voting power in contravention of section 606 (**Excess Rights**) to another person nominated by MP Global. That issue was later the subject of the Anaconda 16, 17 and 18 proceedings.

28. Anaconda advised the Panel that the timing for allotment of the New Shares was specified in the Underwriting Arrangements. It said that if events occurred earlier than expected it would be contractually bound to follow the times specified in the Underwriting Arrangements, otherwise it risked breaching the Underwriting Arrangements. Anaconda noted that this might jeopardise the underwriting and Anaconda's solvency.

29. MP Global also applied to ASIC at the same time for relief in the circumstances that the New Shares were issued over more than one day. It applied for relief to allow it to exercise as many Rights as it would be allowed under the Rising Tide principle assuming the New Shares were issued all on 25 February as predicted in the Prospectus. ASIC declined MP Global's application.

INTERIM ORDER DECISION

30. The Panel received the application at around 12.12 p.m. on Thursday 20 February 2003. The Panel instructed the Executive to write to parties by email at 12.31 p.m. advising parties to treat the MP Global application as a brief and to provide submissions by 3.30 p.m. and rebuttals by 4.30 p.m. on the issue of the interim order

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[9] The **Rising Tide** principle (see also paragraph 121 of the reasons for decision in relation to the Anaconda 02 to 05 decision) is that a person may acquire voting shares by exercise or conversion of securities without breaching section 606 of the Act where the percentage of the total number of shares issued under the conversion that the person exercises or converts is the same as the percentage of voting power that the person held immediately prior to the issue of the new shares.

requested by MP Global. At the same time, MP Global had reapplied to ASIC for relief allowing MP Global to exercise all of the Rights it acquired under its Rights Offer.

31. The Panel decided to commence proceedings in relation to the Anaconda 15 application, other than the request for the interim order set out in paragraph 19(b) above. The Panel determined that it was more appropriate for the issues the subject of paragraph 19(b) to be determined by ASIC pursuant to the application for relief made by MP Global on 19 February 2003.

32. After a review of the submissions and rebuttals made by the parties on 20 February, the Panel accepted Anaconda's submissions that it was bound to proceed according to the terms of the Underwriting Arrangements. The Panel did not see any reason to place the Underwriting Arrangements at risk by making interim orders which varied the terms of the Underwriting Arrangements or directed Anaconda not to comply with the terms. It therefore determined not to grant the interim order sought by MP Global in paragraph 19(a).

33. The Panel advised parties on the evening of 20 February that Anaconda was therefore free to proceed to allot shares pursuant to the Rights Issue the next day (the next day being the date which by that time Anaconda had settled as the date it was required under the Underwriting Arrangements to allot the New Shares to Glencore).

DISCUSSION

Glencore's Acquisition Of 3% Of "Old Shares" On Market - 12-13 February 2003

34. In the afternoon of 11 February 2003, Glencore instructed its broker, Macquarie Equities (Australia) Limited (**Macquarie**), to buy up to 3% (13.8 million) of the Old Shares on the ASX market. Glencore had been entitled to acquire 3% under the Creep provision for some months. Macquarie commenced buying in the afternoon of 12 February and through 13 February, stopping when it had almost entirely filled Glencore's order.

35. Macquarie acquired Old Shares at below 12 cents on 12 February and in the morning of 13 February. It also acquired Old Shares at 12 cents on the morning of 13 February. However, the buying pressure (including that of Glencore) over the period took the price above $0.12 (which was the price offered by MP Global for Old Shares under the Share Offer). On Glencore's instructions, Macquarie continued buying over the afternoon of 13 February paying up to $0.145 per share.

36. Glencore gave a substantial shareholding notice to Anaconda and ASX on 14 February. Macquarie acquired 4,500,000 Old Shares at an average price of $0.1122 per share on 12 February and 9,300,000 Old Shares at an average of $0.1299 per share on 13 February. Together these constituted 2.99% of the Old Shares on issue at the time and 20% and 32% of the trading on 12 and 13 February respectively.

Market Activity

37. Over the days leading up to Glencore's on-market buying there had been higher trading activity in Old Shares. The volumes and price ranges for the relevant period are set out below:

Date	Volume	High	Low	Av
10-Feb-03	4,871,000	$0.091	$0.085	$0.087
11-Feb-03	18,643,296	$0.093	$0.066	$0.080
12-Feb-03	22,767,268	$0.120	$0.084	$0.106
13-Feb-03	29,079,672	$0.160	$0.110	$0.131
14-Feb-03	10,353,400	$0.135	$0.115	$0.125
17-Feb-03	3,124,714	$0.130	$0.120	$0.125
18-Feb-03	1,501,280	$0.125	$0.115	$0.118
19-Feb-03	2,372,398	$0.125	$0.115	$0.121
20-Feb-03	1,350,006	$0.125	$0.120	$0.121

Submissions

38. Glencore submitted that:

a) there was no legal or policy reason preventing it exercising its Creep entitlement while a takeover bid was proceeding;

b) it had been apparent to the market (from Glencore's earlier substantial shareholding notices) that Glencore had been entitled to acquire a further 3% under the Creep provisions for some time;

c) it had made its acquisitions openly on ASX and not in any manipulative manner;

d) it merely met the market price in acquiring the Old Shares that it acquired on the relevant days;

e) there was no reason why it should not acquire those Old Shares it was legally entitled to, with an intention of reducing the prospect of MP Global's Offers succeeding, in circumstances where Glencore had committed a very substantial sum of money to Anaconda, on the assumption of the current management continuing and where it considered that MP Global gaining control of the company risked a detriment to the prospects of the company (and therefore Glencore's large financial commitment);

f) it was merely acting "*to protect itself, and to improve its influence as a shareholder in Anaconda. It did so, and this was a natural, ordinary and predictable thing for Glencore to do.*"; and

g) any price effect of its buying of Old Shares was small and temporary.

39. Glencore said that there was no sinister attribute to the timing of its buying. Rather, it commenced buying Old Shares as soon as it was permitted by the FIRB. The previous FIRB approval given to Glencore applied only to the acquisition of New Shares under the Rights Issue. Glencore applied for FIRB approval after the announcement of the MP Global Offers and commenced buying after it received approval for on-market acquisitions on 12 February 2003.

40. ASIC and Anaconda supported Glencore's right to acquire shares under the Creep provision.

41. MP Global asserted that Glencore's buying had been designed to affect the price of Anaconda shares in a critical period of its offers. MP Global asserted that the buying had been intended to discourage acceptances of its offers and to prevent MP Global acquiring Old Shares on-market when it freed its offer from conditions. MP Global argued that the Creep provision was intended to be a de minimus exception to the prohibition in section 606 and not to be used strategically to affect control.

42. MP Global asserted that Glencore's buying was intended to create an impression in the market of a rival bidder, to reduce the chance of success of MP Global's Offers. MP Global asserted that that constituted unacceptable circumstances.

43. MP Global asserted that Glencore's buying offered some Anaconda shareholders a benefit, in relation to Glencore affecting control of Anaconda, which was not offered to, or available to, all Anaconda shareholders.

Decision

44. The Panel considered the acquisition of Old Shares by Glencore on 12 and 13 February 2003, and found, on balance, that the acquisitions did not constitute unacceptable circumstances.

45. The concern of MP Global was that the acquisitions were priced, structured and timed to have maximum effect on the prospects of MP Global's offers succeeding, especially given the structure of the MP Global Offers.

46. The Panel decided in Anaconda 04 to revoke the relief granted by ASIC from section 606 of the Act which would have allowed MP Global to exercise all of the Rights it acquired under the Rights Offer. However, MP Global decided to proceed with its Share Offer and Rights Offer and to acquire Rights and exercise them relying on the "Rising Tide" principle. The Rising Tide principle is that in a rights issue (or other pro rata issue) a person may acquire new shares by being issued them in the same percentage as the voting shares they held at the time immediately before the new shares are issued. On that basis, every Old Share which MP Global acquired under its offer for the Old Shares allowed it to exercise 14 Rights and retain the New Shares issued to it on the basis of that exercise. However, if MP Global held a smaller percentage of Old Shares than Rights at the time it came to exercise the Rights and acquire New Shares[10], it would be unable to exercise those Rights it held that were more than its percentage of Old Shares.

47. The acutely critical time for MP Global was the period of 12 and 13 February, when it was considering declaring its offers to be unconditional. Acceptances for Rights

[10] The actual date at which MP Global came to determine how many Rights it could exercise is the subject of later proceedings.

were running ahead of acceptances for Old Shares[11] at that time and the closing date for the Rights Issue on 14 February was looming. In total, Glencore bought just under 3% of the Old Shares on-market on these two days.

48. The Panel considered that Glencore's buying was likely to have affected the on-market price of Old Shares during its buying period. Glencore conceded that this was possible.

49. The Panel accepted that Glencore was entitled to acquire the Old Shares, and that it commenced the acquisitions when it became free to do so following FIRB approval (and Glencore appears to have prosecuted that application diligently and properly). There is no evidence that the instructions that it gave to its broker or the actions of the broker involved any attempt to inflate the market price of Old Shares by its buying strategy.

50. Glencore was under no obligation to assist, or even to acquiesce to the MP Global Offers or MP Global's strategy. Indeed, MP Global's strategy was entirely open to the type of market forces to which it found itself exposed on 12 and 13 February. It was open, as Glencore submitted, to MP Global to increase its offer price for Old Shares. As the Old Shares would constitute only 6.7 per cent of the enlarged capital of Anaconda, the overall increase in its offer cost would be relatively small. MP Global chose not to increase the bid price of its Share Offer and it created a bid structure that relied on a flow of acceptances in its Share Offer that would be unusually early in the bid compared to many other bids. In many takeovers, shareholders wait until towards the end of an offer to assess whether there is a prospect of a higher offer or rival bid.

51. Given the impending dilution of the Old Shares to one fifteenth of their existing proportion of Anaconda's shares, there appeared to be only two valid reasons, and one questionable reason, for Glencore acquiring Old Shares at that time at $0.12. That price was almost twice the expected value of $0.064 per Share following the completion of the Rights Issue (which was the theoretically imputed price of the New Shares and Old Shares given the Rights Issue ratio, the exercise price and the price offered under the MP Global Share Offer).

52. The first reason was to acquire Old Shares in order to acquire New Shares in the deferred delivery market between the Rights Issue close and the allotment date and to acquire the real New Shares when issued in order to move up Anaconda's share register on the Rising Tide principle. However, as was later proven, there was little certainty that there would be any volume of deferred delivery New Shares available on market.

53. The second reason was simply to acquire Old Shares in order that MP Global not acquire them, given the limited free float of Anaconda shares (by that time Glencore

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[11] This was fairly unremarkable, as the offer period for the shares extended until 5 March 2003. There was no time pressure for Anaconda shareholders to sell into the Share Offer. However, as various parties pointed out in their submissions, up to the time that the Rights Offer and Share Offer were declared unconditional it would have been rational for any Anaconda shareholders who wished to accept the Rights Offer to accept the Share Offer in order to assist MP Global to achieve the then minimum acceptance condition.

owned 34%, MP Global 31%, Sherritt 8% and Anglo 3% leaving approximately 24% available).

54. The third, and possibly questionable, motive would be to affect, during a critical period, the price of Old Shares on-market. This might be in order to affect acceptances of the MP Global Share Offer or to prevent MP Global acquiring Old Shares on-market (although Glencore did not then know that MP Global would waive its conditions to allow it to acquire Old Shares on-market) or to give the impression of a rival bidder. However, the two former motivations referred to in paragraphs 52 and 53 may well have caused this as a side effect of the valid acquisition strategy. Determining cause and effect would always be difficult.

55. In the absence of credible and convincing evidence that Glencore's use of its Creep entitlement was improper, the Panel did not consider there was a basis to consider it unacceptable.

Glencore's Acquisition of "New Shares" in Anaconda On-Market - 17-19 February

56. Glencore "acquired" 14.7 million New Shares on market over the period 17 - 19 February 2003 (on a deferred delivery basis). It acquired the shares through Shaw Stockbroking Limited. That was before the New Shares were issued, but after the Rights Offer had closed. Glencore paid between $0.07 and $0.08 per share. They constituted approximately 0.2% of the expanded number of Shares in Anaconda. Glencore was entitled to do so because, although it had used up all of its Creep entitlement, the New Shares traded on-market during that period related to shares which had not yet been issued. As such, they would only be acquired for the purposes of section 606 when they were issued, given Glencore's buying of Old Shares on 12 and 13 February. Under section 606, Glencore could afford to acquire up to 2.99% of the total New Shares in the period leading up to the allotment date and rely on the Rising Tide principle to allow it to "acquire" the New Shares when they were issued.

57. Whether Glencore's acquisition of New Shares did or did not technically come within the Rising Tide principle (and thence did not offend section 606) appears open to interesting legal discussion. The Panel was not satisfied that the acquisition contravened section 606.

58. However, the Panel does not consider that the acquisitions were material in terms of Glencore's overall percentage voting power after the Rights Issue and the Underwriting Arrangements. Neither do those acquisitions appear material in terms of the success or otherwise of the Share Offer and Rights Offer as MP Global was expressly not offering for the New Shares. By the time Glencore acquired the New Shares, the Rights Offer had already closed.

59. As Glencore's acquisitions of New Shares do not appear to have contributed to any unacceptable circumstances, and appear to have been made during a period that was not material to MP Global's Offers, the Panel declined that part of MP Global's application.

Sherritt's Failure to Accept Rights Offer or Exercise its Rights

Facts

60. Sherritt held 517,263,138 Rights, worth $5,172,631 under the Rights Offer. It allowed them to lapse, for no value. MP Global argued that there could be no rational explanation for Sherritt deciding to forego over $5.1 million worth of value for its shareholders by not accepting its Rights Offer, not selling the Rights on-market and not exercising the Rights.

61. The Panel was initially concerned that there did not appear to be a sensible explanation. It put to Sherritt the inference that MP Global asserted i.e. that there had to be some other form of benefit for foregoing that amount of value. The Panel put to Sherritt that the most likely source of any such benefit was Glencore since Sherritt's actions increased the likelihood that Glencore (and not MP Global) would have control of Anaconda following the completion of the Rights Issue. MP Global argued that such a benefit, if it existed, would be very easy to conceal given the very extensive, world wide range of complex mineral and other transactions which both Glencore and Sherritt conduct.

62. Initially, Sherritt failed to provide a convincing explanation of its actions, and the Panel reverted to Sherritt a number of times with questions that it considered were not answered in Sherritt's responses, trying to elucidate Sherritt's actions and its motivations and rationale for that action. Sherritt later said that it had been initially concerned about disclosing information which might have been used against it in other areas, or disclosed to the media.

Sherritt's Submissions

63. After a number of requests and submissions, Sherritt provided the following as the reasons for it deciding to allow its Rights to lapse, for no value, with the relevant New Shares being taken up by Glencore as underwriter:

    a) Sherritt was comfortable with the current management of Anaconda, and was concerned that, if it obtained control, MP Global might disturb the management arrangements at Anaconda, to Sherritt's commercial disadvantage. Anaconda licensed technology which Sherritt had developed in relation to acid pressure leaching of laterite nickel ore. Implementing the process at the Anaconda plant (the **Plant**) had proven problematic, to the detriment of the reputation of the process and Sherritt, its developer. In the recent past, under the new management at Anaconda, that process had approached stability and functionality and Sherritt was concerned that changing the management might harm that stability, and hence the reputation and value of its intellectual property;

    b) Sherritt, as the provider of the technology on which the Plant was based, was materially interested in the state of litigation between various parties involved in the construction and operation of the Plant. Anaconda (through its subsidiary Anaconda Operations Pty Ltd (**AOPL**)) and Fluor, the constructor of the Plant, are involved in, a major arbitration relating to certain failings in the operation of the Plant. Anaconda had commenced litigation against Fluor in relation to the

plant aspect of the Murrin Murrin Project. That had resulted in one arbitration agreement between the parties. Fluor had then commenced proceedings against Sherritt and Dynatec Corporation (**Dynatec**) to recover from them whatever Fluor had to pay to AOPL under the arbitration between Fluor and AOPL. Fluor had discontinued that litigation in December 2002 but had reserved its rights to reinstate the proceedings. Sherritt considered that a change in Anaconda's current management would be detrimental to the outcome of the dispute in that aggressive pursuit of Fluor may cause Fluor to recommence its action against Sherritt;

c) Sherritt was also concerned that Mr. Andrew Forrest (a former CEO of Anaconda) appeared to be associated, involved or connected, in some way or other, with MP Global and its offer. Mr. Ian Delaney, the Chairman of Sherritt (who had been Chairman of Anaconda for a period) considered that Mr. Forrest returning to management control or influence would adversely affect Anaconda in terms of production and profitability and in terms of the prospects of any settlement of the Fluor litigation. Forrest had made a number of telephone calls to Mr Delaney supporting MP Global's Offers;

d) Sherritt did not have management time to devote to a detailed analysis of the MP Global Offers. At the time of the Rights Offer Sherritt was also engaged in two other transactions, the "Fording Transaction" and the "Sherritt Power Transaction". These two transactions had a combined value of approximately $2,162,250,000 compared with the value of Sherritt's Rights under the Rights Offer of approximately $5.1 million. For example, the professional fees for the Fording Transaction and Sherritt Power transaction exceeded the value of the Sherritt Rights a number of times over. Sherritt said that had it allowed itself to be distracted by the intricacies and intrigues of the Rights Issues and the MP Global offer, the potential loss or impact to Sherritt could have been significant. However, while Sherritt apparently devoted little time to Anaconda and the MP Global Offers leading up to the final week, Sherritt's statements concerning lack of management attention needed to be considered in light of Mr. Delaney's preparedness to continue a large number of telephone calls between himself and Mr Deru of MP Global and Mr Glasenberg of Glencore over several days leading up to the close of the Rights Issue and to spend his, and his staff's, time on the morning of 13 February (Australian time) in discussing, arranging and buying 4,000,000 Old Shares (0.87%, worth $556,000) allegedly to try to engineer a higher takeover offer for the 0.53% of Anaconda that Sherritt would be entitled to after the issue of the New Shares[12]. Sherritt also demonstrated that when it chose to do so, it was prepared to make very rapid decisions, and that it also had time to arrange for cash to be transferred to an Australian account in case it chose to exercise its Rights;

[12] However, Sherritt did indicate that if an acceptable alternative takeover offer had been made before the Rights Issue closed, it had the procedures in place to allow it to exercise its Rights so that it could then sell both its Old Shares and New Shares into such an offer.

e) Sherritt said that as it had had written off its investment in Anaconda by almost $71.9 million, the further loss of $5 million did not appear material, and the investment of a further $25.45 million to exercise its Rights did not look an appealing transaction especially in circumstances where Sherritt had significant demands placed on its funding capability by the Fording Transaction;

f) Sherritt had not formed a view on whether or not it would exercise its Rights, and kept its options open until the last minute. As part of this exercise, it had transferred funds to an Australian agent to exercise its Rights at short notice if it decided to do so.

64. Sherritt also argued strongly that:

a) the exercise of its business judgment should not be called into question ex post as there was no evidence that it had done anything other than exercise its business judgment, in difficult circumstances, in the interests of its shareholders;

b) it was entitled to make a commercial decision without fear for the impact it may have on others (in particular, MP Global); and

c) it was not under any statutory obligation to do anything in relation to the Rights.

65. Sherritt argued that it had been trying in its discussions with Glencore to encourage Glencore to make a higher bid for Anaconda. Sherritt believed that the successful resolution with Anaconda's bondholders should allow Glencore to offer more for the equity in Anaconda. Mr Delaney characterised much of his actions and conversations with Glencore and MP Global as designed to engineer this higher bid by Glencore.

66. Sherritt submitted that apart from one small and unrelated coal acquisition, there were no transactions between Glencore and Sherritt current or over the past 6 months. Glencore made similar submissions. These submissions were in response to MP Global's assertions that either Glencore had commercial leverage over Sherritt and could influence Sherritt by threat, or that Glencore and Sherritt had many commercial transactions via which Glencore could reward Sherritt for Sherritt's support of Glencore gaining control of Anaconda, as MP Global asserted Glencore was trying to do.

MP Global's Submissions

67. MP Global submitted that Sherritt's decision not to accept its Rights Offer or to exercise Sherritt's Rights (and therefore give up $5.1 million in value) must have been for a reason - in particular, either fear or because it was getting a benefit elsewhere. MP Global argued that the only person likely to want to threaten or induce Sherritt would be Glencore, and MP Global argued that Glencore was competing with MP Global for control of Anaconda.

68. MP Global asserted, which Sherritt denied, that Mr Delaney had advised Mr Deru, on or about 2.00 p.m. on Thursday 13 February, that Sherritt would either exercise its

Rights or sell its Anaconda Old Shares and Rights into the highest bid. Sherritt's failure to do the thing which MP Global asserted Mr Delaney had assured Mr Deru that Sherritt would do, was evidence that some interference had taken place. It argued that this evidenced unacceptable circumstances.

69. MP Global argued against most of Sherritt's assertions:

    a) it said that it had no association with Mr Forrest;

    b) it raised the apparent inconsistency of Sherritt saying it was too involved in the Fording Transaction to devote time to the MP Global Offers, but still clearly spending some significant time effort and energy in Anaconda affairs; and

    c) it disputed Sherritt's versions of various conversations between Mr Delaney and Mr Deru, especially:

        (i) the conversation on 13 February in which Mr Deru asserted that Mr Delaney had said Sherritt would either exercise or sell its Rights; and

        (ii) conversations on 7 and 13 February in which Mr Deru asserted that Mr Delaney had said Sherritt would be concerned about the reaction from Glencore if it accepted a conditional offer from MP Global.

70. MP Global did not introduce any evidence of association or manipulation, apart from the testimony above concerning a number of telephone conversations between principals of MP Global and principals of Sherritt and Glencore.

71. The other parties, especially Sherritt, directly contested MP Global's evidence of those conversations. In the absence of other evidence the Panel did not find MP Global's evidence persuasive in the face of the other parties contesting them.

Decision

72. The Panel found that when it was finally able to gather and arrange Sherritt's evidence explaining why it took the decision to allow its Rights to lapse, that evidence presented a plausible explanation which MP Global failed to rebut. The Panel declined to make any declaration that Sherritt's actions constituted unacceptable circumstances either on the grounds that Sherritt and Glencore were associates or otherwise.

Sherritt's Failure to Accept the MP Global Share Offer

73. Sherritt did not accept the MP Global Share Offer for its 40,947,367 (approximately 8.87%) Old Shares. Had it done so at the offer price of $0.12, and then sought to acquire New Shares, Sherritt would likely have either acquired twice the number of New Shares as it owned Old Shares, or made a profit of up to $1,900,000. This is based on the last price for the Old Shares trading separately on 6 March 2003 following the close of the Rights Offer i.e. $0.068.

74. MP Global raised the same concerns about Sherritt's failure to accept the Share Offer as it raised concerning Sherritt's decision to allow its Rights to lapse. Sherritt raised the same explanations.

75. The Panel made a similar decision in relation to MP Global's assertions concerning Sherritt's decision not to accept the MP Global Share Offer as it found in relation to Sherritt's decision to allow its Rights to lapse. The Panel decided that Sherritt's evidence presented a plausible explanation of why it did not sell to MP Global although this decision involved giving up the opportunity for up to $1.9 million profit.

Sherritt's Acquisition of "Old Shares" on Market - 13 February

76. Sherritt instructed its Canadian broker (National Bank Financial Inc, which in turn instructed an Australian broker JB Were) to acquire Old Shares on-market on the morning of 13 February 2003. Were acquired 4.15 million shares at an average price of $0.139 per share. They constituted 0.87% of the Old Shares.

77. MP Global asserted that Sherritt's buying of Old Shares on-market on 13 February was evidence of collusion between it and Glencore in seeking to prevent the success of MP Global's offer. That would have caused unacceptable circumstances, as well as a breach of section 606.

78. Ms Myson of Sherritt gave evidence that she and Mr Delaney and other Sherritt staff discussed Sherritt's strategy on 12 February (Toronto time), analysing the trading patterns in Anaconda Shares over the previous days, and decided to try and stimulate a rival offer from Glencore or another person. Ms Myson asserted that Sherritt was concerned that another person had been buying Anaconda Old Shares on market and Sherritt was worried that the person might be a supporter of MP Global.

79. Sherritt still was seeking to prevent a change in management of Anaconda, and if a rival bid was to emerge Sherritt sought to increase the price at which the rival bid would have to be made (again Sherritt considered it might yet be able to exercise its Rights and sell into a higher bid).

80. Mr Delaney had been speaking with both Mr Deru of MP Global and Mr Glazenberg of Glencore over the days (and nights) leading up to the close of the Rights Offer. His stated preference was to persuade Glencore to make a counter offer for Anaconda. He believed that Glencore, having recently achieved a good deal in the debt reconstructions was in a position where it could afford to pay more for Anaconda than MP Global.

81. Ms Myson stated that she discussed the market and acquisitions of Old Shares by JB Were for Sherritt and gave detailed instructions through the period through the Canadian broker as to when and at what prices to acquire Old Shares.

MP Global's Submissions

82. MP Global asserted that the buying by Sherritt was evidence of an association between Sherritt and Glencore to enable Glencore to gain control of Anaconda through its underwriting of the Rights Issue.

83. MP Global was critical of Sherritt's explanations for acquiring Old Shares on-market. It criticised Sherritt's submissions in relation to:

a) Sherritt's assertion that it did not know that the Rights were tradeable separately from Current Shares, and thought that they were "imbedded in the Current Shares";

b) Sherritt's assertion that Sherritt had thought that Glencore would make a bid for Current Shares at 25-30 cents. MP Global set out its reasons for disagreeing with Sherritt's analysis of why this might be likely;

c) Sherritt's assertion that it was seeking to profit from its trading in Old Shares given that Sherritt had previously chosen to give up $7.5 million by allowing its Rights to lapse;

d) A number of assertions Sherritt made in relation the possibility of a rival bidder as a basis for its acquisitions of Old Shares; and

e) Sherritt's contention that Glencore might make a higher bid, given Glencore's declining of the Panel's invitation to make a bid for all of the shares at $0.06 per share previously.

Decision

84. The Panel was concerned at the evidence that a second major shareholder in Anaconda went on-market during a critical time in MP Global's offer, at prices well in excess of the Share Offer price, with no intention of making a general offer to all Anaconda shareholders and with the intention of affecting the outcome of a takeover.

85. However MP Global's strategy and bid structure was vulnerable to such actions, as noted in relation to Glencore's buying and MP Global had no right to expect such actions would not happen.

86. The Panel accepted the various reasons put forward by Sherritt explaining its decision to acquire the Old Shares as plausible, and consistent with its other actions and stated reasons. In the absence of any evidence of association, or acting in concert, between Sherritt and Glencore or of market manipulation, the Panel did not consider that Sherritt's buying of Old Shares caused unacceptable circumstances.

87. The Panel declined this part of MP Global's application on the basis of:

a) the relatively small size of the buying by Sherritt;

b) the fact that the market had already moved past MP Global's offer price (albeit perhaps due to Glencore's buying);

c) the fact that there was no evidence presented that convinced the Panel of an agreement between Sherritt and Glencore in relation to the MP Global offers in general and the on-market buying specifically; and

d) the fact that Sherritt owned well under 20% of Anaconda and so it was entitled to acquire Anaconda shares without any breach of section 606 of the Act.

88. However, the Panel was concerned at the apparent inconsistencies in Sherritt's submissions. The most glaring one being Sherritt's repeated and consistent assertion that it was too busy with the Fording Transaction to devote management time to the Anaconda issues and that the sums of money involved in the Anaconda transactions were inconsequential. The amount of time that Mr Delaney and his staff appear to have put into the transactions on 12 and 13 February 2003, and Sherritt's willingness to make rapid decisions when it chose to, make the assertion as to lack of attention difficult to believe.

Further, the arguments Sherritt put forward as to its reasons for buying Old Shares on 13 February are frequently hard to understand or believe.

89. The fact that Sherritt appears to have commenced this action without, according to its evidence, a proper understanding of the Australian market, the terms of the current offer and Australian takeovers law is concerning. It would have been prudent for Sherritt to seek Australian counsel's advice before conducting market affecting transactions during a takeover offer.

Association between Glencore and Sherritt

90. One of the recurring themes of MP Global's later submissions was that of some form of association between Sherritt and Glencore. MP Global asserted that its belief about an association between Sherritt and Glencore was supported by:

    a) Sherritt's action in not selling or exercising its Rights;

    b) Sherritt not accepting the Share Offer;

    c) Sherritt buying Old Shares on-market on 13 February; and

    d) various statements that MP Global asserts were made by Mr Delaney and Mr Glasenberg to Mr Deru.

91. The issues surrounding Sherritt's actual actions have largely been discussed above.

92. Had Glencore and Sherritt entered into an agreement to act together to prevent MP Global achieving control of Anaconda a number of things would have flowed:

    a) Glencore and Sherritt would have breached section 606 by entering into the agreement, each would have acquired the voting power of the other;

    b) Glencore's on-market buying on 12 and 13 would not have been within the Creep provisions of Item 9 of section 611, rather it would have been a further breach of section 606;

    c) Sherritt's on-market buying on 13 February would not have been under the 20% threshold, rather it would also have been a further breach of section 606;

    d) Glencore and Sherritt's on-market buying may well have been closer to market manipulation if it was conducted for improper purposes; and

    e) Glencore and Sherritt's conduct may well have constituted unacceptable circumstances in relation to the affairs of Anaconda.

The telephone conversations

93. The issues of what was said by whom to whom occupied a large volume of these proceedings. There were a large number of telephone conversations between the protagonists made over a short period of intense activity at the peak of MP Global's offers. The conversations were made over a period of time, between persons with very significant experience in corporate negotiations. As would be expected, there were material disputes, lack of recollection, and initial errors in dates and times,

concerning a large number of these conversations. It appears that the parties made very few detailed records at the time of the telephone calls. Eliciting a reasonable estimate of the content of the conversations and the reliability of the various recounts took a material amount of effort on the part of the Panel and on the part of the parties.

94. Further, many of the issues raised concerned alleged association and decisions or agreements to act in concert. Most evidence in relation to association, or acting in concert, is likely to be circumstantial. Rarely in enquiries do parties to such agreements carefully document them and leave them on file for production. These proceedings were little different to many which the Panel has had to consider in relation to questions of association. Decisions in these cases are frequently made on an "on balance" basis and taking a view on the inferences which might properly be drawn from parties' commercial behaviour and from assertion evidence about conversations between parties who are not only interested in the proceedings, but in intense commercial competition. Eliciting such evidence will usually be time consuming, frustrating for parties, and involve iterations of evidence gathering.

95. MP Global explains its theory of the association in its final submissions in these proceedings. MP Global said that the Panel could infer that Sherritt was, up until the end of 13 February, using its significant shareholding in Anaconda to try and influence control of Anaconda to play Glencore off against MP Global, simultaneously encouraging MP Global and seeking to pressure Glencore with acceptance of the MP Global bid, or with the prospect of Sherritt exercising its Rights, unless Glencore made a higher bid to rival MP Global's. At 13 February, Glencore did not make a bid and Sherritt was faced with exercising its Rights, accepting the Rights Offer or seeing its Rights lapse worthless. MP Global then alleged that Glencore had in its turn sought to pressure Sherritt into allowing Sherritt's Rights to lapse. MP Global asserts that Glencore offered Sherritt the hope of lowered risk in the Fluor litigation, and that Sherritt then allowed the Rights Offer to pass, allowed its Rights to lapse, and commenced the purchase of the Old Shares on 14 February.

96. MP Global's theory as to what went on between Sherritt and Glencore, and what went on in Sherritt's mind is well argued and, from MP Global's perspective obviously plausible.

97. However, there was little evidence brought forward by MP Global that was not just its version of what was said against other persons' versions of what was said. MP Global provided little basis for choosing the assertion of malfeasance against the assertion of valid commercial self interest and Glencore and Sherritt acting on parallel but not associated courses of action.

Decision

98. The Panel considers that MP Global was unable to provide sufficient evidence in these proceedings that Sherritt and Glencore decided, or agreed, to act in concert, or to determine or influence the outcome of the MP Global Offers, or to determine of influence control of Anaconda. That is an on balance decision, as is much of this decision, given that the decisions in these proceedings are largely based on the Panel's view as to which of different contentions are more likely to be correct in the absence of hard factual evidence.

DECISION

99. The Panel declined to make the declaration or orders requested by MP Global.

100. The Panel consented to the parties being represented by their commercial solicitors. It made no order for costs.

Confidentiality

101. The Anaconda 15 Panel noted in its release of its decision that the Anaconda proceedings in general appeared to be subject to more than usual comment in the media. The Panel was materially concerned that confidential information provided to the Panel and to parties in the proceedings appeared to be reflected in some media articles on the proceedings, despite parties having given undertakings to the Panel to respect the confidentiality of information provided by parties.

102. In particular, in the Anaconda 15 proceedings one of the parties had concerns in relation to the inclusion of legitimately confidential information in its submissions to the Panel. The fact that the party was initially reluctant to provide this information to the Panel contributed to the length of the Panel proceedings. However, the Panel understood the party's concerns in relation to the provision of this information given the potential for it to suffer adverse commercial consequences if the information was disseminated outside the proceedings, compared with the prejudice it could suffer in the Panel proceedings if the information was not provided.

103. The Panel regrets that the media appears to have been used by parties in the Panel's proceedings, including Anaconda 15, seeking to gain tactical advantages in their campaigns.

Brett Heading
Sitting President
Anaconda 15 Proceedings
14 July 2003