Takeovers Panel

Reasons for Decision
Austral Coal 02

In the matter of Austral Coal 02
[2005] ATP 13

Catchwords:

equity derivatives – combined holding – failure to disclose to the market – economic imperative to acquire and hold hedge shares – negative control over hedge shares – blocking stake – strategic stake – efficient, competitive and informed market – effect on control or potential control – effect on acquisition or potential acquisition of substantial interest – association – restoration order – disclosure order – relevant interest – equity swap – Chinese walls – hedging –possible takeover bid – term sheet – swap confirmation – when swaps became effective – swap exposure – 5% disclosure threshold – 1% voting power increments – draft Guidance Note -

Centennial Coal Corporation Ltd - Austral Coal Limited - CSFB – Credit Suisse First Boston International - ABN AMRO Bank NV, Australia Branch – Glencore International AG – Fornax Investments Limited – Xstrata Plc

Acts Interpretation Act 1901 (Cth), section 22, 36
Corporation Act 2001 (Cth), sections 12(2), 16(1), 105, 602, 621(3), 657A(2)(a), 657A(2)(b), 657B(3), 657C, 657D and 671B
Constitution of Australia section 75

Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Company (No. 4) [1985] 1 Qd R 127
Bank of Western Australia Ltd v Ocean Trawlers Pty Ltd (1995) 16 ACSR 501
Flinders Diamonds Ltd v Tiger International Resources Inc [2004] SASC 119
Grand Hotel Group [2003] ATP 34
Heine Management Ltd v Australian Securities Commission (1993) 12 ACSR 578
IPT Systems Ltd v MTIC Corporate Pty Ltd [2000] WASC 316
LV Living Limited [2005] ATP 5
National Foods Ltd 01 [2005] ATP 8
National Can Industries Limited [2003] ATP 35
New Ashwick Pty Ltd v Wesfarmers Ltd (2000) 35 ACSR 263
Re Australian Securities Commission and John Fairfax Holdings Limited (1997) 25 ACSR 441 (Corporations and Securities Panel)
Village Roadshow Limited 01 [2004] ATP 4
NCSC Policy Statement 110

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 make timely disclosure regarding equity swap arrangements it entered into in relation to Austral Coal, which is the subject of a takeover offer by Centennial. The Panel considered that, once the combination of Glencore's direct holding of Austral Coal shares and its equity swap arrangements in relation to Austral Coal, passed 5%, the existence of Glencore's direct holding and the equity swaps was material information which the market for control of Austral Coal shares required to be efficient competitive and informed.

THE PROCEEDINGS

1. These reasons relate to an application to the Takeovers Panel (**Panel**) from Centennial Coal Limited (**Centennial**) on 3 June 2005 (**Application**) under section 657C of the Corporations Act 2001 (Cth) (**Act**)[1] in relation to the affairs of Austral Coal Limited

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

(**Austral Coal**). At the time of the Application, Austral Coal was the subject of a takeover offer by Centennial.

2. Centennial alleged that unacceptable circumstances existed in relation to the failure by Glencore International AG[2] to make timely disclosure regarding equity swap arrangements it entered into in relation to more than 5% of Austral.

SUMMARY

Background

3. On 23 February 2005 Centennial announced that it would make a takeover bid for Austral Coal, offering 10 Centennial shares for every 37 Austral Coal shares. The bid was unanimously recommended by the directors of Austral Coal, subject to no higher bid. 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.

4. In mid to late March 2005, Glencore entered into cash settled equity swaps (**Glencore Swaps**) with Credit Suisse First Boston International (**CSFBi**)[3] and ABN AMRO Bank NV, Australia Branch (**ABN AMRO**) (together, the **Banks**) over Austral Coal shares. On entering into the Glencore Swaps, the Banks purchased shares in Austral Coal on-market (**Hedge Shares**) to hedge the Glencore Swaps. As each Bank progressively acquired Hedge Shares, it increased the size of the swap exposure it agreed to offer under the Glencore Swaps. Glencore advised each Bank at the time of entering into the relationship that it was considering a takeover bid for Austral Coal. Glencore advised ABN AMRO at the time of entering into the swap with ABN AMRO (**ABN AMRO Swap**) that Glencore had already acquired almost 5% of Austral Coal shares and had entered into a swap with CSFB (**CSFB Swap**).

5. Although the final confirmation was not signed until 4 April 2005, the Panel finds that Glencore and CSFB had entered into the CSFB Swap by 21 March 2005 after Glencore signed a term sheet setting out the details of the swap on 20 March 2005. On 21 March 2005, when CSFB first commenced acquiring Austral Coal shares as Hedge Shares, Glencore owned 4.9% of Austral Coal. CSFB's acquisitions on 21 March 2005 amounted to 0.2% and took the combination of Glencore's direct holdings and the Banks' Hedge Shares (**Combined Holding**) to 5.1% of the voting shares in Austral Coal. Between 21 and 30 March 2005, CSFB acquired approximately 4.6% of Austral Coal as Hedge Shares. This then became the number of reference shares under the CSFB Swap. CSFB's acquisitions of Austral Coal shares as Hedge Shares took the Combined Holding to 9.5%.

6. The Initial Price under the CSFB Swap was $1.3111 (which closely equates to the volume weighted average price paid by CSFB for the 4.6% of Austral Coal acquired by it as Hedge Shares, net of taxes and other costs). The Final Price is the volume

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[2] In these reasons, **Glencore** includes Glencore International AG and its subsidiaries and their nominees. Further discussion in relation to the definition of Glencore is set out in paragraph 31 below.

[3] As noted below in paragraph 32, for ease of reference in these reasons, the Panel refers to **CSFB** as including CSFBi and other members of the Credit Suisse First Boston group involved in the facts giving rise to the Proceedings.

weighted average price of Austral Coal shares based on sales by CSFB over the 60 day period prior to termination of the swap. The Termination Date for the swap is 21 March 2008.[4]

7. On 24 March 2005, Glencore approached ABN AMRO requesting that ABN AMRO enter into the ABN AMRO Swap (a similar cash settled swap over up to 5% of Austral Coal shares). Although the final confirmation was not signed until 4 April 2005, the Panel finds that by 31 March 2005, Glencore and ABN AMRO had entered into the ABN AMRO Swap. ABN AMRO had confirmed by email to Glencore on 30 March 2005 that it would commence providing swap exposure to Glencore and the process under which it would confirm the extent of that exposure each day. At that stage, the ABN AMRO Swap was intended to be over approximately 5% of Austral Coal shares. ABN AMRO actually acquired only 2.8% of Austral Coal between 31 March and 4 April 2005, as Hedge Shares to hedge its exposure under the ABN AMRO Swap. ABN AMRO's acquisitions of Hedge Shares took the Combined Holding to 12.3%.[5]

8. The Initial Price under the ABN AMRO Swap is $1.3065. The Final Price is the VWAP of Austral shares over the 20 business days prior to the Termination Date. The Termination Date is 31 March 2006[6].

9. Glencore made no disclosures of its holding, the Glencore Swaps or the Combined Holding, until 6.00 p.m. on 4 April 2005, and to ASX prior to commencement of trading on 5 April. By that time Glencore's direct holding in Austral Coal was 4.6% and the Hedge Shares constituted 6.5% of Austral Coal.[7]

Decision

10. The Panel decided that unacceptable circumstances existed from the time at which the Combined Holding increased beyond 5% of the issued voting shares in Austral Coal and Glencore did not make disclosure to the market of the Combined Holding before 9.30 a.m. on the next trading day of ASX.

11. Disclosure by Glencore on 22 March 2005 would have shown the market, and Centennial inter alia, the pace of Glencore's acquisition, including its exposure acquired under the CSFB Swap and the price it had paid for its Combined Holding. Further disclosures as the Combined Holding increased, including informing the market of the pace and price of its increase, would have shown the market that the Combined Holding could act as a blocking stake in the context of compulsory acquisition by Centennial in its bid for Austral Coal.

12. The Panel found that the circumstances surrounding Austral Coal at the time made it almost inevitable that the Banks would retain the Hedge Shares for the life of the Glencore Swaps in order to hedge their exposure adequately to price movements in Austral Coal Shares, such that those Hedge Shares would not be accepted in

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[4] However, this is subject to early termination under an Event of Default or related event, or by mutual agreement.
[5] This Combined Holding was diluted to 11.1% upon the issue of Austral Coal shares on 1 April 2005.
[6] However, this is subject to early termination under an Event of Default or related event, or by mutual agreement.
[7] Having been 5.2% and 7.4% prior to dilution.

Centennial's bid, and that there is every likelihood that Glencore knew that the Banks were in this position.

13. The Panel also decided that Glencore therefore had, at the least, a real degree of effective negative control over the disposal of the Hedge Shares, such that the Combined Holding also acted as a strategic stake to Glencore's advantage. The Panel considered that subsequent disclosures of increases in the Combined Holding would have inclined the market more towards the belief that Glencore was considering making a rival takeover bid, for cash.

14. The Panel found that the existence of the Combined Holding had a clear effect on control or potential control of Austral Coal and was clearly material to, inter alia, Austral Coal, shareholders of Austral Coal and Centennial such that the market for control over Austral Coal shares was not efficient, competitive and informed while the Combined Holding was more than 5% and remained undisclosed. The Panel considered that the 5% disclosure threshold under the substantial holding provisions was an appropriate test to apply in these circumstances.

15. The Panel therefore considered that the existence of the Glencore Swaps and Glencore's direct holding, once the Combined Holding passed 5%, was material information which the market for control of Austral Coal shares required to be efficient competitive and informed.

16. The Panel also considered that Glencore's Announcement of 4 and 5 April 2005 failed to disclose a number of essential terms of the Glencore Swaps. Some of these matters were disclosed in the Panel's media release dated 1 July 2005. Accordingly, the Panel found that unacceptable circumstances continued to exist after the announcement of the existence of the Glencore Swaps on 4 and 5 April 2005, until at least 1 July 2005, because of this failure to disclose essential terms of the Glencore Swaps in the 4 and 5 April 2005 Announcement.

Arguable non compliance with black letter law

17. The Panel recognised that, on their face, cash settled equity derivatives, may not appear to generate an interest which is required to be disclosed under the substantial holding notice provisions. On that basis, the Panel recognised that there are arguments that Glencore had no legal obligation, even under widely drafted provisions, to make any disclosure about the Combined Holdings. However, the Panel considered that the commercial effects and practice of hedging of equity derivatives in the type of takeover situation in which Glencore found itself mean that Glencore's failure to disclose caused the market for control of Austral Coal shares not to be efficient competitive and informed.

18. On the other hand, the Panel considered that it was arguable that Glencore did indeed breach the substantial holding notice provisions, but that that is not a necessary prerequisite for unacceptable circumstances or a declaration of unacceptable circumstances, and the Panel did not need to make any such finding.

19. Since its expanded role in 2000 the Panel has publicly stated many times that the existence of unacceptable circumstances does not require breach of the black letter law and that technical compliance with the black letter law is no guarantee that circumstances will not constitute unacceptable circumstances.

Declaration and Orders

20. The Panel decided that unacceptable circumstances existed:

    (a) from the time at which the Combined Holding increased beyond 5% of the issued voting shares in Austral Coal (21 March 2005) and Glencore did not make disclosure to the market of the Combined Holding before 9.30 a.m. on the next trading day of ASX, until the evening of 4 April 2005; and

    (b) from 4 April 2005 until 1 July 2005 when the Panel published its decision, because of the continued failure of Glencore to disclose adequate information about the Glencore Swaps to the market.

21. Glencore made no disclosure of the Combined Holding or the Glencore Swaps until 6.00 p.m. on 4 April, by which stage the Combined Holding was 11.1%[8] of Austral Coal shares. Glencore then owned 4.6% of Austral Coal shares and the Glencore Swaps related to 6.5% of Austral Coal shares.

22. The acquisitions of Austral Coal shares by Glencore and the Banks took place during a takeover bid for Austral Coal by Centennial, a period when accelerated disclosure is required.

23. The Panel considered the public policy issues concerning proper disclosure, and the desirability of an efficient competitive and informed market, and decided that it was not against the public interest to make a declaration of unacceptable circumstances in relation to Glencore's non-disclosure of the Combined Holding.

24. The Panel made final orders (**Final Orders**) that inter alia:

    (a) Glencore make immediate disclosure to the market of the essential terms of the Glencore Swaps (**Disclosure Order**);

    (b) Glencore offer, for a period of one month from the date the offer is announced, to sell to any person who sold Austral Coal shares in a transaction reported to ASX which was entered into during the period from 9.30 am on 22 March 2005 (the next trading day on ASX after Glencore's Combined Holding exceeded 5%) until the opening of trading on 5 April 2005 (**Non Disclosure Period**), the same number of Austral Coal shares as the person sold in that transaction, at the same price that the person sold those shares (**Restoration Order**);

    (c) if Glencore does not own enough Austral Coal shares to meet requests under the Restoration Order, Glencore may require CSFB or ABN AMRO to close out part of the swap and sell sufficient Hedge Shares to Glencore at the initial price under the relevant swap, the number of shares under the swap shall be reduced by the number of those shares and Glencore will use those shares to fulfil its obligations under the Restoration Order.

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[8] Austral Coal issued 37,143,281 new shares on conversion of a series of convertible notes on 1 April, (but announced on 4 April 2005). At the date of these proceedings Austral Coal had on issue 304,631,895, at the time of the Glencore Swaps Austral Coal had 263,463,465 shares on issue. Glencore's announcement on 4 and 5 April was based on the number of Austral Coal shares on issue prior to 1 April. By the morning of 5 April, Glencore owned 4.6% and the Glencore Swaps related to 6.5% having previously been 5.2% and 7.4% respectively.

Review Proceedings

25. On 30 June 2005, the Panel received an application dated 30 June 2005 from Glencore under section 657EA for a review of the decision of this sitting Panel in these Proceedings (**Review Application**).

26. This Panel stayed the operation of its Final Orders until 8 July 2005 to allow the sitting review Panel (**Review Panel**) to commence its consideration of the Review Application. The Review Panel extended the stay period until 15 July 2005 and then again until 22 July and 26 July 2005.

27. The Review Panel varied the decision of this Panel. It found that non-disclosure of the Combined Holding once it had increased beyond 5% of the voting shares in Austral Coal, until the announcement to the market on 5 April 2005, constituted unacceptable circumstances. In part on the basis that this Panel had resolved any ongoing deficiency of information concerning the Combined Holding and Glencore Swaps, the Review Panel decided it was not necessary for it to decide whether unacceptable circumstances existed after 5 April 2005. The Review Panel ordered Glencore to make restoration offers to Austral Coal shareholders who had sold shares in transactions between 9.30 a.m. on 22 March 2005 and 9.30 a.m. on 5 April 2005 and which were reported to ASX. The Review Panel made no orders directing the Banks to sell Austral Coal shares to Glencore in the event that Glencore received more acceptances under the Restoration Order that it could satisfy. However, the Review Panel told Glencore and the Banks that it may do so if needed. The decision of the Review Panel was set out in the Panel's media release TP05/58 on the Panel website and reasons on 16 August 2005.

28. Glencore applied on 25 July 2005 to the High Court of Australia under section 75 of the Constitution of Australia to have the Review Panel's decision quashed. On 29 July 2005, the High Court remitted the application to the Federal Court of Australia. The Federal Court's decision was not available at the time of these reasons.

THE PANEL & PROCESS

Constitution of sitting Panel

29. The President of the Panel appointed Guy Alexander, Hamish Douglass and Meredith Hellicar (sitting President) as the sitting Panel (**Panel**) for the proceedings arising from the Application (**Proceedings**).

Parties and legal representation

30. The parties to these Proceedings were Centennial, the Australian Securities and Investments Commission (**ASIC**), Glencore, CSFB and ABN AMRO.

31. Centennial submitted that the appropriate definition of Glencore for the purposes of these Proceedings should include Xstrata Plc (**Xstrata**) (of which Glencore holds approximately 40% of the voting shares). The Panel had regard to the information before it, including the substantial holder notices lodged in relation to the relevant interests of Glencore. The notices principally pointed to Glencore International AG and Fornax Investments Limited (**Fornax**), a subsidiary of Glencore incorporated in Bermuda, and did not include Xstrata as an associate for these purposes.

Accordingly, as noted in paragraph 2 above, the Panel limited the definition of **Glencore** to Glencore International AG and its subsidiaries and their nominees.

32. As noted above, the relevant member of the Credit Suisse First Boston group that became a party to Proceedings was CSFBi. For ease of reference in these reasons, the Panel refers to **CSFB** as including CSFBi and other members of the Credit Suisse First Boston group involved in the facts giving rise to the Proceedings.

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

Extensions of time for information, submissions and rebuttals

34. The Panel adopted the Panel's Rules (**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**).

35. In accordance with Regulations 20 and 22, the Panel provided parties with an initial 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**). This Brief requested (among other matters) detailed factual information and documents from some of the parties. The Panel issued two further briefs in these Proceedings in order to adduce further factual information from the parties and to allow parties to make submissions in light of the evidence and documents that were submitted.

36. The Panel received requests for additional time from parties in relation to various deadlines for submissions and rebuttals in the Proceedings because of the time differences between Australia and Switzerland and because of the large volume of documentary submissions. Having regard to the complicated factual matrix involved in the Proceedings, and submissions from parties, the Panel extended the deadlines to provide information and make submissions and rebuttals throughout the Proceedings.

Panel Draft Guidance Note on Equity Derivatives

37. The Panel has, for some time, published Guidance Notes from time to time to assist the market in understanding the approach the Panel will take in its decisions as to what may or may not constitute unacceptable circumstances.

38. In March 2005, at the Panel's autumn roundtables, the Panel decided to commence work on a Guidance Note on equity derivatives, principally in response to concerns expressed by Panel members and market participants about the use of equity derivatives to build a stake in a takeover without disclosure. The work to develop the Guidance Note was delegated to a sub-committee comprising five Panel members and two external persons.

39. That sub-committee had, prior to receipt of the Centennial application, circulated a copy of its draft Guidance Note to the members of the wider Panel for their comments prior to the sub-committee publishing the draft document for public consultation. The draft Guidance Note was also provided to ASIC and to relevant officers in the Department of Treasury.

40. The Guidance Note was in draft form throughout these Proceedings. It did not form the basis for the sitting Panel's decision and was not taken into account when considering the Application. However, in order to ensure that parties were aware of the contents of the draft, the Panel provided a copy of the draft Guidance Note to all parties on a confidential basis and advised them that the Panel would not take it into account in considering the Application.

41. The Panel advised all parties that Mr Douglass was one of the Panel members of the equity derivative Guidance Note sub-committee.

APPLICATION

Background

42. The Application requested the Panel to make a declaration of unacceptable circumstances in relation to the affairs of Austral Coal which was, throughout these Proceedings, the target of a takeover bid by Centennial.

43. Centennial alleged that unacceptable circumstances existed in relation to the failure by Glencore to make timely disclosure regarding equity swap arrangements it entered into relation to more than 5% of Austral.

44. Centennial requested interim and final orders as discussed below.

Time limit for the Application

45. The Panel received the Application from Centennial by email at 7.32 p.m. on 3 June 2005. Glencore expressed the view that Centennial had not met the time limit in section 657C(3) of the Act to make its Application.

46. Glencore cited Rule 6.7 of the Panel's Rules that electronic documents must be received by the Panel executive by 6.00 p.m. and therefore alleged that the Application was received on Monday, 6 June 2005, outside the 2 month period specified in section 657C(3)(a).

47. Section 36 of the Acts Interpretation Act 1901 (Cth) (**AIA**) provides as follows:

    (1) Where in an Act any period of time, dating from a given day, act, or event, is prescribed or allowed for any purpose, the time shall, unless the contrary intention appears, be reckoned exclusive of such day or of the day of such act or event.

    (2) Where the last day of any period prescribed or allowed by an Act for the doing of anything falls on a Saturday, on a Sunday or on a day which is a public holiday or a bank holiday in the place in which the thing is to be or may be done, the thing may be done on the first day following which is not a Saturday, a Sunday or a public holiday or bank holiday in that place.

48. For the present purposes, section 105 of the Corporations Act has substantially the same effect as section 36(1) of the AIA. Section 22 of the AIA defines "month" to mean "calendar month".

49. The Panel assumed from the Application that the alleged unacceptable circumstances occurred until at least 4 April 2005. Applying sections 22 and 36(1) of the AIA to the two month period in section 657C(3)(a) would have given Centennial until the end of

Saturday, 4 June 2005 to submit its Application. Applying section 36(2) to that period would extend it until the end of Monday, 6 June 2004.

50. The Panel considered that even if the consequence of the Application of Rule 6.7 was that the Application was not received until Monday, 6 June 2004, Centennial was within the time limit in section 657C(3).

51. Notwithstanding the Panel's conclusion, Centennial requested the Panel for an extension of the time period under section 657C(3)(b). The Panel granted an extension so as to put beyond doubt that the Panel would consider, and, if thought fit, make a declaration in regard to, unacceptable circumstances which occurred prior to 4 April but did not come to light until Glencore's announcement of 5 April 2005.

Interim orders sought

52. Centennial requested the Panel make interim orders that:

    (a) Glencore provide:

        (i) full particulars of all discussions and copies of correspondence between, on the one hand, Glencore[9] or any of its representatives (including legal, corporate finance or public relations advisers) and, on the other hand, all actual and prospective writers of swap arrangements in relation to shares in Austral Coal;

        (ii) full particulars of all discussions and copies of correspondence between, on the one hand, any member of the Glencore group or any of their representatives (including any legal, corporate finance or public relations advisers) and, on the other hand, any other member of the Glencore group or any representative (including any legal, corporate finance or public relations adviser) of any member of the Glencore group in relation to either or both shares in Austral Coal or cash-settled equity swaps in relation to shares in Austral Coal; and

        (iii) copies of any related presentation materials shown or given to Glencore or any of its representatives (including any legal, corporate finance or public relations advisers) by any such actual or prospective swap counterparty.

    (b) in respect of each swap agreement entered into by Glencore in relation to shares of Austral Coal:

        (i) Glencore make immediate disclosure of all the terms and conditions of the agreement and any related agreement, arrangement or understanding in each case in existence as at the time that agreement was entered into (including but not limited to the following matters):

            (A) the parties to the swap;

            (B) the date the swap was entered into;

            (C) the nature and terms of the risk and reward provisions under the swap (for example, whether the Glencore position was long or short) and the reference price;

[9] As noted above in paragraph 31, Centennial submitted a wider definition of Glencore

(D) the cost of the swap (e.g. any initial fees / charges and periodic fees / charges, including any interest);

(E) the duration of the swap (including any provisions for extension) and the circumstances in which the swap must or may be closed out (including when and whether compulsorily or voluntarily or by agreement only, and in each case by whom, including the effect of Centennial or any other party achieving any given percentage level of control of Austral Coal or the effect of a de-listing of Austral Coal);

(F) the number of Austral Coal shares to which the swap relates;

(G) whether the counterparty was required to and / or did physically hedge the swap with Austral Coal shares and if so at what times, in what amounts and at what prices those shares (the Hedge Shares) were acquired;

(H) whether there is any understanding between the holder or any of its associates and the counterparty to the swap as to:

(I) when the swap will be closed out;

(II) whether the holder or any of its associates will or may acquire the Hedge Shares upon closing out and at what price; or

(III) any other matter in relation to the swap and/or Austral Coal and/or Centennial.

(ii) Glencore make immediate disclosure of:

(A) any changes to the original terms and conditions of that agreement and any related agreement, arrangement or understanding that existed as at the time that agreement was entered into (including but not limited to changes or additions in respect of any of the matters referred to in (i) above);

(B) any related agreement, arrangement or understanding entered into after the original agreement was entered into that affects or relates to the original agreement or any related agreement, arrangement or understanding; and

(C) any consents or waivers under or in relation to either or both of (A) and (B) above,

in each case disclosing what was changed, agreed, arranged, understood, consented to or waived and when (even if the effect thereof has subsequently changed);

(iii) each current swap arrangement be suspended pending the determination of this application so that the swap is not closed out or terminated; and

(iv) none of the Hedge Shares (nor any interest therein) is sold or otherwise disposed of.

Declaration sought

53. Centennial sought a declaration of unacceptable circumstances generally in relation to the facts set out in the Application.

Final orders sought

54. Centennial sought the following final orders:

    (a) An order that:

        (i) each swap arrangement entered into by any member of the Glencore group in relation to shares of Austral Coal be terminated or unwound and the counterparty be required to accept the Centennial offer in respect of the Hedge Shares held by or for it (or the Hedge Shares be transferred to a member of the Glencore group (or its nominee) which must then accept the Centennial offer in respect of those shares); and

        (ii) the accepting Austral shareholder be subject to an orderly market undertaking in respect of the Centennial shares arising from acceptance of the Centennial offer, so that those shares (which will have been acquired through unacceptable circumstances) are disposed of on market over a suitable gradual period.

    (b) If the Panel did not make the first interim order sought by Centennial and did not make any of the orders sought above, Centennial sought a final order in the form of the orders sought in paragraphs 52(a) and 52(b)(i) and (ii) above to the extent such interim orders was not granted.

    (c) Centennial submitted that, as less preferable alternatives to the orders sought by paragraphs 54(a) and (b) above, the Panel should make orders that:

        (i) each swap arrangement entered into by any member of the Glencore group in relation to shares of Austral Coal must be terminated or unwound and the counterparty to be required to dispose (or procure the disposal) of these Hedges Shares on market other than to or for any member of the Glencore group; or

        (ii) the Austral shares unacceptably acquired by the Glencore group (or the physical shares hedging the derivative interests unacceptably acquired by the Glencore group) be transferred or offered to the relevant vendors of those shares.

FACTUAL BACKGROUND

Centennial and Austral Coal

55. Centennial is a company listed on ASX. It mines and produces a range of thermal coal products. Centennial has grown rapidly over the last few years by acquisition of other companies. At the commencement of its bid for Austral Coal Centennial had 196,818,287 shares on issue. The closing price of Centennial shares on the last trading day before the announcement of the bid was $4.07 per share.

56. Austral Coal is a company listed on ASX. It mines and produces hard coking coal from the Tahmoor colliery in New South Wales. At the commencement of

Centennial's bid for Austral Coal, Austral Coal had 263,463,465 shares on issue. The closing price of Austral Coal shares on the last trading day before the announcement of the Centennial bid was $1.02 per share. During the course of the bid Austral Coal issued 41,125,408 shares on conversion of 39,949,000 convertible notes. At the date that the Panel made its decision in these Proceedings, Austral Coal had on issue 304,558,873 shares.

Centennial bid for Austral Coal

57. On 23 February 2005 Centennial announced that it would make a takeover bid for Austral Coal shares, offering 10 Centennial shares for every 37 Austral Coal shares. The bid was unanimously recommended by the directors of Austral Coal, subject to no higher bid. Austral Coal had previously allowed a number of potential bidders into a due diligence data room from late 2004 in an attempt to find a party willing to assist with its financial difficulties.

58. Centennial served its bidder's statement on Austral Coal on 9 March 2005 and dispatched its offers to Austral Coal shareholders on 21 March 2005. Austral Coal lodged its target's statement on the same day and sent it to Austral Coal shareholders.

59. At the time of announcing its bid, Centennial had relevant interests in 9.6% of the voting power in Austral Coal via a purchase agreement with then shareholder Noble Group Limited (**Noble**).

60. Centennial declared its bid unconditional on 23 March 2005. This meant that if an Austral Coal shareholder accepted before 7 April 2005, they would participate in a Centennial dividend of $0.06 per share which had been announced. At that time, it had not received any acceptances under its bid, and held only the relevant interest in the 9.6% the subject of the purchase agreement with Noble. On the following day, Centennial announced that its voting power in Austral Coal had increased to 16.5%. It made further announcements on the following dates: on 4 April 30%, on 7 April 48%, on 8 April 66.7% and on 24 April 82.4%.

61. By early May 2005, Centennial held approximately 85% voting power in Austral Coal. Other than a small number of acceptances since then, Centennial's voting power has not changed. The remaining Austral Coal shareholders follow:

    (a) Glencore with 7.32%;

    (b) CSFB with 4.03%, being the shares acquired to hedge CSFB's swap with Glencore;

    (c) ABN AMRO with 2.43%, being the shares acquired to hedge ABN AMRO's swap with Glencore; and

    (d) 230 public shareholders at 0.79%.

62. Glencore acquired the majority of its shares in Austral Coal between 7 and 17 March 2005. CSFB acquired Austral Coal shares to hedge the CSFB Swap between 21 March and 30 March while ABN AMRO acquired Austral Coal shares to hedge the ABN AMRO Swap between 31 March and 4 April 2005. Because of the Glencore, CSFB and ABN AMRO holdings, Centennial has not been able to proceed to compulsory acquisition.

Xstrata approach to Centennial

63. In Centennial's submissions, it advised that in late February it had been approached by Xstrata. Centennial submitted that Xstrata had suggested the possibility of a joint bid for Austral Coal by Xstrata and Centennial.

64. Centennial further submitted that on 2 March 2005 (after the announcement of the Centennial takeover offer for Austral Coal), Mr Ivan Glasenberg (who holds senior positions in both Glencore and Xstrata) telephoned the CEO of Centennial and again raised the possibility of a joint bid with Centennial for Austral Coal. Centennial submitted that he also raised the possibility of a rival bid for Austral Coal. Centennial submitted that part of his discussions included the possibility of Centennial acquiring two coal assets of Xstrata in exchange for giving up Centennial's takeover bid for Austral Coal.

65. Centennial submitted that it assumed that Mr Glasenberg was acting on behalf of Xstrata rather than Glencore, however Glencore disputes that this was a reasonable assumption.

66. Centennial did not agree to Mr Glasenberg's proposals.

Glencore's acquisition of a strategic stake

Initial approach to CSFB - late February to early March

67. Glencore approached CSFB in relation to Austral Coal in late February or early March 2005. Glencore was a significant existing client of CSFB. A senior executive of Glencore (**Glencore Executive**) had an existing relationship with a senior executive of CSFB's Australian Equity Capital Markets (**ECM**) Group (**ECM Executive**) and approached the ECM Executive in the first instance. Glencore's principal contact in these initial stages was however with a broker (**ECM Broker**) who worked for the ECM Executive in CSFB's ECM Group.

68. At that time, Glencore advised CSFB that it was looking to acquire a 10% strategic stake in Austral Coal. An internal CSFB email of 7 March 2005 advises that CSFB ECM was "*looking to do an on-market acquisition of up to 10%*" in Austral Coal shares. Later CSFB internal emails confirmed that from the outset the proposal was to acquire up to 10%. For example, on Sunday 20 March 2005, a CSFB officer responsible for considering and clearing CSFB investment banking conflicts asked the ECM Executive and a senior executive in the investment banking division, copying various members of the CSFB team:

    "*Please advise the outcome of your discussions re Glencore's intentions in buying up 10 per cent of Austral Coal in the face of the current offer from another party. Previously, I was advised that that 10 per cent was a strategic stake without the knowledge of the current offer. We will have to be swift if an hostile conflict memo and clearance is necessary.*"

69. During this period, Glencore advised CSFB that it was considering making a takeover bid for Austral Coal. The Panel noted that an effect of accumulating the Combined Holdings of over 10% would be that Glencore would have, in effect, a blocking stake in relation to Centennial's bid.

Acquisition of initial stake – 7 March 2005 to 17 March 2005

70. In early March 2005, Glencore, through its Executive, instructed the ECM Broker to acquire Austral Coal shares on behalf of Glencore. On 7 March, the ECM Broker instructed a CSFB SEATS operator to acquire the shares for Glencore. The instruction was to buy 26,000,000 Austral shares (or approximately 10% of the issued shares) at market levels, but that before exceeding 13 million shares (approximately 5%), the SEATS Operator should first refer to the ECM Broker.

71. Between around 7 and 17 March 2005, CSFB acquired approximately 2.3% of Austral Coal shares for Glencore (through Fornax Investments Limited, a Glencore subsidiary incorporated in Bermuda). A further 2.6% was acquired on behalf of Glencore (again through Fornax) by another broker, Shaw Stockbroking (**Shaw**). Accordingly, by 17 March, Glencore had directly acquired 4.9% of the Austral Coal shares then on issue.

72. CSFB submitted that it was not aware that Glencore had acquired shares through other brokers during the relevant period. The Panel concluded, however, from emails between the parties and CSFB representatives at the time that CSFB was aware of Shaw's acquisitions on behalf of Glencore. In any event, on 20 March 2005, Glencore provided CSFB with Shaw's contract notes, which set out the prices and amounts of shares Shaw had acquired prior to that date (i.e. the 2.3% referred to above).

73. The email correspondence between Glencore and CSFB over this period indicated that CSFB was certainly aware that Glencore was considering a bid for Austral Coal as one of its options, and that CSFB was assisting Glencore in developing and implementing its strategy in relation to Austral Coal. For example:

    (a) CSFB gave regular reports to Glencore during the period of the acquisitions made by CSFB and Shaw on behalf of Glencore against Glencore's target of acquiring 10% of the shares;

    (b) CSFB and Glencore discussed the implications of the purchases under the minimum floor price rule in section 621(3) of the Act if Glencore were to bid for Austral Coal;

    (c) CSFB provided advice to Glencore on the possible acquisition by Glencore of Austral Coal convertible notes which were then on issue (**Convertible Notes**) as a means of Glencore acquiring a greater interest in Austral Coal without disclosure. CSFB and Glencore discussed the conversion of Convertible Notes and Glencore specifically referred to conversion after the lodgement of a Takeover Notice. While CSFB sought to acquire Convertible Notes for Glencore, it was not successful in acquiring any Convertible Notes, apparently because of the low liquidity of the Convertible Notes in the market;

    (d) as discussed below, from 10 March 2005, the parties commenced discussions in relation to the CSFB Swap. Glencore and CSFB discussed the disclosure implications in relation to the CSFB Swap; and

    (e) the Panel inferred from the emails that CSFB at this time also took account of whether Glencore's Combined Holding would have to be disclosed in a substantial holding notice, or in response to a tracing notice.

Initial instructions for CSFB Swap – 10 to 15 March 2005

74. From around 10 March 2005, Glencore commenced discussing the CSFB Swap with CSFB. The first evidence of the possibility of the CSFB Swap appears to be from a conversation between Mr Ivan Glasenberg of Glencore (who, as discussed above, had earlier contacted Centennial with a proposal that Centennial discontinue its bid in exchange for an asset deal) and an executive in CSFB's European investment banking division on 10 March 2005. The head of CSFB's Equity Derivatives group, based in Singapore (**Derivatives Head**), was appointed to oversee the execution of the CSFB Swap.

75. The Panel considered that Glencore intended the CSFB Swap to be put into place within a short period of time. The Glencore Executive emailed the ECM Client Broker on 15 March 2005 chasing him for the equity swap documentation. He said "*please can you send this to us asap as we want to put this in place straight away. Understand CSFB have done this many times before so not sure why it is taking so long with credit*".

76. On 15 March 2005, on the Derivatives Head's instructions, the ECM Client Broker provided a "*preliminary term sheet*" for the swap to the Glencore Executive, noting that the terms were still conditional upon CSFB's global credit approval.

77. The Derivatives Head sent instructions to his team on 15 March 2005. He noted that:

    "*We are looking at a strategic transaction with Glencore over an Australian underlying. Although I have offered 3 years it is likely to be less than a year. However, in strategic transactions I like the swap to have a maturity of longer than the takeover event so that I am not seen as renegotiating contacts in the midst of the takeover and to confirm that this is a long dated investment.*"

78. In that email, he set out the broad commercial terms for the CSFB Swap. He stated that the transaction could be executed immediately subject to various internal approvals. CSFB proceeded to conduct its normal credit risk checks and compliance procedures. Through these checks, CSFB determined that it already held approximately 0.25% of Austral Coal shares.

79. The Derivatives Head briefed a swap structurer to assist him in structuring the CSFB Swap. The Swap Structurer is a director of CSFB's Equity Derivatives group based in Singapore. He had primary conduct of the execution of CSFB Swap (reporting to the Derivatives Head on various occasions) and, with the ECM Client Broker, was the key contact point with the Glencore Executive. The Derivatives Head also appointed a swaps manager to manage the hedging of the swap.

Proposed crossing from Glencore to CSFB – 15 to 20 March 2005

80. Glencore and CSFB initially proposed at the time of entering into the CSFB Swap, that Glencore would cross the Austral Coal shares it held at that time (approximately 4.6%) directly to CSFB (**Proposed Crossing**) and that CSFB would use the crossed shares to hedge the CSFB Swap. The Glencore Executive and the Swap Structurer agreed on 18 March 2005 that the price of the Proposed Crossing would be the initial price of the CSFB Swap.

81. Glencore and CSFB also proposed that following entry into the swap and the crossing of the shares to CSFB, Glencore would recommence acquiring Austral Coal shares as principal following the Proposed Crossing, beyond a Combined Holding of 5% without disclosure to the market. This is set out in various emails between the Glencore Executive and the Swap Structurer between 15 and 20 March 2005 (usually copied to the Derivatives Head, the ECM Client Broker and others). For example, in an email to the ECM Client Broker and the ECM Executive on 16 March 2005, the Glencore Executive stated:

"When do you expect to get credit approval [for the CSFB Swap]? We are now at 4.6% and need this tomorrow so we can start approaching some institutions for big blocks".

82. For further example, the Derivatives Head noted on Friday 18 March 2005 *"the client wants to trade on Monday so please urgently follow up"*. On Sunday 20 March 2005, the Glencore Executive again asked *"When can the crossing be done?"*. Glencore proposed to continue acquiring Austral Coal shares without disclosure as soon as the Proposed Crossing had been executed.

83. The Panel also noted the following exchange on Sunday 20 March 2005:

[Glencore Executive] *"Please advise when we can continue buying shares, do we need to wait until the crossing tomorrow or can we start buying in our name already? … [We] need all these shares to be crossed to CSFB at the VWAP so that we can begin purchasing further shares in the name of Fornax without having to notify ASX and ASIC of a substantial shareholder".*

[Swap Structurer] *"I would suggest you wait until the crossing is done before purchasing any more shares that may trigger a disclosable event".*

84. Centennial submitted that this correspondence suggested Glencore and CSFB were intending CSFB to warehouse the shares on behalf of Glencore. The Panel did not find it necessary to draw any conclusion in response to Centennial's submission.

85. Glencore and CSFB also considered the Proposed Crossing from the perspective of Glencore's prospective bid for Austral Coal. In an email to the Derivatives Head, the ECM Client Broker, the Swap Structurer and the ECM Executive as late as Sunday 20 March 2005, the Glencore Executive asks *"Now that these shares are being crossed to you, is the price we bought any of these included in [the minimum bid price] provision or do we start afresh?"*.

86. In any event, by early on the morning of on 21 March 2005, CSFB had decided not to proceed with the Proposed Crossing. Instead, Glencore (through Fornax) retained its 4.9% holding, and CSFB began to acquire the Hedge Shares for the swap on market. On 21 March, CSFB bought 651,195 Austral shares which, if aggregated with Fornax's 4.9%, would have taken Glencore through the 5% threshold for a substantial holding notice on that date. In total, CSFB acquired 4.6% of Austral Coal as Hedge Shares under the swap during the period from 21 March to 30 March.

87. CSFB submitted that it had not proceeded with the crossing because:

(a) of taxation advice which raised a potential UK tax issue in relation to the Proposed Crossing;

(b) CSFB understood that the Proposed Crossing may not have been consistent with the ASX Business Rules (which preclude the use of special crossings in a takeover);

(c) the VWAP of Glencore's stock was not acceptable to CSFB;

(d) Austral Coal shares were relatively illiquid;

(e) CSFB believed that sufficient liquidity was entering the market for Austral Coal because of arbitrage activity of other traders seeking to capitalise on price differentials between Austral Coal and Centennial shares; and

(f) there was a risk of being front-run.

88. The Panel was more inclined to the view that a substantive reason was that by early on the morning of Monday 21 March, CSFB staff had come to the view that crossing the shares from Glencore to CSFB would be likely to be noticed by the market. For example, an email from the Derivatives Head to the ECM Client Broker and the ECM Executive on the evening of Saturday 19 March 2005: *"will the market notice if we cross the shares?"*. At 8.19 on the morning of 21 March 2005, the ECM Client Broker emailed the Swap Structurer, the ECM Executive and the Derivatives Head that the Proposed Crossing would be a *"red flag to the market"*. These emails seemed to be prior to discussions on the taxation advice which raised a potential UK tax issue in relation to the Proposed Crossing.

CSFB Swap size and request for Austral Coal to be put on restricted list

89. The Panel considered that the evidence was clear that the intention of CSFB was to conduct the CSFB Swap so that CSFB did not incur a reporting obligation. On that basis, to take into account shares in which CSFB may already have held an interest, CSFB determined that it was willing to offer a swap to Glencore of up to between 4.5% and 4.6% of Austral Coal's ordinary shares. The Panel notes that CSFB's credit and risk management department also had input into determining the size of swap which CSFB was prepared to offer Glencore.

90. The Panel inferred that the 4.6% limit was at least partially intended to ensure that CSFB's hedge shares would not be required to have been disclosed under section 671B. CSFB noted in submissions that the limit ensured that CSFB would not acquire a disclosable interest in Austral Coal (having regard to CSFB's 0.25% house position at that stage).

91. Consistent with CSFB's decision to limit the CSFB Swap to 4.6%, the Swap Structurer requested that Austral Coal be put on CSFB's "restricted list", such that CSFB traders were not permitted to acquire Austral Coal shares without approval. The evidence was not clear whether CSFB proceeded to put Austral Coal on its restricted list.

92. The Panel concluded from the evidence that CSFB was working with Glencore to acquire a stake that would not be disclosed to the market through substantial shareholding notices or tracing notices.

Commercial terms of CSFB Swap – effectively agreed on 21 March 2005

93. The initial terms of the CSFB Swap were set out in a term sheet signed on 20 March 2005 (**First Term Sheet**). Apparently following legal advice, an amended term sheet

was prepared and it was executed on 24 March 2005 (**Second Term Sheet**). Once CSFB had acquired sufficient Hedge Shares to match the number of Reference Shares under the CSFB Swap, the parties executed a binding confirmation (**CSFB Confirmation**) on around 6 April 2005. The First Term Sheet, Second Term Sheet and CSFB Confirmation are referred to below as the **CSFB Swap Documentation**.

94. The final CSFB Swap related to 12,100,000 Austral Coal shares (**Reference Shares**), representing an **Equity Notional Amount** of $15,864,310. The **Initial Price** for the CSFB Swap is $1.3111 (which closely equates to the volume weighted average price of the shares CSFB acquired to hedge its position, net of commissions, taxes and other charges). The **Final Price** under the CSFB Swap is the volume weighted average price of Austral Coal shares based on sales by CSFB of Austral Coal shares over 60 calendar days immediately preceding termination of the CSFB Swap (net of commissions, taxes and other charges).

95. The Termination Date for the CSFB Swap is 21 March 2008. However, the Panel noted email correspondence that indicated that the CSFB Swap could be terminated earlier by agreement between the parties. For example, the email from the Derivatives Head on 15 March 2005 (extracted above at paragraph 77) noted that termination "*is likely to be less than a year*". Another internal CSFB email dated 21 March 2005 noted that:

"*[T]here is a good chance the counterparty will unwind well before the maturity date, so we won't have to wear the credit exposure for the full tenor of the swap*"
CSFB submitted, however, that there was nothing unusual in this as any contract may be terminated by mutual agreement.

96. At termination of the CSFB Swap, Glencore is entitled to receive or pay the difference between the Final Price and the Initial Price (that is, the increase or decrease in the value of Austral Coal shares during the swap period). Glencore is also entitled to receive an amount equal to any dividends payable on the number of Reference Shares to which the CSFB Swap relates, net of taxes payable. For a discussion about the terms of the dividend payment, see paragraph 110(c).

CSFB's hedging decisions and operations – 21 to 30 March 2005

97. Shortly after the decision had been made not to proceed with the Proposed Crossing, the ECM Client Broker gave instructions to the effect that CSFB began acquiring hedge shares in relation to the CSFB Swap. By 10.32am on 21 March 2005, the ECM Client Broker instructed CSFB's SEATS operator to buy, on-market, 12.5 million Austral Coal shares (approximately 5% of the issued capital) at $1.33.

98. CSFB acquired Austral Coal shares to hedge its exposure to the CSFB Swap on all trading days between 21 and 30 March 2005[10] at prices between $1.29 and $1.33. The volume weighted average price of those hedge acquisitions was $1.309. As referred to above, at 30 March, CSFB's holding of Hedge Shares was 4.6%.

99. CSFB submitted that the hedge was established in accordance with CSFB's usual procedures, including the maintenance of a Chinese wall between the client broker,

[10] The Easter weekend was between 25 and 28 March 2005.

CSFB's hedge desk operator and the SEATS operator who purchased the Austral Coal shares used to form the hedge[11]. CSFB submitted that these Chinese walls negated or minimised any control that Glencore had in relation to the hedging decision and the hedge shares. CSFB also stated in submissions that it did not provide any information to Glencore about its hedge position. The evidence and other parties' submissions did not support CSFB's submissions in either regard.

Maintenance of Chinese walls

100. The primary evidence does not support CSFB's contention that the CSFB Swap was completed in accordance with CSFB's usual Chinese wall procedures. There was a series of emails from the Derivatives Head chastising members of the CSFB team for their inappropriate "*audit trail*" in reporting the swap hedging activity across the Chinese wall.

101. The Panel recognises that CSFB's normal procedures are intended to ensure that hedging activities are not disclosed across the Chinese wall. However, the correspondence between the SEATS Operator, the swaps hedger, the Swaps Structurer, and the ECM Client Broker was not in accordance with these procedures.

102. The SEATS Operator and the swaps hedger consistently reported directly to the ECM Client Broker the exact number of hedge shares they had acquired and at what prices. On at least one occasion, the ECM Client Broker appeared to be giving the instructions to the swaps hedger and the SEATS Operator directly. There was also evidence that the Swap Structurer instructed the ECM Client Broker to pass that information on to the Glencore Executive.

103. The Panel also noted that the SEATS Operator doing the acquisitions of Austral Coal shares for the CSFB Swap was the SEATS operator responsible for initially acquiring Austral Coal shares and seeking to acquire Convertible Notes on behalf of Glencore in early March. At that earlier stage, no Chinese wall was needed between the ECM Client Broker and the SEATS Operator.

Hedging reports to Glencore

104. Glencore advised in submissions to the Panel that it was informed periodically by CSFB of the amount of "swap exposure" CSFB was prepared to offer Glencore. Such exposure was based on the number of physical shares acquired by CSFB to hedge the CSFB Swap – CSFB's progressive acquisitions of Austral Coal shares had the effect of increasing the amount of swap exposure which CSFB was prepared to write for Glencore. Glencore also noted in submissions that it enquired as to the hedging activity of CSFB for the purposes of ascertaining the notional number of shares to disclose as underlying.

105. The primary evidence also supported the inference that the hedge position was reported back to Glencore on a number of occasions between 21 March and 30 March 2005. The Panel was provided with internal CSFB email correspondence from the Swap Structurer summarising the "order and fill" on 21 March 2005. This sets out

[11] By this stage, the swaps trader with responsibility for hedging the CSFB Swap, had been "brought over the wall" to the client side and the SEATS Operator was still on the bank side of the Chinese wall.

the shares bought by CSFB and the prices paid. the ECM Client Broker saw on a continued basis that the CSFB Swap was being fully hedged.

106. The 21 March 2005 email also contains instructions to the ECM Client Broker to convey the information to Glencore. Also on 21 March 2005, the Swap Structurer was instructed by the Derivatives Head to prepare a spreadsheet with "*fills and order limits per day to send to all approvers and the client*". Later email correspondence between Glencore and CSFB in early April 2005 confirmed CSFB's "*previous advice*" to Glencore (presumably oral) that the swap "*had been filled*".

107. Having regard to Glencore's submissions and the primary evidence, the Panel concluded that Glencore was updated on a number of occasions at least, on the amount, timing and price of CSFB's acquisitions of Austral Coal shares soon after they were completed.

Amendments to the CSFB Swap Documentation – 15 March to 6 April 2005

108. The Panel noted that there were a number of amendments to the CSFB Swap Documentation prior to execution of the CSFB Confirmation. Many of these amendments, some of which were made after CSFB had acquired the Hedge Shares, were made at the request of Glencore's Australian lawyers and appeared to be designed to ensure that the Documentation itself would not give rise to an inference that the swap gave Glencore a 'relevant interest' for the purposes of the substantial holding notice provisions of the Act. Centennial submitted that these amendments were merely "window dressing" a transaction that gave rise to control over the underlying hedge shares.

109. The Panel considered that these amendments to the CSFB Swap Documentation during the relevant period, whilst reflecting what the parties (particularly Glencore) wanted in the final CSFB Confirmation terms, did not reflect the substance of the actions of Glencore and CSFB. The material amendments follow below.

First Term Sheet – 20 March 2005

110. The first draft of the term sheet was sent to Glencore on 15 March 2005.

    (a) The Initial Price was to be calculated on the basis of CSFB's executions over a period of days to be determined, net of certain transaction costs. However, various emails between Glencore and CSFB indicate that the Initial Price for the CSFB Swap was in fact proposed to be the actual price for the Proposed Crossing, net of any brokerage and other charges.

    (b) The Final Price was to be volume weighted average closing price of Reference Shares over a 60 day period immediately preceding the termination date, calculated on the basis of CSFB's executions.

    (c) Under the dividend clause, CSFB was to pay to Glencore amounts equivalent to all cash dividends (net of applicable taxes and costs) received by CSFB in respect of N Reference Shares *held by it* during the time of the Transaction.

111. An English lawyer acting for Glencore provided certain amendments on 17 March 2005.

(a) Equity Notional Amount (being the total dollar value of the CSFB Swap) should be the amount spent by CSFB to acquire the shares.

(b) Final Price was amended so that it was not calculated on the basis of CSFB's executions during the period, but the closing price of shares in the market immediately preceding termination.

(c) A clause inserted to the effect that no physical settlement option arose under the CSFB Swap.

(d) Specific reference to clause 13.2 of the ISDA 2002 Definitions to the effect that Glencore did not acquire any control or voting rights in relation to any Hedge Shares acquired by CSFB.

(e) The dividends clause was amended so that dividends would be transferred to Glencore within 5 business days of being received (but still based on the number of shares held by CSFB).

112. CSFB accepted these amendments other than the Final Price, which it reinstated to be the volume weighted average closing price of Reference Shares over a 60 day period immediately preceding the termination date, calculated on the basis of CSFB's executions during that period.

113. The Initial Term Sheet was signed on 20 March 2005. The Glencore Executive noted in correspondence to the Swap Structurer that the Initial Term Sheet was signed "*on the understanding that the [Initial Price] will be adjusted to reflect the actual price of the crossing*".

Second Term Sheet – 24 March 2005

114. It appears that Glencore received Australian legal advice on the First Term Sheet shortly after it was executed. Glencore's Australian legal advisers suggested amendments to the definition of Initial Price on 23 March 2005 "*to make it clear that there is no obligation on CSFB to purchase one Reference Share in order to make the pricing formula*". While Glencore's lawyers changed the words of the agreement to reflect their legal advice as to the structure which would address allegations that Glencore intended, or knew, that CSFB would hedge the swap, the Panel considers that the amended words do not reflect the substance of the actions of Glencore and CSFB.

115. It was agreed that the Initial Price be amended as follows:

$$\frac{1.34(N-E) + PxE}{N}$$

where

N is the number of Reference Shares

E is the number of Reference Shares the subject of CSFB's executions during the period of up to 60 trading days (starting on 21 March 2005); and

P is the volume weighted average price of the CSFB executions referred to in the definition of E (net of outgoings) and excluding any executions at a price in excess of $1.37.

116. If CSFB fully hedged its position, N and E would be equal. In that case, the Initial Price would still be based on CSFB's executions (subject to a price cap of $1.37). To the extent that CSFB did not acquire any Austral Coal shares during the relevant period, the Initial Price would be $1.34 under the formula.

117. The dividend term in the Second Term Sheet was not amended. The term remained that CSFB would transfer dividends on Austral Coal shares it held to Glencore within 5 business days of those dividends being received.

118. The Second Term Sheet was executed on around 25 March 2005.

CSFB Confirmation – early April 2005

119. After CSFB had completed hedging its exposure to the CSFB Swap, the parties proceeded to discuss the terms of the CSFB Confirmation in early April 2005. CSFB and Glencore executed the CSFB Confirmation in this form on 4 and 6 April 2005, respectively.

120. Glencore's Australian legal advisers made two relevant amendments to the commercial terms expressed in the CSFB Confirmation, as discussed below.

121. The first amendment was to include a specific clause in relation to relevant interests, as follows:

> *"In relation to any Reference Shares held by or for, or otherwise controlled by, [CSFB] (whether or not as part of any hedge in relation to this Transaction), [Glencore] has no right or relevant interest in any of those Reference Shares or any power in relation to them, including, without limitation, any power to control, or right to be consulted concerning disposal or trading of those Reference Shares by [CSFB] or any decision by [CSFB] with respect to the exercise by [CSFB] of the right to vote attaching to any of those Reference Shares."*

122. The second material amendment to the CSFB Confirmation related to the dividend clause. Glencore's legal advisers commented by email to CSFB that *"the dividend provisions refer directly to a possible holding of Reference Shares by CSFB. This seems somewhat contrary to the acknowledgement on hedges and relevant interests"*. The dividend clause was thereby amended so that it did not refer to Reference Shares "held by" CSFB, as in the term sheets.

123. While the original dividend provision did appear to be contrary to the acknowledgements on hedges and relevant interests in the confirmation document, it appeared to the Panel in fact to be consistent with Glencore's understanding of the hedging and the basis on which Glencore entered into the CSFB Swap.

ABN AMRO Swap – 24 March to 4 April 2005

Glencore's approach to ABN AMRO – 24 March 2005

124. Glencore approached ABN AMRO in relation to a further swap on around 24 March 2005. While Glencore stated in its submissions that it had only approached ABN AMRO after CSFB had advised Glencore that it would not write a swap over greater than 5% of Austral Coal, the Panel was not provided with a copy of such advice.

125. Although it received various submissions on the issues of why both the Glencore Swaps were for less than 5% and why Glencore approached ABN AMRO (for

example: submissions from Glencore and the Banks that banks may wish to enter swaps over less than 5% of a listed entity to reduce their reporting and compliance obligations) the Panel received no conclusive evidence as to why Glencore approached the other Bank. The Panel noted that acquiring swaps from separate banks, with each swap over less than 5% of Austral Coal's shares, fitted Glencore's wish to keep its physical and derivative interests secret from the market at the relevant time, by keeping each individual transaction less than 5% of the voting power of Austral Coal and thus below the substantial holding notice requirements.

126. At this point, Glencore directly held 4.99% of the Austral Coal shares on issue. It also had economic interests through in a further 2.0% through the shares then held by CSFB to hedge the CSFB Swap.

127. An internal email from an ABN AMRO corporate finance director on 26 March 2005 recorded details of Glencore's approach. He stated that Glencore had advised that it:

(a) had bought just under 5% through various brokers, including CSFB;

(b) wished to enter into a short term equity swap arrangement for up to 5%;

(c) wished to potentially lift its shareholding to 19.9% in the short term;

(d) was considering, but had not made a decision whether or not to, make a bid for Austral Coal; and

(e) wished to "*stall the Centennial offer, with investors waiting for a higher offer from another party*".

Glencore noted in submissions that it also advised ABN AMRO that it had also entered into a swap with CSFB, but had not disclosed the size of the swap to ABN AMRO. The CSFB Swap was not noted in the ABN AMRO email of 26 March 2005.

128. In the 26 March email, the ABN AMRO corporate finance director noted that Glencore had received legal advice that Glencore would not need to make disclosure under the ABN AMRO Swap in a substantial holder notice. The author noted his understanding that "*not all lawyers hold this view*".

129. An ABN AMRO internal lawyer advised that Glencore would not acquire a relevant interest in the Hedge Shares provided any hedge position was entered and exited entirely at ABN AMRO's will. Presumably on this basis, ABN AMRO declined Glencore's offer to talk to Glencore's Australian lawyers in relation to this matter.

130. On 29 March 2005, ABN AMRO staff noted in an internal email the 5% holding which they were advised Glencore already held, and internally questioned whether there was anything they needed to consider in the documentation that might be different to ABN AMRO's normal swap documentation. ABN AMRO staff also noted the fact that Austral Coal was subject to a takeover by Centennial.

Commercial terms of ABN AMRO Swap – 1 April 2005

131. ABN AMRO provided Glencore with a draft of the confirmation documentation for the ABN AMRO Swap on 29 March 2005 (**Draft Confirmation**)[12]. The Draft

[12] In his communications with ABN AMRO, the Glencore Executive routinely refers to this Draft Confirmation as the "term sheet" for the ABN AMRO Swap.

Confirmation referred to 13,000,000 Austral Coal shares, suggesting the parties' intention that the ABN AMRO Swap would extend to this number of Austral Coal shares. As discussed below, the ABN AMRO Swap was not filled to this amount.

132. The final ABN AMRO Swap related to only 7,407,302 Austral Coal shares (**Reference Shares**), representing an **Equity Notional Amount** of $9,677,640.06. The **Initial Price** for the ABN AMRO Swap is $1.3065 (which approximately equates to the volume weighted average price of the shares ABN AMRO acquired to hedge its position, including commissions, taxes and other charges).

133. The **Final Price** under the ABN AMRO Swap is the volume weighted average price of Austral Coal shares over the 20 trading days immediately preceding termination of the ABN AMRO Swap prior to termination, or such other final price as agreed by the parties. The Panel noted (in comparison to the CSFB Swap) that the Final Price under the ABN AMRO Swap is not contractually determined by the price at which ABN AMRO sells any Austral Coal shares that it holds.

134. At termination of the ABN AMRO Swap, Glencore is entitled to receive, or pay, the difference between the Final Price and the Initial Price (that is, the increase, or decrease, in the value of Austral Coal shares during the swap period). Glencore is also entitled to receive amounts equal to any dividends payable on the number of Reference Shares to which the ABN AMRO Swap relates, net of taxes payable.

ABN AMRO's hedging decisions and operations – 31 March to 4 April

135. After the initial contact between the corporate finance director and Glencore, ABN AMRO communicated with Glencore through the equities products manager who was running the swap, although the corporate finance director was routinely copied in to emails between the parties.

136. ABN AMRO confirmed by email to Glencore on 30 March 2005 that:

"[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".

137. Between 31 March and 4 April 2005, ABN AMRO acquired 7,407,302 Austral Coal shares at prices between $1.27 and $1.32. The number of shares acquired during this period directly corresponded to the final number of Reference Shares under the ABN AMRO Swap. ABN AMRO's relevant interest in Austral Coal shares was, at that time, approximately 2.43%.

138. In accordance with the early ABN AMRO written confirmation, Glencore was informed daily by ABN AMRO of the amount of swap exposure ABN AMRO was prepared to offer Glencore. Such exposure was clearly based on the number of physical shares acquired by ABN AMRO to hedge the ABN AMRO Swap.

139. Email correspondence during the hedging period also suggests that Glencore was actively managing the terms of the ABN AMRO Swap. For example, an internal ABN AMRO email on 31 March 2005: *"Just spoke to [the Glencore Executive] – he has increased the price limit on his exposure from $1.30 to $1.33 – all other instructions remain the same".*

140. Following one report dated 1 April 2005 confirming that "*Today we have obtained for Glencore: 4,110,488 AUO swap exposure @ AUD 1.3146. We have now obtained total for Glencore: 5,821,133 AUO swap exposure @ AUD 1.3021.*", the Glencore Executive responded on 1 April 2005 that "*these confirmations are inconsistent with what we were expecting*" and noted that he had sent the email to Glencore's lawyers for review. The issue here for Glencore appeared to be that if ABN AMRO confirmed the agreed swap exposure in this way, as ABN AMRO acquired the Hedge Shares, there may be an argument raised later that Glencore had a right or power in respect of the Hedge Shares giving it a relevant interest in those shares. The Panel noted that Glencore should have been expecting updates from ABN AMRO following the email of 30 March 2005, referred to above.

141. Glencore's Australian lawyers wrote directly to ABN AMRO on 4 April 2005, apparently as a consequence of concerns as to material differences between the lawyers' intentions for the form of the documentation and the actual commercial discussions between ABN AMRO and Glencore. The email asserted:

    "*As Glencore, [my colleague] and I had understood the position, it was ABN AMRO's decision whether or not to hedge its position under any equity swap entered into the Glencore, and Glencore had no assumption that ABN AMRO would in fact be seeking to buy shares to so hedge its position, either immediately or at all. Further, the swap would in any event be cash settled (i.e., there would not be any physical settlement involving shares) and Glencore would not obtain any voting or ownership rights in respect of any shares should ABN AMRO in fact seek to hedge its position.*"

    While it may have been Glencore's lawyers' understanding as to how it advised Glencore that hedging under the swaps should be treated, the actual commercial discussions and agreement between ABN AMRO's equities products manager and Glencore appeared to contemplate that the swap would be progressively filled by ABN AMRO acquiring the Hedge Shares and reporting back to Glencore in this manner.

142. Glencore's lawyers asserted in that email that ABN AMRO "*had not in fact acquired any shares for Glencore but, rather you were merely stating by words to the effect just quoted that ABN AMRO had entered into an equity swap with Glencore in relation to the number of shares stated at the initial price stated and that the rules stated [above] still applied*". On the contrary, the Panel found that ABN AMRO was advising Glencore very clearly that it had acquired exactly the number of Austral Coal shares in order to give ABN AMRO hedging to fill Glencore's swap request to that number of shares.

143. Apparently following the correspondence between Glencore's lawyers and ABN AMRO, ABN AMRO ceased acquiring Hedge Shares. The ABN AMRO Swap was confirmed in relation to only those Hedge Shares acquired by ABN AMRO by that time (2.8%) and not the initially proposed swap in relation to 13,000,000 Austral Coal shares (5%).

Settling the ABN AMRO Confirmation

144. As noted above, ABN AMRO provided Glencore with draft swap documentation on 29 March 2005. Negotiation of the ABN AMRO Swap was conducted primarily between Glencore's Australian lawyers and the ABN AMRO equities product

manager. The parties did not execute or discuss term sheets and proceeded directly to confirmation (**ABN AMRO Confirmation**).

145. Glencore's lawyers requested one principal amendment to the ABN AMRO Confirmation. The amendment related to the calculation of the Initial Price under the ABN AMRO Swap. The email quoted above from Glencore's lawyers to ABN AMRO dated 4 April 2005 stated:

"ABN AMRO now seemed, as a matter of commercial practice, to be entering into swaps only if and to the extent it had acquired shares, and I suggested that a better arrangement was that the initial price should be stated by way of formula, which allowed the price to fluctuate, if and to the extent shares were acquired by ABN AMRO hedging, with the price of the shares so acquired. By arrangement with you, [my colleague] suggested two alternative formulae to you on Friday evening to permit this to happen.[13] *The advantage of this approach was that Glencore remained in the position that its swap arrangements with ABN AMRO did not depend on ABN AMRO acquiring shares, and Glencore would be very much less involved in any hedging decision/activity by ABN AMRO, and therefore any acquisition of shares by ABN AMRO."*

146. Despite this email, the formula was not used and the Initial Price was replaced by a flat dollar figure, which approximately equates to the volume weighted average price of the shares acquired by ABN AMRO during the hedging period. The flat dollar figure was used because the parties to the ABN AMRO Swap proceeded straight to confirmation stage and did not first prepare a term sheet.

CSFB notice of the ABN AMRO Swap – early April 2005

147. The Panel noted CSFB's submission that it was not advised of the ABN AMRO Swap. The Panel accepted this submission for the period that CSFB was actively acquiring Austral Coal shares to fill the CSFB Swap. However, Glencore submitted that it did advise CSFB of the ABN AMRO Swap once ABN AMRO had acquired its covering position in early April 2005.

Glencore disclosure on 5 and 6 April

148. On 4 April 2005, Glencore acquired further shares through Shaw, increasing its physical holding to 4.6% (after having its holding diluted by the issue of shares on conversion of Convertible Notes on 1 April 2005). The following day, Glencore acquired an additional physical holding of 1.8%, taking its direct holding to 6.4%.

149. Based on Glencore's direct holding of Austral Coal shares, Glencore was required to issue a substantial holder notice by 9.30 a.m. on 6 April 2005 and Glencore did so (**6 April Substantial Holder Notice**). The 6 April Substantial Holder Notice also noted Glencore's swap exposure in relation to 6.49% of the Austral Coal shares.[14]

150. On 5 April 2005, Austral Coal disclosed to Australian Stock Exchange Limited (**ASX**) an announcement it had received, which had been made by Glencore International (**Glencore Announcement**).

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[13] One of the formulae is set out at paragraph 115 above and was ultimately the basis on which the Final Price was calculated in the CSFB Confirmation.

[14] Austral Coal issued a small number of shares on conversion of the Convertible Notes on 8 April 2005. This issue of shares diluted Glencore's direct holding by less than 1%.

151. The Glencore Announcement disclosed (among other things) that:

    (a) Glencore had acquired approximately 5% of the ordinary shares of Austral Coal; and

    (b) Glencore, through a wholly-owned subsidiary, had entered into a number of cash settled equity swap agreements with well regarded investment banks relating to approximately 7.4% of the ordinary shares in Austral Coal.

152. The Glencore Announcement also disclosed that:

    "Glencore is currently considering its position in relation to Austral Coal and the takeover bid made for Austral Coal by Centennial Coal Company Limited. In this regard, Glencore is assessing a number of options. These options include, but are not limited to, the possibility of a cash takeover bid being made for Austral Coal by a party other than Centennial. [T]his announcement is not intended to be, and should not be read as, a proposal by Glencore or any of its related entities to make a takeover bid for Austral Coal."

153. Glencore advised in submissions that it attempted to release the Glencore Announcement to ASX on the evening of 4 April 2005, without success. The Glencore Announcement was released to some members of the market and was reported in the financial media on the following morning. On 5 April 2005, Glencore provided the Glencore Announcement to Austral Coal, which then released it to ASX on that day.

Glencore's substantial holding notices

154. On 6 April 2005, Glencore gave to ASX and Austral Coal an initial notice of substantial shareholder. The 6 April Substantial Holder Notice disclosed that:

    (a) certain subsidiaries of Glencore had relevant interests in 19,290,443 ordinary shares in Austral Coal, representing 6.42% of the voting power in Austral Coal; and

    (b) Glencore had entered into cash settled equity swap agreements with well regarded investment banks in respect of 6.49% of the issued ordinary share capital of Austral Coal.

155. On 19 April 2005, Glencore acquired approximately 3 million shares taking its direct holding to 7.42% of the increased number of Austral Coal shares on issue. Glencore's direct holding in Austral Coal has not since changed (other than by dilution as a result of the issue of shares on conversion of Convertible Notes).

156. On 19 April 2005, Glencore gave to ASX and Austral Coal a notice of change of interest of substantial shareholder (**19 April Substantial Holding Notice**). The 19 April Substantial Holding Notice disclosed that:

    (a) Glencore International and certain subsidiaries had relevant interests in 22,303,326 ordinary shares in Austral Coal, representing 7.42% of the voting power in Austral Coal; and

    (b) Glencore retained its previously announced cash settled equity swap agreements with investment banks referenced to a number of shares equal to 6.49% of the issued ordinary share capital of Austral Coal; and

(c) Glencore confirmed previous statements that it did not currently intend to accept Centennial's takeover offer for Austral Coal in respect of the ordinary shares held by a Glencore subsidiary.

DISCUSSION

Disclosure obligations and their purpose

157. Section 671B of the Act requires a person who acquires a 'substantial holding' in a listed company to notify ASX and the company of that fact and details of their interest within a specified period after they become aware of the interest (normally two business days, but by 9.30 am on the next trading day if there is a takeover bid for the company on foot). In summary, a person has a 'substantial holding' if the shares in the company in which they have a 'relevant interest', together with the shares in the company in which their 'associates' have a relevant interest, represent 5% or more of the voting shares in the company on issue.

Control

158. Under the Act, a person has a relevant interest in a share where they have power to exercise or control the exercise of the right to vote attached to the share, or where they have power to dispose of, or control the exercise of a power to dispose of, the share. In relation to the second category of relevant interest, the power can be positive (that is, power to force the disposal of the shares) or negative (that is, power to prevent a person from disposing of shares except in certain circumstances). The power does not have to be absolute, but in order to give rise to a relevant interest the person must have some *true or actual measure of control*.

159. The principal objective of the substantial holding provisions (and the reason why they relate only to voting securities[15]) is to disclose to the market the whereabouts of shares which might affect control.

160. It is summarised in the Eggleston Report as follows:

> *"in the case of companies whose shares are traded on stock exchanges, shareholders are entitled to know whether there are in existence substantial holdings of shares which might enable a single individual or corporation, or a small group, to control the destinies of the company and if such a situation does exist, to know who are the persons on whose exercise of voting power the future of the company may depend."*[16]

161. This policy coheres with the overall policy of Chapter 6, as set out in section 602,[17] which includes the objectives that:

(a) control over shares in companies is acquired in an efficient, competitive and informed market;[18] and

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[15] Paragraph 602(a) and sections 671B and 654C.

[16] Company Law Advisory Committee to the Standing Committee of Attorneys-General *Second Interim Report*, Canberra 1969

[17] Both the Panel and ASIC are directed to take into account the objectives in section 602 in exercising discretionary powers in relation to substantial holding matters: subsections 657A(3) and 673(2).

[18] *Village Roadshow Limited 01* [2004] ATP 4 at [51] and [75] – [78] and cases there cited.

(b) directors and shareholders in a company know the identity of a person who proposes to acquire a substantial interest in the company.[19]

Efficient market

162. An efficient market is one which uses information effectively to set prices. The information that the market needs to price shares includes information about supply of, and demand for, those shares (to which the distribution of control over disposal of shares is relevant) and information about the prices and other terms on which they are traded (to which the prescribed particulars of transactions in substantial holder notices including ownership and control information, are relevant), as well as information about the affairs of the issuer (to which the distribution of control over votes is relevant).

163. The substantial holding provisions require (and have always required) disclosure of the terms of acquisition and disposal of shares.[20] On occasion, disclosure of terms such as options will provide additional information about the distribution of control over votes. The routine disclosure of price, even for purchases and sales in the ordinary course of market trading, however, goes beyond what is necessary to disclose the distribution of voting power. It amounts to disclosure of the prices being paid to accumulate and disperse influential blocks of shares, over and above the ordinary reporting of market trades, and the disclosure of the identity of the persons making such acquisitions.

164. The NCSC described the substantial shareholding provisions of the *Companies Act 1981 and Codes* in the following terms:

"*The disclosure required by the new law is essential to an informed market. The objects of the new provisions are to ensure that shareholders and directors of a listed company are provided with sufficient information to enable them*

(a) to identify the controllers of substantial blocks of voting shares and their associates;

(b) to know the details of any special benefits a person may have received for disposing of his interest;

(c) *to know the existence of any agreements or special conditions or restrictions which may affect the way in which shares are voted.*"[21]

165. Obviously, a substantial holder has a contrary interest in being able to acquire or dispose of shares over time without causing anticipatory price movements when other investors use its substantial holding notices to second-guess their trading intentions, or their assessments of the issuer company. The substantial holding provisions strike a balance between the legislative policy and this interest of

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[19] Paragraph 602(b) and *National Can Industries Limited* [2003] ATP 35 at [62(a)].

[20] Currently subsections 671B(3) (particulars) and (4) (copies or notes of agreements) and forms 602 - 604. The Panel in *Grand Hotel Group* [2003] ATP 34 at [33] to [45] looked at these provisions and commented at [42] that they set a high standard, there are no confidentiality exceptions and "Market participants should not have to speculate on the nature and extent of the agreement, arrangement or understanding between persons who state that they are associated". See also *Village Roadshow Limited 01* [2004] ATP 4 at [78].

[21] Policy Statement 110 at [2]

substantial holders by requiring historical reporting only, by requiring reports only of movements through the 5% threshold and 1% increments above that threshold.

166. The Panel and the courts have consistently treated the substantial holding notice provisions of the Act as being very important elements of the regulation of control over companies in Australia and the efficiency of markets in Australia. Similarly, they have treated breaches of the substantial holding notice provisions as serious offences with, at times, draconian penalties.

Disclosure of cash settled equity swaps in Australian takeovers

167. The question of whether a person with a combined physical and derivative position under cash settled equity swaps in excess of 5% should disclose that position to the market, particularly in the context of a takeover for the company, is not a new one in Australia.

168. The issue came before the Panel (as it was previously constituted) in 1997 in relation to the acquisition by Brierley Investments Limited of shares in Fairfax Limited. There the Panel declined to make a declaration of unacceptable circumstances in the circumstances of that particular matter, without deciding whether the relevant swaps gave rise to a relevant interest in the hedge shares. In its decision, the Panel then said market knowledge of swap agreements could have an impact on an efficient, competitive and informed market. It went on to say: "*Desirably, in a fully informed market, swap agreements should be disclosed.*"

169. The Panel noted that in the Fairfax case the issue before the Panel was that of the unwinding of cash settled swaps through the market where the taker of the swap acquired an essentially identical amount of target company shares as the writer disposed of on the day that the swap was unwound. Because of the delay in lodging the application, the Panel did not consider that it could "look back" to the entry into the derivative arrangements.

170. The issue of cash settled equity swaps resurfaced this year in relation to Cleveland Cliffs Inc bid for Portman Ltd and in relation to BHP Billiton Ltd's bid for WMC Resources Limited. At the time, there was considerable media commentary on whether cash settled equity swaps were being used to circumvent the spirit of the substantial holding notification provisions.

171. Therefore, the Panel believed that Glencore and its advisers would have been aware of the market concerns in relation to this issue at the time Glencore entered into the CSFB Swap and the ABN AMRO Swap.

Unacceptable circumstances

172. The Panel found that the acquisition by Glencore of its initial holding, followed by the entry into the Glencore Swaps and the hedging transactions by the Banks, without disclosure to the market until 5 April 2005, gave rise to unacceptable circumstances in relation to Austral Coal.

173. By its acquisition of shares and the Glencore Swaps prior to the announcement on 5 April 2005, Glencore had acquired 6.4% of the voting power in Austral Coal and had effectively ensured that the Banks would acquire and hold a further 7.4% (shortly after diluted to 6.49%) until such time as Glencore chose.

174. The Panel found that the Banks had a strong economic incentive to acquire sufficient Hedge Shares to match their exposure under the Glencore Swaps and to retain them for the life of the Glencore Swaps.[22] This meant that the Hedge Shares were not available to be dealt with during the life of the Glencore Swaps.

175. Accordingly, Glencore's entry into the Glencore Swaps, together with its direct acquisitions, meant that Glencore had acquired either actual or de facto control over a "strategic stake" of up to 12.3% without disclosing it to the market, Austral Coal, Austral Coal shareholders, Centennial or ASIC.

176. The Combined Holding could be used in a number of ways to Glencore's advantage. The Combined Holding could:

    (a) provide a basis for launching a takeover bid for Austral Coal (Glencore argued that the Hedge Shares were not immediately available to it. However the Panel deals with that issue from paragraph 188 below in relation to the Panel's finding of the extent of Glencore's control over the Hedge Shares);

    (b) provide price insurance against an increase in the Austral Coal share price while Glencore considered whether or not to make a takeover bid for Austral Coal;

    (c) effectively block compulsory acquisition by Centennial under its takeover bid, providing Glencore with a powerful negotiating tool if it sought to profit from the stake or negotiate a deal with Centennial (either during the bid or after it closed) over:

        (i) Centennial's coal assets;

        (ii) the marketing of Centennial's coal production; or

        (iii) supply contracts with Centennial in relation to Centennial's coal production; or

    (d) take the momentum out of Centennial's takeover bid for Austral Coal, allowing Centennial further negotiating power with Centennial (which is what Glencore advised its ABN AMRO corporate finance banker it was intending to do).

177. The Panel found that all of the matters set out in paragraphs 175 and 176 had an effect on control or potential control of Austral Coal under section 657A(2)(a)(i). The undisclosed Combined Holding had an effect on the number of shares available to be accepted into Centennial's bid, the speed at which control could pass to Centennial, whether majority control would have even passed to Centennial, as well as Centennial's ability to proceed to compulsory acquisition.

178. The undisclosed Combined Holding also had an effect on the acquisition or proposed acquisition of a substantial interest in Austral for the purposes of section 657A(2)(a)(ii). The Panel found that the Combined Holding acted as a strategic stake which was available for Glencore to provide a basis for launching a takeover bid for Austral Coal or to affect the prospect of Centennial's takeover bid, and therefore had an effect on an acquisition or proposed acquisition (by either Glencore or Centennial) of a substantial interest in Austral Coal.

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[22] The Panel's consideration of the Banks' incentive is set out in more detail from paragraph 188 below.

179. In considering whether unacceptable circumstances existed, the Panel had regard to the purposes of Chapter 6 as set out in section 602. The Panel found that the non-disclosure of the Combined Holding meant that the market for acquisition of control over Austral shares was not efficient, competitive and informed.

180. Disclosure by Glencore of the Combined Holding on 22 March 2005 would have shown the market for control over Austral Coal, and Austral Coal shares, the pace of Glencore's acquisition (through both CSFB and Shaw). Subsequent disclosures as the Combined Holding increased would have shown that Glencore's direct holding, together with the existence of the Glencore Swaps, could act as a blocking stake in terms of compulsory acquisition by Centennial in its bid. The Panel also considered that disclosure would have inclined the market more towards the belief that Glencore was considering making a rival takeover bid, for cash. These matters were clearly material to the market for control over Austral Coal, and Austral Coal shares in the context of Austral Coal shareholders deciding whether to hold their shares, accept Centennial's bid or sell on-market or other persons considering acquiring Austral Coal shares.

181. The legislature requires that a strategic or blocking stake in voting shares, in a takeover situation, must be disclosed the day after a person acquires a relevant interest in more than 5% of the voting shares of a company and then each time that the person increases its relevant interest by 1% or more. The Panel found that the materiality thresholds under the substantial holding provisions were appropriate tests to apply to the Combined Holdings in the circumstances.

182. Accordingly, the Panel found that the market was not efficient, competitive and informed from 9.30am on the day after the Combined Holdings exceeded 5% of the Austral Coal shares and each day that the Combined Holding increased by 1% or more until the commencement of trading on 5 April 2005.

183. If Glencore had acquired its interests in Austral Coal solely by acquiring shares, or had treated its acquisitions of swap exposure as acquisitions of shares, it would have been required to lodge a substantial holding notice on 22 March. On the basis of Glencore only making share acquisitions, or treating the swap exposure as its share acquisitions, Glencore would have been required to make additional substantial holding notices on most trading days between 22 March and 5 April 2005.

184. The Panel considered the evidence to be clear that Glencore had a plan and an intention to accumulate its physical holdings and the Glencore Swaps without disclosing its interests above 5% to the market, and that Glencore worked diligently to avoid this disclosure and, was assisted in pursuing its plan by the Banks, each of whom had knowledge of Glencore's plan.

185. For the period from 9.30am on 22 March 2005 to before the commencement of trading on 5 April 2005 (**Non Disclosure Period**), the market traded, Centennial declared its bid unconditional and many Austral Coal shareholders accepted the Centennial bid, all in ignorance of information which they would expect, and the Panel expected, would be material and would have expected to have been disclosed on the morning of 22 March 2005 and subsequently throughout the Non Disclosure Period.

186. The Combined Holding clearly affected the control or potential control of, and acquisition or potential acquisition of a substantial interest in, Austral Coal. Accordingly, having regard to the policy of Chapter 6 including that the acquisition of control over Austral Coal shares takes place in an efficient, competitive and informed market, the Panel found that unacceptable circumstances existed in relation to the non disclosure of the Combined Holdings during the Non Disclosure Period.

187. The Panel considered that the unacceptable circumstances continued to exist after Glencore's Announcement. The Panel found that there were a number of essential terms of the Glencore Swaps that were not set out in Glencore's Announcement and which were necessary to ensure an efficient, competitive and informed market. These essential terms were not disclosed to the market until the Panel 's media release dated 1 July 2005 in these Proceedings. Accordingly, the Panel found that unacceptable circumstances continued to exist until at least 1 July 2005.

The extent of Glencore's control over the Hedge Shares

188. Centennial submitted that Glencore had control over the Hedge Shares because, by virtue of the Glencore Swaps, the Banks were in reality compelled to hold the Hedge Shares for the life of the Glencore Swaps to hedge their exposure. Centennial submitted that this level of control made the existence of the Glencore Swaps material to the market.

189. The Panel considered that, in the circumstances of these Proceedings, the Banks had a strong economic incentive to acquire sufficient Hedge Shares to match their exposure under the Glencore Swaps and to retain them for the life of the Glencore Swaps.

190. The Panel did not consider it necessary to determine whether or not the economic incentive was of a nature which would give Glencore a relevant interest in the Hedge Shares. However, having regard to the purposes of the substantial holder notification provisions and for the reasons set out below, the Panel considered that this economic incentive was strong enough to give Glencore a real degree of effective control, such that disclosure of the Glencore Swaps was required in order to ensure an efficient competitive and informed market for control of shares in Austral Coal. Entry into the Glencore Swaps was also information which the market would have expected Glencore to have disclosed, in the context of Combined Holdings in excess of 5%.

191. On the question of the incentive for the Banks to acquire Austral Coal shares as a hedge for the Glencore Swaps, ad the consequent effect on Glencore's control over the Hedge Shares, the Panel noted in particular the following:

    (a) Austral Coal Shares provide a perfect hedge for the Glencore Swaps;

    (b) the Glencore Swaps, in total, related to 7.4%[23] of the shares in Austral Coal, which is greater than a substantial holding, and more than twice the size of a substantial holding when added to Glencore's direct holdings in Austral Coal on 5 April 2005;

[23] 7.4% on an undiluted basis when they were entered into, but 6.49% on a diluted basis.

(c) there were no exchange traded derivatives available to hedge swap exposure over Austral Coal shares exactly;

(d) Austral Coal was under a takeover bid at the time, therefore other indices, securities or baskets of securities were unlikely to provide effective hedging of the Glencore Swaps;

Actions of the parties

(e) each Bank purchased the same number of Austral Coal shares to which its Glencore Swap related prior to increasing the size of the swap exposure it agreed to offer under the Glencore Swaps, and continued to hold those shares while the Glencore Swaps were in place[24];

(f) it was apparent from the facts set out in the Factual Background that the Banks only increased the size of the swap exposure they agreed to offer under the Glencore Swaps when they had acquired the Hedge Shares for the purposes of hedging their exposure under the Glencore Swap[25], and at the prices they paid for the Hedge Shares, an inference being that whatever necessity gave rise to such acquisitions would continue to apply throughout the life of the Glencore Swap;

Statements in submissions

(g) Glencore stated in its submissions that it considered it likely that both CSFB and ABN would hedge their exposure under the Glencore Swaps (although it stated it considered that there were alternatives to Austral Coal shares);

(h) CSFB stated that its current view was that the Hedge Shares provided the most appropriate method of protecting its position in relation to the CSFB Swap. ABN stated that "*it is fair to say that it is currently holding its Hedge Shares only because of the swap with Glencore*";

(i) CSFB stated in its submissions that it "*was not contractually required to hedge the Swap but elected to open a physical hedge because it did not wish to carry any risk on the Swap, **particularly in a takeover environment which can engender significant uncertainty and volatility in the price of the reference shares***" (emphasis added). It also suggested that it was *likely* that it would acquire the Hedge Shares;

(j) the solicitors for Glencore emailed ABN AMRO on 4 April 2005 acknowledging that "*ABN AMRO now seemed, as a matter of commercial practice, to be entering into swaps only to the extent that it had acquired [Austral Coal] shares*" to hedge the increased exposure.

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[24] Indeed this was part of Glencore's lawyers' complaint to ABN AMRO on 4 June, that ABN AMRO's confirmations seemed to state that ABN AMRO was refusing to increase Glencore's swap exposure until and unless ABN AMRO had previously increased its Hedge Shares coverage by a similar amount. Glencore's lawyers complained that this was inconsistent with the wording it wished to put into the document.

[25] See, for example, paragraphs 104 and 138 above.

(k) in an internal email between ABN AMRO staff when the swap arrangement was first being considered, it was noted that the "*S=O exposure is mitigated by the fact that [ABN AMRO] will hold the physical as a 100% market risk hedge on AUO.*";

(l) ABN AMRO's stated in its submissions that "*it is fair to say it will not usually have an imperative to retain the Hedge Shares when the Swaps are terminated*" . The Panel considered that this supported the inference that such an imperative existed prior to the termination of the ABN AMRO Swap;

Necessity of Banks to hold Hedge Shares

(m) when addressing the unfair prejudice which they said would be caused by the orders sought by Centennial, both Banks complained that an order requiring divesture of their Hedge Shares would be prejudicial to them, among other reasons, because it would leave them unable to hedge their risk under the Glencore Swaps. This suggested to the Panel that they in fact regarded holding the Hedge Shares as necessary, or at least highly preferable to other alternatives;

(n) a term of the Glencore Swaps gave the Banks a right to terminate in the event of a "Hedging Disruption" which is defined as essentially where the Bank is unable to establish its hedge. The hedging of exposure was apparently sufficiently important to warrant a termination right;

Other

(o) Centennial's submissions observed that a swap in relation to a material percentage of a company will "*almost invariably*" be hedged by acquiring physical shares.;

Advancing Glencore's objective

(p) the evidence before the Panel is that both CSFB and ABN AMRO knew the purpose of the Glencore Swaps was to accumulate a Combined Holding of more than 5% in Austral Coal without disclosure to the market. Once they had agreed to provide their services for this purpose, the Panel considers they would have had significant commercial pressures to deliver those services within the terms agreed;

(q) the relationship which then existed between Glencore and the Banks (discussed below under the Association section) also leads the Panel to believe that Glencore had a real degree of negative control over the Hedge Shares held by the Banks and was a basis for Glencore to disclose the Combined Holding to the market.

Arguments against economic imperative

192. The following factors were argued against there being an economic imperative for the Banks to acquire Hedge Shares, or continue to hold, the Hedge Shares for the life of the Glencore Swap:

(a) Glencore had no legal right to require the Banks to acquire or dispose of, or not dispose of, the Hedge Shares and the Banks were free to do so at their own will.

(b) There was claimed to be no understanding or arrangement between the parties as to disposal of the Hedge Shares.

(c) The Swap confirmations included a fixed initial price. In the case of CSFB, this price was based on a formula in the Term Sheet which was drafted to work independently of any actual acquisition of Austral Coal shares by CSFB. The formula was drafted in this way in an apparent attempt to avoid an inference that CSFB was expected, or had agreed, to acquire Austral Coal shares. However, if CSFB purchased the full amount of shares necessary to provide a 100% hedge (as it in fact did), then the reference price became simply the price actually paid by CSFB for those shares (subject to a cap): see paragraph 115 of Factual Background).

(d) Each of Glencore and CSFB obtained legal advice that no relevant interest arose in these circumstances and Glencore submitted that "*traditional legal views*" were that there was no relevant interest (although the ABN AMRO corporate finance director stated in the email of 16 March 2005 that he was not sure all lawyers take this view).

(e) CSFB stated that it is a securities trader and may decide to dispose, or not dispose, of the Hedge Shares in its discretion based on its view of the value of those shares.

(f) CSFB stated that the likelihood that it would acquire the Hedge Shares did not amount to an *imperative*.

(g) Both Banks maintained that it was possible that they would not hedge their exposure under the Swap at all or hedge it in some way other than acquiring the Hedge Shares – for example, long-dated exchange traded options in other sector stocks and back-to-back Austral Coal swaps. ABN AMRO submitted that it does not hedge its position with physical stock in all cases and it may hedge using futures, options or other derivatives (although it did not identify specific securities and how they may effectively hedge exposure or give any evidence as to how often, in a relative sense, it uses hedges other than physical shares and back to back swaps). ABN AMRO also pointed out that if another client wanted to take an off-setting short position, this alone may provide a hedge.

193. Most of the arguments put forward by Glencore and the Banks as to why the Banks were not compelled to hedge with physical shares (notwithstanding that that was how they had thought fit to hedge in the present case, and refused to increase the size of the swap exposure they agreed to offer until they had hedged 100% with Austral Coal shares) centred around the Banks being "able" or being "free" to hedge in other ways or not hedge at all.

194. The Panel did not disagree that the Banks had the *legal* discretion to hedge how they liked; and there is no evidence that they limited this freedom by contract with Glencore. However, to the extent that the Banks were *legally* free to do this, that did not negate the possibility of the Banks being effectively compelled to acquire and retain the Hedge Shares by their acceptance of the imposition of an economic incentive in agreeing to enter into the Glencore Swaps.

195. To the extent that Glencore and the Banks were suggesting that the Banks were *economically* free to hedge in any way, they needed to show:

    (a) how other means of hedging provided an alternative that was as desirable, or nearly as desirable, in an economic sense as hedging using physical Austral Coal shares or a back-to-back Austral Coal swap or other derivative; or

    (b) that it was both commercially prudent, and feasible under their internal risk management rules, for them to enter the Glencore Swaps unhedged.

    They did not show either of these.

196. Back-to-back swaps were the only other securities or instruments suggested by any party which would provide a perfect hedge to the exposure under the swaps. On the basis of the evidence produced that CSFB and ABN AMRO had refused to enter into the Glencore Swaps without first fully hedging the swaps, it is reasonable to infer that another bank would not enter into a back-to-back swap with either CSFB or ABN AMRO until that other bank had acquired physical shares which it would retain for the life of the second swap. Therefore, to the extent that Glencore had a form of negative control over the disposal of any shares held by the first Bank, it would also have such control over any shares held by the second bank.

197. As for entering into a back-to-back swap with a person prepared to take an exactly matched short position, neither of the Banks provided evidence that a market for such instruments existed in the present case or that there were such opportunities available or likely to become available to the Banks. This suggestion is unconvincing to the Panel because it would leave the Bank with an unhedged exposure to the other swap if either of the counterparties terminated their swap early. While the Panel understands that large banks may include such positions as elements of their hedging factors in large investment books for liquid securities, and such balancing short positions are discussed in theoretical texts on derivatives and hedging, the Panel does not understand that an opposing short swap with a separate counterparty would be at all realistic for the size and nature of the Glencore Swaps proposed to both CSFB and ABN AMRO.

198. The Banks suggested two different securities which might be possible ways which the Banks might have hedged their exposures under the Glencore Swaps: long-dated exchange traded options (**ETOs**) and Austral Coal convertible notes. However, there were no securities or derivatives exchanges which traded ETOs over Austral Coal shares, and ETOs over other sector stocks would not have provided a sufficiently accurate hedge, so exchange traded derivatives were not viable alternatives for the Banks to use to hedge the Glencore Swaps.

199. Similarly, the Austral Coal convertible notes were not appropriate hedging instruments, in part because of the much smaller number of Convertible Notes on issue compared to Austral Coal shares, in part because the traded supply of Convertible Notes was much less liquid than Austral Coal shares, and finally, the Convertible Notes were open to be redeemed for cash by Austral Coal as a result of the takeover which would have negated any hedging value. In any event, the Banks did not even suggest why they would choose any such securities as an alternative to hedging using Austral Coal shares.

200. Similarly it would have been commercially unattractive to the Banks to hedge their exposure to the Glencore Swaps by using a different stock in a similar sector, an index or a basket of similar securities. At the time that the Banks were discussing the Swaps with Glencore, they were aware that Austral Coal shares were subject to Centennial's takeover offer, and a possible bid by Glencore, and would therefore be subject to price movements which were specific to Austral Coal and were unlikely to be mirrored in other stocks.

201. To the extent the Banks were suggesting that they were under no compelling incentive to hedge at all, they needed to demonstrate to the Panel that the Banks are generally prepared to write unhedged swaps in this sort of takeover situation. Their unwillingness to write unhedged swaps in the present case and general market practice in regard to swaps left the Panel unconvinced that either Glencore or the Banks had ever considered that this could have been a viable alternative.

202. Given the evidence before the Panel, which included a letter submitted by Centennial from its adviser, Macquarie Bank, setting out Macquarie's view that a bank transacting a swap would "*almost invariably*" hedge its exposure using physical shares, the Panel considered that there was very likely a very strong incentive for the Banks to physically hedge their exposure under the Glencore Swaps by acquiring Austral Coal shares. If Glencore or the Banks wished to rebut this they needed to do more than show theoretical alternative hedging *possibilities*; they needed show that those alternative hedging possibilities were in a practical sense available to the Banks in relation to 7.4% of Austral Coal at March/April 2005 and were sufficiently attractive to a bank to negate any overriding incentive to hedge using Hedge Shares instead.

203. The Banks did not demonstrate this, indeed their submissions in relation to possible Panel orders positively undermined such a proposition. The submissions before the Panel supported the inference that there was at least a strong economic incentive for the Banks to hedge their exposure under a swap by acquiring physical Austral Coal shares or back-to-back Austral Coal swaps, and to maintain that hedge, and that Glencore was highly likely to have known this when it was considering its course of action.

204. ABN AMRO submitted that it is not at all unusual for a bank to hold, as principal, around 2.4% of a listed company's shares in the circumstances existing at the time the Glencore Swaps was entered into. The Panel accepts that many large investment banks may well take significant proprietary positions in stocks at different times. However, the circumstances of Austral Coal at the time of the Glencore Swaps make such general statements not particularly relevant to the hedging of the Glencore Swaps. Further, such general statements are not relevant given the clear understanding of Glencore from each bank that they would actively hedge the Glencore Swaps with Austral Coal shares. Finally, ABN AMRO's submission related to a bank holding a long position in a stock, which is materially less relevant to a bank holding a short position, such as an unhedged swap.

205. Regardless of the legal effect of the signed documentation, the reality of the transactions between Glencore and the Banks and the market factors influencing the price of Austral Coal shares at the time was that, unless and until Glencore released

the Banks from their obligations, their internal hedging policies meant that the Banks would almost certainly hold the Hedge Shares in order to avoid the risk of making a loss on those transactions. Moreover, there is every likelihood that Glencore knew that the Banks were in this position; there did not need to be any warehousing arrangement or agreement between them to procure this outcome.

206. The Panel reached the view that the particular arrangements entered into between Glencore and the Banks, when coupled with the circumstances surrounding Austral Coal at the time, made it almost inevitable that the Banks would hedge their exposure by acquiring the Hedge Shares and retaining them for the life of the Swaps, and that this level of practical control was sufficient to be material to the market for control of Austral Coal shares, in the context of a Combined Holding in excess of 5%. The Panel also concluded that Glencore knew and intended that this level of practical control would occur.

When did the control arise?

207. Glencore and the Banks submitted that even if the Swaps caused Glencore to acquire control of the Hedge Shares, that could not have occurred prior to the Swaps becoming binding and that the Swaps did not become binding until the relevant "swap confirmations" were executed on or around 5 April 2005.

208. In the Panel's view, the relevant degree of control arose at the time in principle agreement was reached with the Banks and the Banks commenced purchasing the Hedge Shares (21 March 2005), regardless (in the case of CSFB) that the term sheet which had been signed stated that the arrangements were non-binding until such time as a confirmation was signed. The CSFB First Term Sheet recorded an essentially complete agreement which the parties had negotiated as the basis of their subsequent formal confirmation, and which Glencore signed at CSFB's request (providing notarial evidence of authority to sign). CSFB relied on the First Term Sheet in outlaying $15.8 million in buying Austral Coal shares to hedge the swap position. Glencore also committed funds on the basis of the executed First Term Sheet, it provided $5.3 million as collateral against CSFB's buying of the Hedge Shares for the Glencore Swaps as of the date of the executed First Term Sheet.

209. The Panel also noted market practice of counter parties acquiring hedge shares on the basis of in principle agreement with formal swap confirmations at the end when the hedge shares are acquired. The CSFB Confirmation is consistent with this interpretation:

"The purpose of this letter agreement is to confirm the terms and conditions of transaction entered into between CSFBi and Counterparty on the Trade Date ..."

210. The Trade Date in the CSFB Confirmation is 21 March 2005.

211. These factors clearly indicated to the Panel that the CSFB Swap was entered into on or prior to the Trade Date (being 21 March 2005) and not when the CSFB Confirmation was signed.

212. The Panel also considered ABN AMRO's confirmation by email to Glencore on 30 March 2005, set out below, to be highly significant in assessing when the commercial agreement had become firm. ABN AMRO said on 30 March:

"[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".

213. The Panel also noted an email from the Glencore Executive to ABN AMRO on 30 March 2005 requesting action to be taken so that the parties could "*implement the swap arrangement from tomorrow morning*".

Other factors relevant to unacceptable circumstances

Effect of "non-disclosure"

214. During the period from the commencement of trading on 22 March 2005 to the time of the Glencore Announcement on the evening of 4 April 2005, Centennial received acceptances relating to 24.74% of Austral Coal shares. During the same period there were 35,510,614 Austral shares traded, which is approximately 13.4% of the shares on issue at the time, more than half of which were bought by Glencore and the Banks under the Glencore Swaps. The aggregate of Glencore's holdings and the banks' hedge shares increased from 5% to 11%, though it was diluted slightly by the issue on 1 April and further increased by Glencore's buying on 5 April 2005. The price of Austral Coal shares dropped slightly over the period. The Panel notes that the price of Austral Coal shares rose 5% on 5 April 2005, the day that Austral Coal published Glencore's announcement on ASX.

215. The Panel was unable to say how Centennial would have responded to any disclosures that Glencore might have made from 22 March 2005 onwards. In the event, Centennial declared its bid unconditional on 23 March 2005, when it had a 9.6% strategic stake and no acceptances. The bid was open for nearly another month at that time, and on 23 March 2005 Centennial could have delayed a decision whether to extend it or declare it unconditional for three weeks. Had Glencore published a notice disclosing that it had acquired a 5.1% parcel, Centennial may have chosen to maintain control over its exposure by retaining the defeating conditions of the bid. It may, however, have sought to ensure that it was able to retain shares for which it received acceptances, by declaring its bid unconditional.

216. The Panel was also unable to say what effect such notices would have had on the market for shares in Austral Coal. During the Non Disclosure Period, only one bid had been made for Austral Coal, which was recommended, but for which relatively few acceptances had been received as yet. The bid would be open for another four weeks and was still subject to defeating conditions. Austral Coal was known to have cash flow problems and to have solicited takeover or other offers to resolve its cash problems. Speculation about Glencore's intervention is likely to have led to a rise in the price of Austral Coal shares, by inducing some shareholders to delay accepting the bid or selling on market, while Glencore, Centennial or both made further moves.

217. On the other hand, the risk that Glencore's intervention would delay the Centennial bid going unconditional and consideration being provided may have induced some shareholders to sell their shares on market, or lead them to discount the prospects of Centennial proceeding with its then conditional bid, tending to depress the price of

Austral Coal shares. Centennial's response would have been a factor which shareholders took into account.

218. Centennial submitted that, like the Panel, it could not predict what would have happened if Glencore had made its first announcement on 22 March, instead of 5 April. Centennial said that it **may** not have declared its offer unconditional on 23 March had it known of Glencore's position on the Austral Coal share register. It submitted that it **may** not have waived the 90% minimum acceptance condition on its bid. Centennial concluded in its submissions that it is, in a sense, not worth speculating what Centennial may or may not have done (and that it is very difficult to prove one way or another).

219. Although the Panel cannot predict how the market for shares in Austral Coal or particular buyers, sellers and holders of Austral Coal shares would have responded to such notices, it is clear that the notices would have been material to decisions whether to accept the Centennial bid, or to buy, sell or hold shares in Austral Coal.

Delay by Centennial

220. Glencore submitted that the Panel should dismiss Centennial's application, or refuse to commence proceedings, on the basis that for two months from learning of the Glencore Swaps and Glencore's shareholding, Centennial had apparently not considered that Glencore's non-disclosure constituted unacceptable enough circumstances to warrant making an application to the Panel.

221. The Panel had some sympathy for Glencore's submissions and considered the issue carefully. Despite Centennial's delay, the Panel considered it necessary to address the apparent harm which Glencore's non-disclosure had caused to the market for Austral Coal shares and to Austral Coal shareholders who had traded (in whatever manner) during that period. Therefore it decided to commence proceedings regardless of the lateness of Centennial's application.

Relevant Interest

222. In the submissions made to the Panel, much of the debate focused on whether, in the circumstances, the CSFB Swap and the ABN AMRO Swap gave Glencore a sufficient measure of power or control over the disposal of the Hedge Shares held by CSFB and ABN AMRO respectively to give Glencore a relevant interest in those shares, and, if so, when that relevant interest may have arisen. If the swaps did give a relevant interest from the time the banks acquired the hedge shares, then Glencore would have been in breach of section 671B from as early as 22 March, and the failure to disclose the swap positions until 5 April may cause the Panel to make a declaration of unacceptable circumstances under section 657A(2)(b).

223. However, the Panel does not have to find a breach of section 671B in the current circumstances in order to make a declaration of unacceptable circumstances. Under section 657A(2), the Panel can also make a declaration where it considers the circumstances are unacceptable having regard to the effect of the circumstances on the control or potential control of Austral Coal.

Association

224. Centennial submitted in its application that Glencore and the Banks had become associates as a result of the Glencore Swaps by virtue of either section 12(2)(b) or 12(2)(c):

    (a) under section 12(2)(b), Centennial submitted that Glencore and each of the Banks had a relevant agreement, the purpose of which was to control or influence the affairs of the body corporate (which includes ownership of Hedge Shares under paragraph 53(e)). Centennial submitted that Glencore intended to prevent Centennial proceeding to compulsory acquisition (which goes to control); and

    (b) under section 12(2)(c), Centennial submitted that "*the Glencore Swaps constituted an act which is a concerted act of both Glencore and the respective Counterparty in relation to a takeover bid (either the Centennial bid or the failed Glencore bid) which is designed to affect the market for control of Austral (whether to keep the Hedge Securities from Centennial or to secure them for Glencore...*".

225. If CSFB, or later ABN AMRO, had become an associate of Glencore in entering into the swaps, Glencore would have been required to include in its substantial holding notice calculations, any Austral Coal shares in which CSFB or ABN AMRO had a relevant interest (primarily the Hedge Shares acquired by the Banks for the purpose of hedging the Glencore Swaps). From 22 March 2005, Glencore would have contravened section 671B if it had not given the required substantial holding notices.

226. The Panel did not consider it necessary to determine whether or not Glencore and the Banks had become associates. However, the Panel considers that the relationship which existed between Glencore and the Banks assisted Glencore's control over the hedge shares, and each of the Banks may well have become an associate of Glencore. The Banks certainly assisted Glencore to amass the Combined Holdings in knowledge of Glencore's intentions, Glencore's direct holdings and (to the extent known) the other Glencore Swaps. The Panel sets out in detail below the facts and actions on which it bases its view that each of CSFB and, to a lesser extent, ABN AMRO may well have become an associate of Glencore. The Panel considers that this potential association was another basis for Glencore to have disclosed the existence of the Combined Holding greater than 5%.

227. Glencore was associated with either Bank at a particular time if and only if Glencore and the Bank were at that time:

    (a) parties to a relevant agreement for the purpose of controlling or influencing the composition of the board or the conduct of the affairs of Austral Coal (briefly "exercising control");[26] or

    (b) acting in concert in relation to the affairs of Austral Coal.[27]

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[26] Paragraph 12(2)(b). Proposed agreements and concerts are covered by this provision and the next to be mentioned, but not presently relevant.

[27] Paragraph 12(2)(c).

Relevant agreement

228. For a relevant agreement to be for the purpose of exercising control, that purpose must be common to the parties, or a term of the agreement. As *Flinders Diamonds*[28] illustrates, a relevant agreement is for the purpose of exercising control if both parties intend that performance of the agreement will enable one of the parties to exercise control.

229. The Panel noted that neither the CSFB Swap Documentation nor the ABN AMRO Confirmation deals expressly with the exercise of control over Austral Coal, or with any measures which would confer on Glencore the power to cast or control the casting of votes attached to shares in Austral Coal. In particular, the Panel has no reason to disregard as shams the clauses of the agreements providing that there is no physical settlement option and that Glencore is to have no control over the votes attached to Reference Shares.

230. However, agreements include all manner of arrangements and understandings (including oral understandings), and need not be enforceable.[29] It is arguable that such an understanding arose between Glencore and CSFB and between Glencore and ABN AMRO.

231. As discussed above, the Banks' officers knew that the Glencore Swaps and connected transactions were designed to facilitate Glencore's strategy in relation to Austral Coal, one of the alternative objectives of which was to obtain control over Austral Coal.

232. A bid for Austral Coal would have been an attempt to obtain a controlling interest in Austral Coal. An acquisition of a blocking stake would have frustrated Centennial's bid (which was, at the time of entering the CSFB Swap, conditional on 90% acceptances). Knowing Glencore's plan, the Banks, by entering into the Glencore Swaps as principal counterparties, assisted Glencore's strategy to acquire a stake in shares in Austral Coal as to be able to influence the composition of its board and the conduct of its affairs, either by making a bid itself or blocking Centennial's bid.

233. By co-operating in that way, Glencore and the Banks were arguably implementing a relevant agreement between them for the purpose of influencing or controlling the conduct of the affairs of Austral Coal. Accordingly, the Panel considers, without having to decide the point, that Glencore and the Banks may well have become associates under the first limb of the definition.

234. The Panel also noted that the relationship between CSFB and Glencore during the relevant period appeared to extend to providing advice on the acquisition of substantial holdings without disclosure and preliminary assistance with preparations for a possible bid by Glencore (see 73 above). This was additional evidence of a possible association (both under this limb of the definition and the 'acting in concert' limb below) between Glencore and CSFB.

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[28] *Flinders Diamonds Ltd v Tiger International Resources Inc* [2004] SASC 119

[29] *Flinders Diamonds* at [37] – [40], following *Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Company (No. 4)* [1985] 1 Qd R 127 at 131-132 and *New Ashwick Pty Ltd v Wesfarmers Ltd* (2000) 35 ACSR 263 at [33]

Acting in concert

235. The alternative form of association is acting in concert in relation to the affairs of the target company. The analyses of concerts in *Flinders Diamonds*[30], *Ocean Trawlers*[31], *LV Living*[32] and *National Foods 01*[33] all concentrate on whether the candidate associates were pursuing a common goal of a relevant kind (referred to below as a "common objective"). Equal participation is not required.

236. The ordinary concept of affairs includes the company's internal affairs and its business. Regulation 1.0.18 expands "affairs" to include a long list of matters, including ownership of its shares.[34]

237. Although ownership of a company's shares is deemed to be included in its affairs, the context and the policy of paragraph 12(2)(c) support a plain reading on which the concert must relate to the affairs of the relevant company in general and not to discrete matters which happen to form part of those affairs. The history of the association concepts lends no support to a strained reading on which any dealing in a company's shares, no matter how small, is a concert in relation to its affairs. Accordingly, if a dealing in shares is to amount to a concert in relation to the company's affairs in general, it must be a dealing in a strategic or substantial parcel, one with a bearing on control.

238. Glencore submitted that parties are not associates merely because they act in concert to implement a transaction which they negotiated at arm's length, citing *TNT Australia Pty Ltd v Poseidon Ltd & ors* (1989) 7 ACLC 303.

239. The Panel did not accept that this principle applied to the Banks to the extent that they had knowledge of Glencore's intention and strategy to accumulate the Combined Holding of more than 5% and to hide that from the market. The corporate finance divisions of both Banks, and in the case of CSFB, the equity capital markets division, were aware of and communicated Glencore's intentions and strategy to the divisions of the Banks which then affected the swaps.

240. For parties to be acting in concert in relation to the affairs of Austral Coal there needed to be something more than a mere agreement to enter into a long cash-settled equity swap. There needed be a common objective to acquire a substantial parcel bearing on control.

241. From early March 2005, CSFB, and from late March ABN AMRO, were clearly acting to assist Glencore to acquire a strategic stake in Austral Coal which Glencore sought not to disclose to the market. This objective of assembling (without disclosing it) a stake which was capable of affecting control required the co-operation of the Banks, because it depended, in addition to Glencore's direct holdings, on there being two parcels of about 5% each, each too small to require disclosure, but together, and with Glencore's direct holding, large enough to affect the Centennial bid, block

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[30] *Flinders Diamonds Ltd v Tiger International Resources Inc* [2004] SASC 119
[31] *Bank of Western Australia Ltd v Ocean Trawlers Pty Ltd* (1995) 16 ACSR 501
[32] *LV Living Limited* [2005] ATP 5
[33] *National Foods Ltd 01* [2005] ATP 8
[34] Paragraph 58(e)

compulsory acquisition, and to operate as an effective strategic stake in the event that a takeover bid was made.

242. An inference available from the primary evidence is that the Banks were acting in concert with Glencore in relation to acquisition of an undisclosed strategic stake in Austral Coal, with a clear bearing on control. Accordingly, without having to decide the point, the Panel concluded that Glencore and the Banks may well have become associates under the second limb of the definition.

Section 16(1) exception

243. Someone who falls within an inclusive part of the definition of an associate may nonetheless be excluded by subsection 16(1). The principal exceptions are for people who provide advice to a person or act on behalf of a person in the proper performance of their professional functions or business relationships. A nominee is not associated with its beneficiary because of this exception,[35] nor is a mere intermediary.[36]

244. There are no clear decisions and there seems to be no commentary on whether "proper" in subsection 16(1) means fidelity to the client or conformity with fair commercial conduct as regards other people. The Panel considers that the overall policy of association and its work within the legislative framework suggests the latter is the appropriate interpretation.[37]

245. Given that the Panel concludes that unacceptable circumstances arose as a consequence of the Banks' assistance of Glencore's strategy; the Panel finds that the exception in subsection 16(1) would be unlikely to apply. Accordingly, the exception is unlikely to apply to any association which may have arisen between Glencore and each of the Banks.

DECISION

Unacceptable circumstances

246. The Panel assessed whether or not unacceptable circumstances existed in relation to these Proceedings against the policy and legislative provisions of the Corporations Act.

Non compliance with legislative policy

247. The Panel considered the evidence to be clear that Glencore had a plan and an intention to accumulate its physical holdings and the Glencore Swaps without disclosing its interests above 5% to the market, and that Glencore worked diligently to avoid this disclosure. The Panel considered that this strategy went directly against the policy and objectives of Chapter 6 and of the substantial holding notice provisions of the Act.

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[35] In *Heine Management Ltd v Australian Securities Commission* (1993) 12 ACSR 578 per Hayne J.

[36] This interpretation correlates with section 52, under which a person is taken to do an act which it causes or authorises to be done. If the acts of the intermediary are attributed to the principal, the legislature would not need to provide for the intermediary as an associate.

[37] See also Owen J's comments in *IPT Systems Ltd v MTIC Corporate Pty Ltd* [2000] WASC 316 that association has a flavour of impropriety.

248. The Panel decided that Glencore's failure to make timely public disclosure of the fact that its Combined Holding increased beyond 5% of the issued shares in Austral Coal and further subsequent increases in the Combined Holding constituted unacceptable circumstances under section 657A(2)(a)(i) and (ii). The Panel considered that the existence of the Glencore Swaps, once Glencore's Combined Holding passed 5%, was material information which the market for control of Austral Coal shares required to be efficient competitive and informed.

249. Disclosure by Glencore would have shown the market for control over Austral Coal shares the pace of Glencore's acquisition, through both CSFB and Shaw. On the basis of Glencore only making share acquisitions or treating the swap exposure as its share acquisitions, Glencore would have been required to make additional substantial holding notices on most trading days between 22 March and 5 April 2005. The Panel considered that these disclosures would have shown the market that Glencore's direct holding together with the existence of the Glencore Swaps could act as a blocking stake in terms of compulsory acquisition by Centennial in its bid. It would also have inclined the market more towards the belief that Glencore was considering making a rival takeover bid, for cash. These matters were clearly material to the market for control over Austral Coal, and Austral Coal shares.

250. In these circumstances, timely disclosure would have been required by 9.30 a.m. on the next trading day of ASX after Glencore became aware that the Combined Holding had exceeded 5%. The evidence before the Panel was that the Combined Holding exceeded 5% of the issued shares of Austral Coal on 21 March 2005 as a consequence of CSFB buying 651,195 Austral Coal shares as part of its hedging for the CSFB Swap. On that basis, Glencore should have made public disclosure by 9.30 a.m. on Tuesday 22 March 2005. Glencore did not make any announcement until after the close of trading on 4 April 2005 (and not released to ASX until the following day).

251. The Panel therefore considered that for the period from 22 March 2005, to the time of Glencore's first announcement, the market for control of Austral Coal shares was not efficient competitive and informed, due to the lack of disclosure by Glencore of the Combined Holding of more than 5% and the increases in the Combined Holding over that period.

252. Instead, for the period 9.30am on 22 March 2005, to 9.30am on 5 April 2005 (the Non Disclosure Period, as defined above), the market traded, Centennial declared its bid unconditional and many Austral Coal shareholders accepted the Centennial bid without such knowledge. Although the Panel cannot predict how the market for shares in Austral Coal or particular buyers, sellers and holders of Austral Coal shares would have responded to such notices, it is clear that the notices would have been material to decisions whether to accept the Centennial bid, or to buy, sell or hold shares in Austral Coal.

253. The Panel also found that unacceptable circumstances continued to exist after Glencore's first announcement. None of Glencore's announcements of 4 and 5 April 2005, or subsequently, provided the market with adequate information concerning the Glencore Swaps. The Panel considered that, for the market to be fully informed, Glencore should have disclosed at least the identity of the Banks, the initial and

closing prices or formulae of the Glencore Swaps and the termination rights which attached to each of the Glencore Swaps.

Arguable non compliance with black letter law

254. Since its expanded role in 2000 the Panel has publicly stated many times that the existence of unacceptable circumstances does not require breach of the black letter law and that technical compliance with the black letter law is no guarantee that circumstances will not constitute unacceptable circumstances.

255. The Panel recognised that, on their face, cash settled equity derivatives, may not appear to generate an interest which is required to be disclosed under the substantial holding notice provisions. On that basis, the Panel recognised that there are arguments that Glencore had no legal obligation, even under widely drafted provisions, to make any disclosure about the Combined Holdings. However, the Panel considered that the commercial effects and practice of hedging of equity derivatives in the type of takeover situation in which Glencore found itself mean that Glencore's failure to disclose caused the market for control of Austral Coal shares not to be efficient competitive and informed.

256. However, the Panel considered that it was arguable that Glencore did indeed breach the substantial holding notice provisions, but that that is not a necessary prerequisite for unacceptable circumstances or a declaration of unacceptable circumstances, and the Panel did not need to make any such finding.

Declaration

257. The Panel considered that it was not against the public interest to make a declaration that Glencore's failure to make disclosure of its 5% Combined Holding, and subsequent increases, constituted unacceptable circumstances.

258. The Panel made a declaration that unacceptable circumstances existed:

(a) from the time at which the Combined Holding increased beyond 5% of the issued voting shares in Austral Coal (21 March 2005) and Glencore did not make disclosure to the market of the Combined Holding before 9.30 a.m. on the next trading day of ASX, until the evening of 4 April 2005; and

(b) from 4 April 2005 until the Panel's media release of 1 July 2005 announcing this decision, because of the continued failure of Glencore to disclose adequate information about the Glencore Swaps to the market.

259. The text of the Declaration is set out at Annexure A.

Interim Orders

260. Centennial requested the Panel to make interim orders that Glencore make certain disclosures to the market, as set out in paragraph 52(a) and 52(b)(i) and (ii) above (**Disclosure Interim Orders**). The Panel did not make the Disclosure Interim Orders.

261. The Panel found the Disclosure Interim Orders were not 'holding' in nature. To make the Disclosure Interim Orders would have been to anticipate final orders and not just to maintain the status quo. However, the Panel requested Glencore, CSFB and ABN AMRO to provide a great deal of information to the Panel and parties,

which the Panel considered covered the matters of which Centennial requested disclosure under the Interim Disclosure Orders sought.

262. Centennial also requested the Panel to make interim orders that each of Glencore Swaps be suspended pending the determination of the Proceedings and that none of the Hedge Shares be sold or otherwise disposed of, as set out in paragraphs 52(b)(iii) and (iv) above (**Freezing Interim Orders**).

263. In lieu of making the Freezing Interim Orders, the Panel accepted undertakings from each of Glencore, CSFB and ABN AMRO not to terminate the Glencore Swaps nor dispose of Hedge Shares until the conclusion of these Proceedings.

Final Orders

264. The Final Orders made by the Panel, including the Disclosure Order and the Restoration Order are summarised in paragraph 24 above. The full text of the Final Orders is set out in Annexure B.

Final orders requested by Centennial

265. Centennial requested a wide range of orders, some of which related to disclosure of the terms of the Glencore Swaps that were entered into, some of which related to its takeover bid. The Panel considered that Centennial's requested orders in relation to disclosure of the Glencore Swaps that were actually entered into were largely reasonable and made orders to similar effect. A discussion of the Panel's disclosure orders is set out in paragraphs 279 to 280 below.

266. However, many of the orders which Centennial requested related to Centennial's ability to compulsorily acquire the outstanding shares in Austral Coal. Centennial requested that the Panel order each of the Glencore Swaps to be unwound and the Banks be ordered to accept the Hedge Shares into the Centennial takeover bid or sell them into an orderly market.

267. The Panel did not consider that the mere acquisition of the Hedge Shares, if Glencore had acquired them physically (and had made appropriate disclosure) would have breached any provision of the Act, nor created unacceptable circumstances. Therefore, the Panel did not consider that orders directing the unwinding of the Glencore Swaps or concerning the orderly disposal of all of the Hedge Shares, on the basis solely of Glencore acquiring a blocking stake, would be appropriate.

268. The Panel noted Centennial's submissions in response to the Panel's second supplementary Brief requesting submissions on Centennial's knowledge of trading in Austral Coal shares leading up to Centennial's decision to declare its offer free of defeating conditions on 23 March 2005.

269. In the days leading up to Centennial's decision to declare its takeover bid for Austral Coal unconditional, CSFB and Shaw Stockbroking were buying significant numbers of Austral Coal shares, both for Glencore and for the purpose of hedging the Glencore Swaps. At an earlier stage, Centennial had some discussions with Glencore concerning Austral Coal and its future.

270. The Panel noted Glencore's submission in its request for a supplementary Brief that:

*"In statements widely reported by the media on 5 April 2005, Centennial's Chief Financial Officer Robert Dougall apparently stated that when Centennial declared its offer unconditional it knew that there was a risk that another party may try to take a minority position. Mr Dougall further stated that "**We had our eyes open about that – it's something we're prepared to live with… We can get control and operate the company with a minority shareholder, it's not an issue for us**". "*

271. The Panel asked Centennial about its state of knowledge of:

    (a) the potential for, or existence of, a rival bidder for Austral Coal;

    (b) the buying on-market of Austral Coal shares;

    (c) the identity of buyers on-market of Austral Coal shares;
    (collectively **Rival Bids**).

272. The Panel also asked Centennial about its state of knowledge of:

    (a) any advice Centennial received from its commercial advisers as to the issues above;

    (b) any monitoring of market trading or of Austral Coal's register that Centennial conducted; and

    (c) whether Centennial was aware of the risks in declaring its offer unconditional as suggested in the press article referred to by Glencore.

273. Centennial advised the Panel that it was not advised by its investment bankers or brokers of any unusual or significant trading activity in Austral Coal shares in the period leading up to its decision to declare its offer free of conditions on 23 March 2005. Centennial also advised the Panel that it knew that there was a risk that it might not achieve 90% of Austral Coal and therefore compulsory acquisition, or even 50% of Austral Coal, and therefore control.

274. Centennial also advised the Panel of the financial incentives for declaring the offer free from its defeating conditions on 23 March 2005.

275. While the Panel may accept that Centennial was not actively aware of the possibility of Glencore being a rival bidder, or amassing a blocking stake, it did not consider that there was adequate evidence that either:

    (a) knowledge of the existence of Glencore as a 5.1% shareholder on 22 March, 2005, would have materially changed Centennial's decision to declare its offers free of conditions;

    (b) or that the possibility of ending with less than 90% was a deterrent to Centennial.

276. The Panel considered it clear that Centennial accepted the risk of not achieving 90%, and that Glencore's acquisitions were merely one way that such an event could have happened. In other circumstances the Panel may infer that such an outcome would likely not have occurred without the impugned acquisitions, but this is not such a case.

277. The Panel did not consider that Centennial's interests had been harmed to the point that an order unwinding the Glencore Swaps and directing the shares be accepted

into the bid was warranted. Similarly the Panel did not consider that an order unwinding the Glencore Swaps and requiring the shares be sold on-market was appropriate.

278. The Panel considered that the Restoration Order (as discussed below in paragraphs 281 to 289) requiring that Austral Coal shareholders who sold Austral Coal shares during the Non Disclosure Period be given an opportunity to acquire a similar number of shares at the same price they sold, was an adequate remedy to repair the unacceptable circumstances and allow Centennial's bid to proceed as if the unacceptable circumstances had not occurred.

Disclosure Order

279. The Panel ordered that Glencore make immediate public disclosure of the following information concerning each of the Glencore Swaps:

    (a) the parties to the swap;

    (b) the date the swap was entered into;

    (c) the nature of the risk and reward provisions under the swap (for example, whether the Glencore position was long or short);

    (d) the reference price;

    (e) the duration of the swap (including any provisions for extension) and the circumstances in which the swap must or may be closed out (including when and whether compulsorily or voluntarily or by agreement only, and in each case by whom, including the effect of Centennial or any other party achieving any given percentage level of control of Austral Coal or the effect of a de-listing of Austral Coal);

    (f) the number of Austral Coal shares to which the swap relates.

280. The Panel considered that the information above was what was required to inform the market adequately on 22 March 2005, of Glencore's interests in Austral Coal shares. The Panel could not take the market back to 22 March to give it this information then: the best it could do is to ensure that the market was adequately informed after its proceedings.

Restoration Order

281. The Panel considered that the impairment of an efficient, competitive and informed market for control of Austral Coal shares in the relevant period should be remedied. The Panel recognised that it could not turn back the clock to 22 March 2005 and have all persons make their investment decision on the basis of the information which the Panel considered that they should have had at that time. The Panel recognised that its orders would be made, and have effect, in the circumstances existing at the time of its decision. Therefore, its orders could only partially remedy the unacceptable circumstances.

282. The Panel made the Restoration Order that for one month from the date of its order, Glencore sell, to any person who provided evidence of having sold Austral Coal shares and reported that to the ASX during the relevant period, the same number of Austral Coal shares which the person sold, at the price at which the person sold.

283. The Panel ordered Glencore to make a public announcement, of those persons' right to acquire Austral Coal shares and an appropriate mechanism for processing such requests. For the avoidance of doubt, the Panel ordered that Glencore not seek to unwind the Glencore Swaps, and the Banks not sell the Hedge Shares, until the operation of the Restoration Order had completed.

284. The Panel ordered that, if Glencore received requests to buy more Austral Coal shares than it owned, CSFB or ABN AMRO must vary the number of reference shares under the Glencore Swaps , and sell to Glencore, sufficient Austral Coal shares to allow Glencore to meet its obligations under the Restoration Order.

285. The price at which the Banks would be required to sell the Hedge Shares to Glencore would be the initial price of the relevant Glencore Swap.

Impact on Austral Coal shareholders who accepted Centennial's bid

286. The Panel spent a long time considering the position of persons who accepted the Centennial offer for Austral Coal during the Non Disclosure Period. Clearly, they also made investment decisions in an uninformed market. The Panel considered that those persons' interests were equally likely to have been disadvantaged by the lack of disclosure of the Glencore Swaps as were persons who sold Austral Coal shares on-market during the Non Disclosure Period.

287. Therefore, the Panel carefully considered an order that Centennial offer, for one month, to each former Austral Coal shareholder who accepted the Centennial takeover offer during the relevant period, the right to rescind their acceptance.

288. The Panel noted that accepting shareholders would not derive much benefit from an order enabling them to return one Centennial share and receive instead 3.7 Austral Coal shares they previously held, as the price of a Centennial share had been very close to 3.7 times the price of an Austral Coal share since early in the bid, and was likely to remain close for as long as the bid remained open.

289. Further, for reasons of practicality, the Panel decided not to make such an order. The Panel was concerned, given the lapse of time since the Non Disclosure Period, that former Austral Coal shareholders may have traded the Centennial shares they had received under the Centennial takeover. Those former Austral Coal shareholders who had been eligible for the Centennial dividend would be required also to return those dividends. Centennial would be required to cancel the new shares it had issued as consideration for Austral Coal shares tendered under its bid, which could create taxation and accounting difficulties.

290. Further, the Panel was concerned not to affect adversely the interests of those persons who had accepted the Centennial offer in reliance on the eligibility of the bid consideration for tax roll-over relief based on Centennial acquiring more than 80% of Austral Coal (which may subsequently be lost if acceptances for more than 5% of the shares were withdrawn).

Unfair prejudice

The Banks

291. The Panel did not consider that the Final Orders would unfairly prejudice the Banks.

292. First, there was abundant evidence throughout the submissions and documents that the Banks fully expected the possibility of early termination at the discretion of Glencore. There was no basis for asserting that early termination of some or all of the Glencore Swaps would prejudice the Banks in any way which they were not reasonably aware of the possibility of when they entered into the Glencore Swaps.

293. Secondly, the Panel's Disclosure Order was not unfairly prejudicial to the Banks because the price at which the Banks would be required to sell Austral Coal shares to Glencore to meet the Restoration Order would be the initial price of the swaps i.e. the price at which the Banks acquired the Hedge Shares, and the reference number of the swaps would be reduced accordingly.

Glencore

294. The Panel considered that Glencore would not be prejudiced by the proposed orders, let alone unfairly.

295. The Disclosure Order merely required similar information to that which would have been required if Glencore had acquired the Hedge Shares directly. Given the Panel's finding that the Glencore Swaps were entered into as part of Glencore's strategy to acquire an interest which for many purposes was as controlling of the Hedge Shares as acquiring them physically, that level of disclosure was not unfairly prejudicial.

296. The Restoration Order was not unfairly prejudicial to Glencore. The buying by the Banks to acquire the Hedge Shares was the major part of the trading over the Non Disclosure Period. Therefore, the average of prices at which Austral Coal shareholders sold on market would be similar to the reference prices of the Glencore Swaps. On that basis, any prejudice to Glencore arising from a difference in the price at which it was required to sell Austral Coal shares to persons who sold during the Non Disclosure Period and the effective price at which it bought them i.e. the reference prices of the Glencore Swaps would be small. Given Glencore created the unacceptable circumstances by its decision to seek to assemble its physical stake and the interests under the Glencore Swaps without making disclosure on 22 March 2005, the Panel found that such prejudice would not be unfair.

297. Similarly, Glencore may have suffered some prejudice from foregoing any profit it might have made on the reduction of the number of reference shares under the Glencore Swaps to meet the Restoration Order. Given that Glencore caused the unacceptable circumstances by its strategy of non-disclosure, any forgoing of the profit which was directly required to remedy the unacceptable circumstances cannot be considered unfairly prejudicial.

Centennial

298. The Panel considered that Centennial would not be unfairly prejudiced by the Final Orders.

The Australian equity derivative market

299. ABN AMRO submitted that the orders requiring termination of the Glencore Swaps might have deleterious effects on the equity derivatives market in Australia. ABN AMRO wrote "*If the providers of equity derivatives, either over-the-counter or retail traded CFDs, were to find themselves in a situation where they are forced to dispose of shares that*

they hold for risk management purposes due to the actions of their clients, in circumstances where the writer did not breach the Act or cause unacceptable circumstances to arise by its own actions, then this will have a significant impact on a vibrant market for financial products in Australia."

300. The Panel carefully considered the likely effects of the proposed orders on the Australian equity derivative market. It did not consider that the orders will adversely affect the legitimate use of equity derivatives in Australia. The Panel considered that the orders have been designed to ensure that the large majority of users of equity derivatives in Australia would not be materially disadvantaged by the Panel's orders. The Panel believes that very few users of equity derivatives in Australia are likely to wish to use equity derivatives to assemble a stake of more than 5%, and the adverse effect on those who do is warranted in terms of the efficiency of the market for control of those shares, and therefore those adverse effects will not be unfair.

301. Similarly, the Panel's Disclosure Orders required disclosure of that amount of information which the Panel considered is required for an efficient competitive and informed market for control of shares in companies over which banks write equity derivatives. It is not unfair prejudice to the equity derivatives market to impose accepted market standards for disclosure.

302. The Panel did not consider that its decision and orders would inhibit the use of equity derivatives in the Australian market other than for avoidance of the substantial holding notice provisions.

Costs

303. The Panel did not receive any application for an award of costs, and made no order for costs.

Meredith Hellicar
President of the Sitting Panel
Decision dated 28 June 2005
Reasons published 16 August 2005

Annexure A

Corporations Act
Section 657A
Declaration of Unacceptable Circumstances

In the matter of Austral Coal Limited 02

WHEREAS

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

B. Between March 2005 and early April 2005, Glencore International AG and its subsidiaries and their respective nominees (collectively **Glencore**) was considering acquiring a strategic stake in Austral Coal with a view to either launching its own takeover offer for Austral Coal or otherwise preventing Centennial from achieving the 90% compulsory acquisition threshold prior to close of the Centennial Offer.

C. Prior to 21 March 2005, Glencore acquired 12,865,881 voting shares in Austral Coal (**Austral Coal Shares**) representing (at that time) approximately 4.9% of Austral Coal Shares.

D. On 21 March 2005, Glencore entered into a cash-settled equity swap arrangement (**CSFB Swap**) with Credit Suisse First Boston International (**CSFB**) (with CSFB as the equity amount payer) in respect of Austral Coal Shares.

E. Given the circumstances surrounding Austral Coal at the time CSFB entered into the CSFB Swap, there was a strong economic incentive for CSFB to hedge its exposure under the Swap by purchasing Austral Coal Shares (**CSFB Hedge Shares**) (which CSFB did) and retaining them for the term of the Swap, giving Glencore a significant level of control over the disposal of the CSFB Hedge Shares.

F. Glencore knew and intended this outcome.

G. On 21 March 2005, CSFB acquired 651,195 Austral Coal Shares representing approximately 0.2% of Austral Coal Shares, as CSFB Hedge Shares. This acquisition caused the aggregate of the Austral Coal Shares held by Glencore and the CSFB Hedge Shares acquired by CSFB to exceed 5% of Austral Coal Shares.

H. Between 22 March 2005 and 30 March 2005, CSFB acquired a further 11,448,865 Austral Coal Shares as CSFB Hedge Shares, approximately 4.6% of Austral Coal Shares (at that time).

I. Between 22 March and 4 April 2005, Glencore did not make disclosure of any interest in the CSFB Hedge Shares acquired by CSFB during the period from 21 March 2005 to 30 March 2005.

J. On 31 March 2005, Glencore entered into a cash-settled equity swap arrangement (**ABN AMRO Swap**) with ABN AMRO Bank NV (**ABN AMRO**) (with ABN AMRO as the equity amount payer) in respect of Austral Coal Shares.

K. Given the circumstances surrounding Austral Coal at the time ABN AMRO entered into the ABN AMRO Swap, there was a strong economic incentive for ABN AMRO to hedge its exposure under the Swap by purchasing Austral Coal Shares (**ABN AMRO Hedge Shares**) (which ABN AMRO did) and retaining them for the term of the Swap, giving Glencore a significant level of control over the disposal of the ABN Hedge Shares.

L. Glencore knew and intended this outcome.

M. Between 31 March 2005 and 4 April 2005, ABN AMRO acquired 7,407,302 Austral Coal Shares as ABN AMRO Hedge Shares, representing approximately 2.5% of Austral Coal Shares.

N. Between 31 March 2005 and 4 April 2005, Glencore did not make any disclosure of any interest in the ABN AMRO Hedge Shares acquired by ABN AMRO during this period.

O. On 5 April 2005, Glencore disclosed that it held approximately 5% of Austral Coal Shares and, in addition, had entered into cash-settled equity swap arrangements in regard to 7.4% of Austral Coal Shares.

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

1. The failure of Glencore to disclose promptly and publicly the following matters in regard to Glencore's own holding of Austral Coal Shares, and the CSFB Swap or ABN AMRO Swap (each a **Swap**), as applicable, when the aggregate of Glencore's holding of Austral Coal Shares, CSFB's holding of CSFB Hedge Shares and ABN AMRO's holding of ABN AMRO Hedge Shares (**Combined Holding**) exceeded 5% of Austral Coal and following each subsequent 1% increment in the Combined Holding since the previously disclosed level:
   (a) the parties to the Swap;
   (b) the number of Austral Coal Shares to which the Swap relates;
   (c) the date the Swap was entered into;
   (d) whether the Glencore position was long or short;
   (e) the reference/initial price; and
   (f) the duration of the Swap (including any provisions for extension) and the circumstances in which the Swap must or may be closed out (including when and whether compulsorily or voluntarily or by agreement only, and in each case by whom, including the effect of Centennial or any other party achieving any given percentage level of control of Austral Coal or the effect of a de-listing of Austral Coal).
2. In the absence of disclosure of Glencore's direct holdings, the Glencore Swaps, the Banks' holding of Hedge Shares, or the Combined Holding, each purchase of Hedge Shares by either CSFB or ABN AMRO (each a **Bank**) on ASX between 22 March and 4 April 2005 (inclusive) in circumstances where, after Glencore had acquired its initial 4.9% shareholding, and Glencore and the Banks had entered into the Swaps;

constitute unacceptable circumstances.

Meredith Hellicar

President of the Sitting President

Austral Coal 02 Proceedings

28 June 2005

Annexure B

Orders

under section 657D of the Corporations Act 2001 (Cth)

In the matter of Austral Coal Limited 02

Pursuant to:

(a) section 657D 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 28 June 2005,

the Takeovers Panel hereby makes the following orders:

Disclosure order

1. Within one business day of the date of this order Glencore International AG (**Glencore**) will announce to Australian Stock Exchange Limited (**ASX**) following information concerning each of the cash-settled equity swap agreements relating to ordinary shares in Austral Coal (**Austral Coal Shares**) dated 4 April 2005 (each a **Swap**), one between Glencore and Credit Suisse First Boston International (a **Bank**) and the other between Glencore and ABN AMRO Bank NV (also a **Bank**):

   (a) the parties to the Swap;

   (b) the number of Austral Coal shares to which the Swap relates;

   (c) the date the Swap was entered into;

   (d) whether the Glencore position was long or short;

   (e) the reference/initial price;

   (f) the duration of the Swap, including any provisions for extension; and

   (g) the circumstances in which the Swap must or may be closed out.

   If the Swap is governed by standard International Swaps and Derivatives Association documentation which provides that a swap may be closed out on the occurrence of a merger, tender offer or delisting event or by mutual agreement of the parties to the Swap, the announcement complies with paragraph (g) if it includes a statement to that effect.

Restoration order

2. Glencore will make an offer to the following effect (**Restoration Offer**) to each person who sold Austral Coal Shares in a transaction (the **Transaction**) which was reported to ASX and which was entered into at or after the opening of trading on 22 March 2005 and before the opening of trading on 5 April 2005 (**Seller**) in respect of the Austral Coal Shares to which the Transaction related (**Sold Shares**):

   (a) Glencore will offer to sell to the Seller a number of Austral Coal Shares (**Restoration Shares**) equal in number to the Sold Shares, at a price equal to the price for which the Seller sold the Sold Shares, not adjusting either price for commission or other costs of sale;

(b) Glencore must publish the Restoration Offer by announcement to ASX and by newspaper advertisements. Each announcement or advertisement must contain the particulars mentioned in paragraph (a), including an address to which an Acceptance Notice (defined below) may be sent and a date by which it must be received, which must be not less than one month after the announcement is made;

(c) A Seller may accept the Restoration Offer by sending to Glencore at the address and by the time mentioned in paragraph (b) a written notice (**Acceptance Notice**) setting out the number and price of its Sold Shares and identifying the Transaction, together with a certified copy of a contract note or other evidence of the Transaction, a cheque for the price, made payable to Glencore and transfer details for the Restoration Shares.

(d) Glencore must transfer the Seller's Restoration Shares to the Seller within 5 business days of receipt of the Seller's Acceptance Notice.

Glencore may cause Fornax Investments Limited to make the Restoration Offers, in which case all references to Glencore in these orders include references to Fornax Investments Limited.

3. To facilitate Glencore being able to perform its obligations under the Restoration Offer, Glencore and each Bank will implement the following procedure in regard to close out of the Swaps, and amend the Swaps as necessary to achieve this outcome:

(a) If at any time the total number of Restoration Shares in respect of Acceptance Notices which have been received by Glencore but which remain to be processed in accordance with Order 2(d) exceeds the sum of:

(i) the number of Austral Coal Shares then held by Glencore and any of its subsidiaries and their respective nominees; and

(ii) the number of Close-out Shares in respect of any previous Close-out Notices which remain to be processed in accordance with this Order 3,

(the difference being defined as the **Excess**), Glencore may give a notice (**Close-out Notice**) to either Bank from time to time until 5 business days after the last date for acceptance of the Restoration Offer that it wishes to close out its Swap in respect of a specified number of reference shares (**Close-out Shares**) not exceeding the lesser of the Excess and the total number of reference shares under the Swap and to purchase from the Bank a corresponding number of ordinary shares in Austral Coal.

(b) On the business day following the Bank's receipt of a Close-out Notice the Bank will sell to Glencore and Glencore will buy from the Bank a number of Austral Coal shares equal to the number of Close-out Shares at the Initial Price under the Swap, and Glencore will pay to the Bank an agreed proportion of any termination fee under the Swap. The equity notional amount, the number of reference shares and the termination fee under the Swap will be reduced accordingly.

Ancillary orders

4. Centennial and Austral Coal will use their best endeavours to procure that Austral Coal remains included in the Official List of ASX until at least 10 business days after the last date for acceptance of the Restoration Offer.

5. In regard to Glencore's obligation to publish the Restoration Offer under Order 2(b) above:

   (a) Glencore must submit to the Panel a draft of the announcement or advertisement (and the proposed placement, layout and size of the advertisement) at least one business day before the announcement is made or copy of the advertisement must be lodged;

   (b) The Panel must have approved the draft of the announcement or advertisement (and the proposed placement, layout and size of the advertisement) by the day before the announcement is made or the advertisement is published; and

   (c) Austral Coal must facilitate the making to ASX of any announcement.

6. To facilitate the performance of Order 3 above, until the period for Glencore to give a Close-out Notice under Order 3 has expired, neither Glencore nor a Bank will (other than under a Close-out Notice,):

   (a) agree to early termination of any of the Glencore Swaps, or

   (b) dispose of any Austral Coal Shares (other than Austral Coal Shares held by a Bank for a reason other than to hedge its exposure under a Swap).

7. Orders 1, 2, 3 and 5 are stayed until 8 July 2005, or earlier order of the Panel.

Meredith Hellicar

President of the Sitting Panel

Austral Coal 02 Proceedings

1 July 2005