Takeovers Panel

Reasons for Decision Anaconda 19

In the matter of Anaconda Nickel Limited 19
[2003] ATP 20

Catchwords:

Review of Panel decision – breach of section 606 – "creep exception" – exercising creep exception during takeover bid – equal opportunity principle – allegation of association between underwriter and major shareholder – onus – 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, 609(2) and item 9 section 611

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

These are the Panel's reasons for its decision as a Review Panel following MP Global's application for review of the Anaconda 15 decision. The reasons are in relation to the Panel's decision to decline the application by MP Global for a declaration of unacceptable circumstances in relation to:

a) Glencore's buying on market on the 12 and 13th of February 2003;

b) Glencore's buying of New Shares on 19 to 21 February 2003;

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 alleged misleading of MP Global prior to MP Global declaring its Share Offer free from conditions; and

f) the alleged association between Sherritt and Glencore.

These are also the Panel's reasons for making a declaration of unacceptable circumstances and orders in relation to Sherritt's on market buying of Old Shares on 13 February 2003.

1. These reasons relate to the application made on 11 April 2003 by Matlin Patterson Global Opportunities Partners LP (**MP Global**)[1] under section 657EA of the Corporations Act (**Act**) in relation to the affairs of Anaconda Nickel Limited (**Anaconda**). The application was for review of the decision made by the Anaconda 15 Panel on 07 April 2003 not to make a declaration of unacceptable circumstances in response to MP Global's original application made on 20 February 2003.

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

The Panel & Process

2. The President of the Panel appointed Simon McKeon (sitting President), David Gonski (sitting Deputy President) and Ian Ramsay as the sitting Panel for the application (the **Panel**).

3. The Sitting President of the Anaconda 15 Panel consented on 16 April 2003, under section 657EA(2) of the Act, to MP Global applying for review of the Anaconda 15 decision.

4. The Panel met on 16 April 2003 to consider the **Anaconda 19** 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 the brief on 23 April 2003.

Definitions

5. Unless indicated to the contrary, terms used in these reasons have the same meaning as in the Panel's reasons for decision in the Anaconda 02 to 05 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.

SUMMARY

Glencore's acquisition of Old Shares on 12 and 13 February

6. The Panel considered that the on-market acquisitions of **Old Shares**[2] by Glencore International AG (**Glencore**) on 12 and 13 February 2003 did not constitute unacceptable circumstances. It considered that while Glencore's acquisitions may have affected the market during that period they did not appear to be intentionally manipulative, and the acquisitions were within the terms of the "Creep" exception (**Creep Exception**) set out in item 9 of section 611 of the Act. The Panel did not accept arguments from MP Global as to why Glencore was not entitled to acquire Old Shares under the Creep Exception.

GLENCORE'S ACQUISITION OF NEW SHARES BETWEEN 17 AND 19 FEBRUARY

7. The Panel agreed with the Anaconda 15 Panel 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

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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 made under a prospectus issued by Anaconda on 18 January 2003.

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 or constituted unacceptable circumstances. 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

8. The Panel was concerned at some of the evidence provided by Sherritt International Corporation (**Sherritt**) as to its reasons for allowing its Rights to lapse, for no value, in light of the existence of the **Rights Offer**[5]. However, overall, the Panel accepted the submissions given by Sherritt to the Panel and to the Anaconda 15 Panel that Sherritt's decision was an exercise of the business judgment of its executives, without external pressures or as a result of pre-existing arrangements or associations, based on commercial imperatives that the Panel accepted were plausible.

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 all of 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 considers that there is sufficient evidence that Sherritt, in acquiring Old Shares on 13 February 2003 (at the same time as Glencore was also purchasing Old Shares), was seeking to create a false market in Old Shares.

11. The Panel considers that Sherritt's intention and actions are likely to have adversely affected the efficient, competitive and informed market for control of Anaconda shares at a critical point in the MP Global Rights Offer and Share Offer. The Panel considers that such actions constituted unacceptable circumstances. It has made orders requiring the Old Shares that Sherritt bought be vested in ASIC and sold by a stock broker appointed by ASIC.

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[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.

[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

12. The Anaconda 02-05 Panel's reasons set out a brief summary of some aspects of the background to the Rights Issue, the Underwriting Arrangements and the MP Global Offers, taken from various application documents. The Anaconda 15 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 15' 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/anaconda15.asp

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

Application

13. MP Global applied for a declaration that any or all of the following circumstances in relation to the affairs of Anaconda constituted unacceptable circumstances:

    a) the acquisition of Old Shares by Glencore on 12 and 13 February 2003;

    b) the acquisition of New Shares by Glencore over 17 to 19 February 2003;

    c) the failure of Sherritt to sell or exercise its Rights or accept the Rights Offer in respect of those Rights;

    d) the failure by Sherritt to accept the Share Offer in respect of its holding of Old Shares; and

    e) the acquisition of Old Shares by Sherritt on 13 February 2003.

14. MP Global applied in the Anaconda 15 application for various interim orders. However, by the time these proceedings had commenced there was no requirement for any interim orders and MP Global did not continue the request for those interim orders from the Anaconda 15 application.

Final Orders

15. MP Global applied for consequential orders that:

    a) the following securities should be required to be transferred to MP Global:

(i) the Old Shares purchased by Glencore and Sherritt on 12 and 13 February 2003, together with the percentage of New Shares equivalent to that percentage of Old Shares (ie 2.99%), at the price of 12 cents for Old Shares and 5 cents for New Shares;

(ii) the New Shares equivalent to the Rights which Sherritt allowed to lapse, at the price of 5 cents; and

(iii) the Old Shares retained by Sherritt, at the price of 12 cents; and

b) the New Shares acquired by Glencore over 17 to 19 February 2003 be vested in ASIC for sale by a stockbroker appointed by ASIC by way of a bookbuild to persons who were not associated with either Glencore or Sherritt.

MP Global's Submissions

16. MP Global submitted that the Anaconda 15 Panel had not focussed on the *effect* of the conduct of Glencore and Sherritt in light of the principles in section 602 of the Act, but rather asserted that the Anaconda 15 Panel had based its decision on:

a) the *motives* of Glencore and Sherritt; in light of

b) the *circumstances* of Glencore and Sherritt, not as shareholders in Anaconda, but in their capacities as:

(i) in Glencore's case, the underwriter of the Rights Issue; and

(ii) in Sherritt's case, a potential party to litigation involving Anaconda and a supplier of technology to Anaconda; and

c) whether, having regard to those motives in those circumstances, their conduct was prohibited by Chapter 6.

17. MP Global asserted that in the case of Glencore, the Anaconda 15 Panel had accepted that, as the underwriter of the Rights Issue, Glencore was entitled to protect itself from another party gaining control of Anaconda, a company into which it had committed to contributing a large sum of money. The Anaconda 15 Panel considered that there needed to be good evidence that Glencore's acquisition of Old Shares under the Creep Exception was "*improper*" before there was a basis for considering its conduct to be unacceptable. MP Global submitted that the Anaconda 15 Panel should have had regard to the *effect* of Glencore's acquisition of Old Shares under the Creep Exception, in conjunction with the Underwriting Arrangements, on an efficient, competitive and informed market for control of Anaconda, rather than merely whether there was a breach of the Act by Glencore's purchases on 12 and 13 February.

18. MP Global was concerned that the Anaconda 15 Panel appeared to have accepted that Sherritt's reasons for purchasing Old Shares on 13 February were consistent with Sherritt's commercial motivation in failing to exercise or sell its Rights and Old Shares. The Anaconda 15 Panel stated that in the absence of any evidence of association, or acting in concert, between Glencore and Sherritt, or of market manipulation, there were no unacceptable circumstances.[7]

19. MP Global asserted that the Anaconda 15 Panel should have had regard to the *effect* that Sherritt's conduct had had on the market for control of Anaconda, rather than just on whether there was a breach of the Act by reason of an association or market manipulation.

20. MP Global asserted that the *effect* of Glencore's and Sherritt's conduct referred to above was that:

    a) MP Global's takeover bids were prevented from succeeding; and therefore

    b) Glencore was able to acquire effective control of Anaconda via its underwriting, and not by a takeover offer under Chapter 6 of the Act.

DISCUSSION

Glencore's acquisition of Old Shares on 12 and 13 February

21. Glencore acquired 13.8 million Old Shares (almost 3% of the total number) on 12 and 13 February. It acquired them at prices ranging from $0.11 to $0.145 per share. MP Global's Share Offer was set at $0.12 per share, and MP Global did not increase it. MP Global was therefore unable to acquire Old Shares on-market for more than $0.12.

22. Glencore had been entitled to acquire 3% under the Creep Exception for some months. Macquarie Equities Ltd, as Glencore's broker, commenced buying in the afternoon of 12 February and through 13 February, stopping when it had almost entirely filled Glencore's order.

23. Glencore's acquisitions made up approximately thirty percent of the total acquisitions of Old Shares on the two days (almost 50% when combined with Sherritt's acquisitions of Old Shares on 13 February). The Panel considers it highly likely that the acquisitions by Glencore did affect the market in Old Shares and did move the market price of Old Shares on those days and did contribute to the rise from approximately $0.11 to $0.15 per share on those two days.

24. Glencore gave a substantial shareholding notice to Anaconda and ASX on 14 February. Glencore had 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

[7] *Anaconda 15 [2003] ATP 17* at [98]

$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.

25. Glencore's buying, and the resultant price rise, may have affected the ability of MP Global to acquire Old Shares on those days, which were crucial days in terms of the success or failure of MP Global's Share Offer and Rights Offer. However, the Panel was not given evidence which would convince it that Glencore's purchases were not primarily directed at acquiring more Old Shares for itself. While it might have been unacceptable for Glencore to acquire shares for the purpose of affecting the price of Old Shares, the fact of a price rise due to Glencore's acquisitions is not of itself unacceptable. Similarly, it is not unacceptable for Glencore to want MP Global's offers to fail and to acquire Old Shares which MP Global might otherwise have acquired.

26. MP Global should have been aware, at the time that it commenced the MP Global Offers, and at the time it declared its offers to be free of its earlier defeating conditions, that Glencore was entitled, under the Creep Exception, to acquire up to 3% of the voting power in Anaconda.

27. MP Global's offers, and its overall strategy for seeking control of Anaconda, were particularly sensitive, or susceptible, to another person acquiring Old Shares during the course of the MP Global Offers.

28. The Panel considered the course of trading on the relevant days. From that and from the other evidence provided by parties, the Panel did not see evidence that Glencore's acquisitions were made in manipulative ways, or indeed in any other way other than seeking to acquire its desired 3% as cheaply as possible. As Glencore appeared to be entitled to acquire such shares, the Panel considered that Glencore's acquisitions of Old Shares on 12 and 13 February 2003 did not constitute unacceptable circumstances. The acquisitions were within the terms of Item 9 of section 611 of the Act, and the Panel did not accept arguments from MP Global as to why the Creep Exception should not have been available to Glencore in the circumstances.

29. MP Global asserted that Glencore's buying had been designed to affect the price of Anaconda Old Shares in a critical period of the MP Global 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 Exception was intended to be a de minimus exception to the prohibition in section 606 of the Act and not to be used strategically to affect control.

30. 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 the MP Global Offers. The concern of MP Global was that the acquisitions were priced, structured and timed to have maximum effect on the prospects of the

MP Global Offers, especially given the structure of MP Global's offers. MP Global asserted that that constituted unacceptable circumstances.

31. 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.

Equal Opportunity

32. The Panel did not accept MP Global's assertion that the on-market buying offended the equal opportunity principle in section 602(c) of the Act. While not all Anaconda shareholders may have been aware of the prices being paid by Glencore, Glencore was clearly indifferent to the identity of the shareholders from whom it bought Old Shares. MP Global provided no evidence that Glencore knew or considered who might be selling Anaconda Old Shares on the days it was buying. Any Anaconda shareholder was equally entitled to sell.

33. The Panel did not accept MP Global's assertions that the equality of opportunity principle in section 602(c) of the Act was offended by the fact that Glencore and Sherritt both had interests as commercial transactors with Anaconda, as well as having interests as shareholders. Both Glencore and Sherritt considered their commercial interests as well as their interests as shareholders.

Insider Information

34. MP Global asserted that as underwriter, Glencore was likely to have been privy to material non public information concerning Anaconda having conducted due diligence on Anaconda as part of the Underwriting Arrangements negotiations. Both Glencore and Anaconda denied that there had been any price sensitive information given to Glencore in this due diligence. MP Global was not able to provide evidence to support this allegation.

Submissions

35. Glencore submitted that:

    a) there was no legal or policy reason preventing it exercising its entitlement under the Creep Exception 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 Exception for some time;
    c) it had made its acquisitions openly on ASX and not in any manipulative manner;
    d) it merely met the market in acquiring the percentage;

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 not 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 on Old Shares was small and temporary.

36. 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 Foreign Investment Review Board (**FIRB**). The previous FIRB approval given to Glencore applied only to the acquisition of Anaconda 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.

37. ASIC and Anaconda supported Glencore's right to acquire Old Shares under the Creep Exception.

Decision

38. 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.

39. 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 Share Offer 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[8], it would be unable to exercise those Rights it held that were more than its percentage of Old Shares. The Rising Tide principle is also discussed in

[8] The actual date at which MP Global came to determine how many Rights it could exercise is considered in the Review Panel's reasons for its decision in relation to the Anaconda 18 application.

paragraph 122 of the Panel's reasons for decision in relation to the Anaconda 02 to 05 applications.

40. 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 were running ahead of acceptances for Old Shares[9] 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 the two days.

41. 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.

42. The Panel accepted that Glencore was entitled to acquire the Old Shares and that it did so when it became free to do so following FIRB approval (and Glencore appears to have prosecuted that application diligently and properly). The Panel was not satisfied 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.

43. Glencore was under no obligation to assist, or even to acquiesce, to MP Global's offers or 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.

44. In the absence of good evidence that Glencore's use of its entitlement under the Creep Exception was improper, the Panel did not consider there was a basis to consider it unacceptable.

Glencore's acquisition of New Shares between 17 and 19 February

45. Glencore acquired 14.7 million New Shares on market over the period 17 - 19 February 2003 (on a deferred delivery basis), which amounted to approximately 0.2% of the fully diluted shares in Anaconda following the Rights Issue. The

[9] 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.

Panel agreed with the Anaconda 15 Panel that this acquisition was not material in the context of control of Anaconda and did not appear to have contributed to any unacceptable circumstances.

46. 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 making an offer for the New Shares, nor did it seek to acquire New Shares at any time. Glencore's acquisitions of New Shares were made after the Rights Offer had closed.

47. 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 of the Act) appears open to legal discussion.

48. However, the Panel was not satisfied that this acquisition contravened section 606 of the Act, nor that it contributed to any unacceptable circumstances. Consequently, the Panel declined the 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

Facts

49. 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 and not selling the Rights on-market and not exercising the Rights.

50. The Panel considered Sherritt's evidence for its reasons in allowing its Rights to lapse, for no value, in light of the existence of the Rights Offer. Although Sherritt's explanations in some areas did not appear credible, on balance, the Panel accepted that Sherritt's decision was an exercise of the business judgment of its executives, without agreement or association with any other parties, based on commercial imperatives that the Panel accepted were plausible. The Anaconda 15 Panel has set out in its reasons some of the explanations and concerns put forward by Sherritt for its conduct.

51. Sherritt asserted, and the Panel did not receive evidence which adequately rebutted Sherritt's claims, that the potential financial impact on Sherritt associated with these concerns outweighed the value that Sherritt could have received from MP Global for selling its Rights under the Rights Offer.

52. 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 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.

53. Sherritt submitted that apart from one small and unrelated coal acquisition, there were no current transactions between Glencore and Sherritt and that there had not been any such transactions 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.

54. The Panel decided that Sherritt's actions in relation to its Rights did not constitute unacceptable circumstances.

Onus

55. MP Global alleged that Sherritt and Glencore had become associates during the course of the MP Global Offers. Consequently, the two parties had breached section 606 of the Act for two reasons. The first was that they had aggregated their shareholdings, from 8 and 34% individually, to 42% together, when they had become associates. The second was that because that association had occurred within the previous six month, neither Glencore nor Sherritt had any entitlement to acquire Old Shares under the Creep Exception. Therefore all of Sherritt' and all of Glencore's buying on -market was in breach of section 606 of the Act. Therefore, MP Global argued, the acquisitions on 12 and 13 February, although ostensibly acquisitions by separate and unrelated parties, were actually made by associates in breach of the Creep Exception.

56. The question of whether Sherritt and Glencore were associates was therefore crucial to determining whether the elements of any contravention of the Act existed. Consequently, the onus lay with MP Global to provide a sufficient case and evidence to persuade the Panel that its version should be preferred.

57. It is interesting to contrast this with the decision of the first instance and review Panels in the Anaconda 16-17 and 18 proceedings. In those proceedings the facts were that MP Global had acquired more New Shares in Anaconda on exercise of the Rights it had acquired under the Rights Offer than it was legally entitled to do. Prima facie the elements of a breach of section 606 of the Act by

MP Global were present (that is, proof of association between MP Global and AIU was not an element of the contravention).

58. MP Global asserted that this prima facie breach of section 606 of the Act should be overlooked because it was entitled to the exception in section 609(2) of the Act. Section 609(2) of the Act provides that a relevant interest (and therefore in MP Global's case, the acquisition of the Excess Shares) should be ignored if the person who appeared at first instance to have that relevant interest (and therefore appeared to have acquired the Excess Shares in breach of section 606 of the Act) held the relevant interest as a bare trustee. Where there appears to be a prima facie contravention of the Act, and a person claims the benefit of an exception (which is analogous to a defence), the Panel considers it proper that that person should make out their entitlement to the exception before the apparent contravention of the Act is accepted not to have occurred.

59. The manner in which question of association is approached (and of who bears the burden of proof in relation to that question) in these proceedings and the Anaconda 16-18 proceedings are therefore distinguishable since:

    a) in Anaconda 19 it was essential that association be proved to *establish a breach* of the Act; whereas

    b) in Anaconda 16-18 it was essential for association to be disproved to establish a *defence* to a breach of the Act.

60. In the one case (Anaconda 19), MP Global was required to make out that the apparently lawful actions were unacceptable. The Panel did not believe that MP Global had discharged this burden.

61. In the second case (Anacondas 16 - 17 and 18), because the acquisition appeared to be in breach, the onus lay on MP Global to demonstrate that it was entitled to the exception. The first instance and review Panels in Anacondas 16-18 considered that if MP Global could not prove beyond reasonable doubt that AIU was not one of its associates, then the Panel should declare the circumstances to be unacceptable.

Sherritt's failure to accept the Share Offer

62. Sherritt did not accept the MP Global Share Offer for its 40,947,367 (approximately 8.87%) Old Shares. The Anaconda 15 Panel found that had Sherritt 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 was 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.

63. MP Global asserted that this was further evidence of Sherritt acting commercially irrationally which indicated some other motive. MP Global

asserted that Sherritt's motives were to assist Glencore to gain control of Anaconda, and to prevent the MP Global Offers succeeding. MP Global raised the same issues in relation to the failure of Sherritt to sell its Old Shares to MP Global under its Share Offer as it had raised in relation to Sherritt's decision to allow its Rights to lapse.

64. 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

65. 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[10] million shares at an average price of $0.139 per share. They constituted 0.87% of the Old Shares.

66. Ms Paula Myson (Director, Corporate Development of Sherritt) gave evidence that she, Mr Ian Delaney (the Chairman of Sherritt) 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 asserts 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. Sherritt still was seeking to prevent a change in management of Anaconda, and if a rival bid were 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). 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.

67. The Panel considered that there was sufficient evidence that Sherritt, in acquiring Old Shares on 13 February 2003 (at the same time as Glencore was also purchasing Old Shares), was seeking to create a false market in Old Shares. The Panel bases this on Sherritt's statements in the submissions that Sherritt gave to the Panel. They include statements that its intention was to

> "*support the market appearance of there being an impending bid with a view to encouraging Glencore to make a bid*".

Sherritt was seeking to create an impression in the market of buying pressure from a rival takeover bidder, to reduce the chances of success of the MP Global Offers, and to make a higher return on its Anaconda Shares.

[10] MP Global advised that 150,000 of those shares were purchased by JB Were for a separate client.

68. Sherritt's acquisitions were made at a very significant time for the MP Global Offers and for the market in general. It appears to have been a volatile market, with significant professional investor involvement, and the market was interested in the buying or selling activities of the major players. Sherritt entered the market with significant acquisitions, using an institutional/corporate broker that had not previously been a material acquirer in the market, and buying above $0.12 per share. Glencore made detailed submissions on the trading at the time and its analysis and inferences about why MP Global would not have acquired any Old Shares on market if the Sherritt acquisitions had not been made. The Panel also received detailed submissions from MP Global on the day's trading. The Panel considered that Glencore's and MP Global's views were simply that, the views of two of the parties in circumstances where there are a range of views as to what might have happened on that day.

69. The Panel considered that Sherritt's buying, and the way that it was undertaken, is highly likely to have influenced the market. Sherritt's acquisitions made up approximately fifteen percent of the total acquisitions of Old Shares on 13 February (it was also made at a time when Glencore's significant acquisitions of Old Shares were already creating pressure in the market for Old Shares) The Panel considers that it was not open to contend that the Sherritt acquisitions, at the time they were made and in the manner they were made, did not affect the price at which Old Shares traded. As it has said above, it is impossible to determine precisely what the quantum of that effect was. The Panel also accepts MP Global's submissions that it is well possible that Sherritt's actions would have enticed other buyers into the market, making it more difficult for MP Global to acquire Old Shares at its Share Offer price of $0.12 per share.

70. The Panel considered that Sherritt's intention and actions were likely to have adversely affected the efficient, competitive and informed market for control of Anaconda Shares at a critical point in the MP Global Rights Offer and Share Offer. The Panel considered that such actions constituted unacceptable circumstances.

Association between Glencore and Sherritt

71. 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) Glencore and Sherritt both buying Old Shares on-market at above the Share Offer price on 12 and 13 February;

d) the communications between Mr Delaney and the Chief Executive Officer of Glencore, Mr Ivan Glasenberg, in the days leading up to the close of the Rights Offer; and

e) various statements that MP Global asserted were made by Mr Delaney and Mr Glasenberg to Mr Gustiaman Deru (a partner of MatlinPatterson Advisers (Asia) Limited).

72. 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 of the Act.

73. The Panel considers that it might appear, especially to MP Global, that Sherritt intended that its actions might generate favour with Glencore. However, no evidence was presented to the Panel that convinced it that Sherritt's actions were reciprocated and that Sherritt and Glencore became 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 that part of MP Global's application.

Misleading of MP Global

74. MP Global asserted that it had been mislead by Sherritt in MP Global's telephone conversations with Sherritt in the period leading up to MP Global's decision to declare its Share Offer (and therefore its Rights Offer) free of conditions.

75. For example, MP Global asserted, which Sherritt denied, that Mr Delaney had informed 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. MP Global asserted that Sherritt's failure to do either was evidence that it had been mislead.

76. MP Global said that had Mr Delaney made Sherritt's position clear (according to MP Global that position was subsequently shown to be that Sherritt would not accept the MP Global Offers under essentially any circumstances), MP Global would not have declared its offers unconditional.

77. The evidence which MP Global presented was not strong enough to overcome Sherritt's firm statements that it had not misled MP Global but had always made it clear that it was keeping its options open and that MP Global should not rely on Sherritt acting in any particular way, especially not on Sherritt selling to MP Global.

The telephone conversations

78. The issues of what was said by whom to whom occupied a large volume of these and the Anaconda 15 proceedings. There were a large number of telephone conversations between the protagonists made over a short period whilst the MP Global Offers remained open. The conversations were made over a period of time, between persons with very significant experience in corporate negotiations. As is not surprising, 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 Anaconda 15 Panel and on the part of the parties.

79. Further, many of the issues raised concerned alleged association and decisions or agreements to act in concert. As the Anaconda 15 Panel observed, 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.

Decision

80. MP Global's lack of firm evidence concerning its recollections of robust commercial discussions between sophisticated commercial participants in a hotly contested takeover meant the Panel could not prefer MP Global's version over those of the other parties which denied MP Global's version of the couple of critical telephone conversations. The Panel declined that part of MP Global's application.

ANACONDA 18

81. Following the decision in the Anaconda 19 proceedings, the Anaconda 18 Panel executed the orders it had decided to make following making a declaration of unacceptable circumstances in relation to MP Global's acquisition of Excess Shares by exercising all of the Rights it acquired under its Rights Offer and then contracting to pass those Excess Shares on to AIU. See Annexure B for a copy of the Anaconda 18 Orders.

82. The Anaconda 18 Panel also ordered that for the purpose of calculating its future 3% entitlement under the Creep Exception, MP Global be taken to have

acquired the 60,000,000 New Shares to which the Anaconda 19 decision relates, and none of the other Excess Shares to which the Anaconda 18 decision relates, on 21 February 2003, when the Anaconda New Shares were issued under the Rights Issue.

DECISION

83. The Panel considered that there is no principle that requires significant shareholders in a target company to remain passive in the face of a takeover offer which they considered not to be in their interests. The Panel considered it reasonable for those shareholders to take all of their interests into consideration when determining whether the offer is in their interests, not only their interests as shareholders. The Panel considers that shareholders may take actions to advance their own interests, even where they consider that their interests lie in the bid not succeeding. Although such actions may constitute unacceptable circumstances or contravene the Act for other reasons, they will not necessarily be unacceptable solely because they are intended to reduce the chance of the unwanted bid succeeding.

84. The Panel decided that there had not been evidence presented to it which indicated that the on-market buying of shares in Anaconda by Glencore constituted unacceptable circumstances. The Panel reached a similar decision in response to Sherritt's decisions in relation to the Rights Offer and the Share Offer. These decisions affirm the majority of the decision by the Anaconda 15 Panel in declining the application by MP Global.

85. However, the Panel considered that the actions of Sherritt, in acquiring 0.87% of the Old Shares on-market, at a price well above the MP Global Share Offer price, at a critical point in the offers and Anaconda shareholders' decisions, for reasons which according to Sherritt's own evidence, were intended to create a false market, constituted unacceptable circumstances.

86. The Panel ordered that the Old Shares that Sherritt acquired on 13 February 2003 be vested in ASIC and disposed of in a bookbuild with the Shares to be sold under the Anaconda 16-17 and 18 proceedings.

87. The Panel ordered that the number of Excess Shares that MP Global was ordered to dispose of in the Anaconda 16-17 and 18 proceedings be reduced by sixty million shares (i.e. fifteen times the shares ordered to be divested by Sherritt).

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

Simon McKeon
President of the Sitting Panel
Decision dated 12 May 2003
Reasons published 14 July 2003

Annexure A - Anaconda 19 Panel Declaration of Unacceptable Circumstances

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;

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 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

Annexure B - Anaconda 18 Panel Final Orders

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;

(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 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