



**In the matter of Normandy Mining Limited
[2001] ATP 27**

Catchwords

Competing takeover bids – restraining dispatch of target’s statement – misleading valuation of target’s shares – valuation of scrip bid – inadequate disclosure in target’s statement – disclosure of rival bidder’s consideration in target’s statement – disclosure of risks associated with accepting rival bid in target’s statement – consent of expert

Corporations Act 2001 (Cth), sections 602 and 638

Ridley MI Pty Ltd v Joe White Maltings Ltd (1996) 22 ACSR 319

An application under section 657E of the Corporations Act by AngloGold Limited (AngloGold) for an interim order to restrain dispatch by Normandy Mining Limited (Normandy) of its target’s statement to Normandy shareholders in response to AngloGold’s bid for Normandy. The Panel made interim orders on Thursday, 22 November 2001 restraining dispatch of the target’s statement until 5.00pm Monday, 26 November. The Panel declined to make a declaration of unacceptable circumstances in relation to the disclosures made in Normandy’s target’s statement.

THE APPLICATION

1. AngloGold applied to the Panel on Thursday 22 November 2001 under section 657E of the Corporations Act for an interim order restraining dispatch by Normandy to its shareholders of the target’s statement in response to AngloGold’s bidder’s statement which was dispatched to Normandy shareholders on 7 and 10 November 2001. (the **Application**)
2. The sitting Panel in this matter is constituted by Mr David Gonski (sitting President), Ms Meredith Hellicar (sitting Deputy President) and Ms Ilana Atlas.

BACKGROUND

3. AngloGold announced its intention to make a takeover offer for all of the shares in Normandy on 5 September 2001. AngloGold lodged its Australian and US bidder’s statement on 17 October and its replacement Australian bidder’s statement on 2 November. The offers were dispatched between 7 November and 10 November to Normandy shareholders and the bid is currently due to close on 14 December.
4. On 14 November Newmont Mining Corporation (**Newmont**) announced its intention to make a takeover offer for Normandy. Between 17 and 19 November, AngloGold and Normandy were in communication regarding the content of Normandy’s proposed target’s statement responding to AngloGold’s bidder’s statement. On 19 November Normandy lodged the target’s statement with the Australian Securities

and Investments Commission (**ASIC**) and provided a copy to the Australian Stock Exchange (**ASX**).

5. The parties had not reached agreement on all issues relating to the target's statement prior to its lodgment with ASIC. On 21 November AngloGold wrote to Normandy setting out in what it believed to be deficiencies in the target's statement that had not been addressed. AngloGold requested that the alleged deficiencies be corrected by Normandy prior to the dispatch of the target's statement to its shareholders. Normandy did not consider that amendment of the document was required.
6. On 22 November, the Panel received the application for interim orders restraining dispatch from AngloGold.
7. Normandy's timetable at its printing and mailing house allowed for the target's statement to be dispatched on Thursday, 22 and Friday, 23 November. The last day on which Normandy could dispatch the target's statement in accordance with section 633 of the Corporations Act was Monday, 26 November.

GROUNDS FOR INTERIM ORDERS

8. The Application alleged that the target's statement was deficient and had the potential to seriously mislead Normandy shareholders in the following ways:
 - (a) it gives the impression that the value of the scrip takeover offer for Normandy by Newmont is \$1.70 per Normandy share, notwithstanding the significant drop in Newmont's share price after announcement of its intention to bid, which is not something that may be adequately reversed or qualified in a subsequent supplementary target's statement;
 - (b) it extensively discusses the risks involved in Normandy shareholders accepting the AngloGold Bid but does not discuss the equivalent risks involved in Normandy shareholders accepting the Newmont Bid including the effect of the proposed merger of Franco-Nevada with Newmont and the conditionality of the Newmont Bid; and
 - (c) the Chairman's letter at the front of the target's statement refers to the advice to Normandy's Board and conclusion by Macquarie Bank Limited (**Macquarie**) that the AngloGold offer is inadequate and undervalues the target company but the content of that advice is not disclosed and it is unclear whether Macquarie consented to inclusion of that statement in the letter.
9. AngloGold submitted that distribution of the target's statement would be contrary to one of the purposes of Chapter 6 of the Corporations Act set out in section 602(a) that the acquisition of control of voting shares in

a listed body take place in a competitive, efficient and informed market and therefore would give rise to unacceptable circumstances.

Interim Orders

10. We decided on Thursday, 22 November to make interim orders restraining Normandy from dispatching the target's statement until 5.00pm (ESST) on Monday, 26 November 2001. We invited parties to make submissions on Thursday, 22 November as to whether AngloGold's application raised significant issues in relation to the target's statement that warranted restraining its dispatch while we considered those issues. We considered that the short timeframe for these submissions was necessary to ensure we were in a position to reach a decision on the interim orders that same day.
11. We decided that if AngloGold were able to substantiate its concerns in respect of the target's statement, there may be further disclosure required and it might be appropriate to require that such information be dispatched to shareholders with the current target's statement. We also considered that Normandy and its shareholders would be unlikely to suffer material harm by Normandy being asked to restrain dispatch of the target's statement for two business days. We noted that the AngloGold Bid is not due to close until 14 December 2001. A copy of the interim orders is attached as Annexure 1.

SUBMISSIONS

12. Following the interim orders, we gave parties an opportunity to make submissions and rebuttal submissions in relation to the disclosure issues raised in the Application and identified in paragraph 8 (a), (b) and (c) above. The Panel met on Saturday, 24 November to consider those submissions so that a decision could be made and communicated to the parties as early as possible and in time for any action that might be required to be taken before expiry of the interim orders on Monday, 26 November.

AngloGold

13. AngloGold's main contention in its submissions was that, in its current form, the target's statement is deficient such that it has the potential to seriously mislead Normandy shareholders. It also argued that a letter or supplementary statement could be ineffective in undoing the misconceptions created by the target's statement since the target's statement is the primary communication from a target to its shareholders.
14. AngloGold acknowledged that its announcement on 19 November had publicly raised concerns about the value of the Newmont Bid. However, it contended that its announcement did not address in any detail the issue relating to the Macquarie advice or the risks associated with the Newmont Bid, and had not been given to all Normandy shareholders.

15. AngloGold contended that the target's statement:
- (a) contained a valuation of Newmont's offer at \$1.70 per Normandy share that was out of date by 19 November when the target's statement was signed. The implied value of the offer on 19 November was \$1.46¹ due to the significant decline in Newmont's share price post-announcement. Accordingly, AngloGold submitted that this is material information for Normandy shareholders to know particularly given the fact that the target's statement prominently states that, on the basis of an implied value of \$1.70, the Board's intention is to recommend acceptance of the Newmont Bid (subject to its fiduciary duties);
 - (b) should disclose more information in relation to the risks associated with, and conditions of, the Newmont Bid. AngloGold's reasons for this included:
 - (i) the existence of that bid was a material factor in the Normandy Board's decision to reject the AngloGold Bid;
 - (ii) the only information shareholders have in relation to that bid is Newmont's announcement of its intention to make a bid;
 - (iii) Newmont is a US company not listed on ASX;² and
 - (iv) the AngloGold Bid had been subjected to in-depth scrutiny by the Normandy directors; and
 - (c) failed to disclose the basis for Macquarie's advice to the Normandy Board that the AngloGold Bid be rejected, especially since that advice appeared to be important to the Board's decision as it is referred to in the Chairman's letter at the front of the target's statement.

Normandy

16. Normandy submitted that it was appropriate for it to value Newmont's scrip offer on the basis of the implied value of the offer immediately prior to it being announced and that any subsequent disclosure would appropriately be made in respect of a reasonable period so as to display any meaningful trend in Newmont's share price and avoid misleading shareholders. Normandy also submitted that in each case where the target's statement refers to an implied offer value of \$1.70, that statement is clearly referenced back to the relevant pre-announcement date of 13 November on which that valuation is based.

¹ Ignoring the 5 cent per share top up if Newmont reaches 90% acceptance of its bid.

² AngloGold suggested that these risks include that the Newmont Bid is subject to a number of conditions which are cross referenced only in a footnote in the target's statement to a copy of Newmont's announcement at p288 of the target's statement and that there is no analysis of the future implications and risks for Normandy shareholders who accept Newmont scrip as consideration.

17. Normandy submitted that the fact that the differential in implied values of the AngloGold and Newmont Bids will continue to fluctuate over time is adequately disclosed for shareholders in section 2.2.4 and in footnote 2 of the target's statement. Normandy noted that shareholders are advised in the target's statement to seek their own financial advice if they wish to know the differential at any point in time.
18. Further, Normandy submitted that even if there were a possibility of its shareholders being misled, this had been removed by AngloGold's announcement of 19 November and the significant press coverage discussing the implied value of each bid and the changing differential between them. In rebuttal, AngloGold submitted that even if AngloGold had publicly released all of its concerns about the target's statement, this would not Normandy's Board is still under a duty to provide a target's statement that is not misleading or deceptive. It submitted that retail shareholders in particular place considerable reliance on the advice of their directors and that whatever action AngloGold took to put across its point of view does not excuse Normandy from its obligations under the Corporations Act.
19. Normandy submitted that it is not appropriate for it to address in detail the risks associated with the Newmont Bid in the AngloGold target's statement because:
 - (a) the purpose of the target's statement in response to the AngloGold Bid is to inform shareholders of the directors' recommendation in respect of the AngloGold offer and set out their reasons for that decision and is not to make a detailed recommendation in respect of the Newmont Bid which is yet to be made. Normandy said that that analysis will be undertaken once the Newmont bidder's statement is received (and therefore detailed information is available) and provided to Normandy's shareholders by the usual response procedure in the form of a target's statement addressing the Newmont Bid. It said that the Normandy Board is not in a position to give an accurate and detailed analysis of the Newmont Bid without first seeing the bidder's statement and to do so would risk misleading shareholders; and
 - (b) the dominant reason for the Normandy Board's decision to recommend rejecting the AngloGold Bid was that Grant Samuel & Associates independent report concluded that the AngloGold Bid is neither fair nor reasonable. Normandy contended that this was made clear in the target's statement.
20. In relation to the issue of disclosure of Macquarie's advice to the Normandy Board, Normandy submitted that there is no separate advice from Macquarie to the Normandy Board which it would be material for shareholders to receive. It said that Macquarie advised Normandy in relation to the preparation of the entire target's statement and therefore

its views are adequately reflected and that Macquarie's advice was based on Grant Samuel's independent expert's report which is included in its entirety with the target's statement. Normandy considered that the consent given by Macquarie in the target's statement is sufficiently clear.

21. Normandy requested the Panel order AngloGold to extend its offer by a period equal to the period from 22 November until the first date after 26 November by which Normandy can physically cause dispatch to occur. Normandy submitted its timetable for dispatch of the target's statement to Australian and United States shareholders was the latest possible that would give shareholders sufficient time to consider their position in respect of the AngloGold Bid. This was because of the time needed for the documents to reach interstate destinations around Australia and the delays in the US mail system resulting from current increased security there.

DECISION

Implied value of Newmont Bid

22. We considered that the target's statement included sufficient information³ about the date on which the implied value of the Newmont Bid was calculated to be \$1.70 per share and sufficient warning that this value would fluctuate with Newmont's share price. The statements and level of disclosure would not be likely to mislead Normandy's shareholders.
23. We accept that the primary reason for the Normandy Board's decision was the Grant Samuel independent expert's report and the fact that the implied value of the AngloGold Bid did not fall within the fair range of values for Normandy shares found by the independent expert. This is based upon the submissions received and the manner in which Normandy's Board set out its view in the target's statement that the AngloGold Bid be rejected
24. The target's statement does give prominence to the fact that the Normandy Board proposes to recommend the Newmont Bid when and if made (subject to the Directors' fiduciary duties). However, we accept that the target's statement states that those intentions were based on the implied value of the Newmont Bid being \$1.70 as at 13 November 2001. We do not consider that Normandy shareholders would be misled by these statements in the form and context in which they appear in the target's statement.
25. Accordingly, we consider that the target's statement did not raise sufficient concern in relation to the level or nature of disclosure made by

³ Paragraph 2.2.4 and footnote 2 on page 5 and paragraph 6 of the Chairman's letter on page 1.

Normandy in relation to the Newmont Bid's implied value to give rise to unacceptable circumstances.

26. However, the Panel wishes to note that it considers it would have been better practice and more useful to Normandy shareholders for Normandy to have set out in its target's statement the implied value of the proposed Newmont Bid based on the up to date Newmont share price as at, or immediately prior to, the date of the target's statement (on 19 November the implied value of the Newmont Bid was \$1.46, excluding the 5c top up if 90% acceptances are reached). The Panel considers that it will usually be preferable for a bidder or target to disclose up to date information in bid documents where possible. The Panel does not accept Normandy's argument that it did not have time to update the value of the Newmont Bid on the day that the target's statement was signed and lodged with ASIC.
27. Further, the Panel considers that it would have been appropriate for that information to be given the same prominence as statements regarding the implied value of that offer being \$1.70 per Normandy share.

Risks

28. In relation to the risks associated with the Newmont Bid, the Panel does not consider that information that is material to shareholders' decision whether or not to accept the AngloGold Bid has been omitted such that it would give rise to unacceptable circumstances. The Panel notes that section 2.4 of the target's statement indicates that the Newmont Bid will be subject to a 50.1% minimum acceptance condition and refers shareholders to Newmont's announcement later in the target's statement that sets out the other conditions of its offer.
29. However, the Panel again considers that better practice would have been for Normandy to acknowledge in its target's statement the fact that there would be risks for Normandy shareholders in accepting any bid by Newmont. This is especially so, given the prominence given to the existence of the Newmont Bid in the target's statement and the fact that Newmont would, like AngloGold be offering scrip in a foreign gold company.
30. The Panel notes that Normandy has set for itself for itself a benchmark in critical rigor in this target's statement for assessing the risks associated with the Newmont Bid which the Panel assumes will be followed in any target's statement in response to such bid by Newmont.
31. The Panel recognises that the purpose of the target's statement is to address the AngloGold Bid, its value for Normandy shareholders and the risks associated with it and that any discussion of the risks involved with the Newmont Bid would have been limited and very qualified given the preliminary stage of the Newmont Bid and the fact that Newmont's bidder's statement has not yet been lodged.

Notwithstanding this, the Panel considers that the prominence given to the Newmont Bid in the target's statement and the Normandy Board's qualified (and Chairman's enthusiastic) recommendation in favour of that bid mean that a clear and prominent acknowledgement of the existence of those risks would have been useful to Normandy shareholders in assessing their options.

32. The Panel does not consider that providing that basic level of information about the Newmont Bid to shareholders in the target's statement would have been unusually difficult for Normandy. This appears especially to the Panel to be the case since the Chairman of Normandy publicly acknowledged in a television interview that Normandy and Macquarie had done a lot of work to analyse the Newmont Bid before recommending that bid to Normandy's Board.⁴
33. In these circumstances, where there are two competing offers for Normandy, in the interests of shareholders receiving all relevant information on which to base their decision, the Panel considers that it is desirable that Normandy take a balanced and even-handed approach in its target's statements and any supplementary target's statements when discussing the relative merits of, and the risks associated with, each bid. This approach is even more important given that AngloGold and Newmont are each offering overseas scrip as consideration under their respective bids and therefore the implied value of each bid is subject to both market and currency exchange risk.

Request for undertakings

34. The Panel is aware that the AngloGold Bid may close before Newmont proceeds to make its bid and send its offer document to Normandy shareholders and before Normandy has issued its target's statement in relation to the Newmont Bid. The Panel was therefore concerned to ensure that Normandy shareholders receive up to date information in relation to the relative values of the two bids and the progress of the Newmont Bid prior to the close of the AngloGold Bid.
35. In light of this, on Saturday, 24 November 2001 the Panel sought undertakings from Normandy that:
 - (a) if the AngloGold Bid appears likely to close before Normandy has issued its target's statement in response to the Newmont Bid (if and when that bid is made), then Normandy will issue a supplementary target's statement in relation to the AngloGold Bid containing then current information dealing with:

⁴ In an interview with "Business Sunday" on Channel 9, Mr Champion De Crespigny stated, "We did a lot of work and that allowed us with Macquarie to work out what we thought would happen initially from the Newmont bid. Now it hasn't gone any differently than we planned, in fact we submitted to the board the number that it is now."

- (i) the progress of Newmont's arrangements for making its bid and the prospects for that bid proceeding;
 - (ii) the relative values of the AngloGold Bid and the Newmont Bid; and
 - (iii) the Normandy Board's recommendation concerning acceptance of the AngloGold Bid and its intentions in respect of the Newmont Bid; and
- (b) if the AngloGold Bid is still open at the time Normandy issues its target's statement in response to the Newmont Bid, that target's statement will contain a comparison of the two bids including the different risks attaching to each bid.
36. The Panel considered whether it would be appropriate to require Normandy to undertake to send a copy of such supplementary target's statement to each Normandy shareholder.
37. The Panel recognises the time pressures in preparing, printing and dispatching a supplementary target's statement to the shareholders of a large company such as Normandy, a number of whom are resident overseas. Normandy indicated that, assuming the AngloGold Bid would close on 14 December 2001 without extension, if it were required by the Panel to do so, it would need to be in a position to dispatch its supplementary target's statement before 7 December and therefore effectively have such a statement prepared and signed off within about a week and a half's time of the date of these reasons.
38. If the AngloGold Bid is extended, Normandy would still need to finalise, and commence the printing of, any supplementary target's statement more than 2 weeks prior to the new scheduled closing date of the bid. On that basis the information may well be stale by the time it reached shareholders, and Normandy could not be certain of the closing date of the bid when it commenced printing.
39. Given the desirability for the target's recommendation to be based on current information, we considered in the circumstances that any such supplementary target's statement would therefore only be required to be released to ASX in final week of the AngloGold Bid, rather than posted to target shareholders. In these circumstances, Normandy also agreed to take appropriate steps to advertise the content of the supplementary target's statement in appropriate newspaper advertisements, to ensure its closing recommendation is, as far as practicable, brought to the attention of its shareholders.
40. The Panel received the requested undertakings from Normandy in the early afternoon of Monday, 26 November and confirmation that Normandy would arrange release to the ASX of the Macquarie confirmation letter (referred to below in these reasons). Accordingly, we agreed to revoke the interim orders restraining dispatch immediately so

that Normandy could proceed to instruct its mailing house to dispatch the target's statement. A copy of the revocation appears in Annexure 2.

Macquarie advice and consent

41. The Chairman's letter to Normandy shareholders, set out in the front of the target's statement at page 1, reads relevantly as follows:

*"An independent expert, (Grant Samuel & Associates Pty Limited) has concluded that **the AngloGold offer is neither fair nor reasonable**. Based on this and other reasons set out in this document, Normandy's Directors and their advisers, Macquarie Bank Ltd, have concluded that the AngloGold offer is inadequate and undervalues Normandy."*

42. Section 17 of the target's statement on page 22 states that Macquarie gave its consent as required by section 636(3) of the Corporations Act as follows:

"Macquarie Bank Limited has given and not withdrawn its consent before the date of this Target's Statement to being named in this Target's Statement as financial adviser to Normandy. Macquarie Bank Limited does not make or purport to make any statement that is included in this Target's Statement and there is no statement in this Target's Statement which is based on any statement of Macquarie Bank Limited. Macquarie Bank Limited specifically disclaims responsibility for any statement included in this Target's Statement."

43. The Panel did have some concerns that the consent given by Macquarie, as quoted above, did not refer to the statement made in the Chairman's letter and that the express limitations and denials set out in the consent might be contradictory to the statement made by the Chairman as to Macquarie's opinion of the AngloGold Bid and its advice to Normandy.
44. To clarify the position, we requested that Macquarie provide, before 12 noon (ESST) on Monday, 26 November, a letter stating that Macquarie:
- (a) consents to the use of its name:
 - (i) in the Chairman's letter; and
 - (ii) in the target's statement in the context in which it has been used;
 - (b) affirms that the statement made in the Chairman's letter was an accurate representation of the advice given to the Normandy Directors by Macquarie concerning the AngloGold Bid; and
 - (c) gives a clear description of all and any oral or written advice on which the statement in the Chairman's letter was based.
45. Macquarie provided a letter to us addressing items (a), and (b) above and it was released to the ASX on Monday, 26 November 2001, in accordance with the Panel's request and Normandy's undertaking to the Panel. Macquarie also provided the information requested in (c) above, but we did not require that to be published.

46. Provided that Macquarie confirmed its consent for the statement in the Chairman's letter, to the extent that this may have breached section 636(3) of the Corporations Act, the Panel did not consider that it was a breach that would materially mislead or affect Normandy shareholders or that it gave rise to unacceptable circumstances.
47. We note that in *Ridley MI Pty Ltd v Joe White Maltings Ltd* (1996) 22 ACSR 319, Einfeld J held that the Board of a target company should have disclosed the grounds on which its investment banking adviser had advised them that the relevant bid was inadequate. In this case, there is not the same need to require Macquarie to set out its reasons for supporting the Board in dismissing the AngloGold Bid, given that Normandy has provided an elaborate report by an independent expert (Grant Samuel) valuing the target and the AngloGold Bid.
48. We note for completeness that it was raised with the Panel that the statement regarding Macquarie's opinion might be asserted not to be in the target's statement proper, but in the Chairman's letter. While we considered that argument we did not consider it to hold much weight in relation to the issue before us.
49. We think that the better view is that because Normandy chose to bind together all parts of the communication to shareholders into one document, Normandy shareholders will, and can reasonably expect to, assume that the whole booklet constitutes the target's statement. Therefore the statement concerning the Macquarie advice is contained within the target's statement, and the Macquarie consent should have clearly addressed it. We are reassured by the numerous statements in the booklet that refer to the document as a whole.
50. Even if we had considered that the Chairman's letter did not constitute part of the target's statement we would not have adopted a different course. We consider that if a target board chooses to suggest to its shareholders (in any communication with them) that an adviser concurs with the directors' views, the directors should obtain and publish that adviser's consent and affirmation.

David Gonski

President of the Sitting Panel

Decision dated 26 November 2001

Reasons published 10 December 2001

Takeovers Panel

Reasons for Decision - Normandy Mining Limited 01

Annexure 1

Takeovers Panel

Corporations Act 2001

Section 657E

Interim Order

In the Matter of Normandy Mining Limited

To Normandy Mining Limited

100 Hutt Street

Adelaide, South Australia

Pursuant to section 657E of the Corporations Act 2001, the Takeovers Panel orders Normandy Mining Limited, its servants and agents, not to dispatch to its shareholders before 5.00p.m. Eastern Australian Summer Time on Monday 26 November 2001 or further order copies of its target's statement dated 19 November 2001 in response to the offers made by AngloGold Limited variously dated 7 and 9 November 2001 to acquire all of the ordinary shares in Normandy Mining Limited under a bidder's statement dated 2 November 2001, notwithstanding that section 633 of the Corporations Act would in the absence of this order require the copies to be dispatched no later than 26 November 2001.

Dated 22 November 2001

Signed at the direction of David Gonski, sitting President, by George Durbridge

Takeovers Panel

Reasons for Decision - Normandy Mining Limited 01

Annexure 2

Takeovers Panel

Corporations Act 2001

Section 657E

Revocation of Interim Order

In the Matter of Normandy Mining Limited

To Normandy Mining Limited

100 Hutt Street

Adelaide, South Australia

Upon receiving the undertakings of Normandy Mining Limited ("Normandy") to:

- (a) today cause to be released a letter from Macquarie Bank Limited to Australian Stock Exchange Limited in the form provided to the Panel today; and
- (b) shortly after the date determined under subsections 630(1) and (2) of the Corporations Act 2001 in relation to the offers made by AngloGold Limited variously dated 7 and 9 November 2001 to acquire all of the ordinary shares in Normandy under a bidder's statement dated 2 November 2001 ("the AngloGold bid"), publish in accordance with section 647 of the Corporations Act and by publication in appropriate newspapers a supplementary bidder's statement which deals on the basis of then current information with:
 - (i) the progress of the arrangements by Newmont Mining Corporation to bid for shares in Normandy as announced on 14 November 2001 ("Newmont's proposed bid") and the prospects of that bid proceeding;
 - (ii) the relative values of the AngloGold bid and of Newmont's proposed bid;
 - (iii) the Normandy board's recommendation concerning acceptance of the AngloGold bid and its intentions concerning Newmont's proposed bid,

pursuant to section 657E of the Corporations Act, the Takeovers Panel revokes the order dated 22 November 2001 restraining dispatch to its shareholders of Normandy's target's statement in response to those offers.

Dated 26 November 2001

Takeovers Panel

Reasons for Decision - Normandy Mining Limited 01

Signed at the direction of David Gonski, sitting President, by George Durbridge