



# Takeovers Reasons for Decision Panel Anaconda 18

## In the matter of Anaconda Nickel Limited 18 [2003] ATP 18

### Catchwords:

*Review of Panel decision – 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 – truth in takeovers – unacceptable circumstances involving acquisition of substantial interest – unfair prejudice*

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

*ASIC Policy Statement 25: Takeovers: false and misleading statements*

*Corumo Holdings Ltd v C. Itoh Pty Ltd (1991) 24 NSWLR 370*

*A-G (Vic) v Walsh’s Holdings Ltd [1973] VR 137*

*Aberfoyle Ltd v Western metals Ltd (1998) 84 FCR 113*

**These are the Panel’s reasons for declining the application by MP Global for a review of the decision by the Anaconda 16 – 17 Panel to make a declaration of unacceptable circumstances in relation to the affairs of Anaconda 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% of the New Shares. The Panel made orders requiring the Excess Shares to be sold by a stockbroker nominated by ASIC.**

1. This matter concerns an application made on 11 March 2003 by MatlinPatterson Global Opportunities Partners LP (**MP Global**) under section 657EA of the Corporations Act (**Act**) of the decisions and the orders in the matters of Anaconda 16 - 17, concerning the affairs of Anaconda Nickel Ltd (**Anaconda**).

### **The Panel & Process**

2. The President of the Panel appointed Simon McKeon (President), David Gonski and Ian Ramsay to consider the Anaconda 18 application.

### **Definitions**

3. Unless indicated to the contrary, terms used in these reasons have the same meaning as in the Panel’s reasons for decision in the Anaconda 02 to 05 and Anaconda 16 - 17 applications. A copy of the Anaconda 02 to 05 reasons can be found at <http://www.takeovers.gov.au/Content/Decisions/2003/anaconda02-05.asp>. Annexure C of those reasons sets out a glossary of the terms defined in the reasons. A copy of the Anaconda 16 - 17 reasons can be found at <http://www.takeovers.gov.au/Content/Decisions/2003/anaconda16-17.asp>.

#### SUMMARY

4. On 10 April 2003, the Panel affirmed the decision of the Panel in Anaconda 16 - 17 (the **Anaconda 16 - 17 Panel**) that the sale of the Excess Shares by MP Global to AIU Australian Investments United Pty Ltd (AIU) (**AIU Agreement**) gave rise to unacceptable circumstances and that the shares should be sold into the market by a bookbuild. The Panel advised parties at that stage of the orders that it proposed to make but advised that it would hold over making the orders until the result of the review proceedings of the decision in Anaconda 15 proceedings had been completed, as the two Panels may look to deal with similar shares in Anaconda. A copy of the declarations and orders made by the Panel are annexed to these reasons. In addition, a copy of the declaration and orders from the Anaconda 19 decision are also annexed to these reasons for decision, because that Panel decided to combine the sale of shares from those proceedings with the sale of Excess Shares in these proceedings.

#### 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 Anaconda 16 - 17 Panel's reasons set out some additional facts which are relevant to these proceedings. The Panel has also published a separate document which sets out the course of events, applications, decisions, course of the various offers, and other information useful to understand the Anaconda takeovers and proceedings. The documents are titled 'Anaconda Nickel Limited 02 to 05', 'Anaconda Nickel Limited 16 and 17' and 'Anaconda Nickel Limited - Chronology of Applications'. They are available at <http://www.takeovers.gov.au/Content/Decisions/2003/anaconda02-05.asp> and [http://www.takeovers.gov.au/Content/Decisions/2003/ANL\\_chronology.asp](http://www.takeovers.gov.au/Content/Decisions/2003/ANL_chronology.asp).

##### Application

6. MP Global's main submissions were that:
  - a) the main features of the AIU Agreement were determined by the need to avoid a breach of Chapter 6 of the Act on issue of the Excess Shares, a lack of alternative buyers, and its need to keep Glencore from acquiring the Excess Shares;
  - b) keeping the Excess Shares out of the hands of Glencore supported an efficient, competitive and informed market in Anaconda shares, as otherwise the market in Anaconda shares was likely to be thin, particularly if Glencore acquired effective control of Anaconda under the Rights Issue;
  - c) there was insufficient evidence to support a finding that AIU and MP Global were associated, or for putting the onus on MP Global to show that they were not; and

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- d) the order for disposal of the Excess Shares was unfairly prejudicial to MP Global.
- 7. MP Global requested the Panel to set aside the decision of the Anaconda 16 -17 Panel and substitute a new decision dismissing the applications in Anaconda 16 -17.

## DISCUSSION

### Unacceptable Circumstances

- 8. The Panel found that the circumstances the subject of the application warranted the commencing proceedings.
- 9. The Panel makes the same findings of fact as the Anaconda 16 - 17 Panel. On the basis of those facts, the Panel concluded that there appeared, *prima facie*, to have been a breach of section 606 of the Act, because the Excess Shares were issued to MP Global. Once that was found, the Panel was prepared to find that section 606 of the Act had been breached by MP Global, AIU, or both, unless it was shown that the acquisition did not involve a contravention. The Panel also found that the Excess Shares constituted a substantial interest.
- 10. To rebut the finding of a breach arising from the acquisition of the legal title to the Excess Shares, and to satisfy the Panel that it was entitled to rely on the exception in section 609(2) of the Act, MP Global needed to show that it:
  - (a) acquired the shares as bare trustee; and
  - (b) was not associated with AIU.

### Association

- 11. If AIU and MP Global were associated, the acquisition would have contravened section 606 of the Act, for reasons set out in the Anaconda 16 - 17 Panel's reasons. In addition, if they were associated, the relationship between MP Global and AIU would not have been one of bare trust, to which the exception in subsection 609(2) of the Act applied, because MP Global would have had some say in the disposal of the shares.<sup>1</sup> On all of the evidence, MP Global and AIU had not shown that they were not associates, or that they were within the exception in subsection 609(2) of the Act.
- 12. The Anaconda 16 - 17 Panel noted the following factors amount in aggregate to an arguable case that AIU and MP Global were associates at the times the AIU Agreement was made and the Excess Shares were issued, although no one of them is decisive:
  - a) evidence that the principals of AIU, on the one hand, and MP Global, on the other hand, had been acquainted for a long time;

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<sup>1</sup> *Corumo Holdings Ltd v C. Itoh Pty Ltd* (1991) 24 NSWLR 370.

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- b) MP Global's seeming concern that AIU acquire the shares, and not buyers in the ordinary course in the market, 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;
  - c) MP Global's failure to look for alternative buyers and its refusal to attempt to arrange a sale to a broker acceptable to Anaconda, although such a sale would have had to have unusual characteristics;
  - d) the unusual terms of the sale;
  - e) the unusual nature of the transaction for AIU, being many times greater than any transaction which AIU or its principal could demonstrate it had ever conducted before;
  - f) the high degree of personal reliance by MP Global on the principal of AIU, which is the polar opposite of the indifference as to the identity of the buyer which characterises a competitive market;<sup>2</sup> and
  - g) MP Global's failure to approach any other possible buyers of the Excess Shares, although the Panel specifically invited MP Global to detail any such approaches.
13. The Panel notes that none of Glencore, Anaconda or any other party to the proceedings produced evidence (other than the circumstantial evidence mentioned above) that MP Global and AIU were associated.
14. The Panel accepts that the main provisions of the AIU Agreement would have been needed in any agreement to sell the Excess Shares so as to prevent MP Global from acquiring a relevant interest in the shares when they were issued, whether the sale was to AIU or another buyer. The problem is less in the terms of sale than in the way MP Global chose the buyer and the way in which the terms limited the choice of buyer.
15. The Excess Shares could have been sold down through a broker acting as principal, although for the purpose of resale, or to an institution buying as principal. Therefore, the Panel does not accept that MP Global had to sell to AIU for reasons of personal reliance. It could have sold on similar terms under a properly documented contract of sale with a buyer of adequate means. Its failure to do so and to explain its choice leave open the inference that it was associated with AIU. The Panel was further convinced that this was the case because Anaconda was no longer a distressed company. It was just completing a major debt restructure, it had made significant strides in the operating efficiency of its plant and it had further secured the support of a very substantial shareholder in Glencore. On that basis, the Panel considered that MP Global should have looked to a broker or independent institution.

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<sup>2</sup> *A-G (Vic) v Walsh's Holdings Ltd* [1973] VR 137; *Aberfoyle Ltd v Western Metals Ltd* (1998) 84 FCR 113.

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16. Like the Anaconda 16 - 17 Panel, 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 the purchase money of \$20 million or more was unsecured. The principal of AIU offered to provide, and the Panel accepted his offer, evidence in the form of declarations, to establish that at the time he had the means to execute a transaction of this size. Two separate declarations were provided to the Panel Executive for the Panel members on the following bases<sup>3</sup>:
- a) in relation to the first declaration, that AIU would not under any circumstances consent to the disclosure of the declaration to the other parties to the Anaconda 18 proceedings; and
  - b) in relation to the second declaration, that AIU would consent to the disclosure of the declaration to the other parties to the Anaconda 18 proceedings if the Panel considered this to be necessary for reasons of procedural fairness.
17. In light of these restrictions, the Panel considered whether evidence that clearly showed the Mr Hutapea was able to fund the acquisition of the Excess Shares by AIU would affect its decision in relation to Anaconda 18 in AIU's favour. The Panel formed the view that even if such clear evidence was provided to it, it would not affect its decision in the proceedings. Consequently, in light of Mr Hutapea's concerns about maintaining the confidentiality of the declarations the Panel determined that, in the interests of procedural fairness, it would not review either of the declarations referred to in paragraph 16.
18. Had the Panel needed to do so to make a decision, it would have conducted further enquiries and examinations to determine, in positive terms, whether MP Global and AIU were associates in relation to Anaconda. However, as explained below the Panel came to the view that MP Global's had breached section 606 of the Act unless it was able to show, among other things, that AIU was not one of its associates. The Panel found that MP Global did not demonstrate that it and AIU were not associates. In light of this, it was not necessary for the Panel to make further enquiries in this regard, and the Panel makes no positive findings as to whether or not MP Global and AIU were associates in relation to Anaconda.

### Declarations as to Association

19. Principals of both MP Global and AIU provided declarations 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. They offered to give oral evidence and submit to cross-examination.

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<sup>3</sup> The Panel invited the principal of AIU initially to provide the documents to the Panel only, and via the Panel's Executive so that the Panel might consider how best to deal with sensitive private information. Therefore, the documents were provided to the Executive which advised the Panel of the nature of the contents, but not the substantive information in the documents. The Panel then considered how it would use the documents, if at all.

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Both MP Global and AIU urged the Panel to rely on those declarations, in the absence of direct evidence of association.

20. The Panel concurs with the Anaconda 16 - 17 Panel in declining to base its decision on these declarations, and with its reasons. In such a complex and subjective matter as association, it is particularly necessary for the Panel to make its own findings and not merely to accept the assurances of parties, no matter how sincere.

#### DECISION

21. The Panel finds that, despite the AIU Agreement, MP Global (and perhaps also AIU, though it is unnecessary to decide that) breached section 606 of the Act by acquiring legal title to the Excess Shares. Having subscribed for the Excess Shares, MP Global placed itself in a position where it would be in breach of section 606 of the Act unless it showed that it was bare trustee of the Excess Shares. In the circumstances, that required it to show not only that it had entered into the AIU Agreement and that the AIU Agreement had the effect that MP Global claimed, but also that it did so with a person who was not an associate.
22. The breach is not merely technical, inadvertent or trivial. It involved a parcel of Shares which was material and could easily have been critical to control of Anaconda, which at that date was far from settled. MP Global entered into the arrangements with full knowledge of the circumstances and the market and regulatory risks. The effect of the AIU Agreement was to remove that substantial parcel from the open, competitive market, and to pass control of it under special arrangements between the parties which were only commercially justifiable because of their previous dealings and understanding of one another.
23. In addition, MP Global had been on notice since the time it decided to continue with its Share Offer and Rights Offer without the benefit of the ASIC Relief that the possibility existed that it would acquire more Rights than it could legally exercise. MP Global published a Media Release on 6 February announcing that it would be proceeding with its Offers, even without the ASIC Relief. It also said in that announcement that it would be restricted in the number of Rights that it could exercise to the number which would cause MP Global's percentage voting power immediately after the issue of New Shares to be equal to, or below, the percentage voting power that MP Global would be entitled to at *the close of its Rights Offer*. MP Global sought to allay some of the Panel's concerns by arguing that MP Global had been under extreme time pressure on 14 February to find a person to acquire the Excess Shares on similar terms to the AIU Agreement. The Panel rejects that element of MP Global's argument. Any time pressure on MP Global on 14 February was entirely of its own making and no justification for a lack of proper process in the sale of a potentially control affecting parcel.
24. In coming to these findings, the Panel makes no finding of impropriety by MP Global or AIU. However, having regard to the nature of the AIU Agreement and its effect on overall control of Anaconda, the Panel considers that the AIU Agreement, and the process by which it was brought into being, constituted unacceptable circumstances.

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25. The Panel considered that had MP Global conducted a proper sale process, a true test of the market, the onus may not have lain on MP Global to prove that there was no association between itself and AIU, and it may have allowed the AIU Agreement to stand.

#### Alternative Basis

26. The Panel agrees with the Anaconda 16 – 17 Panel that it constituted unacceptable circumstances for MP Global to exercise all the rights it acquired under its Rights Offer, subscribe for the Excess Shares and then to choose the purchaser of the Excess Shares.
27. If it had not come to the view that MP Global was required to demonstrate that the prima facie breach of section 606 of the Act did not occur because MP Global could rely on being a bare trustee (under section 609(2) of the Act), the Panel would have come to the alternative conclusion that the public interest requires disposal of the Excess Shares in an open, competitive process. The Panel considers that, in these unusual circumstances, a sale through such a process is required to ensure that the Excess Shares in Anaconda are acquired in an efficient, competitive and informed market.

#### Efficient Market

28. As MP Global submitted, it is likely that the market in Shares in Anaconda would be less active than it now is, had MP Global allowed some of its Rights to lapse and had Glencore taken up the Excess Shares as underwriter, because Glencore would have obtained outright control of Anaconda. MP Global argued that the result of the AIU Agreement was acceptable, because it promoted the policy of paragraph 602(a) of the Act by preventing Glencore from acquiring the Excess Shares. For instance, it remains possible for a person wishing to make a takeover bid for Anaconda to have the prospect of gaining control of Anaconda even if Glencore were not to accept its offer.
29. The policy of paragraph 602(a) of the Act, however, is not to maintain an efficient, competitive and informed market by preventing acquisitions of substantial interests, but to ensure that when they occur, acquisitions of substantial interests happen in an efficient, competitive and informed market. In these circumstances, that policy requires that control of the Excess Shares pass in an efficient, competitive and informed market, rather than they be placed so as to promote a more efficient market in Anaconda shares in the future.
30. Had MP Global sold the shares to a broker (or a clearly non-associated institution, perhaps) instead of selling them to a buyer chosen on the basis of personal connections, the market in which control of the Excess Shares themselves passed would have been more efficient, competitive and informed.

#### Market Perception Issue

31. MP Global argued that the Panel should not adopt as its own the assumed perception of market participants that AIU and MP Global were associated, which might arise (if it arose at all) merely from reports of these proceedings. The Panel agrees. The issue is not what people might imagine, but what they would be justified in inferring from the terms and circumstances of the AIU Agreement. However, the Panel considers that the majority of the market is unlikely to take the time to review the facts and circumstances of the AIU Agreement, and come to reasoned conclusions. Therefore it is necessary for the Panel to ensure that facts are clearly presented to the market which assure it that the market for control of Anaconda is conducted in an efficient, competitive and informed manner.

#### Truth in Takeovers

32. As noted above, on 6 February 2003, MP Global announced that it would not acquire more Anaconda shares under the Rights Issue than the proportion of Old Shares for which it had acceptances at the close of the Rights Offer on 13 February. Its conduct in lodging notices of exercise in relation to all of its Rights, and in selling to AIU only as many New Shares as were in excess at the time the New Shares were issued on 21 February was inconsistent with this: in effect, it sought to acquire net the same proportion of New Shares as its holding of Old Shares at the later date that the New Shares were issued.
33. Anaconda submitted that this conduct led to unacceptable circumstances because it tended to prevent MP Global's bids from proceeding in an efficient, competitive and informed market, and offerees from having adequate information about the offers. Anaconda asserted that MP Global had stated intentions on which the market and offerees could rely, and then behaved inconsistently with those statements. It pointed to ASIC's Truth in Takeovers policy (PS 25) and to section 1041H of the Act (misleading and deceptive conduct).
34. The Panel supports the Truth in Takeovers policy and finds that MP Global did not act consistently with its own public statements, but prefers not to base its decision on this conduct. MP Global's statement did not provide a numerical limit to the number of New Shares it would acquire, only one dependent on the number of acceptances received for the Share Offer until 13 February. That statement was made in the context of a 51% minimum acceptance condition, which was only later waived. MP Global made a number of statements later in the course of its offers that expressly raised the possibility of MP Global determining the number of Rights to exercise on different bases. The Panel does not think that MP Global's change of intention removed the reasonable basis of any specific expectation as to the number of New Shares MP Global would acquire, particularly in the range below 51%.

#### Remedies

35. The Panel determined to:
  - a) unwind, as far as possible, the flawed decision to enter into the AIU Agreement;

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- b) reverse the results of that agreement; and
  - c) dispose of the Excess Shares in a way which supports an efficient competitive and informed market for control of voting shares in Anaconda.
36. It believes that the orders proposed by the Anaconda 16 - 17 Panel are effective and appropriate to achieve that purpose. Accordingly, the Panel made similar orders to those proposed by the Anaconda 16 -17 Panel i.e. that the Excess Shares be vested in ASIC and dispersed by way of a book build conducted by a broker appointed by ASIC. In addition, the Panel ordered that the AIU Agreement be voided.

### Unfair Prejudice

37. The Panel has not come to its decision lightly. It recognises that the AIU Agreement relates to Excess Shares worth some \$24 million, and that the possible profit or loss on sale of those shares is considerable.
38. Neither MP Global nor AIU is unfairly harmed by the declaration and orders because the AIU Agreement was entered into by a flawed process and therefore AIU and MP Global should not have arrived at the position which the Panel is now required to unwind. Since the AIU Agreement is cancelled, AIU will not now make a profit or a loss on the resale of the Excess Shares. Given the delay in selling the Excess Shares which has been caused by these proceedings and the consequent additional uncertainty as to the price they will fetch, the Panel considers that AIU is not materially adversely affected by the cancellation of the AIU Agreement. While MP Global is exposed to the outcome of the sale of the Excess Shares, it accepted that risk when it chose to exercise all of its rights, and laid off part of it only in an attempt to comply with section 606 of the Act.
39. MP Global has argued that the market in Anaconda shares will be flooded if the Excess Shares are offered for sale, as they represent a major increase in the free float of Anaconda shares. In the Panel's experience, this risk can be managed by a bookbuild. The orders are designed to dispose of the shares in this way, precisely to avoid unduly depressing the price, and ASIC is directed to ask for further directions if this objective is not likely to be achieved.
40. The Panel settled the orders for the dispersal of the Excess Shares in light of the specific circumstances of the Anaconda 18 proceedings. Each case in which the Panel decides to order vesting or disposal of securities will be considered on its own merits and the orders may take materially different forms to the orders in Anaconda 18.

### INTERACTION WITH ANACONDA 19

41. However, the Panel deferred making its orders until it knew the result of the proposed review of the decision in Anaconda 15. This has been conducted, as Anaconda 19. The Panel decided that a further short delay in disposition of the Excess Shares would not materially adversely affect MP Global, AIU, Anaconda or its shareholders, but finally disposing of the Excess Shares before the result of the

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review of Anaconda 15 was settled could adversely affect the range of orders that any Panel in that matter might consider appropriate.

42. Pending final orders, the Panel left on foot (and later extended) the interim order made in Anaconda 16 - 17 preventing further sale, transfer or voting of the Excess Shares.

#### **FINAL ORDERS**

43. On 12 May, the Panel made final orders, as foreshadowed, but excluding from the Excess Shares some 60 million shares which it had been decided in Anaconda 19 (the review of Anaconda 15) should be retained by MP Global, and directing that the remaining Excess Shares should be sold together with 4 million shares held by Sherritt International Inc. which the Anaconda 19 Panel ordered vested in ASIC and sold.
44. The Panel consented to parties being represented by their commercial solicitors. The Panel has made no order for costs.

**Simon McKeon**

**President of the Sitting Panel**

**Decision dated 10 April 2003**

**Reasons published 14 June 2003**

## Takeovers Panel

### Declaration & Orders - Anaconda 18 & 19

#### Annexure A - Copy of Declaration in Anaconda 18

#### Corporations Act Section 657A Declaration

#### WHEREAS

- A. Mongoose Pty Ltd (ACN 103 410 297) (**Mongoose**) (a wholly owned subsidiary of MatlinPatterson Global Opportunities Partners LP (**MP Global**)) applied to be issued with certain shares (the **Shares**) pursuant to a 14 for 1 pro rata renounceable rights issue (the **Rights Issue**) by Anaconda Nickel Limited (ABN 23 060 370 783) (**ANL**).
- B. MP Global made a public statement on 6 February 2003 that its takeover bid for ANL (which was being made by Mongoose) would proceed on the basis that its ability to exercise ANL rights (the **Rights**) would be limited to the maximum shareholding percentage that it had acquired by the close of its offer for the Rights on 13 February 2003 under its offer for ANL shares.
- C. Mongoose subsequently exercised all of the Rights it had acquired under its Rights Offer. By means of the agreement referred to in recital E, it sought to limit the number of shares it acquired based on its shareholding percentage in ANL at the time that the Shares were issued under the Rights Issue on 21 February 2003, rather than at the time referred to in recital B.
- D. Subject to the effect of the agreement referred to in recital E, the result of Mongoose's actions referred to in recital C was that the issue of the Shares to Mongoose by ANL resulted in an increase in Mongoose's voting power in ANL in breach of section 606 of the Corporations Act (the **Act**).
- E. Mongoose 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 certain shares (the **Sale Shares**) in ANL by Mongoose to AIU. As mentioned in recital C, the Agreement was an attempt to prevent the breach of section 606 referred to in recital B from occurring. The Agreement provided that the number of Sale Shares was to be the number of Shares which resulted in Mongoose's voting power in ANL immediately after the issue of the Shares under the Rights Issue being more than Mongoose's voting power in ANL immediately before the issue of those Shares.

Under section 657A of the Corporations Act, the Panel declares that the circumstances relating to:

- (a) Mongoose acting on a basis inconsistent with the public statement made by MP Global as referred to in recitals B and C; and
- (b) the sale of the Sale Shares by Mongoose to AIU referred to in recital E ,

are unacceptable circumstances in relation to the affairs of ANL.

**Simon McKeon**  
**President of the Sitting Review Panel**

**Dated 17 April 2003**

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Declaration and Orders - Anaconda 18 &19

Annexure B – Copy of Orders in Anaconda 18

Corporations Act  
Section 657D  
Final Orders

**In the matter of Anaconda Nickel Limited (No. 18)**

Pursuant to section 657D of the Corporations Act 2001 and pursuant to a declaration of unacceptable circumstances made by the President of the sitting Panel on 17 April 2003, the Takeovers Panel HEREBY ORDERS:

- (a) that the agreement between Mongoose Pty Limited (**MP Global**) and Australian Investments United Pty Limited (**AIU**) dated 14 February 2003 or thereabouts pursuant to which the shares mentioned in the Schedule (**the Shares**) were sold to AIU by Mongoose is cancelled, from its outset;
- (b) that the legal and beneficial title to the Shares vest in the Australian Securities and Investments Commission (**ASIC**) to sell the Shares by bookbuild and account to MP Global for the proceeds of sale, nett of the costs, fees and expenses of the sale;
- (c) that ASIC retain a competent and independent Broker to conduct the sale;
- (d) that none of AIU, MP Global, Anaconda Nickel Limited (**Anaconda**) and Glencore International AG or their respective associates (**the Parties**) may buy any of the Shares;
- (e) that ASIC instruct the Broker to seek to maximise the sale price of the Shares while not selling more than 1% of the total shares in Anaconda to any person, alone or together with its associates (**the 1% cap**);
- (f) that the Broker obtain from any prospective purchaser of Shares a statement in accordance with rule 7.1(c) of the Panel's Rules for Proceedings:
  - (i) that it is not associated with any of the Parties; and
  - (ii) setting out, to the best of its knowledge, the identity of any associate who is bidding for any of the Shares;
- (g) that ASIC seek further orders from the Panel if:
  - (i) the Broker is unable to dispose of the whole parcel within the 1% cap within 6 weeks from the date of this order, at a price not below \$0.06 per share, and without unduly depressing the market price of Anaconda shares;
  - (ii) the Broker receives bids which are so high as to suggest that the bidder is indifferent as to the price it pays;
  - (iii) it appears to the Broker, in the course of the bookbuild, that the 1% cap would materially reduce the return to MP Global on the sale;

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### Declaration and Orders - Anaconda 18 &19

- (h) that AIU or MP Global not sell, transfer, mortgage or otherwise deal with the Shares (except to give effect to the vesting or sale), or to exercise the votes attached to the Shares, until the vesting or sale is completed by registration of a transfer or transmission of the Shares (**Transfer**);
- (i) that Anaconda not register any transfer or transmission of the Shares (except to give effect to the vesting or sale) or pay any dividend on the Shares, until Transfer;
- (j) that any exercise of the voting or other rights attached to the Shares be disregarded, until Transfer; and
- (k) that the sale of the Shares be conducted together with the sale of 4,000,000 shares in Anaconda ordered by the Panel in the matter of **Anaconda Nickel Limited (No. 19)**;
- (l) that in determining how many shares it may acquire under item 9 of section 611, MP Global (and any person the application to whom of item 9 of section 611 is affected by the number of shares in Anaconda in which MP Global has a relevant interest) calculate that number on the basis that MP Global acquired 60,000,000 (but no more) of the shares mentioned in the Schedule when those shares were issued.

### Schedule - the Shares

407,051, 769 ordinary shares held by MP Global in Anaconda Nickel Limited, being the Excess Shares mentioned in the Panel's media release notifying its decision in the matter of **Anaconda Nickel Limited (No. 18)**, less 60,000,000 shares deducted for reasons set out in the Panel's decision in the matter of **Anaconda Nickel Limited (No. 19)**.

**Simon McKeon**  
**President of the Sitting Panel**

**Dated 12 May 2003**

**Annexure C - Copy of Declaration and Orders in Anaconda 19**

**Corporations Act 2001**

**Sections 657A and 657D**

**Declaration and Orders**

**In the matter of Anaconda Nickel Ltd (No. 19)**

**WHEREAS:**

- A. Mongoose Pty Ltd (MP Global) offered to acquire rights to subscribe for ordinary shares in Anaconda Nickel Ltd (ANL) at 1 cent/right. Those offers were dated 30 January 2003 and closed at midnight on 13 February 2003;
- B. MP Global also made takeover offers to acquire all of the fully paid shares in ANL on issue before completion of the rights issue at 12 cents/share. Those offers were dated 5 February 2003 and closed on 5 March 2003;
- C. On 13 February 2003, MP Global declared the offers for the rights and the shares free from all defeating conditions;
- D. On 13 February 2003, Sherritt International Corporation (Sherritt) held 40,000,000 shares in ANL (approximately 8% of the shares then on issue);
- E. On 13 February 2003, Sherritt caused 4,000,000 shares in ANL (approximately 0.8% of the shares then on issue) to be purchased on market at a weighted average price of 13.75 cents/share;
- F. Sherritt gave evidence that part of its motive in causing those shares to be purchased on 13 February 2003 at that price was to give the impression that someone other than MP Global intended to make a takeover bid for ANL at a higher price than 12 cents/share;
- G. On 13 February 2003, Sherritt did not intend to make such a bid itself and did not suppose and had no basis for supposing that any other person would do so, except as a result of its actions;
- H. Sherritt's actions were intended and calculated to induce in other participants in the market an unfounded belief that someone other than MP Global intended to make a takeover bid for ANL at a higher price than 12 cents/share;
- I. Sherritt's actions were calculated to cause acquisitions of control of shares in ANL (whether by MP Global or by other people) to take place in a market which was less efficient, competitive and informed than it would otherwise have been;
- J. Because of the effect of Sherritt's actions on the acquisition and proposed acquisition of shares in ANL under the bid made by MP Global, the circumstances to which those actions gave rise are unacceptable circumstances in relation to the affairs of ANL;

## Takeovers Panel

### Declaration and Orders - Anaconda 18 &19

the Takeovers Panel:

- (a) declares that the circumstances set out in recitals E to J are unacceptable circumstances in relation to the affairs of ANL;
- (b) orders that 4,000,000 shares in ANL held by National Australia Trustees Limited on behalf of Sherritt (the Bought Shares) be vested in the Australian Securities and Investments Commission (ASIC), to sell the Bought Shares and account to Sherritt for the proceeds of sale, nett of the costs, fees and expenses of the sale;
- (c) orders ASIC to sell the Bought Shares in the same way and at the same time as it sells the shares vested in ASIC by Panel order in the matter of Anaconda Nickel Ltd (No. 18), and to divide the nett proceeds of sale between MP Global and Sherritt in proportion to the number of Excess Shares and Bought Shares respectively;
- (d) orders Sherritt not to sell, transfer, mortgage or otherwise deal with the Bought Shares (except to give effect to the vesting or sale), or to exercise the votes attached to the Bought Shares, until the vesting or sale is completed by registration of a transfer or transmission of the Bought Shares (Transfer);
- (e) orders ANL not to register any transfer or transmission of the Bought Shares (except to give effect to the vesting or sale) or pay any dividend on the Bought Shares, until Transfer; and
- (f) orders that any exercise of the voting or other rights attached to the Bought Shares be disregarded, until Transfer.

**Simon McKeon**  
**President**

**Dated 12 May 2003**