



**In the matter of Southcorp Limited
[2005] ATP 4**

Catchwords:

Broker valuations - consent to average of broker valuations - content of bidder's statement - defeating conditions - disclosure in bidder's / target's statement - dispatch of documents - intentions - misleading statements - options condition - other material information - unacceptable circumstances - undertaking to Panel - updating broker valuations - wrap document

Corporations Act 2001 (Cth) sections 633(6), 636(1)(m), 636(3); Guidance Note 5; ASIC Practice Note 55; GIO Australia Holdings Ltd v AMP Insurance Investment Holdings Pty Ltd (1998) 29 ACSR 582; Aberfoyle Ltd v Western Metal Ltd (1998) 28 ACR 187; AurionGold [2002] ATP 13; Brisbane Broncos No. 1 and No. 2 [2002] ATP 1; General Property Trust [2004] ATP 30.

These are the Panel's reasons for concluding proceedings without making a declaration of unacceptable circumstances and orders concerning the affairs of Southcorp Limited. The Panel was concerned that the inclusion in Foster's bidder's statement of an average of 9 broker valuations of Southcorp may be misleading. The Panel accepted an undertaking from Foster's to send a letter to Southcorp shareholders disclosing the range of dates on which the relevant broker reports had been made and the range of valuations, in a form approved by the Panel.

SUMMARY

1. These reasons relate to an application (the **Application**) by Southcorp Limited (**Southcorp**) under sections 657C, 657D and 657E of the *Corporations Act 2001 (Cth)* (the **Act**)¹ dated 28 January 2005 alleging unacceptable circumstances in relation to the takeover offer by Beringer Blass Wines Pty Limited (**Beringer**) (a wholly owned subsidiary of Foster's Group Limited (**Foster's**)) for all the ordinary shares in Southcorp.
2. The Panel accepted an undertaking from Foster's to despatch a letter to Southcorp shareholders containing certain clarifying information in regard to the use by Foster's in its bidder's statement of an average of 9 brokers' valuations of Southcorp.
3. The Panel declined to make a declaration of unacceptable circumstances, make orders, or require any further undertakings.

Unacceptable circumstances

4. The Panel considered that unacceptable circumstances existed when Foster's gave its bidder's statement to Southcorp on 18 January 2005, without including any of a 10 page document (**Wrap Document**) which Foster's proposed to bind into the document containing the Foster's Bidder's Statement to send to Southcorp shareholders two weeks later.
5. However, given that:

¹ Unless otherwise stated, all section references are to sections of the Corporations Act.

Takeovers Panel

Reasons for Decision – Southcorp Limited

- (a) Foster's had provided an advanced draft of the Wrap Document to the Southcorp directors on 25 January 2005 following requests by Southcorp's advisers;
- (b) the Foster's Bidder's Statement was not due to be dispatched until Wednesday 2 February 2005;
- (c) the contentious information in the Wrap Document was relatively short (3 pages);
- (d) Southcorp had been aware since 17 January 2005 of a presentation on Foster's bid which Foster's had posted on Australian Stock Exchange Limited (**ASX**), and most of the material information in the Wrap Document had come from that presentation;
- (e) the Panel did not consider any of the information or statements in the Wrap Document to be materially misleading; and
- (f) Foster's had provided a letter to Southcorp shareholders clarifying the one item of concern which the Panel had had about some of the information in the Wrap Document;

the Panel decided that it would not be in the public interest to make a declaration of unacceptable circumstances or any orders.

- 6. The Panel noted that this application was the first in which the Panel had considered the issue of the lodgement of a wrap document and the first time that the Panel had provided guidance to the market in a decision on the issue.

Wrap Information

- 7. The Panel considers that the information and statements in the Wrap Document that discussed the merits of the Foster's takeover bid, and why Southcorp shareholders should accept (**Wrap Information**), although covering only three pages, were material to Southcorp shareholders' decision as to whether or not to accept the Foster's offer. On that basis the Wrap Information should have been given to Southcorp at the time Foster's gave the Foster's Bidder's Statement to Southcorp so that the Southcorp directors would have had the statutory period of two weeks prior to dispatch to consider the Wrap Information.

Average Value of Broker Reports

- 8. One of the contentious issues in the Wrap Document was Foster's use of an average of recent broker valuations for Southcorp shares (**Average Value**). Foster's had derived the Average Value from the numerical average of the nine most recent reports from stockbrokers on the value of Southcorp shares which Foster's had said were available prior to the announcement of Foster's acquisition of Reline Investment Pty Ltd's 18.8% of Southcorp shares.
- 9. Southcorp asserted that under section 636(3), Foster's should have gained the consent of each of the brokers to the use of their valuations in deriving the Average Value.
- 10. The Panel considered that the use of individual broker valuations in the Foster's Bidder's Statement, as Foster's had done in the Investor Presentation, would have required the consent of the individual brokers. However, the aggregation of the nine

Takeovers Panel

Reasons for Decision – Southcorp Limited

values into the Average Value meant that the Average Value could not properly be attributed to any one broker, so that section 636(3) did not require Foster's to gain the consent of any of the individual brokers.

11. The Panel had initially been concerned that the Average Value implied a much greater degree of consensus than the 9 individual valuations would show. Similarly the Panel was concerned that the Average Value did not show the time period from which the broker valuations had come (August 2004 to January 2005). The Panel requested Foster's to send a letter to Southcorp shareholders setting out some clarification of those two points to assist Southcorp shareholders in assessing the weight that they might give to the Average Value quoted in the Wrap Document.
12. Foster's agreed to do so as close as practicable to the date on which it sent the Foster's Bidder's Statement to Southcorp shareholders. On that basis the Panel decided that the concerns raised by the rest of the Application were not of such a nature as to warrant restraining dispatch of the Foster's Bidder's Statement. If Southcorp's other concerns were made out, the Panel considered they would be able to be corrected by supplementary or corrective disclosures to Southcorp shareholders.

Misleading Statements

13. Southcorp asserted that four statements in the Wrap Information were misleading. Foster's responded that they were not misleading, they should be treated as solely Foster's opinions and that Foster's had a reasonable basis for holding the opinions. The Panel did not accept that the statements were solely Foster's opinions. However the Panel did not consider that the statements were misleading.

Other elements of Southcorp's application

14. Southcorp asserted that Foster's statements as to its intentions for the merged entity in the event its bid was successful fell short of the level of certainty and development of Foster's actual plans. Southcorp cited two media articles to support its position. The Panel did not accept that the articles were inconsistent with the intentions that Foster's had stated in the Foster's Bidder's Statement. The Panel declined to commence proceedings in relation to that part of Southcorp's application.
15. Similarly the Panel did not commence proceedings in relation to concerns raised by Southcorp that the conditions of Foster's bid relating to the cancellation or exercise of various options issued by Southcorp, was incapable of being fulfilled.

THE PANEL & PROCESS

16. The President of the Panel appointed Professor Ian Ramsay (sitting President), Alice McCleary (sitting Deputy President) and Michael Ashforth as the sitting Panel for the proceedings arising from the Application.
17. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
18. Southcorp, Foster's and the Australian Securities and Investments Commission (ASIC) appeared in the proceedings.

Takeovers Panel

Reasons for Decision – Southcorp Limited

19. The Panel consented to Southcorp and Foster's being legally represented by their commercial lawyers in the Proceedings.
20. The Panel decided to commence proceedings in relation to some parts of the Application, namely the failure by Foster's to provide the Wrap Document to Southcorp at the same time it provided its bidder's statement to Southcorp, the statements relating to broker valuations and other statements in the Wrap Document.
21. In relation to Southcorp's request for interim orders restraining dispatch of the Foster's Bidder's Statement, the Panel instead accepted Foster's undertaking to send a clarifying letter to Southcorp shareholders, as described in paragraphs 11 and 12, to assist Southcorp shareholders in assessing the weight that they might give to the Average Value quoted in the Wrap Document.
22. Under Regulation 21 of the Australian Securities and Investments Commission Regulations 2001 (Cth), the Panel issued a brief to parties on Tuesday, 1 February 2005.
23. The Panel published its decision in the proceedings on Wednesday, 9 February 2005.

APPLICATION

24. In its Application, Southcorp raised the following concerns:
 - (a) **(Wrap Document)** The failure by Foster's to lodge the Wrap Document with Southcorp on 18 January 2005 at the same time as the Foster's Bidder's Statement so as to give the directors of Southcorp sufficient time to consider it and advise Southcorp shareholders. The Wrap Document was first provided to Southcorp in draft form on 25 January 2005 following requests by Southcorp's advisers;
 - (b) **(Broker valuations)** The use by Foster's in the Wrap Document of the Average Value. Southcorp objected to no consent from the relevant brokers having been obtained to the inclusion of that information in the Foster's Bidder's Statement. Southcorp also maintained that the use of such valuations without an explanation of the assumptions and qualifications underlying the relevant broker reports would be misleading to Southcorp shareholders and that some (or, Southcorp contended, all) of the broker reports were out of date at the time the Foster's Bidder's Statement was lodged;
 - (c) **(Misleading statements)** The inclusion of the following other statements made in the Wrap Document² which Southcorp alleged were misleading:
 - (i) that "in the absence of takeover speculation, Southcorp's share price would be significantly lower than the Offer price of \$4.17 per share";
 - (ii) the Foster's offer is a "substantial premium to the average valuation of Southcorp based on independent broker research";

² The statements were made in both the Chairman's letter at the front of the Wrap Document and in the body of the Wrap Information in the Wrap Document. However they were made in slightly different forms in the two places.

Takeovers Panel

Reasons for Decision – Southcorp Limited

- (iii) the Foster's offer "represents a significant premium to the trading price of Southcorp"; and
- (iv) "Southcorp's share price has traded above its fundamental valuation".
- (d) (**Foster's intentions**) Foster's intentions being more advanced than those stated in the Foster's Bidder's Statement, as allegedly evidenced by interviews of senior Foster's executives published in *BRW* and the *Australian Financial Review*; and
- (e) (**Options Condition**) The condition in section 2.12(p) of the Foster's Bidder's Statement to the effect that all options to subscribe for Southcorp shares be exercised, cancelled or subject to cancellation agreements before the Foster's offer period ends (**Options Condition**) being unacceptable because it could not be satisfied.

Interim orders sought

25. Southcorp sought interim orders pursuant to section 657E(1) restraining Foster's from sending the Foster's Bidder's Statement to Southcorp shareholders pending final determination by the Panel of these proceedings.

Final Declaration and final orders sought

26. Southcorp sought a declaration under section 657A that each of the matters listed above constituted unacceptable circumstances.

Southcorp sought the following final orders:

- (a) That Foster's be restrained from dispatching the Wrap Document to Southcorp shareholders as part of or accompanying the Foster's Bidder's Statement unless the Wrap Document was included with the Foster's Bidder's Statement in a replacement bidder's statement that was dispatched to Southcorp shareholders not less than 14 days after it was lodged with ASIC and sent to Southcorp and the ASX;
- (b) That Foster's amend the Wrap Document prior to its dispatch to Southcorp shareholders in accordance with any order made by the Panel under paragraph (a) above to correct the materially misleading nature of the Wrap Document in terms approved by the Panel;
- (c) That in relation to certain statements of intention in the Foster's Bidder's Statement, Foster's amend the Foster's Bidder's Statement prior to dispatch to Southcorp shareholders to correct the materially misleading nature of the statements in terms approved by the Panel;
- (d) That Foster's remove the Options Condition by amending the Foster's Bidder's Statement prior to dispatch to Southcorp shareholders; and
- (e) Such further orders as the Panel considered appropriate.

Background

27. On 17 January 2005, Foster's announced its intention to make a conditional takeover offer for all of the ordinary shares in Southcorp. Foster's had announced a few days before hand that it had agreed to acquire the 18.8% of the shares in Southcorp owned

Takeovers Panel

Reasons for Decision – Southcorp Limited

by Reline Investments Pty Ltd. On the same date Foster's published a fourteen page media release discussing its proposed bid and setting out a range of the terms and conditions of the proposed offer (**Foster's Announcement**).

28. On the same date, Foster's posted a 30 page document on ASX which was described as a presentation to institutional investors (**Investor Presentation**). The Investor Presentation contained a wide range of information on Foster's view of its takeover bid and its reasons for making the bid and its reasons why it would be beneficial to Foster's. The Investor Presentation also contained the values, dates of report and identity of the broker for each of the 9 valuations used in calculating the Average Value. Foster's stated that the nine valuations cited were all of the most recent broker valuations of Southcorp prior to the announcement of Foster's acquisition of Southcorp shares from Reline.
29. On 18 January 2005 Foster's lodged its bidder's statement with ASIC and sent it to Southcorp and ASX. Foster's did not lodge any other documents with the Foster's Bidder's Statement.
30. Over the next few days correspondence was sent between the solicitors for Foster's and Southcorp discussing various concerns Southcorp held about the Investor Presentation and the Foster's Bidder's Statement. On 21 January 2005 Southcorp expressly asked whether Foster's intended to dispatch any other additional material to Southcorp shareholders other than the bidder's statement which had been lodged with ASIC and given to Southcorp. Southcorp asked for copies of any additional material to be provided to Southcorp at least 5 business days prior to the dispatch of Foster's Bidder's Statement.
31. In a letter of 24 January 2005 Foster's indicated that it intended to include additional material with, or as part of, the Foster's Bidder's Statement to be dispatched to Southcorp shareholders. As at the date of that letter, the Wrap Document had not been lodged with ASIC or sent to ASX or Southcorp.
32. On 25 January 2005 Foster's provided to Southcorp a copy of an advanced draft of the Wrap Document. On 28 January 2005 Foster's provided Southcorp with a final printer's proof of this document.
33. The Wrap Document comprised 10 pages and was made up of the following documents:
 - (a) a front cover of the booklet, which included the title "Bidder's Statement";
 - (b) one page headed "Important Dates";
 - (c) a one page letter from Foster's Chairman to Southcorp Shareholders dated 2 February 2005 (**Chairman's Letter**);
 - (d) one page entitled "Features of the Offer";
 - (e) two pages entitled "Why You Should Accept";
 - (f) one page entitled "What you Should Do";
 - (g) the table of contents to the Foster's Bidder's Statement; and
 - (h) two blank pages.
34. On 28 January 2005, Southcorp made an application to the Panel.

INTERIM ORDERS

35. Southcorp sought interim orders restraining despatch of the Foster's Bidder's Statement pending conclusion of the proceedings.
36. In relation to Southcorp's concerns regarding the timing of the service of the Wrap Document and the four statements in that document alleged to be misleading, the Panel did not believe those issues were so serious as to be incapable of being remedied by requiring Foster's to make appropriate further disclosure (if indeed further disclosure was needed at all) after the conclusion of these proceedings.
37. In relation to Southcorp's concerns regarding the statements of Foster's intentions in the Foster's Bidder's Statement and the Options Condition, the Panel decided not to commence proceedings for the reasons discussed below.
38. In relation to Southcorp's concerns regarding Foster's use of broker valuations in its bidder's statement, the Panel felt that there was a material risk that the disclosure in the Foster's Bidder's Statement may be found to be inadequate.

Foster's stated on page 3 of the Wrap Document:

"The offer of \$4.17 per share is \$1.38 per share more than the average broker valuation for Southcorp of \$2.79 per share, or a 49% premium."

This statement was supported by a graphic and a note in small type:

"Average broker valuation based on the valuation published by 9 brokers in the most recent broker research reports available to Foster's prior to 13 January 2005, being the day Foster's announced the purchase of a 18.8% interest in Southcorp from Reline Investments Pty Ltd. The names of the brokers from whom you may obtain copies of these reports may be requested by calling the offer enquiry line."

39. The Panel was concerned that on the evidence in Southcorp's Application, the disclosure regarding broker valuations would appear prima facie to be deficient in that it did not disclose that some of the valuations dated as far back as August 2004 and the average of those valuations did not reflect a true "consensus" among the brokers because the valuations had a very wide range (from approximately \$2.00 to approximately \$4.00). The Panel, therefore, considered that there was a material risk that it may find the Wrap Document to be deficient in regard to these broker valuations.
40. In Guidance Note 5 ("Restraining despatch of bidder's statements") the Panel states (at paragraph 5.5):

Dispatch of a bidder's statement will usually only be held up where the Panel is satisfied that the statement contains defects which may not adequately be remedied by a supplementary bidder's statement (with any necessary extension of the closing date of the bid). Therefore, any application seeking restraint of dispatch will need to show clear and serious issues relating to the adequacy of the bidder's statement and not merely omissions from it. ... Generally before restraining dispatch, the Panel would have to be satisfied that there is a significant risk that the bidder's statement will be misleading in a material respect, or that a material omission is unlikely to be remedied by the provision of a supplementary bidder's statement.

Takeovers Panel

Reasons for Decision – Southcorp Limited

41. The Panel considered that, in the present circumstances, the risk of the disclosure in the Wrap Document regarding the Average Value being inadequate could be adequately dealt with by requiring Foster's to despatch clarifying information to Southcorp shareholders at the same time as, or very shortly following, despatch of the Foster's Bidder's Statement.
42. The Panel, therefore, accepted an undertaking from Foster's to send a letter to Southcorp shareholders reproducing the relevant statement and graph from page 3 of the Wrap Document and setting out the approximate range of the broker valuations (\$2.00 to \$4.00) and the approximate period over which they were published (August 2004 to January 2005), to assist Southcorp shareholders in assessing the weight that they might give to the Average Value quoted in the Wrap Document. Foster's undertook to send this letter by the end of Sunday, 6 February 2005, 4 days (or 2 business days) after dispatch of the Foster's bidder's statement. The Panel accepted that in the circumstances this was the earliest that this letter could be dispatched.
43. In regard to Southcorp's complaint that Foster's should have obtained the relevant brokers' consent, the Panel was of the preliminary view that it may have been preferable for Foster's to obtain the consent of each broker under section 636(3) to the use of their valuation so as to allow it to publish the name of each broker, the relevant valuation and date of valuation, and any other material information in relation to the broker's report in the Foster's Bidder's Statement. However, as Foster's had apparently been unable to obtain the consent of all of the relevant brokers, it was only possible for Foster's to publish an average figure and the range of valuations and valuation dates, rather than details of individual reports.
44. Having received the undertaking, the Panel determined in accordance with the principles set out in Guidance Note 5 not to restrain the despatch of the Foster's Bidder's Statement. The Panel, therefore, declined to make the interim order sought by Southcorp.

SERVICE OF WRAP DOCUMENT

Southcorp's contentions

45. Southcorp submitted that:
 - (a) The Wrap Document contained information which section 636(1)(m) required to have been included in the Foster's Bidder's Statement lodged with ASIC. Southcorp said that as a consequence, the directors of Southcorp had not had a reasonable time to consider all material information that should have formed part of the Bidder's Statement; and
 - (b) Foster's should include the additional information in the Wrap Document in a replacement bidder's statement that should be dispatched to Southcorp shareholders.
46. Southcorp also contended, that contrary to section 602(b), Southcorp's directors had not been given "a reasonable time to consider the proposal" and "enough information to enable them to assess the merits of the proposal"
47. Section 636(1)(m) requires a bidder's statement to set out

Takeovers Panel

Reasons for Decision – Southcorp Limited

"any other information that is material to the making of the decision by a holder of bid class securities whether to accept an offer under the bid" and "is known to the bidder".

48. Southcorp contended that the Wrap Document contained the type of information which was material to the making of the decision by Southcorp shareholders whether to accept the Foster's offer. Southcorp submitted that the Wrap Document was presented in a way which suggested that it forms a key part of the Bidder's Statement.
49. Southcorp noted that section 633(6) allows a bidder to send additional information to target shareholders with its bidder's statement, provided such information is also sent to the target company at the time the bidder sends the bidder's statement to target company shareholders. Southcorp also noted that a predecessor of section 633(6) has been relied upon to include a Chairman's letter together with the offer documents when dispatched to target shareholders. However, Southcorp submitted, the Wrap Information and the Wrap Document contained information which went well beyond that which the legislature had intended to be covered by section 633(6). Southcorp submitted that information under section 633(6) should not be information which is material to an offeree's decision whether or not to accept the offer before them.

Foster's Response

50. Foster's responded by denying that it had been under any obligation to provide the Wrap Document to Southcorp prior to dispatching its bidder's statement.
51. Amongst other things, Foster's said that:
 - (a) the information and statements in the Wrap Document were not material and therefore not required to be included in the Foster's Bidder's Statement under section 636(1)(m);
 - (b) the Wrap Information was merely Foster's opinion, and so was not "information" as described in section 636(1)(m);
 - (c) a substantial quantity of the Wrap Information had been included in the Foster's Bidder's Statement;
 - (d) some of the Wrap Document concerned process only (for example the enquiry line phone number, how to accept etc);
 - (e) the information used to compile the three substantive pages of the Wrap Document was taken from the Investor Presentation which had been published by Foster's on the ASX on 17 January 2005 or the media release issued by Foster's on 17 January 2005 announcing its bid; and
 - (f) Southcorp had clearly read that information because some of it at least is referred to in Southcorp's letter to shareholders dated 24 January 2005.
52. Foster's referred to section 633(6) and interpreted it as permitting it to send "additional information" to the Southcorp shareholders with the Foster's Bidder's Statement provided such information is also sent to the target company at the time of dispatch of the offers to Southcorp shareholders. Foster's asserted that the Wrap Document contained merely "additional information".

Takeovers Panel

Reasons for Decision – Southcorp Limited

53. The Panel considered the submissions and rebuttals that parties provided.

Materiality

54. The first consideration of the Panel was whether some or all of the Wrap Information was material to Southcorp shareholders' decision whether to accept Foster's offer.
55. The Panel considered that part of the Wrap Document was clearly material to Southcorp shareholders' decision, and that Foster's also clearly considered it to be material given the prominence and presentation of the Wrap Document.
56. The Panel considered this to be the case despite Foster's submissions that the Wrap Document contained information which might merely "*influence*" Southcorp shareholders. For example, two of the pages are headed "Why you should accept". The Wrap Document was also the most prominent part of the booklet to go to shareholders and included material which would be arguably the most influential in their decisions. Under the principle that target directors should have reasonable time to assess the merits of a takeover, the Southcorp directors should have had that information in the form that it was proposed to be presented, no later than they had the Foster's Bidder's Statement.
57. The Panel considered that some of the Wrap Information:
- (a) included factual information and was not solely a statement of Foster's opinion;
 - (b) was material to Southcorp shareholders and not merely information which might, in some immaterial way, influence Southcorp shareholders;
 - (c) was presented very prominently, in such a way that Southcorp shareholders would take it that Foster's intended the Wrap Information to be material to their decision; and
 - (d) is the sort of material Southcorp shareholders would expect their directors to address in the target's statement.
58. The Panel did not accept Foster's submissions that the Wrap Information is not claimed to be factual or objective, nor that it is "*no more than a helpful aggregation of existing material*".
59. The Panel accepted that while some parts of the Wrap Information were carefully expressed to be Foster's opinion, much of the Wrap Information was presented as factual information. The Panel agreed with Foster's that because the Wrap Document was presented as Foster's "selling" document, Southcorp shareholders would be likely to assume that Foster's conclusions from the information it was presenting in the Wrap Document would be open to argument from Southcorp in its target's statement. Nevertheless, the Panel considered that the Wrap Information could not all be categorised as merely Foster's opinions, and that the Wrap Information was information which was material to Southcorp shareholders.

Additional Information

60. The Panel accepted Foster's submissions that it was entitled to send additional information with the Foster's Bidder's Statement, under section 633(6). However, that is subject to the proviso that any information or statements in the Wrap

Takeovers Panel

Reasons for Decision – Southcorp Limited

Document which were material to Southcorp shareholders' decision should also have been included in the Foster's Bidder's Statement.

61. However, if Foster's nevertheless had wished to present the contents of the Wrap Document as an additional supplementary document under section 633(6), the Panel considers that Foster's should have included in the Foster's Bidder's Statement all material information which it proposed to include in that supplementary document. In addition, Foster's should have ensured that the presentation of the additional information was not materially different from the way that the information was presented in the Foster's Bidder's Statement lodged with ASIC.

Already Disclosed

62. The Panel did not accept Foster's submissions that the Wrap Information had already been disclosed to Southcorp shareholders such that it was not required to be disclosed under section 636(1)(m). While much of the information had been presented in one form or another in the Investor Presentation and the Foster's Announcement, the Panel did not consider that mere posting on ASX of the Investor Presentation and the Foster's Announcement a few days previously meant that the information had been disclosed to Southcorp shareholders so as to allow the Wrap Information to be left out of the Foster's Bidder's Statement given to Southcorp. The Panel considers that Foster's presentation of the valuation of its offer compared to Southcorp's share price, and the reasons Southcorp shareholders should accept, were information which should be provided to Southcorp shareholders as part of the Foster's Bidder's Statement.

Time for Southcorp's directors to consider the Wrap Document

63. Southcorp submitted that its directors had been given insufficient time to consider the information in the Wrap Document.
64. It is true that the Southcorp directors did not receive the full two weeks to which they were entitled to consider information in the Foster's Bidder's Statement before it was dispatched to Southcorp shareholders. Instead, they received a little less than a week.
65. Nevertheless, in these particular circumstances the Panel was not inclined to make any orders delaying dispatch of Foster's Bidder's Statement solely on the basis that the Wrap Document had not been lodged at the same time as Foster's Bidder's Statement. In the Panel's view, the time which the Southcorp directors had to review the Wrap Document allowed them to respond to the additional information contained in the Wrap Document in Southcorp's target's statement.
66. The Panel noted that, while the Southcorp directors had not previously been given the contents of the Wrap Document, they were very likely to have had some familiarity with those contents given that most of the additional material in the Wrap Document came from the Investor Presentation which had been published on ASX on 17 January 2005. Albeit that the Southcorp directors did not know until they received a copy of the Wrap Document what the information content would be, when they received the Wrap Document their assessment and assimilation of the Wrap Information is likely to have been materially quicker given their prior exposure to the Wrap Information. The Panel also noted that there were only three substantive

Takeovers Panel

Reasons for Decision – Southcorp Limited

pages of the Wrap Document which Southcorp directors would have needed to address.

67. However, in saying this, the Panel does not consider that posting material on ASX or any other website is justification for not providing material information to target directors.

Market practice

68. Foster's submitted that it is market practice for bidders not to include material such as the Wrap Document and the Wrap Information in bidder's statements lodged with ASIC, and that market practice is to provide a copy of such information to the target at the time that the bidder's statement is dispatched to shareholders.
69. The Panel considers that the evidence is at best mixed and that there is no consistent practice of not providing information such as the Wrap Document to ASIC, ASX and the target directors at the time a bidder's statement is lodged with ASIC.
70. Regardless of market practice, it would not be acceptable for Foster's to exclude material information from its bidder's statement and merely to give a copy of the Wrap Document to Southcorp and to ASIC when the Foster's Bidder's Statement was dispatched to shareholders. Any market practice which condoned such exclusion would be unacceptable.

Supplementary bidder's statement

71. Foster's submitted that a bidder must be allowed to respond to developments in the market between the time a bidder's statement is lodged (with ASIC and the target) and the time that bidder's statement is sent to shareholders. Foster's submitted that if the Panel accepted Southcorp's submissions then if information or statements were not in the Bidder's Statement at the time of lodgement, they could never be disclosed to shareholders.
72. The Panel did not accept Foster's submissions that its decision would inhibit rapid and easy communication of material information to target shareholders. Where there are changes to material information, such as developments in the market, which occur after a bidder has lodged its bidder's statement, there are a number of proper ways to inform target shareholders. If the changes are material, the supplementary bidder's statement provisions apply and are the appropriate way for a bidder to provide new information to target shareholders. Or, alternatively, a bidder may apply to ASIC for relief to allow it to dispatch a replacement bidder's statement if the bidder's statement has not yet been dispatched.
73. If the market developments are not material to a target shareholder's decision, but a bidder still wishes to advise target shareholders of the developments, it remains open to a bidder to send current information to target shareholders with the bidder's statement under the provisions of section 633(6) concerning additional information.

Future implications – broker valuations

74. Foster's submitted that requiring it to have included the Wrap Document in the Foster's Bidder's Statement would set a precedent that would mean that all other bidders would be required (under section 636(1)(m)) to disclose individual broker valuations for the target whenever those valuations are known to the bidder.

Takeovers Panel

Reasons for Decision – Southcorp Limited

Foster's submitted that such a decision would mean that almost every Bidder's Statement lodged by a bidder in the past would have been defective.

75. The Panel considered Foster's submissions carefully. The Panel would not wish this decision to be taken to stand for an overly inclusive requirement which would cause bidders material compliance problems.
76. Because of its content, presentation and location, much of the contents of the Wrap Document is intended and expected to influence Southcorp shareholders deciding whether or not to accept the offer. Accordingly, it is material and, if it was to be used at all, it should have been included in the Foster's Bidder's Statement. However, some of the material was a matter of Foster's judgement and opinion, rather than information, and therefore, while potentially material, was not strictly required to be given to Southcorp shareholders, whether in the Foster's Bidder's Statement or elsewhere. The information provided in the Wrap Document in support of Foster's opinions in the Wrap Document would not have been required by section 636(1)(m), had Foster's not stated these opinions. However, once Foster's decided to send the Wrap Document to Southcorp shareholders, the policy of section 602(b) required Foster's to include the material statements included in it in the Foster's Bidder's Statement (i.e. both the factual information and the statements which were merely Foster's opinion).
77. On the other hand, not all of the contents of the Wrap Document would necessarily be material information and therefore required to be included in the Foster's Bidder's Statement under section 636(1)(m).
78. Foster's may also have known very large amounts of other information, which it considered not to be material and chose not to include in either the Foster's Bidder's Statement or the Wrap Document. If that information had included broker valuations, and Foster's did not consider them to be material to Southcorp shareholders' decision, then the Panel does not consider its decision implies that that other information (including broker valuations) should have been included in the Foster's Bidder's Statement. The Panel's decision does not stand for a position that broker valuations will always be material information required to be disclosed under section 636(1)(m) merely because a bidder is aware that brokers have published valuation reports concerning the target company.
79. Of course what is or is not material is at times open to dispute between parties. Merely because Foster's, or Southcorp, considered a piece of information to be, or not to be, material, does not make it so. However, that problem already exists for every bidder or target and their advisers currently. The Panel's decision in these proceedings does not make that problem any harder or more complicated for them.
80. This decision merely stands for the proposition that most of the Wrap Information was material for Southcorp shareholders and should have been included in the Foster's Bidder's Statement.
81. In terms of what must be included in a Bidder's Statement (as opposed to merely being despatched as "additional information" under section 633(6)) this decision does not make any statement about the materiality of broker valuations in general, or when they must be included in a Bidder's Statement if known by a bidder.

Takeovers Panel

Reasons for Decision – Southcorp Limited

Consistency with Aberfoyle and GIO cases

82. Foster's cited the decision in *GIO Australia Holdings Ltd v AMP Insurance Investment Holdings Pty Ltd* (1998) 29 ACSR 582 (**GIO**) as deciding that neither the Wrap Information nor the Wrap Document was required to be given to Southcorp at the same time as the Foster's Bidder's Statement.
83. The Panel accepts that Foster's was entitled to send additional documents with the Foster's Bidder's Statement. However, the decision in *GIO* is no support for Foster's submissions, because Emmett J did not hold that a wrap section could contain material information omitted from the Part A statement. In these proceedings, the Panel finds that the Wrap Information included material statements which had not been included in the Foster's Bidder's Statement. This is fully consistent with the *GIO* decision.
84. Foster's cited the decision in *Aberfoyle Ltd v Western Metal Ltd* (1998) 28 ACR 187 (**Aberfoyle**) at 209 and 210 in which Justice Finkelstein stated:
- "cl 17 [the predecessor of section 636(1)(m)] does not require an offeror to disclose its evaluation of the shares or the economic assumptions upon which that evaluation has been based. Speaking strictly, cl 17 is concerned with the disclosure of facts and circumstances of which the offeror is aware and not with the disclosure of matters of opinion about which minds may differ, assessments that are based on variable assumptions or predictions or the assumptions or predictions upon which those assessments are based."
85. However, for the reasons set out above, the Panel does not accept that the Wrap Information constitutes merely Foster's opinions nor that it is held out by Foster's to be only its opinions. The Wrap Information clearly contains, and is held out to contain, factual and other information, into which Foster's has included some of its opinions and conclusions. However, as it would be impractical and undesirable to attempt to extract those parts which are clearly opinion from the large volume of factual information, all of the substantive material in the Wrap Document should have been provided to Southcorp. This also is consistent with the section of the decision in *Aberfoyle* which Foster's cited to the Panel.

Decision

86. The Panel decided the following in relation to the Wrap Document:
- (a) some of the Wrap Information is material to the decision of Southcorp shareholders in considering the Foster's takeover bid;
 - (b) the position and presentation of the Wrap Document is relevant in assessing whether the Wrap Document should have been included in the Foster's Bidder's Statement;
 - (c) the Wrap Document should have been included in the Foster's Bidder's Statement lodged with ASIC and given to Southcorp;
 - (d) Foster's was not merely following "common market practice" in not serving the Wrap Document with the Foster's Bidder's Statement;

Takeovers Panel

Reasons for Decision – Southcorp Limited

- (e) Southcorp directors, although not given the statutory period of time to review the Wrap Document, did receive adequate time in the circumstances of these proceedings; and therefore; and
 - (f) while unacceptable circumstances existed at the time of Foster's lodging the Foster's Bidder's Statement with ASIC and giving it to Southcorp, they no longer exist and it would not be in the public interest to make any declaration of unacceptable circumstances. Similarly, while the Panel may have required Foster's to give the Wrap Document to Southcorp if it had received the Application prior to 25 January 2005, there is now no need for the Panel to consider such an order.
87. The Panel was not asked, and did not consider, the issue of whether or not the Wrap Document, assuming the Foster's Bidder's Statement contained all material information, should, or should not have been bound into the Foster's Bidder's Statement. The Panel notes, however, that it considers it highly likely that ordinary Southcorp shareholders would take the whole, bound document to be the Foster's Bidder's Statement and take it that the Wrap Document was part of the Foster's Bidder's Statement. One of the indicators was that the Wrap Document has "Bidder's Statement" on the front cover. The Panel considers that Foster's choice of binding the material into the Foster's Bidder's Statement reduced the prospect of the Wrap Document being considered merely "additional information" sent with the Foster's Bidder's Statement.

INCLUSION OF AVERAGE BROKER VALUATIONS

88. Foster's stated on page 3 of the Wrap Document:

"The offer of \$4.17 per share is \$1.38 per share more than the average broker valuation for Southcorp of \$2.79 per share, or a 49% premium."

This statement was supported by a graphic and a note in small type:

"Average broker valuation based on the valuation published by 9 brokers in the most recent broker research reports available to Foster's prior to 13 January 2005, being the day Foster's announced the purchase of a 18.8% interest in Southcorp from Reline Investments Pty Ltd. The names of the brokers from whom you may obtain copies of these reports may be requested by calling the offer enquiry line."

89. In the Investor Presentation released to ASX on 17 January, Foster's derived this average³ from 9 identified broker reports, giving dates, valuations and the names of the relevant brokers. These details were not given in the Wrap Document or the Foster's Bidder's Statement. Foster's stated in submissions that it had requested each broker's consent to the use in the Foster's Bidder's Statement of a statement based on their report, but that three of the nine had refused, for company policy or conflicts reasons. Foster's said it had decided that an average would be more useful to many investors than separate statements based on the respective brokers' reports. It was common ground that shareholders who were not clients of the relevant brokers would be unlikely to be able to obtain copies of the reports, which were not on web sites available to the public.

³ The investor presentation actually used the average figure \$2.76 due to a change in one valuation.

Takeovers Panel

Reasons for Decision – Southcorp Limited

90. The Panel was concerned that this description of the broker valuations might imply that there was a consensus between the brokers as to the value of Southcorp, whereas the highest valuation was nearly twice the lowest. As mentioned above, at the Panel's suggestion, Foster's undertook to send to each shareholder a clarifying letter explaining that the broker reports had been issued over the period from August 2004 to January 2005 and that the valuations ranged from about \$2.00 to about \$4.00.
91. Southcorp objected, saying that the statements regarding broker valuations in the Wrap Document:
- (a) contained material information, which should have been included in the Bidder's Statement, because they:
 - (i) were capable of influencing shareholders to accept or reject offers under the bid;
 - (ii) were part of the material used to support statements of Foster's' opinion in the Wrap Document; and
 - (iii) had not previously been disclosed to shareholders;
 - (b) contravened subsection 636(3), which requires the consent of a person to the use in (or in a document accompanying) a Bidder's Statement of a statement said to be based on a statement by that person;
 - (c) were misleading or incomplete, in that they were not accompanied by a discussion of the methods, assumptions and qualifications relevant to the various brokers' valuations;
 - (d) were misleading, so far as they suggested that offerees could obtain copies of the reports from the brokers; and
 - (e) should have been updated when the brokers updated their reports (which several had done by the time the Bidder's Statement was issued).
92. Southcorp added that broker forecasts are in many circumstances matters of speculation or opinion and judgement, which should not be sent to shareholders at all.
93. ASIC submitted that its stated policy position is that the broker's consents should have been obtained to the issue of a statement based on their views, in relation to both the Wrap Document and the letter which Foster's sent to Southcorp shareholders in accordance with the undertaking given to the Panel.
94. The Panel regards Foster's use of the broker reports as resembling the use in a Bidder's Statement of market prices, and not as resembling the use of an independent expert's report. That is, averaged or otherwise taken together, the broker reports are a useful sampling of market sentiment. For this reason, it was inappropriate to require Foster's to obtain the brokers' consents, as would have been required for an independent expert's report under section 640.
95. Subsection 636(3) requires the bidder to obtain the consent of a person to the use in a Bidder's Statement of a statement said to be made by the person or to be based on a statement made by the person. A statement is based on a statement by another person when it conveys something that other person said, directly or by implication.

Takeovers Panel

Reasons for Decision – Southcorp Limited

The average of these nine broker valuations is different from each of the valuations given by each of the brokers. The Panel considers that because the average does not convey something said by any one of the nine brokers, section 636(3) does *not* require consents of the brokers to be obtained for Foster's use of the average. In the particular context of the issue of brokers' valuations, Foster's use without consent in the explanatory letter of the approximate end points of the range of brokers' valuations is consistent with this view, in that this information was used to indicate the variety of views taken by the brokers and not as a view with which Foster's agreed, or which it invited offerees to adopt.

96. ASIC's Practice Note 55 on the requirement for consents in fundraising documents refers to the need for consent where the use of a statement is aimed at clothing the statement in the expertise or respect of the person who made it. The Panel considered that the use of the Average Value, being from a range of brokers who were not named, and with a wide value range was, again, more akin to a reflection of market sentiment than seeking to clothe the Average Value with the expertise of any individual broker.
97. This conclusion is consistent with the policy of subsection 636(3), which is to ensure that statements are made in a Bidder's Statement only with appropriate care and consideration, by preventing an issuer from shielding itself from liability for a statement by attributing that statement to someone else, unless the other person accepts liability under item 10 in subsection 670B(1) by consenting to the use of their statement in the context. This policy has no sensible application to the averaged broker valuation, which is *different* from the valuation published by each broker and could not usefully be attributed to any one of the brokers and for which no one of them could meaningfully take liability.
98. This does not mean that nobody takes responsibility for the statement. Since Foster's made the statement in a document connected with a takeover, it is civilly liable for it, if it is deceptive or misleading, whether under section 670B or section 1041H. Since the average was included in the Wrap Document, not the Bidder's Statement proper, if it is misleading, Foster's is liable under section 1041H, not section 670B. In such circumstances, Foster's cannot rely on the reasonable reliance defence in subsection 670D(3). Instead, Foster's would have to rely on the conduit defence in *Yorke v Lucas* (1985) 158 CLR 661, which is not open to it because Foster's did not specifically disclaim liability for the truth of the relevant statements, a requirement of the defence.
99. In Practice Note 55, ASIC indicates that it may give relief from the corresponding requirement in subsection 716(2) for the use in a prospectus of a correct and fair copy of a statement from a book or periodical, where the statement was not made in connection with the offering or the business or assets of the issuer. The basis of this policy is that, where a relevant statement was made by a disinterested person, offerees may be better served by allowing the issuer to put the statement before them without the maker's consent than by requiring it to omit the statement, if it cannot obtain the maker's consent, under strict insistence on the policy of obtaining consents for all attributed statements.
100. The broker valuations considered in this matter have been produced for purposes other than documenting or responding to the bid, and have been widely

Takeovers Panel

Reasons for Decision – Southcorp Limited

disseminated. The brokers owe a duty of care to their clients in issuing the reports. Many shareholders, but not all, are clients of the brokers and have access to some of the reports, and a few may have access to all of them. There may be a case for considering an extension of the policy to exempt bidders from obtaining consent for fair use of broker valuations, on an averaged or other aggregated basis, in cases such as this. There are, however, some difficult issues, such as whether a broker's valuation should (or may) be excluded, because the broker is connected with a party, or the valuation appears to be an outlier.

101. The Panel does not accept the implication in Southcorp's submissions that brokers' valuations of shares should generally be omitted from bidders' and targets' statements, because they are speculative. However, neither does the Panel consider that Foster's should have included them on a routine basis, as being material information. Bidders and targets should be free to use aggregated valuations as a useful but not infallible indicator of market sentiment, where such an indicator is useful information for shareholders. Given that shareholders may place material weight on them, care should be taken in their presentation (such as the disclosure of the range of values mentioned above), and relevant and current valuations should only be excluded for good and specific reasons (and those reasons should be clearly disclosed with any use of the aggregate value). If valuations are to be used to indicate market sentiment, it is important that a bidder or target be able to use all relevant and current valuations, which may not be the case if they must obtain the consent of each broker to include their valuation in an aggregate.
102. Similarly, bidders should disclose carefully the period from which the valuations come and the bidder's reasons for choosing the period. If the period is not the most recent, or selecting a more recent period may give a materially different result, the bidder should ordinarily give the most recent aggregate result as well. This is consistent with the Panel's decision in *General Property Trust* [2004] ATP 30.
103. The Panel was not convinced, on the submissions before it, that there was a current requirement for Foster's to update the average broker valuation. Foster's submitted that there had been no material change in the Average Value and provided its arguments for believing so. Southcorp, in turn, disagreed. In their submissions, both parties asserted that to determine the "true" current Average Value required one or more of the most recent broker valuations to be excluded, for various reasons. The Panel considered that in the particular circumstances of these proceedings the case had not been made, as at the date of the decision, for Foster's to update the Average Value.
104. The Panel noted that if Southcorp considered that there had been a material change in the Average Value it is open to provide its view of the correct value to Southcorp shareholders. This decision should not be taken to be a view on whether or not there might be any requirement for such update, now or in the future if there were any material change to the average valuation figure.
105. Given that offerees who are not already clients of those brokers are unlikely to be able to obtain copies of the relevant brokers' reports from the brokers whose names they can obtain from Foster's by telephone, it is unfortunate that the note in the Wrap Document invited them to request those copies. The note, however, has no tendency to mislead or deceive offerees about their decision on the offer, only into spending

Takeovers Panel

Reasons for Decision – Southcorp Limited

time attempting to obtain the copies. Foster's states that the note was included in response to a remark by the Panel in *AurionGold* [2002] ATP 13 at [82] to the effect that it would be good practice for a bidder who used broker reports to tell offerees where they could obtain copies of those reports. No doubt this is true, but to do so where the reports would not be forthcoming is counterproductive. The remark in *AurionGold* may need to be qualified in a Guidance Note, in the light of brokers' practices and an assessment of the role of brokers' valuations in takeover documents.

106. The Panel does not think that there is any risk that, if their use is countenanced, broker valuations such as these will come to replace independent experts' reports in takeovers. An independent expert has advantages over a broker in that its report is prepared as an assessment of a particular bid, with access to inside information and the freedom to choose a valuation method appropriate to the company in question.
107. The Panel intends to refer the issues raised in these proceedings concerning the use of broker valuations and consent to the wider Panel with a suggestion that the Panel consider whether it is appropriate to issue a Guidance Note on the subject.

Decision

108. The Panel decided that Foster's was not required to gain the consent of the nine brokers to include the Average Value in the Wrap Document or the Foster's Bidder's Statement.
109. The Panel decided that the use of the Average Value without further information concerning such things as the brokers' identities and the assumptions and methodology of their valuations, did not constitute unacceptable circumstances (this decision is made partly on the basis of Foster's having provided the clarifying letter to Southcorp shareholders).

MISLEADING STATEMENTS

110. In section 3.2(d) of the Application, Southcorp alleged that the following statements in the Wrap Document were materially misleading to Southcorp shareholders:
 - (a) that "in the absence of takeover speculation, Southcorp's share price would be significantly lower than the Offer price of \$4.17 per share";
 - (b) the Foster's offer is a "substantial premium to the average valuation of Southcorp based on independent broker research";
 - (c) the Foster's offer "represents a significant premium to the trading price of Southcorp"; and
 - (d) "Southcorp's share price has traded above its fundamental valuation".
111. The statements were made both in the Chairman's letter and in the body of the Wrap Document. They were stated in slightly different forms in the different places and prefaced with differing qualifications as to whether or not they were expressly Foster's opinion.
112. The Panel accepted Foster's submission that each of these statements had a reasonable basis and was not arrived at recklessly.

Takeovers Panel

Reasons for Decision – Southcorp Limited

113. However, the Panel did not accept Foster's submissions that all of the statements were merely and solely Foster's opinions. Some of the statements were prefaced by the words "Foster's believes ...". However, many of these clear statements of opinion were also supported by statements that were clearly intended to be read as factual statements and which appeared intended to elevate the statements from being merely Foster's' unfounded opinions.
114. The Panel considered that target shareholders were unlikely to accept the assertions as unqualified hard fact. Instead, shareholders were likely to look to their directors to express any contrary view, if they think it necessary. This may readily be done in a media release or in the Target's Statement. The statements were unlikely to mislead target shareholders and did not prevent the existence of an informed market in Southcorp shares.
115. In particular the Panel notes:
- (a) In regard to Foster's statement that in the absence of takeover speculation, Southcorp's share price would be significantly lower than the Offer price of \$4.17 per share, the Panel accepted Foster's submissions that the prevalence of recent media commentary to the effect that recent rises in Southcorp's share price were, to a large extent, due to speculation that a takeover offer was imminent provided a reasonable basis for this opinion; and
 - (b) In regard to the Foster's statement that the Offer represented a substantial premium to the average valuation of Southcorp based on independent broker research, the Panel did not accept Southcorp's submissions that "premium" is generally understood by the market to be only the amount by which the Offer price exceeds the trading price. In this regard the Panel notes that it is quite customary to advertise the "premium" represented by an offer price over other measurements of value (for example, net tangible assets).

Decision

116. The Panel formed the view that these statements were not misleading and did not otherwise give rise to unacceptable circumstances.

INTENTIONS OF FOSTER'S

117. The Panel declined to commence proceedings in regard to Southcorp's allegation that Foster's disclosure of its intentions for Southcorp was incomplete.
118. Southcorp alleged that in two interviews with the *Australian Financial Review*⁴ and one interview with *BRW*⁵, Trevor O'Hoy, the Chief Executive Officer of Foster's, and Jamie Odell, the managing director of the Foster's Beringer Blass wine division, made statements that suggested that Foster's intentions for Southcorp were more advanced than those disclosed in section 4 of Foster's Bidder's Statement.
119. The Panel assumed that Messrs O'Hoy and Odell spoke for Foster's and were not simply voicing individual opinions. Given their positions and roles in the bid, this seems likely.

⁴ Australian Financial Review: page 11, 24/01/05 and page 13, 25/01/05

⁵ BRW: page 12, 27/01/05

Takeovers Panel

Reasons for Decision – Southcorp Limited

120. The Panel noted that these statements were not inconsistent with the statements in the Bidder's Statement and included more detail only in regard to certain aspects of the procedure by which Foster's intentions may be put into effect, and which were not material to Southcorp shareholders. Each of them is reported as agreeing that the success of the post-bid integration of Southcorp into Foster's depends on the resulting cost savings, but as refusing to quantify the expected amount of savings.

OPTIONS CONDITION

121. The Foster's bid is subject to a condition in section 2.12(p) of the Bidder's Statement which requires that all options to subscribe for Southcorp shares be exercised, cancelled or subject to cancellation agreements before the Foster's offer period ends (**Options Condition**).
122. Southcorp alleged the existence of the Options Condition constituted unacceptable circumstances because, in its view, the condition could not be fulfilled. This was in part due to a large proportion of the options being not currently exercisable.
123. The Panel declined to commence proceedings in relation to this aspect of the Application.
124. In general a bidder is free to choose its bid conditions, subject to those conditions not being contrary to the prohibitions in sections 626 to 629 and not being otherwise self-defeating or impossible to satisfy (*Brisbane Broncos No. 1 and No. 2* [2002] ATP 1). The Panel could see no reason why, for example, the condition could not have been satisfied by Foster's obtaining the agreement of all optionholders to the cancellation of their options. The fact that this could not be achieved without the cooperation of all optionholders does not make the Options Condition impossible, or unacceptable.
125. The Panel noted further that Foster's undertook in section 2.17(a) of its Bidder's Statement to use its best endeavours to ensure that each of conditions to its offer was satisfied and not to do or omit to do anything which may cause a breach of any such condition. To the extent that satisfaction of the condition required reasonable co-operation from Foster's, Foster's is obliged to provide this co-operation. This increases the likelihood of the Options Condition being satisfied and removes any element of discretion from Foster's as to whether or not the condition will be fulfilled.

DECISIONS

Interim Orders

126. Given the undertaking provided by Foster's in relation to the clarifying information regarding the broker valuations, the Panel determined that no interim order was required.
127. A copy of the undertaking given by Foster's is at Annexure A to these reasons.

Declaration and final orders

128. For the reasons discussed above in relation to the matters raised by Southcorp in its Application in relation to which the Panel decided to commence proceedings, the Panel determined that no declaration of unacceptable circumstances was warranted and no final orders were required.

Takeovers Panel

Reasons for Decision - Southcorp Limited

Ian Ramsay

President of the Sitting Panel

Decision dated 9 February 2005

Reasons published 3 March 2005

Takeovers Panel

Reasons for Decision – Southcorp Limited

Annexure A

Southcorp Limited – Undertaking by Fosters Group Ltd.

Via its solicitors, Fosters provided the following undertaking to the Panel:

Fosters undertakes to the Panel that it will include in a letter sent to Southcorp shareholders to be lodged with Australia Post no later than the evening of Sunday 6 February 2005, a document containing a copy of the text and graph under item 1 of page 3 of the Wrap Information headed “The Offer is a substantial premium to the average valuation of Southcorp based on broker research”. The document will include text under the graph advising Southcorp shareholders that the broker reports on which the \$2.79 figure is based have dates which range from August 2004 to January 2005 and that the valuations of Southcorp shares in those brokers’ reports range from approximately \$2.00 per share to approximately \$4.00 per share. The text will be of similar size to the body text on page 3 of the Wrap Information.

Justin Fox

Partner

Corrs Chambers Westgarth

1 February 2005