



**In the matter of Austral Coal Limited 03R
[2005] ATP 15**

Catchwords:

Consent to review – exercise of discretion to consent – insufficient evidence – extension of time to make application – prejudging case – difficulty in providing evidence in association or illegal agreement cases – reasonable basis – effects of not consenting – Glencore International A.G – Fornax Investments Limited – Austral Coal Limited – Centennial Coal Company Limited – Noble Group Limited

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

Australian Securities and Investments Commission Act 2001 (Cth) section 192

These are the President's reasons for declining to grant consent under section 657EA(2) of the Corporations Act to a review of the decision of the Panel in the *Austral Coal Limited 03* proceedings.

THE PROCEEDINGS

1. These reasons relate to an application (the **Review Application**) to the Panel dated 12 July 2005 from Glencore International A.G. and Fornax Investments Limited (together, **Glencore**) under section 657EA(1) of the Corporations Act 2001 (Cth) (**Act**) seeking a review of the decision of the Panel in the *Austral Coal Limited 03* proceedings (**First Instance Decision**).

THE PANEL & PROCESS

2. As the President declined to grant consent to a review of the First Instance Decision, no sitting Panel was appointed.

FIRST INSTANCE DECISION

3. The *Austral Coal Limited 03* proceedings related to an application made by Glencore to the Panel on 4 July 2005 (**Initial Application**). The Initial Application related to the affairs of Austral Coal Limited (**Austral Coal**), which was subject to a takeover offer from Centennial Coal Company Limited (**Centennial**), and the sale of Austral Coal shares into Centennial's offer by an Austral Coal shareholder, Noble Group Limited (**Noble**). The Initial 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**).
4. On 8 July 2005, the Panel declined to grant an extension of time under section 657C(3)(b) of the Corporations Act to permit the application to be made. 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.

REVIEW APPLICATION

5. The Review Application lodged by Glencore on 12 July 2005 alleged that the first instance Panel had decided not to commence proceedings (or not to grant an extension of time to allow proceedings to be commenced) on the basis that the allegations made in Glencore’s Initial Application were not proven; and that the Panel had, therefore, prejudged the case without having the benefit of the parties’ submissions and the further information which may have otherwise been discovered in the course of the Panel’s proceedings.
6. Glencore complained that the reason it was not able to furnish further evidence of the allegations made in its Initial Application was that Centennial had failed to make proper disclosure, itself one of the allegations sought to be proved. Glencore submitted that it was appropriate in these circumstances for the Panel to commence proceedings and use its powers under section 192 of the ASIC Act to issue a summons in order to discover information which would support Glencore’s case.

DISCUSSION

Consent to review

7. Section 657EA(2) provides that, where a decision of the Panel is not a decision to make a declaration of unacceptable circumstances or orders, a person may apply for a review of that decision only with the consent of the President of the Panel.
8. The First Instance Decision was a decision not to allow an extension of time under section 657C(3) to permit proceedings to be commenced. It did not involve a declaration of unacceptable circumstances or orders. Accordingly, the consent of the President was necessary before Glencore’s Review Application could proceed to consideration by a Review Panel.
9. The President considered that the existence of the consent requirement was a firm indication that the legislature did not intend that parties would have an automatic right to review of a decision by a full Review Panel, where that decision did not involve a declaration of unacceptable circumstances or orders.
10. If an application for review under section 657EA presented no potential error in the first instance decision and no new evidence relevant to the matter, the President did not consider he had a reasonable basis for exercising the discretion to consent under section 657EA(2) for the review to proceed.
11. The President considered that nothing in the Review Application or the First Instance Decision pointed to a potential error in that decision.
12. Contrary to Glencore’s claim, the first instance Panel had not in fact pre-judged the merits of the case. The first instance Panel stated that Glencore’s Initial Application did not present:

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.

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13. The President considered that the first instance Panel was not requiring actual proof of the relevant allegations when it referred to a “reasonable basis”. It appeared to the President that the first instance Panel merely sought to establish whether there was sufficient evidence before it to justify granting an extension of time and permitting proceedings to be commenced and a brief to be issued to affected parties. The first instance Panel found none.
14. Further, the President noted that Glencore’s Review Application presented no relevant evidence which had not been brought before the first instance Panel.¹
15. The President then considered other factors that might be relevant to the exercise of his discretion, namely the apparent importance of the dispute, what material prejudice might be suffered if his consent was granted or not granted and what appeared just and proper in all the circumstances. He found no basis in these factors for exercising his discretion.
16. The President, therefore, declined to grant consent under section 657EA(2) to a review of the First Instance Decision.

Merits of Glencore’s Application

17. While it was not necessary for the President to reconsider the merits of the First Instance Decision, the President could find no reasonable basis to suspect that a Review Panel would decide to commence proceedings if he were to grant consent to such a review.
18. It appeared to the President that the first instance Panel had no firm evidence before it on which it might have been able to conclude that Glencore’s allegations, whether in regard to the alleged association between Centennial and Noble, the suspected arrangement regarding the Marketing Agreement or the substantial holder notice issued by Noble in March 2004, warranted the commencement of proceedings.
19. Glencore proposed in its Review Application that where allegations relate to disclosure deficiencies, the Panel should commence proceedings if the applicant is not able to make out its case without the discovery of information that would follow from proceedings being commenced.
20. The President recognised that evidence in relation to applications which allege associations and illegal agreements will rarely be easily obtained, or even in existence. However, the President did not consider it appropriate for the Panel to commence proceedings in relation to the review application where Glencore had merely alleged certain matters and requested the Panel to investigate.
21. Such a practice would allow a person to lodge an application with the Panel making serious but groundless allegations concerning disclosure and expect the Panel to commence proceedings and issue a brief to assist the applicant in gathering facts about the respondents. The President did not consider this to be a proper use of the Panel’s process.

¹ Glencore’s Review Application attached one piece of correspondence which was not referred to in its Initial Application, but that correspondence was a third party statement which was vague, speculative and of no obvious relevance to the matter at hand.

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22. While the President took into account the fact that Glencore, as an applicant alleging inadequate disclosure, was unlikely to have available to it all of the information necessary to make out its case (and not all of this information may in fact exist), the onus was nevertheless on Glencore to present in its application some level of substantiation for the allegations it made before the Panel could reasonably decide to commence proceedings.

DECISION

23. The President declined to grant consent under section 657EA(2) to a review of the First Instance Decision.

Ian Ramsay

President of the Panel

Decision dated 15 July 2005

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