Takeovers Panel

Reasons for Decision
Austral Coal 02(R)

In the matter of Austral Coal 02(R)
[2005] ATP 16

Catchwords:
review of Panel decision – equity derivatives – combined holding – failure to disclose to the market – power or control – substantial interest – efficient, competitive and informed market – acquisition and retention of hedge shares – market assessment of intentions – identity of industry buyer – 5% and 1% increases thereafter – restoration order

Corporation Act 2001 (Cth), sections 602, 657EA, 657D and 671B
Austral Coal 02 [2005] ATP 11
Village Roadshow Limited 02 [2004] ATP 12

These are the Panel's reasons for its decision to make a declaration of unacceptable circumstances and final orders in relation to the failure by Glencore to disclose its combined direct holding and holdings of Hedge Shares under equity swaps it arranged in relation to Austral Coal on 22 March 2005, the day after this "Combined Holding" exceeded 5%, and Glencore's failure to disclose 1% increases in the Combined Holding until Glencore's announcements on 4 and 5 April 2005. The Panel conducted a de novo review of the decision to make a declaration of unacceptable circumstances and final orders by the first instance Panel. Although this decision is consistent in end result with the decision of the first instance Panel, the Panel varied the detail of the first instance Panel's decision and orders. The Panel considered that the existence and size of the equity swaps, the identity of Glencore as the common entity behind the Combined Holding, and Glencore's direct holding as a material part of the Combined Holding, was information which, had it been disclosed, would have had an effect on the control or potential control of Austral Coal, an effect on the acquisition or proposed acquisition of substantial interests in Austral Coal, and an effect on the efficiency, competitiveness and information available to the market for control over Austral Coal shares. Glencore's failure to disclose the Combined Holding constituted unacceptable circumstances for the reasons explained herein.

SUMMARY

1. In mid to late March 2005, Glencore International A.G. and Fornax Investments Limited (together, **Glencore**) entered into cash settled equity swaps (**Glencore Swaps**) with Credit Suisse First Boston International (**CSFBi**)[1] and ABN AMRO Bank NV, Australia Branch (**ABN AMRO**) (together, the **Banks**) over shares in Austral Coal Limited (**Austral Coal**). At the time Glencore entered into the Glencore Swaps, Centennial Coal Company Limited (**Centennial**) had commenced a takeover bid for Austral Coal which it had first announced on 23 February 2005, offering 10 Centennial shares for every 37 Austral Coal shares.

[1] For ease of reference in these reasons for decision, the Panel refers to **CSFB** as including CSFBi and all other members of the Credit Suisse First Boston group involved in the transactions giving rise to the Proceedings.

Centennial's bid was unanimously recommended by the directors of Austral Coal in the absence of a superior bid.

2. The review Panel (**Panel**) in these proceedings decided that Glencore's failure to disclose to the market, from 9.30 a.m. on 22 March 2005 until the morning of 5 April 2005, the fact that the combination of Glencore's holding of voting shares in Austral Coal and the swap exposure agreed to be provided under the Glencore Swaps (**Combined Holding**) [2] exceeded 5% of the voting shares in Austral Coal, constituted unacceptable circumstances.

3. The Panel further decided that Glencore's failure to disclose to the market, from 9.30 a.m. on each relevant trading day between 23 March and 5 April 2005, any increase of 1% or more of the Combined Holding, also constituted unacceptable circumstances.

4. The Panel considered that the existence and size of the Glencore Swaps, the identity of Glencore as the common entity behind the Combined Holding, and Glencore's holding as a material part of the Combined Holding, was information which, had it been announced, would have had an effect on the control or potential control of Austral Coal, an effect on the acquisition or proposed acquisition of substantial interests (at least by Glencore and Centennial, and possibly by others), and an effect on the efficiency, competitiveness and information available to the market for control over Austral Coal shares. Accordingly the Panel considered that the information set out earlier in this paragraph was information which the market would have expected, and needed, in proper disclosure by Glencore of the Combined Holding.

5. The Panel did not consider it necessary to determine whether there had been a contravention of any of Chapters 6, 6A, 6B or 6C of the Corporations Act 2001 (Cth) (**Act**)[3] (which provide other grounds for a finding of unacceptable circumstances under section 657A), because the Panel considered that this would add nothing to the effect of the circumstances on control or potential control, or acquisition or proposed acquisition of a substantial interest, which it considered were at the heart of the matter.

6. The Panel took into consideration the effect of the relevant circumstances not only on persons directly affected by the Glencore Swaps (relevant to both control and substantial interest acquisitions), but also their effect on the market, in each case in the light of the legislative policy stated in section 602 and the legal protections contained in Chapter 6 of the Act more generally.

7. The Panel decided that it was unnecessary for it to determine whether or not unacceptable circumstances existed between 5 April 2005 and 1 July 2005. Although the Panel considered that Glencore failed to disclose all of the salient features of the Glencore Swaps to the market in its disclosures on 4 and 5 April 2005, the quantum of the Combined Holding was then disclosed and sufficient

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[2] In the present case, Glencore's exposure under the Glencore Swaps was determined by the number of Hedge Shares acquired by the Banks. See discussion from paragraph 89.

[3] All statutory references in these reasons relate to the Act, unless otherwise stated.

disclosure has since been made, particularly in the Media Release announcing the decision of the Initial Panel on 1 July 2005.

8. The Panel varied the decision of the Initial Panel by making the declaration at Annexure A and also varied the orders of the Initial Panel by substituting the orders set out in Annexure B (**Restoration Order**). In summary, the orders require Glencore:

   (a) to make offers (**Restoration Offers**) to all persons who sold Austral Coal shares between 9.30 a.m. on 22 March 2005 and 9.30 a.m. on 5 April 2005 (**Non Disclosure Period**) by transactions (**Uninformed Transactions**) which were reported to Australian Stock Exchange Limited (**ASX**):

      (i) to sell to those persons the same number of Austral Coal shares which those persons sold in any Uninformed Transaction (the persons may accept the offers in whole or part);

      (ii) at a price per share no higher than that of the relevant Uninformed Transaction; and

   (b) to hold those Restoration Offers open for one month, during which time a person is entitled to withdraw the acceptance; and

   (c) to make a public announcement (in a form approved by the Panel) of the existence and terms of the Restoration Offers.

9. The Panel decided that it would allow Glencore to make one application to the Panel for a variation of the Restoration Order in relation to any particular Uninformed Transaction or Transactions. The Panel would consider any application, after seeking submissions from any person whose interests would be affected by the proposed variation of the Restoration Order. The Panel would also allow Glencore to apply for further orders if it received acceptances for more shares than it had available or could procure.

10. At the time of these reasons being published, the Panel has made no other orders concerning the Glencore Swaps.

11. Following the announcement of the Panel's decision, Glencore applied to the High Court of Australia under section 75 of the Constitution of Australia for review of the Panel's decision and orders. The High Court has made orders staying the Panel's orders and remitting Glencore's application to the Federal Court of Australia.

THE PROCEEDINGS

12. These reasons relate to an application (**Application**) to the Panel on 1 July 2005 from Glencore under section 657EA.

13. The Application sought review of the decision of the sitting Panel in *Austral Coal 02* [2005] ATP 11 (**Initial Panel**) on 28 June 2005 to make a declaration that unacceptable circumstances existed in relation to the affairs of Austral Coal and to make orders remedying those unacceptable circumstances.

14. The Initial Panel's decision was made following an application to the Panel by Centennial on 3 June 2005 in relation to the affairs of Austral Coal. At the time of the Application, Austral Coal was the subject of a takeover offer by Centennial.

THE PANEL & PROCESS

Sitting Panel

15. The President of the Panel appointed Mr. David Gonski AO, Mr. Norman O'Bryan SC and Professor Ian Ramsay (sitting President) as the sitting Panel (**Panel**) for the proceedings (**Proceedings**) arising from the Application.

De novo review

16. As a review Panel, the Panel conducted a de novo review of the Initial Panel's decision in Austral Coal 02. The sitting Panel was provided with all submissions, rebuttals, primary evidence and key correspondence (including the decision letter of the Austral Coal 02 Panel) circulated to parties in the Austral Coal 02 proceedings. The Panel was also provided with all submissions and rebuttal submissions and other background information (eg ASX announcements) relating to the Proceedings.

Orders of the Initial Panel

17. The Initial Panel made orders on 1 July 2005. On learning of the Panel's receipt of the Application in these Proceedings, the Initial Panel stayed its orders 1, 2, 3 and 5 until 8 July 2005. The Panel in these Proceedings further extended the stay of those parts of the orders made by the Initial Panel which it had stayed. The period was extended from 8 July to 15 July, then to 22 July and finally to 26 July 2005.

Parties

18. The parties to the Proceedings were Centennial, the Australian Securities and Investments Commission (**ASIC**), Glencore, CSFB and ABN AMRO. These parties lodged notices of appearances with the Panel at the commencement of Proceedings in accordance with Rule 3.2 of the Panel's published Rules for Proceedings (**Rules**).

19. The Panel consented to Centennial, Glencore, CSFB and ABN AMRO being legally represented by their commercial lawyers in the Proceedings.

Process

20. The Panel adopted the Panel's published procedural rules (**Panel Rules**), which are made under section 195 of the ASIC Act 2001 (**ASIC Act**), for the purposes of the Proceedings and also applied the processes set out in the ASIC Regulations 2001 (**Regulations**).

21. In accordance with Regulations 20 and 22, the Panel provided parties with a brief setting out a general description of the matters to be examined in the

Proceedings and the issues to be addressed in submissions for the Proceedings (**Brief**). The Brief also set out:

(a) the Panel's tentative summary of facts, based on its review of the submissions and evidence in the Austral Coal 02 proceedings; and

(b) the findings which, the Panel put to the parties, were open to it to find based on the Panel's tentative summary of facts.

The Brief requested parties to make comment on both the Panel's summary of the facts, and it the findings which it said appeared open to it to find.

APPLICATION

Review of Initial Panel decision

22. The Application sought review of the decision of the Initial Panel on 28 June 2005 to make a declaration of unacceptable circumstances and final orders remedying those unacceptable circumstances.

23. Glencore set out various submissions in its Application, including that:

(a) the findings of the Initial Panel were not consistent with, were not founded on, or were contrary to, the evidence before it;

(b) the decision of the Initial Panel contained inferences which were not founded on, or were contrary to, the evidence before it, and therefore should not have been made;

(c) the Initial Panel made errors based on a failure to afford procedural fairness to parties in relation to the facts on which it was intending to rely;

(d) the decision was pre-determined and based on an unpublished and untested policy; and

(e) the Initial Panel made various errors of law.

24. Although not made explicit in the Application, the Panel understood that Glencore sought that the Panel should set aside the declaration of unacceptable circumstances and orders made by the Initial Panel under section 657EA(4)(b).

25. The Panel, being a de novo Review Panel, did not seek to address, and then redress or reject, Glencore's criticisms of the Initial Panel's decision. Rather, the Panel commenced considering the allegations and complaints raised by Centennial's 3 June 2005 application, with the advantage of the concerns Glencore had raised in its 1 July 2005 application. Therefore, these reasons, while written with knowledge of the Glencore application, do not seek to address the specific issues raised by Glencore concerning the Austral Coal 02 decision. Rather, these reasons address the original Centennial application and the submissions made by the parties in these review proceedings.

Centennial request for interim orders

26. Centennial requested that the Panel make interim orders restraining Glencore and its affiliates from selling or otherwise disposing of Centennial shares until any orders made by the Austral 02R Panel have taken effect.

27. The Panel decided, and advised the parties, that it did not consider that the request came within the scope of its de novo review function in this matter and it was taken no further in the Proceedings.

FACTUAL BACKGROUND

Centennial bid for Austral Coal

28. Centennial announced a takeover bid for Austral Coal on 23 February 2005, offering 10 Centennial shares for every 37 Austral Coal shares. Centennial's bid was unanimously recommended by the directors of Austral Coal in the absence of a superior bid.

29. Centennial's bid followed public revelations that Austral Coal:

    (a) was in serious financial difficulties; and

    (b) had granted access to a number of potential acquirers to due diligence information concerning Austral Coal in an endeavour to resolve its financial difficulties.

30. When Centennial's bid was announced Austral Coal had 263,463,465 ordinary shares and 40,000,000 convertible notes on issue. Under both the normal terms of the convertible notes and because of the Centennial takeover, the convertible notes were able to be converted at times during the Centennial takeover bid period. Under the terms of the convertible notes, Centennial's takeover bid for Austral Coal meant that Austral Coal had the right to give a redemption notice in relation to the convertible notes if the Centennial bid was declared to be unconditional. On 23 February 2005 Austral announced that the convertible notes would become convertible into ordinary shares when Centennial's bid became unconditional. Most of the convertible notes were converted on 1 April 2005. Austral Coal issued 41,125,408 shares on conversion of the convertible notes and currently has 304,588,873 ordinary shares on issue. The various percentage holdings of Austral Coal shares mentioned below have been affected by the conversion.

31. Centennial announced on 4 March 2005 that it had become a substantial holder in Austral Coal on 2 March 2005 with a relevant interest in 9.6% of Austral Coal shares.

32. Centennial served its bidder's statement on Austral Coal on 9 March 2005 and dispatched its offers to Austral Coal shareholders between 21 and 23 March 2005.

33. Austral Coal lodged its target's statement on 21 March 2005, recommending the Centennial bid and dispatched it between 21 and 23 March 2005.

34. Centennial declared its bid unconditional on 23 March 2005. On 24 March 2005, Centennial announced that its relevant interest in Austral Coal had increased to 16.5%.

35. On 4 April 2005 Centennial announced that its relevant interest in Austral Coal had increased to 30%. On 5 April 2005 Centennial announced that its relevant

interest in Austral Coal had increased to 34.3% and on 6 April 2005 Centennial announced that its relevant interest in Austral Coal had increased to 42.04%.

36. On 7 April 2005 Centennial announced that its relevant interest in Austral Coal had increased to 48%.

37. On 8 April 2005 Centennial announced that its relevant interest in Austral Coal had increased to 66.7%.

38. On 24 April 2005 Centennial announced that its relevant interest in Austral Coal had increased to 82.4%.

39. Centennial's relevant interest in Austral Coal is today approximately 85.4%. It cannot currently proceed to compulsory acquisition of the outstanding shares in Austral Coal under Chapter 6A of the Act.

40. The other remaining relevant interest holders in Austral Coal today are:

    (a) Glencore: 7.32%;

    (b) CSFB: 4.03%;

    (c) ABN AMRO: 2.43%; and

    (d) 230 public shareholders: 0.79%.

Glencore direct holding

41. Glencore acquired 4.9% of the shares in Austral Coal before 21 March 2005[4]. These shares were acquired for Glencore by CSFB (2.3%) and Shaw Stockbroking (**Shaw**) (2.6%). Shaw acquired a further 0.09% for Glencore on 24 March 2005, taking Glencore's direct holding of Austral Coal shares to 4.99%.

CSFB Swap

42. Glencore approached CSFB in relation an equity swap (**CSFB Swap**) on around 10 March 2005. The parties executed a term sheet on 20 March 2005, which set out the commercial terms of the CSFB Swap including the proposed face value of approximately $16 million (based on the "initial price" multiplied by the number of "reference shares"). A further amended term sheet was executed by the parties on around 25 March 2005.

43. In the early stages of discussing the CSFB Swap, Glencore and CSFB proposed that Glencore would cross its physical holding of 4.6% of Austral Coal shares to CSFB. In submissions, CSFB said that the crossing was proposed because CSFB would then have been able to quickly erect a physical hedge against the CSFB Swap if it wished to do so. Ultimately, Glencore and CSFB did not proceed with the proposed crossing.

44. CSFB acquired 12,100,060 Austral Coal shares (approximately 4.6% of the shares in Austral Coal) progressively between 21 and 30 March 2005 in order to hedge

[4] Based on the number of Austral Coal shares on issue at the time. Due to the issue of new Austral Coal shares on the conversion of the convertible notes that percentage would now be less than 4.9%.

its exposure under the CSFB Swap (**Hedge Shares**[5]). The value of the swap exposure which CSFB was prepared to offer Glencore gradually increased between 21 and 30 March 2005. The value of the swap exposure CSFB was prepared to offer Glencore was limited to the size of CSFB's physical holding in Austral Coal from time to time, as CSFB acquired Hedge Shares up to the agreed value of the swap.

45. The evidence was clear that CSFB's acquisition of Austral Coal Hedge Shares preceded its confirmation of the swap exposure it would offer Glencore from time to time and that exposure never exceeded the number of Hedge Shares previously acquired by CSFB. Internal CSFB correspondence confirmed this approach.

46. On 21 March 2005, the CSFB swap structurer responsible for creating the CSFB Swap was instructed by his supervisor to prepare a spreadsheet relating to the CSFB Swap with "fills" and "order limits" per day to send to "all approvers and the client". On the same day, the swap structurer circulated a spreadsheet setting out the "number of [Austral Coal] shares bought" on that day and the "average price" of those purchases. The spreadsheet also set out the "swap notional accumulated" amount, which was clearly based on the number of Austral Coal shares acquired, multiplied by the average price per share. The spreadsheet was updated on each day that CSFB acquired Hedge Shares and was circulated to relevant CSFB staff, including Glencore's client broker at CSFB.

47. Glencore was clearly advised of CSFB's pre-hedging practice. In the email attaching the spreadsheet referred to above, the swap structurer instructed Glencore's client broker to "*convey the information to ... [Glencore] and advise him that he is legally obliged on the aggregate TRS [total return swap] notional*". In later email correspondence from CSFB to Glencore, CSFB noted "*As [your client broker] has advised you, the TRS swap was filled last week*". This email confirms that there was earlier (presumably oral) communication between the CSFB client broker and Glencore in relation to "filling" the CSFB swap.

48. The CSFB client broker gave evidence in a signed statement provided to the Panel that Glencore decided each day the extent to which it wished to increase its swap for that day. For Glencore to have been able to "decide" how much it wished to increase the swap for the day it must have been informed on a daily basis of the size of the swap. CSFB provided to the Panel what it described as "all documents relating to the Glencore Swaps" in its possession. There were no documents in those provided by CSFB to the Panel which recorded any of Glencore's instructions to increase the swap amount. Glencore provided, under a statutory notice to ASIC, at the Panel's request, copies of all documents it held in relation to the Glencore Swaps. There were no documents in those provided by Glencore which recorded any of Glencore's instructions to increase the swap amount.

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[5] In these reasons for decision, Hedge Shares means shares in Austral Coal acquired by either or both of CSFB and ABN AMRO to hedge their respective exposures under the Glencore Swaps.

49. Glencore clearly understood that the swap exposure was based on the number of shares acquired by CSFB. On 4 April 2005, a Glencore representative reported to various Glencore staff on the number of shares held by each of Glencore, CSFB and ABN AMRO. A document attached to this email noted what was described as Glencore's total "*Effective Austral Shareholding*" of 12.61%.

ABN AMRO Swap

50. Glencore approached ABN AMRO in relation to a further equity swap of up to 5% of the shares in Austral Coal (**ABN AMRO Swap**) on around 24 March 2005. An internal ABN AMRO email dated 26 March 2005 from the ABN AMRO corporate finance director whom Glencore had approached to enter into the ABN AMRO Swap, recounted Glencore's strategy including to "*potentially lift its shareholding to 19.9% in the short term*" and "*stall the Centennial offer, with investors waiting for a higher offer from another party*".

51. ABN AMRO acquired its holding of Hedge Shares progressively between 31 March and 4 April 2005 in order to hedge its exposure under the ABN AMRO Swap. The proposed face value of the swap of 5% of the shares in Austral Coal was stated in the draft confirmation provided from ABN AMRO to Glencore in relation to the ABN AMRO Swap. However, the ABN AMRO Swap was ultimately halted at approximately 2.8%, apparently after correspondence between Glencore's Australian legal advisers and ABN AMRO. The final (lower) face value was stated in the confirmation issued in relation to the ABN AMRO Swap after ABN AMRO had agreed to cease further increases in the value of swap exposure ABN AMRO was prepared to offer Glencore.

52. The value of the swap exposure which ABN AMRO was prepared to offer Glencore gradually increased between 31 March and 4 April 2005. The value of the swap exposure ABN AMRO was prepared to offer Glencore was limited to the size of ABN AMRO's physical holding in Austral Coal from time to time, as ABN AMRO acquired Hedge Shares.

53. The evidence was clear that ABN AMRO's acquisition of Austral Coal Hedge Shares preceded its confirmation of the swap exposure it would offer Glencore from time to time and that exposure never exceeded the number of Hedge Shares previously acquired by ABN AMRO. This arrangement was the subject of the following email correspondence from ABN AMRO to Glencore on 30 March 2005:

54. "[We] will proceed as discussed – i.e. you provide order instructions as to what level you are seeking economic exposure, we will use best endeavours to provide that exposure, reporting via daily email (instructions can be amended by you at any time) and booking out a final confirmation when completed".

55. ABN AMRO reported daily to Glencore on its "swap exposure". The Panel found that Glencore understood that swap exposure was based on the number of shares acquired by ABN AMRO. It is noted above that a Glencore representative reported to various Glencore staff on the number of shares held

by each of Glencore, CSFB and ABN AMRO, including the total "*Effective Austral Shareholding*" of 12.61%.

Possible Glencore bid for Austral Coal

56. Based on the evidence before it, the Panel found that leading up to, and during the period of acquiring exposure under, the Glencore Swaps, Glencore was considering whether to make a takeover bid for Austral Coal and that Glencore communicated this possibility to CSFB and ABN AMRO.

57. There are various emails between Glencore and CSFB which relate to Glencore considering whether to make a takeover bid for Austral Coal. First, in an email to various CSFB staff on 7 March 2005, Glencore explained the importance of CSFB advising Glencore of the highest price of Glencore's purchases in the context of section 621(3) in case "*we land up making a bid for the company*" and "*if it all happens within 4 months of the purchase*".

58. The possibility of Glencore making a bid was also referred to in the context of Glencore converting Austral Coal convertible notes which were proposed to be acquired by CSFB on behalf of Glencore at the time. In correspondence to CSFB on 8 March 2005, Glencore noted that "*we are able to convert [convertible notes]… within 15 days after lodging the Takeover Notice*".

59. Glencore later requested advice from its CSFB broker and a senior member of CSFB's equity capital markets group in relation to the application of the minimum bid price rule to its purchases of Austral Coal shares in mid-March 2005. In an email from Glencore to CSFB dated 20 March 2005, Glencore stated:

> *"[As] you know, the Corporations Act requires that if a takeover is made, the minimum price of the offer must be the highest price paid for the shares in the preceding four months. Now that these shares are being crossed to you, is the price we bought any of these included in this provision or do we start afresh?"*

60. ABN AMRO was also aware that Glencore was considering making a bid for Austral Coal. In an internal email to members of the ABN AMRO team, the supervisor of the ABN AMRO Swap noted that "*Glencore has not made any decision as to whether to bid or not and it will depend on … the CEY [Centennial] takeover offer*".

Glencore's announcements on 4 and 5 April 2005

61. Glencore made no public announcement about any of the holdings of itself, CSFB or ABN AMRO, or the Glencore Swaps, until the evening of 4 April 2005, when it published a statement to the media, and the morning of 5 April 2005, when it announced to the market through ASX, that it held approximately 5% of Austral Coal and had entered into equity swap agreements with "well regarded investment banks" in respect of a further approximately 7.4% of Austral Coal's expanded capital on that date.

62. Glencore also announced in its media release on 4 April, and to ASX on 5 April, 2005 that it was "considering its position" in respect of Austral Coal and Centennial's bid, and that its considerations then included "the possibility of a

cash takeover bid being made for Austral Coal by a party other than Centennial".

63. Glencore lodged two substantial holder notices in relation to its relevant interests in Austral Coal on 6 and 19 April 2005 respectively.

64. Prior to the commencement of the Initial Panel's proceedings, Glencore did not make any other public announcement about the matters noted above.

FINDINGS BASED ON FACTS AND SUBMISSIONS

65. When Glencore negotiated and agreed its equity swap arrangements with CSFB and ABN AMRO between 21 March and 4 April 2005 there was no readily available or liquid market in any security with which CSFB or ABN AMRO could efficiently or reliably hedge their exposures under their respective swaps, other than Austral Coal shares.

66. Had CSFB and ABN AMRO not hedged their respective swap positions by acquiring shares in Austral Coal there was a real and material risk that they would be left without an effective hedge, particularly in the event that Centennial continued to increase its relevant interests in Austral Coal in March and April 2005 (as was in fact occurring) or in the event that Glencore (or any other bidder) commenced a rival takeover bid (as Glencore had informed both CSFB and ABN AMRO it was considering). A rival takeover bid by Glencore (an industry buyer) or anyone else, especially an unconditional cash bid, would be likely to significantly increase Austral Coal's share price and decrease the shares available to the Banks for hedging their exposures under the swaps.

67. It was highly unlikely that either CSFB or ABN AMRO would expose themselves to these risks and it was therefore highly likely that they would hedge their risks under their respective swaps by acquiring shares in Austral Coal, as they in fact did. Indeed the Panel observed that both CSFB and ABN AMRO separately and independently indicated to Glencore that they were only prepared to offer swap exposure to the limited extent that they were *already* fully hedged by their holdings of Austral Coal shares.

68. Had the market been promptly informed about the existence and the salient terms of the Glencore Swaps, and the fact that Glencore was the common entity behind the Combined Holding, the market is likely to have concluded that CSFB and ABN AMRO would hedge their respective exposures under the swaps by acquiring Austral Coal shares, particularly having regard to the facts set out above, the Centennial takeover bid and the identity of Glencore.

69. The Panel found that the Combined Holding (12.4% of Austral Coal shares at its highest) substantially reduced the free float of Austral Coal shares, particularly in light of Centennial's unconditional takeover bid and the increasing number of reported acceptances into that bid. Non-disclosure of the Combined Holding thereby materially affected the control or potential control of Austral Coal because the market was not aware that the number of shares available to be traded or accepted into Centennial's bid had been materially reduced.

70. Disclosure of the Combined Holding was material to the question whether the market for control over Austral Coal shares operated in a manner which was efficient, competitive and informed. This is because the Hedge Shares were being withdrawn from the market, and the free float of Austral Coal shares on the ASX thereby substantially reduced, without any information about the Combined Holding being disclosed to the market. The Panel considered that many Austral Coal shareholders would have reassessed their investment decisions in light of this information, had it been disclosed.

71. Non-disclosure of the Combined Holding until the time of Glencore's announcements on 4 and 5 April 2005 affected the control or potential control of Austral Coal and caused the market for control over Austral Coal shares to operate in a manner which was not efficient, competitive and informed between 21 March 2005 (being the first date on which CSFB acquired Austral Coal shares to hedge the CSFB Swap and the date on which the Combined Holding exceeded 5%) and 5 April 2005 (being the first trading day after Glencore's announcement).

ANALYSIS

72. The Panel considered that the existence and size of the Glencore Swaps, the identity of Glencore as the common entity behind the Combined Holding, and Glencore's holding as a material part of the Combined Holding, was information which, had it been announced, would have had an effect on the control or potential control of Austral Coal, an effect on the acquisition or proposed acquisition of substantial interests (at least by Glencore and Centennial, and possibly by others), and an effect on the efficiency, competitiveness and information available to the market for control over Austral Coal shares. The Panel considered that the information set out earlier in this paragraph is the information which the market would have expected, and needed, in proper disclosure by Glencore of the Combined Holding.

73. The Panel considered that disclosure of the Combined Holding would have had an effect, in part, because the market would have seen acquisition of the Hedge Shares as a commercially highly likely, if not inevitable, consequence of the circumstances surrounding Austral Coal at the time, and also, critically, a consequence of Glencore being the common entity behind the Combined Holding. The Panel considered that Glencore's identity as an industry buyer rather than a financial buyer supported this conclusion.

74. Having found that unacceptable circumstances existed as a consequence of non-disclosure of the Combined Holding, the Panel considered the effects of making a declaration of unacceptable circumstances on the parties involved, the market for Austral Coal shares and the persons most likely affected by the non-disclosure and the decision of the Panel. The Panel decided that making a declaration of unacceptable circumstances in these Proceedings would not be against the public interest.

Unacceptable Circumstances

75. The Panel considered that the non-disclosure of the Combined Holding constituted unacceptable circumstances having regard to its effect on:

    (a) the control, or potential control of Austral Coal; and/or

    (b) the acquisition, or proposed acquisition, of a substantial interest in Austral Coal.

Control or Potential Control

76. The Panel considered that the gradual acquisition of the Combined Holding affected the control or potential control of Austral Coal by withdrawing from the market for Austral Coal shares, 12.4% (at the highest possible number) of the voting shares in Austral Coal, at a time when Centennial's takeover bid was proceeding and the market reasonably anticipated that control of Austral Coal might soon pass to Centennial or to another bidder. Glencore was the common factor in the acquisition of the Combined Holding and apparently the only party with full knowledge of its existence, size, ownership and commercial features.

77. Disclosure of the Combined Holding would have identified Glencore as a possible alternative bidder for Austral Coal and revealed the existence of significant parcels of Austral Coal shares controlled by Glencore, CSFB and ABN AMRO respectively. The market would have identified Glencore as a natural potential bidder for Austral Coal, or blocker of Centennial's bid. The market would also have identified CSFB and ABN AMRO not as likely bidders or blockers of any bid, but as likely traders of the Austral Coal shares they held when they had no further economic need for their hedges.

78. The Panel considered that the market would have reasonably concluded that the Hedge Shares were acquired to hedge the Glencore Swaps. Non-disclosure of the Combined Holding meant that the market was not aware that the number of shares available to be traded or accepted into Centennial's bid had been materially reduced, with a consequent significant change in the 'balance of power' for the potential control of Austral Coal.

79. The market would have been particularly interested to know of Glencore's role in the Glencore Swaps (and the commercially highly likely, if not inevitable, acquisition of the Hedge Shares), especially having regard to Glencore's own direct holding. Considering the Combined Holding, market participants would have made an assessment about Glencore's intentions and would have factored this assessment into their own decisions whether to buy, sell (on-market or by accepting Centennial's bid) or hold Austral Coal shares. Market participants were likely to have speculated about the possibility of a rival cash takeover bid by Glencore, or, at the least, the possible purchase of shares at higher prices by Glencore to increase its position.

80. Austral Coal shareholders may have made different decisions in relation to their acceptance of Centennial's bid if they had been aware of the Combined Holding. Accordingly, non-disclosure of the Combined Holding had an effect

on Centennial's bid and therefore an effect on control or potential control of Austral Coal.

81. CSFB argued that, even if Glencore had direct control over the disposal and voting of the largest possible percentage of the Combined Holding of Austral Coal shares (12.4%), Glencore could not be regarded as having control, or potential control, of Austral Coal. The Panel did not consider this argument to be an answer to the conclusions reached above. The Panel considered the *effect* of the circumstances on control or potential control of Austral Coal. The Panel did not regard it as decisive of that question whether Glencore itself could be regarded as exercising control or potential control of Austral Coal. It is clear from the 20% threshold in section 606 and the 5% threshold in section 671B, that the legislature regards the effect on control of holdings well below actual control as being material to the potential control of a company. The Panel has addressed this issue previously.[6]

82. In summary, the Panel considered that the Combined Holding, once it reached 5% or more, in the circumstances of Austral Coal at the time, had an effect on the control or potential control of Austral Coal. The existence of the Combined Holding was not disclosed to the market in a timely manner, and that lack of disclosure was unacceptable given the effect of non-disclosure on the control or potential control of Austral Coal.

Acquisition or proposed acquisition of a substantial interest

83. The Panel considered that the non-disclosure of the Combined Holding affected the acquisition or proposed acquisition of a substantial interest in Austral Coal for essentially the same reasons as were identified above in connection with the effect on control. The Combined Holding at its highest possible number represented 12.4% of the shares in Austral Coal. In the Panel's view this was a substantial interest, and Glencore was the common factor in its acquisition and apparently the only party with full knowledge of its existence, size, ownership and commercial features. The Panel considered that this would have affected Glencore's decisions and behaviour in connection with acquisitions or proposed acquisitions of substantial interests in Austral Coal.

84. Further, the non-disclosure of the Combined Holding may also have affected the behaviour of Centennial, or other persons, who may have been considering the acquisition of a substantial interest in Austral Coal at this time. The outcome of Centennial's bid was by no means certain in late March – early April 2005. Other bidders may have emerged had the market in Austral Coal been more liquid or more fully informed. Because it seems that only Glencore knew about the Combined Holding and its commercial features, Glencore had an information advantage over other market participants which in the Panel's view affected the acquisition or proposed acquisition of a substantial interest in Austral Coal.

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[6] See, for example, *Village Roadshow Limited 02* [2004] ATP 12.

Efficient, competitive and informed market

85. In making its decision as to whether unacceptable circumstances existed, the Panel had regard to the purposes of Chapter 6, as set out in section 602 of the Act, and specifically to the purpose that acquisition of control of the voting shares in a listed company should take place in an efficient, competitive and informed market.

86. If the Combined Holding had been disclosed when it reached 5%, the market would have made its own assessment as to Glencore's likely intentions and behaviour towards Austral Coal. Glencore's identity as the holder of the Glencore Swaps was also material to the market because it would be perceived as an industry buyer whose interest in Austral Coal was likely to be strategic, not merely financial. The market would consider that, because of the possible strategic and other advantages to Glencore of acquiring Austral Coal, Glencore might be more willing to pursue Austral Coal at a higher price or on more attractive terms than those offered by Centennial.

87. The Panel considered that many Austral Coal shareholders would have reassessed their investment decisions in light of the information and may have made different investment decisions in the non-disclosure period. It is impossible to tell exactly whether or how they would have changed their investment decisions in light of the information, but the Panel considered that they should have had the information when they made their investment decisions.

88. Therefore, the Panel finds that non-disclosure of the Combined Holding until the time of Glencore's announcements on 4 and 5 April 2005 caused the market for control over Austral Coal shares to operate in a manner which was not efficient, competitive and informed.

Aspects of the Glencore Swaps

Acquisition of Hedge Shares

89. The Panel considered that it was commercially highly likely, if not inevitable, that the Banks would hedge their exposure under the Glencore Swaps by acquiring Austral Coal shares. The Panel considered that the Banks clearly conveyed to Glencore that they would provide increased swap exposure to Glencore only as they progressively acquired Hedge Shares, and that was in fact what happened.

90. The Panel considered that there were a number of factors particular to Austral Coal's circumstances in late March – early April 2005, and to Glencore, which made it commercially highly likely, if not inevitable, that the Banks would fully hedge their exposure under the Glencore Swaps by acquiring Austral Coal shares. Those factors included:

    (a) there were no exchange traded derivatives (such as futures contracts or options) over Austral Coal shares;

(b) Austral Coal had only one mine, so the volatility of its share price was affected by mine factors specific to Austral Coal, against which no other hedge is available;

(c) Austral Coal produced only one product (coking coal), so its share price was likely to move differently to companies which had different (e.g. thermal coal) or more diversified energy products;

(d) Austral Coal had recently encountered difficulties with the longwall operations in its mine, which made it potentially more volatile than other coal mining stocks;

(e) Austral Coal had recently experienced some financial difficulties, which was likely to increase the risk associated with its shares relative to other coal mining companies;

(f) there are no publicly traded Australian coking coal indices which might have closely correlated values for the purpose of hedging;

(g) there were no companies with closely correlated share prices;

(h) Centennial shares were not a reliable hedge because the nature or the ratio of the bid consideration might change, disrupting the correlation of the hedge, and the Banks had been informed that Glencore was considering a possible takeover bid for Austral Coal which may have disrupted the correlation between the Austral Coal and Centennial share prices;

(i) Austral Coal convertible notes were not an efficient hedge because they were relatively illiquid and therefore the Banks were unlikely to be able to acquire sufficient numbers of convertible notes to hedge the Glencore Swaps. The evidence before the Panel was that Glencore requested CSFB to try to acquire Austral Coal convertible notes on Glencore's behalf as an alternative to acquiring physical shares over the period 7 to 18 March 2005 but that CSFB had been unable to acquire an acceptable number of Austral Coal convertible notes;

(j) Austral Coal convertible notes were also not an efficient hedge because there was a redemption provision in the terms of the convertible notes which allowed them to be redeemed for cash in certain tax-related events or in the event of an unconditional takeover bid, thereby eliminating any correlation with the value from time to time of Austral Coal shares;

(k) Austral Coal was the subject of a takeover bid by Centennial which was likely to make its share price more volatile and reduce its correlation with other stocks;

(l) Centennial's announcements of the steadily increasing acceptances into its bid, once the bid was declared unconditional, meant that the market in Austral Coal was becoming progressively less liquid, increasing the likelihood of the Banks acquiring a direct physical shareholding hedge;

(m) Glencore had advised both Banks that it was considering making a rival takeover bid for Austral Coal which had an even greater potential to make

Austral Coal's share price more volatile, thereby reducing its correlation with other stocks and further reducing the liquidity of the market in Austral Coal shares; and

(n) the identity of Glencore as an industry buyer was known to the Banks, and they would have surmised, even if they had not been told, that it was possible that Glencore may make a rival takeover offer.

Retaining the Hedge Shares

91. The same factors which caused the Banks to decline to increase the swap exposure they were prepared to extend to Glencore under the Glencore Swaps beyond the number of Austral Coal shares they had been able to acquire as Hedge Shares, made it commercially highly likely, if not inevitable, that until the Glencore Swaps terminated or decreased in size, the Banks would hold the Hedge Shares. Therefore Glencore could be reasonably certain that no other person (e.g. Centennial, another rival bidder or anyone else) would be able to acquire the Hedge Shares while the Glencore Swaps remained on foot.

92. The Banks also needed to retain the Hedge Shares during the life of the Glencore Swaps because Glencore's own actions, whether in acquiring further Austral Coal shares to increase its position, announcing its identity (as an industry buyer) on the Austral Coal register, or announcing its own takeover bid for Austral Coal, might have increased the amounts payable under the Glencore Swaps. In the absence of an effective hedge, the Banks would be materially exposed to the actions of the other counterparty to the swaps.

When did the unacceptable circumstances commence?

93. The Panel considered that unacceptable circumstances commenced when the Combined Holding reached 5% and Glencore did not make disclosure of the Combined Holding to the market on the following day.

94. The Panel considered that 5% (and each 1% increase thereafter) is an appropriate threshold to use in this case for assessing the significance to the potential control of Austral Coal and for the market for control over Austral Coal shares. This is because:

(a) 5% (and each 1% increase thereafter) is a well-known statutory substantial holding threshold. Hence the market would reasonably expect to be informed about a Combined Holding greater than that threshold;

(b) because of the Panel's earlier findings as to the high commercial likelihood, if not inevitability, of the Banks fully hedging the Glencore Swaps with Austral Coal shares, the effect of the Glencore Swaps on the availability of the Hedge Shares to the market and other potential acquirers was similar to Glencore acquiring the Hedge Shares directly; and

(c) the legislature has decided that a holding of 5% or more in a listed company may affect the potential control of a company, or may be a substantial interest in a company, and is therefore material information required for the market to operate in an efficient, competitive and

informed manner. Clearly, in some circumstances 5% will not materially affect control of a company. However, the Panel considered that in the present case a Combined Holding of 5% or more of Austral Coal could materially affect control or potential control of Austral Coal and the market for control over Austral Coal shares.

95. Austral Coal was at the time subject to a takeover bid. Accordingly disclosure of the acquisition of a substantial holding in Austral Coal was required to be made on the trading day following the acquisition. Similarly, the Panel considered that this time limit was also appropriate for disclosure of the Combined Holding.

96. Accordingly, the Panel concluded that the non-disclosure of the Combined Holding until the time of Glencore's announcements on 4 and 5 April 2005, gave rise to unacceptable circumstances between 9.30 a.m. on 22 March 2005 (being the day after the first date on which CSFB acquired Austral Coal shares to hedge the CSFB Swap and the date on which the Combined Holding exceeded 5%) and 9.30 a.m. on 5 April 2005 (being the first trading day after Glencore's announcement).

When did the Glencore Swaps come into existence?

97. The Banks and Glencore submitted that the Glencore Swaps did not come into existence until the final confirmations were executed by the relevant parties; that is, 4 or 6 April 2005. Glencore submitted that no unacceptable circumstances can be found to have existed because, as soon as the Glencore Swaps came into existence, Glencore promptly announced their existence to the market on the evening of 4 April 2005.

98. The Panel did not consider decisive in this case the question of when the swaps became legally enforceable. The Panel was concerned with the commercial substance of the swaps, not their legal form. The Panel considered that the evidence is quite clear that Glencore and the Banks had reached commercial understandings or arrangements to proceed with the Glencore Swaps at the time each Bank started buying Hedge Shares to support their offers of swap exposure to Glencore under the Glencore Swaps.

99. For example, the Panel noted that evidence from the CSFB broker who was Glencore's primary contact, states:

> "The correct sequence of events is that, during the period from 21 March to 30 March 2005, CSFB progressively increased the size of the CSFB Swap on instructions from Glencore and, as a consequence, CSFB progressively acquired more Austral Coal shares to hedge its exposure under the CSFB Swap."

100. This evidence is consistent with all contemporaneous email communications produced to the Panel, namely that the CSFB Swap, for all practical and commercial purposes, existed from 21 March 2005. The Panel found that an arrangement or understanding for the CSFB Swap existed between Glencore and CSFB at the time that CSFB commenced buying Hedge Shares, ultimately rising to a value of $15.86 million.

101. The comments are also consistent with the documentary records of ABN AMRO when agreeing the basis on which it would commence buying several millions of dollars of Austral Coal shares (ultimately approximately $9.7 million). Like CSFB, by the time that ABN AMRO commenced buying Austral Coal shares, an arrangement or understanding for an equity swap existed between Glencore and ABN AMRO.

Disclosure of terms of Glencore Swaps

102. Centennial asked the Panel to make a declaration and orders in relation to the failure of Glencore to disclose details of the Glencore Swaps.

103. Centennial submitted that, although Glencore disclosed the existence of the Glencore Swaps on 4 April 2005, it failed to disclose other information which Centennial submitted to the Panel was analogous to the information which is required under the substantial holding notice provisions of the Act.

104. When the Initial Panel received Centennial's 3 June 2005 application, it was faced with a real question of an alleged deficiency of information in the market for control over Austral Coal shares, albeit of a materially lesser severity than for the period between 21 March 2005 and 4 April 2005. The question of whether the market was inadequately informed was then a real issue. However, by the time the Review Panel came to consider the parties' submissions and rebuttals on the Glencore review application, the Media Release announcing the decision of the Initial Panel had been published to the market, including full details of the swaps.

105. The Panel considered that Glencore did fail to disclose to the market all of the salient features of the Glencore Swaps in its disclosures on 4 and 5 April 2005. However, because of the disclosures by the Initial Panel on 1 July 2005, and because the acquisition of Hedge Shares had ceased after 4 April 2005, the Panel decided that no remedial orders were necessary or appropriate with respect to that matter. Therefore the Panel decided it was unnecessary for it to address further the issue of whether unacceptable circumstances existed between 5 April 2005 and 1 July 2005.

Decision limited to facts

106. The Panel does not intend by this decision to state any general rule about whether unacceptable circumstances may arise in other cases where equity swaps or similar transactions occur. In different circumstances, non-disclosure of equity swaps may not constitute unacceptable circumstances. Each such case must be considered on its own facts, as the Panel has done here.

No reliance on breach of Corporations Act

107. The Panel's decision on unacceptable circumstances in these Proceedings did not depend upon, and was not based upon, a finding of any breach of the Corporations Act.

ORDERS

108. The Panel varied the decision and the orders of the Initial Panel by making a new declaration of unacceptable circumstances varying that of the Initial Panel and substituting final orders to redress the unacceptable circumstances which it has found existed, to the extent that was reasonably possible. The orders are attached at Annexure B.

109. The Panel accepted that it could not determine exactly what would have happened in the market if Glencore had properly disclosed the existence of the Combined Holding. Even if the Panel could determine what would have happened in the market, it could not return to their previous positions all persons who traded in the uninformed market.

110. The Panel's orders seek to give the persons who sold their Austral Coal shares in that uninformed market an opportunity to buy back the shares they sold and then reassess their positions in light of the information which has now emerged and which the Panel considered they should have had before they sold. The Panel considered that giving the persons affected the choice was the appropriate form of order.

Centennial

111. The Panel accepted that Centennial had also been entitled to proper disclosure of the Combined Holding at the time when Centennial declared its offers free from defeating conditions.

112. However, the Panel considered that Centennial knowingly took the risk that it might end up at the end of its takeover bid unable to compulsorily acquire all of the outstanding shares in Austral Coal. The Panel noted that Centennial declared its offer free of all conditions when it held only 9.6% of Austral Coal. Although the unacceptable circumstances found in these proceedings were not circumstances that Centennial might reasonably have expected to face, it was quite foreseeable that it could have faced a 10% holder who acquired Austral Coal shares after Centennial had decided to declare its bid free from conditions.

113. On that basis, although Centennial appeared to have been harmed by the unacceptable circumstances, the harm, when considered in light of the risks Centennial knowingly took, did not in the Panel's view warrant any order to facilitate Centennial achieving compulsory acquisition of Austral Coal through acquisition of the Hedge Shares.

Restoration Order

114. The Panel made a Restoration Order to protect the interests of those persons who sold Austral Coal shares during the non-disclosure period in transactions reported to the ASX (**Affected Sellers**). The Panel ordered Glencore to make Restoration Offers, open for a period of one month, to those Affected Sellers.

115. The Panel advised that it would allow Glencore to make one application to the Panel for a variation of the Restoration Order in relation to any specific sale, or sales, of Austral Coal shares which occurred during the non-disclosure period.

The Panel advised Glencore that it should provide its reasons and full supporting evidence with any such contention or request. The Panel advised that if it received an application from Glencore it would notify all parties in these Proceedings and then seek submissions from any person whose interests the proposed variation of the Restoration Order would affect.

Glencore Swaps

116. Glencore submitted that the Restoration Order should not operate to require it to make Restoration Offers where Glencore may not have sufficient Austral Coal shares to meet all possible acceptances (referred to below as the **shortfall**).

117. The Panel advised Glencore that it had taken this issue into account when considering the Restoration Order and had been concerned not to make any order which would be impossible for Glencore to comply with.

118. The Panel could not speculate as to how many of the Affected Sellers would give acceptances to Glencore under the Restoration Offers, and therefore the extent of the shortfall (if any). However, the Panel considered that if there was a shortfall, Glencore may be able to meet any shortfall in a number of ways, including by acquiring Austral Coal shares on-market, agreeing with either or both Banks to acquire Hedge Shares as part of unwinding the Glencore Swaps, or by the Panel making an order under section 657D(3) that CSFB or ABN AMRO (or both) sell a number of Hedge Shares to Glencore to meet the shortfall.

119. Therefore, at the time of making its decision, the Panel did not consider that there was any need to make any other order concerning the existence, operation or maintenance of the Glencore Swaps. However, the Panel advised that it would reconsider this matter if there was in fact a shortfall.

Glencore's shares and Hedge Shares

120. To ensure that the status quo was maintained, the Panel ordered that, except as contemplated by these orders or with the consent of the Panel:

    (a) Glencore must not sell or otherwise dispose of Austral Coal shares until the orders were completed;

    (b) CSFB must not sell or otherwise dispose of its Hedge Shares until the orders were completed; and

    (c) ABN AMRO must not sell or otherwise dispose of its Hedge Shares until the orders were completed.

Listing of Austral Coal

121. The Panel ordered that Austral Coal and Centennial do all things necessary to maintain Austral Coal as a listed entity on ASX during the period of the Restoration Order and for a period of one month after the period for which the Restoration Order operates.

Shareholder communication

122. If, during the Restoration Offer period, Centennial or Glencore communicated with any person who may be an Affected Seller concerning the Panel's orders or accepting Centennial's bid for Austral Coal, the Panel ordered that Centennial or Glencore must provide the Affected Seller's contact details to the other party by 9.30 a.m. on the next business day after contact was made.

Acquisitions of Austral Coal shares during and after Restoration Order

123. The Panel made no order restricting any person from acquiring Austral Coal shares during or after the operation of the Restoration Order. The Panel regarded it as important that it limit as much as possible the interference its orders make in the normal operations of the market, while protecting the interests of those persons who have been affected by the unacceptable circumstances it found.

124. The Panel considered that it would adversely affect the efficiency of the market for control over Austral Coal shares if it were to remove, by its orders, one or more possible buyers of Austral Coal shares, including Glencore. Removing a potential buyer or buyers of Austral Coal shares may also have adversely affected the interests of any person who exercised their rights under the Restoration Order.

125. The Panel recognised that the outcome of its decision may be that Glencore may acquire some or all of any Austral Coal shares which were restored to their sellers under the Restoration Order. The Panel considered that, had Glencore made proper disclosure of the existence of the Combined Holding, there would have been no objection to Glencore acquiring such shares on-market at the time.

126. Centennial submitted that, if Glencore had made proper disclosure, the Banks, would not have been able to acquire some, any or all of the Hedge Shares on-market at the prices which Glencore wished during the non-disclosure period. The Panel did not consider that Centennial had shown that this would have been the case i.e. that Glencore or the Banks would not have been able to acquire *any* of the Hedge Shares, and therefore the Panel made no order that all of the Hedge Shares be disposed of.

Professor Ian Ramsay
President of the Sitting Panel
Decision dated 25 July 2005
Reasons published 16 August 2005

Corporations Act
Section 657A and 657EA
Declaration of Unacceptable Circumstances

In the matter of Austral Coal Limited 02R

WHEREAS

A. At all relevant times, Austral Coal Limited (**Austral Coal**) was subject to the takeover offer from Centennial Coal Company Limited announced on 23 February 2005.

B. Before 21 March 2005, Glencore International AG or its subsidiaries (**Glencore**) acquired approximately 4.9% of shares in Austral Coal.

C. On or before 21 March 2005, Glencore entered into an equity swap arrangement in relation to Austral Coal shares with Credit Suisse First Boston (**CSFB**), the practical effect of which was that CSFB confirmed the swap exposure it offered Glencore from time to time as it acquired Austral Coal shares as a hedge.

D. On 31 March 2005, Glencore entered into a similar equity swap arrangement with ABN AMRO with the same practical effect (the swaps in recitals C and D collectively **Glencore Swaps**).

E. On 21 March 2005, CSFB acquired approximately 0.2% of Austral Coal shares, as a hedge.

F. Between 22 March 2005 and 30 March 2005, CSFB acquired a further approximately 4.4% of Austral Coal shares (at that time) as a hedge.

G. Between 31 March 2005 and 4 April 2005, ABN AMRO acquired approximately 2.8% of Austral Coal shares as a hedge.

H. On 4 and 5 April 2005, Glencore disclosed that it held approximately 4.9% of Austral Coal shares and, in addition, had entered into equity swap arrangements with well regarded investment banks in regard to 7.4% of Austral Coal shares.

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

1. Glencore's failure to disclose to the market, from 9.30 a.m. on 22 March 2005 until 4 and 5 April 2005, the fact that the combination of Glencore's holding of voting shares in Austral Coal and the swap exposure agreed to be provided under the Glencore Swaps (**Combined Holding**) exceeded 5% of the voting shares in Austral Coal; and

2. Glencore's failure to disclose to the market, from 9.30 a.m. on each relevant trading day between 23 March and 5 April 2005, any increase of 1% or more of the Combined Holding;

constitute unacceptable circumstances in relation to the affairs of Austral Coal Limited.

Professor Ian Ramsay

President of the Sitting Panel

Dated 20 July 2005

Orders

under sections 657D and 657EA of the Corporations Act 2001 (Cth)

In the matter of Austral Coal Limited 02(R)

Pursuant to:

(a) sections 657D and 657EA of the *Corporations Act 2001* (Cth) (the **Act**); and

(b) a declaration of unacceptable circumstances in relation to the affairs of Austral Coal Limited (**Austral Coal**) made by the Takeovers Panel on 20 July 2005,

the Panel varies the decision reviewed and makes the following orders in substitution for the orders made on 1 July 2005:

Restoration Order

1. Glencore International AG (**Glencore**) must make or cause to be made an offer to sell Austral Coal shares to each person who sold Austral Coal shares in a transaction reported to Australian Stock Exchange Limited (**ASX**), which sale took place between 9.30 am on 22 March 2005 and 9.30 am on 5 April 2005.
2. The offers must:
   (a) be unconditional, except to the extent that Glencore may apply to the Panel under these orders, including for an order that a sale or sales be excluded from the Restoration Order.
   (b) be contained in an announcement to ASX,
   (c) be contained in newspaper advertisements in a national newspaper and a newspaper in each Australian state and territory,
   (d) be made within two weeks of the date of this order,
   (e) clearly identify the class of persons to whom they are made (affected sellers),
   (f) be for an equivalent number of Austral Coal shares to the number that the affected seller sold,
   (g) be at a price no higher than the price at which the affected seller sold, not adjusting for commission or other costs of sale,
   (h) remain open for at least one month, during which time an affected seller is entitled to withdraw the acceptance,
   (i) set out that the affected seller may accept the offer, in whole or part, by sending an acceptance to Glencore at a specified Australian address, to be received by no later than the specified time,
   (j) specify that affected sellers whose sales are not excluded from the Restoration Order will receive within 3 business days after the end of the

offer period or within 1 business day of the Panel's order (whichever is later):

(A) confirmation of the acceptance,

(B) advice as to the amount payable,

(C) a request for payment and for a certified copy of the contract note (or other acceptable evidence) of the sale, which must be given to Glencore within 5 business days, and

(D) any further information necessary to allow processing of the acceptance,

(k) specify that affected sellers whose sales are excluded from the Restoration Order by the Panel will be sent notification within 1 business day of the Panel's order, and

(l) specify a contact telephone number and an address to which queries can be directed.

3. The Panel will approve the content (and in the case of the advertisements the proposed placement, layout and size) of the draft announcement and newspaper advertisements, which must be given to the Panel for its approval before publication. The Panel will allow parties an opportunity to comment on the proposed announcement and advertisements.

4. Glencore must complete the transfer to affected sellers whose sales are not excluded from the Restoration Order within 2 business days after the 5 business days in paragraph 2(j) have elapsed.

Ancillary orders

5. Glencore must provide a clear and reasonable mechanism for resolving disputes over:

(m) who is entitled to accept the offer and in relation to which sales, and

(n) technical deficiencies in an acceptance.

127. Glencore is entitled to make one application to the Panel for a variation of the Restoration Order in relation to specific sales which it says the Restoration Order should not apply to. The application by Glencore:

(a) must be made within 2 business days after the end of the offer period,

(b) must be copied to all parties and any other person who may be affected by the proposed variation, and

(c) must set out its reasons and full supporting evidence for the request. The Panel will seek submissions from any person whose interests the proposed variation would affect.

128. The Panel may determine that a sale or sales be excluded from the Restoration Order.

129. In addition to the application in paragraph 6, Glencore may apply to the Panel for further or supplementary orders if it receives acceptances for more Austral Coal shares than it owns or can obtain. Any application should address (among

other things) why Glencore could not obtain enough shares from the market or by acquisition of Hedge Shares (as defined in the decision letter of 20 July 2005**)**.

130. Glencore must give the Panel a copy of any notification it gives to an affected seller whose sale or sales were excluded from the Restoration Order by the Panel. Glencore must do so at the time of giving the notification.

131. Centennial Coal Company Limited (**Centennial**) and Austral Coal must use their best endeavours to maintain the listing of Austral Coal on ASX during the period of the Restoration Order and for a period of one month after the end of the offer period.

132. Austral Coal must facilitate the making of the announcement to ASX.

133. If, during the offer period, Centennial or Glencore communicates with any person who may be an affected seller, concerning these orders or accepting the Centennial offer for Austral Coal shares, it must provide the person's contact details to the other party by 9.30am on the next business day after contact was made.

134. Except as contemplated by these orders or with the consent of the Panel:

    (a) Glencore must not sell or otherwise dispose of Austral Coal shares until the orders are completed,

    (b) Credit Suisse First Boston International must not sell or otherwise dispose of its Hedge Shares until the orders are completed, and

    (c) ABN AMRO Bank NV must not sell or otherwise dispose of its Hedge Shares until the orders are completed.

Professor Ian Ramsay

President of the sitting Panel

Dated 25 July 2005