Takeovers Panel

Reasons for Decision
Austral Coal Limited 03

In the matter of Austral Coal Limited 03
[2005] ATP 14

Catchwords:
Unacceptable circumstances – elapse of time since alleged unacceptable circumstances - extension of time to make application - association – collateral benefit – substantial holding notices – insufficient evidence - pre-bid agreement – acquiring shares to accept into a bid to procure the success of bid - common purpose to procure the success of bid – benefit from continuation or extension of marketing agreement - Glencore International A.G. , Fornax Investments Limited, Austral Coal Limited, Noble Group Limited, Centennial Coal Company Limited

Corporations Act 2001 (Cth) section 621, 657C, 657C(3)(b).

These are the Panel's reasons for declining to grant an extension of time under section 657C(3)(b) of the Corporations Act to permit an application by Glencore International A.G. and Fornax Investments Limited in relation to the affairs of Austral Coal Limited. The Panel did not consider that Glencore's application presented any reasonable basis for the allegations contained in it such as to justify the Panel exercising its discretion to extend the time within which the application could be made and allow proceedings to be commenced.

THE PROCEEDINGS

1. These reasons relate to an application (the **Application**) to the Panel from Glencore International A.G. (**Glencore**) on 4 July 2005 in relation to the affairs of Austral Coal Limited (**Austral Coal**), which was subject to a takeover offer from Centennial Coal Company Limited, and the sale of Austral Coal shares into Centennial's offer by an Austral Coal shareholder, Noble Group Limited.

2. The Application was made outside the two month time limit for making applications set out in section 657C(3) of the Corporations Act 2001 (Cth) (**Act**)[1].

THE PANEL & PROCESS

3. The President of the Panel appointed Mr. Denis Byrne, Mr. Chris Photakis and Mrs. Nerolie Withnall (sitting President), as the sitting Panel (the **Panel**) for proceedings arising from the Application.

BACKGROUND

Centennial's takeover bid

4. On 23 February 2005 Centennial Coal Company Limited (**Centennial**) announced that it would make a takeover bid for Austral Coal offering 10 Centennial shares for every 37 Austral Coal shares (**Offer**). The bidder's statement for the Offer was first despatched on 21 March 2005.

5. On 23 March 2005, Centennial declared the Offer unconditional and advised of accelerated payment terms under the Offer.

[1] In these reasons, unless otherwise stated, statutory references are to the Corporations Act.

6. Centennial's voting power in Austral Coal, as disclosed in substantial holding notices, passed 20% on 31 March 2005 and 50% on 7 April 2005.

Noble and the Marketing Agreement

7. On 8 January 2004, Noble Group Limited (collectively with its related bodies corporate, **Noble**) and Austral Coal entered into an agreement under which Austral Coal appointed Noble as the exclusive agent for the sale of approximately six million tonnes of Austral Coal's coking coal over a period of 7 years (**Marketing Agreement**). This represented more than 60% of the expected production of coking coal from Austral Coal's Tahmoor mine.

8. According to a substantial holding notice lodged by Noble on 24 March 2004, it had an interest in 11.01% of Austral Coal at that time. Part of this shareholding was issued to Noble following its entry into the Marketing Agreement.

Noble's share dealings in March 2005

9. On 1 March 2005, Noble purchased a further 6.9% of Austral Coal on-market, and disclosed by substantial holder notice on 3 March 2005 that it had a relevant interest in 16.5% of Austral Coal[2].

10. On 2 March 2005, Centennial entered into an agreement with Noble to purchase 9.6% of Austral Coal's capital (**Sale Shares**) from Noble, with completion to occur before Centennial dispatched its Offer (**Pre-bid Agreement**). These Sale Shares were all of the Austral Coal shares held by Noble, other than those which had been purchased on-market on 1 March 2005 (**Extra Shares**). Entry into the Pre-bid Agreement caused Centennial to acquire voting power in Austral Coal of 9.6%.

11. On 23 March 2005, the day that the Offer was declared unconditional, Noble accepted the Offer for the Extra Shares, taking Centennial's voting power in Austral Coal to 16.5%.

APPLICATION

12. Glencore made an application to the Panel on 4 July 2005 alleging that unacceptable circumstances existed in relation to the facts set out above.

13. Glencore made a number of principal allegations:

    (a) (**Association Allegation**) That Centennial reached an agreement with Noble that Noble would accept the Offer in respect of the Extra Shares it purchased on 1 March 2005, that this caused Centennial and Noble to become associates and Centennial to have a relevant interest in the Extra Shares as soon as they were acquired by Noble, and that Centennial had, therefore, not correctly disclosed its voting power in substantial holder notices issued around that time.

    (b) (**Benefit Allegation**) That Centennial had reached an agreement with Noble that Noble would retain the Marketing Agreement (or that Centennial would even extend the Marketing Agreement to cover additional coal produced by Austral Coal or Centennial or extend its term) in return for Noble's accepting

[2] Between Noble's substantial holding notices of 24 March 2004 and 1 March 2005, Austral Coal had issued new shares, diluting Noble's holding from 11.01% to 9.6% of the enlarged capital of Austral Coal.

the Offer for the Sale Shares and the Extra Shares and that this constituted a benefit which was not offered to all shareholders.

(c) (**Substantial Holding Notice Allegation**) That Noble failed to attach a copy of a document, which Glencore alleged to be the Marketing Agreement, to substantial holding notices that Noble lodged on or about 27 January 2004 and 24 March 2004.

14. In support of the Association Allegation, Glencore argued that the Panel should infer from, inter alia:

(a) the existence of communications between Centennial and Noble in regard to the Pre-bid Agreement and the sale and purchase of the Sale Shares;

(b) the fact that Noble acquired the Extra Shares prior to agreeing to sell its existing stake in Austral Coal to Centennial; and

(c) the fact that Noble accepted the Offer in respect of the Extra Shares on the same day that the Offer was declared unconditional,

that there was an understanding between Noble and Centennial that Noble would do so and a common purpose to procure the success of Centennial's bid.

15. In support of the Benefit Allegation, Glencore argued that the Panel should infer from the existence of the communications referred to above between Centennial and Noble, and the obvious benefit to Noble in maintaining its rights under the Marketing Agreement and Centennial's financial support of Austral Coal that an agreement to maintain these rights and provide financial support to Austral Coal was in fact reached. Glencore asserted to the Panel that the Marketing Agreement was "highly profitable" and that the Panel should infer that this profitability would motivate Noble to give Centennial the benefit of Noble's support for Centennial's bid in return for an agreement that Noble would retain the Marketing Agreement.

16. The actions which Glencore alleged to be unacceptable occurred prior to 23 March 2005. Accordingly, Glencore's application was outside the 2 month time limit for lodging an application under section 657C(3).

17. Glencore submitted that the Panel should exercise its discretion under section 657C(3)(b) to extend this period on the basis that Glencore had not had a sufficient case to warrant an application until it received submissions from Centennial on 21 June 2005 in relation to the *Austral Coal Limited 02* proceedings to the effect that Centennial had documents pertaining to the Austral Coal share purchases by Noble in March 2005.

DISCUSSION

Consideration of whether to grant extension

18. The Panel is given a discretion to extend the 2 month time limit set out in section 657C(3)(a) to make an application. The Panel considered that it should not lightly exercise that discretion. The time limit was set by the legislature to provide certainty to market participants in the context of takeovers that actions could not be challenged indefinitely.

19. Notwithstanding this, the Panel considered that it would be undesirable for Glencore's application be allowed to go unheard because it was lodged outside the 2 month time limit, if:

    (a) essential matters supporting Glencore's case first came to light during the 2 month period preceding the application; and

    (b) Glencore's application made credible allegations of clear, serious and ongoing unacceptable circumstances.

20. Unacceptable circumstances in relation to Austral Coal should not go unremedied merely because their existence has been able to be hidden for more than 2 months.

21. The Panel, therefore, considered it desirable to review the merits of the Application on its face in order to assist in its decision whether or not to grant an extension of time.

Merits of the Application

22. The Panel did not consider that the Application presented any reasonable basis for either the Association Allegation or the Benefit Allegation. Glencore's Application essentially asked the Panel to make inferences based on a collection of circumstantial evidence and assertions which did not appear to be supported by the facts or commercial reasoning.

23. In particular, the Panel could not find, and did not consider that Glencore had provided, any basis to infer that any agreement may have been reached between Centennial and Noble, either in regard to Noble's dealings with the Extra Shares or the continuation of the Marketing Agreement. The Panel did not consider that it should commence proceedings merely to require Centennial to provide information which may assist Glencore to refine its claims, when Glencore had not made out a sufficient case in its application.

Association Allegation

24. In regard to the Association Allegation, the Panel noted that even if an association between Centennial and Noble were to have existed between 1 March 2005 and 23 March 2005, this would have caused Centennial's voting power to have increased from approximately 9.6% to less than 17%. The Panel could not see, and did not consider that Glencore had provided, any reason why Centennial may have sought to reach a secret understanding with Noble that Noble would tender the Extra Shares into the Offer, given that Noble and Centennial could have openly contracted to do so without breaching the 20% threshold in section 606.

25. Further, Glencore did not provide evidence that such a contract alone could have required Centennial to increase the consideration under the Offer because of the minimum bid price rule in section 621.

26. In regard to the consequent disclosure obligation under Chapter 6C, there did not appear to be any reason why Centennial may have wanted not to disclose an increase in its voting power.

Benefit Allegation

27. In regard to the Benefit Allegation, the Panel noted that there was no evidence, and did not appear to be any suggestion, in the Application that the Marketing Agreement could be terminated by Centennial or Austral Coal once Centennial acquired control or that that document was otherwise under threat.

28. In regard to the allegations generally, it appeared to the Panel that the actions of Noble were consistent with the actions of a shareholder who also had material commercial interests in the success of Austral Coal, and therefore may well have had its own reasons to accept the bid and, potentially, unilaterally take action to increase the likelihood of the bid succeeding. Glencore in fact alluded in its Application to the fact that Noble, as the beneficiary of a seven year marketing contract in regard to the distribution of Austral Coal's coal, may have had an interest in the Centennial bid succeeding. What was apparent to the Panel was that, if any such interest existed, there were perfectly legitimate reasons for Noble to act in its own interest, of its own volition, without having to come to any arrangement with Centennial which would cause the two to become associates or Centennial to acquire a relevant interest in Noble's shares. Glencore did not provide any material evidence to suggest that its postulated unacceptable circumstances were a more likely explanation for Noble's actions than Noble merely acting unilaterally to promote its own commercial interests.

Substantial Holding Notice Allegation

29. In regard to the Substantial Holding Notice Allegation, the Panel noted that Glencore was well outside the 2 month time limit for making an application in relation to that matter. The Panel considered whether the failure of Noble to attach the Marketing Agreement to its March 2004 substantial holder notice may give rise to presently existing unacceptable circumstances (assuming it was demonstrated that there was in fact a requirement to annex this document). The Panel considered that the market would currently have no relevant use for such information given the long period of time since the acquisition and substantial holding notice to which Glencore submitted the Marketing Agreement related, and that the substantial holding to which it related had been entirely disposed of. As such, the Substantial Holding Notice Allegation was not a matter on which the Panel considered it was an appropriate body to take any action, if any was warranted.

DECISION

30. On the basis of the above, the Panel reached the view that the Application presented no reasonable basis for a finding that the unacceptable circumstances alleged by Glencore might exist. The Panel therefore concluded that:

    (a) it was not in the interests of public policy for it to extend the 2 month time limit for Glencore to make its Application under section 657C(3); and

    (b) if the Application had been made with the 2 month time limit, the Panel would have declined to commence proceedings.

COSTS

31. As the Panel has made no declaration of unacceptable circumstances, it made no orders as to costs.

Nerolie Withnall
President of the Sitting Panel
Decision dated 8 July 2005
Reasons published 25 August 2005