Takeovers Panel

Reasons for Decision
Austral Coal Limited 02(RR)

In the matter of Austral Coal Limited 02(RR)
[2005] ATP 20

Catchwords:

Unacceptable circumstances; cash settled swaps; hedged swaps; disclosure; combined holding; confirmation; efficient; competitive and informed market; substantial holding; de facto power; Austral Coal 02R; cash-settled equity swaps; substantial holding notice; ISDA Master Agreement; hedge shares; swaps; substantial interest; disclosure of actual intentions; effect on control; effect on acquisition of substantial interest; economic incentive; disposal of hedge shares; power to control disposal; differences contract; association; relevant agreement; acting in concert; hedging; equity derivatives; substantial shareholder; undisclosed substantial parcels; remedial and protective orders; adverse effect on the market; unfair prejudice

Corporations Act 2001 (Cth), sections 657B, 671B, 657D, 657D(2)(a), 657EA, 602, 657A, 611, 636, 606, 611(2)
Australian Securities and Investments Commission Policy Statement 25 *Takeovers: False and Misleading Statements*
Austral Coal 02 [2005] ATP 11
Austral Coal 02(R) [2005] ATP 16
BreakFree Limited 04(R)[2003] ATP 42
National Foods Limited 01 [2005] ATP 8
LV Living Limited [2005] ATP 5
Village Roadshow Limited (No.2) [2004] ATP 12, (2004) 22 ACLC 1332
Pinnacle VRB Ltd No. 11 [2001] ATP 23
Glencore AG & Anor v Takeovers Panel and Ors [2005] FCA 1290
Samic Ltd v Metals Exploration Ltd (1993) 11 ACLC 717
Metals Exploration Ltd v Samic Ltd (1994) ACLC 752
Samic Ltd v Metals Exploration Ltd (No.2) (1993) 11 ACLC 624
North Broken Hill Holdings Ltd (1986) 4 ACLC 131
Crosley Ltd v North Broken Hill Holdings Ltd (1986) 4 ACLC 432
Australian Securities and Investments Commission v Terra Industries Inc (1999) 31 ACSR 186
Flinders Diamonds Ltd v Tiger International Resources Ltd [2004] SASC 119
Australian Securities and Investments Commission v DB Management Pty Ltd & Ors; Southcorp Wines Pty Ltd v DB Management Pty Ltd & Ors [2000] HCA 7
Masters v Cameron [1954] HCA 72
FCT v Lutovi Investments Pty Ltd [1978] HCA 55
Heine Management Ltd v Australian Securities Commission (1992) ACSR 578
Gillard v R [2003] HCA 64
Humes Ltd v Unity APA Ltd (1986) 11 ACLR 641
Brierley Investments Limited v Australian Securities Commission (1997) 15 ACLC 1341
Re Australian Securities Commission and John Fairfax Holdings Ltd (1997) 15 ACLC 1457
Re Australian Securities and Investments Commission and Wesfi Ltd (1999) ACLC 1690
Intercapital Holdings Ltd v National Companies and Securities Commission (1988) 6 ACLC 243
Sagasco Amadeus Pty Ltd v Magellan Petroleum Australia Ltd (1993) 11 ACLC 452
Keygrowth Ltd v Mitchell (1990) 3 ACSR 476
Aberfoyle Ltd v Western Metals Ltd (1998) 84 FCR 113, 156 ALR 68
Re Kornblum's Furnishings Ltd [1982] VR 123
TVW Enterprises Ltd v Queensland Press Ltd (1983) 7 ACLR 821
North Sydney Brick & Tile Co Ltd v Darvall (1986) 10 ACLR 822
Corumo Holdings Pty Ltd v C Itoh Ltd (1992) 10 ACLC 428
Cullen v Wills, Adler and Jooste (in their capacity as members of the Corporations and Securities Panel) (1991) 9 ACLC 1450
Australian Securities and Investments Commission v Yandal Gold Pty Ltd & Ors (1999) 17 ACLC 1126
Edensor Nominees Pty Ltd v Australian Securities and Investments Commission (2002) 41 ACSR 325
Australian Securities Commission v Bank Leumi Le-Israel (1995) 18 ACSR 639
Australian Securities Commission v Bank Leumi Le-Israel (Switzerland) (1996) 21 ACSR 474

Re Bligh Ventures Ltd: Australian Securities and Investments Commission v Merkin Investments Ltd (2001) 38 ACSR 648
Brunswick NL v Blossomtree Pty Ltd (1992) 10 ACLC 542
Gjergja & Atco Controls v Cooper (1986) 4 ACLC 359
Australian Securities Commission v Mt Burgess Gold Mining Co NL (1995) 13 ACLC 271
Corebell v NZ Insurance (1988) 13 ACLR 349
Yaramin Pty Ltd v Augold NL (1987) 5 ACLC 783
National Companies and Securities Commission v Monsoon Nominees Pty Ltd (1990) 9 ACLC 43
Boral Energy Resources Ltd v TU Australia (Queensland) Pty Ltd (1998) 16 ACLC 1199
ICAL Ltd v County Natwest Securities Aust Ltd & Transfield (Shipbuilding) Pty Ltd (1988) 6 ACLC 467
National Companies and Securities Commission v Monarch Petroleum NL (1984) 2 ACLC 256
W.P. Keighery Ltd v Federal Commissioner of Taxation [1957] HCA 2, (1957) 100 CLR 66
Elders IXL v National Companies and Securities Commission (1986) 4 ACLC 465
Waldron v MG Securities (Australasia) Ltd [1975] VR 508
Australian Securities and Investments Commission v FAI Traders Insurance Co Ltd (1998) 13 ACLR 85
Albert & Ors v Votraint No. 320 Pty Ltd (1989) 7 ACLC 485

These are the Panel's reasons for its decision to revoke a declaration that circumstances in relation to the affairs of Austral Coal Limited were unacceptable circumstances, which was made on 28 June 2005 in the *Austral Coal 02* proceedings, and to make a fresh declaration of unacceptable circumstances.

OUTLINE

1. Beginning on 21 March 2005 and ending 4 April 2005, Glencore International AG, which already held nearly 5% of the shares in Austral Coal Limited, obtained cash settled swaps over a further 7.4% of the shares in Austral Coal from two investment banks, which hedged those swaps by buying shares in Austral Coal.

2. Glencore did not disclose the existence of either the direct holding or the swaps until the evening of 4 April 2005, a fortnight after the aggregate number of shares comprised in Glencore's direct holdings and the hedged swaps exceeded 5%, the level at which it would have been required to disclose a direct holding under the substantial holding notice provisions of the Corporations Act.

3. During the period from the morning of 22 March 2005 until the evening of 4 April 2005 (the Non-disclosure Period), acceptances for a takeover bid by Centennial Coal Company Limited for Austral Coal lifted Centennial's interest in Austral Coal from under 10% to over 35%. On 7 April 2005, Centennial announced that it had acquired majority control of Austral Coal.

4. We have before us an application to review a decision (in the Initial Proceedings) to declare that Glencore's failure to disclose the existence and growth of its direct and swap interests in Austral Coal during the Non-disclosure Period constituted unacceptable circumstances in relation to the affairs of Austral Coal and to make orders designed to remedy certain effects of the circumstances identified in the declaration as being unacceptable. A previous decision by the Panel on review of that decision (in the Review Proceedings) was quashed by the Federal Court, because that decision appeared to have been made without taking into account several relevant factors.

5. On a full review of the evidence and submissions in the previous proceedings, and with the benefit of new evidence and submissions which were particularly directed

to the factors found to be missing by the Federal Court, we varied the decision made in the Initial Proceedings by revoking the declaration of unacceptable circumstances and orders made in the Initial Proceedings and substituting a fresh declaration. **See Annexure A**.

6. We did not find that Glencore or the banks contravened the substantial holding provisions of the Act. We did, however, find that during the bid Glencore had accumulated a substantial interest in Austral Coal comprising direct holdings and the hedged swaps (together, Glencore's position) without disclosure, with the effect that Glencore acquired its position (comprising direct holdings and hedged swaps, with a degree of de facto control over disposal of the shares in Austral Coal the banks acquired to hedge the swaps) more cheaply or sooner than if it had disclosed its position on 22 March 2005 and progressively as its position grew, with shareholders unaware of the identity of a person who proposed to acquire a substantial interest in the company and in a market which was less informed and competitive and therefore less efficient than it would have been.

7. Another effect was that the Centennial bid succeeded sooner, and in a less competitive market, than it would have done, had Glencore disclosed its position when that position first comprised more than 5% of the shares in Austral Coal and again at 1% increments. The market was accordingly less informed and competitive and therefore less efficient than it would have been. Glencore in fact tried to use its 4 April announcement to check the progress of the bid, but left it too late.

8. In the course of arriving at these findings, we set out a narrative of the events and the proceedings, and described the swaps and the legislative regime applying to the proceedings.

9. Analysis of the effects of Glencore's announcement of its position on 4 April shows that, had Glencore disclosed its position when that position first comprised more than 5% of the shares in Austral Coal and again at 1% increments, the price at which the banks acquired hedge shares would have been greater by a not insignificant amount. Glencore benefited from the lower prices the banks paid, and people selling on market were correspondingly adversely affected.

10. For these reasons, the market in shares in Austral Coal was adversely affected by being unaware of the formation of a substantial interest and the identity of the person who proposed to acquire that substantial interest. The effects of the non-disclosure on the price of Austral Coal shares and on the progress of the Centennial bid are symptoms of the market having been less informed and competitive than it should have been, and accordingly less efficient.

11. During the Non-disclosure Period Glencore had a degree of *de facto* power to prevent the banks disposing of Austral Coal shares they bought to hedge the swaps, because there were at that time no satisfactory alternative hedges and the exposure was to a volatile share price, Austral being a single mine coal company, financially distressed and already subject to a bid by Centennial. That power came into existence progressively during the Non-disclosure Period, as the requested swap exposure was filled and the hedges were obtained.

(a) Because of that degree of control, Glencore's direct holding of shares in Austral Coal and the hedged swaps together constituted a substantial interest in Austral Coal.

(b) Because the banks could in theory have found alternative hedges or chosen not to hedge, Glencore did not have absolute control over disposal of the hedge shares, and we are not satisfied that the degree of control that Glencore had over disposal of the hedge shares during the Non-disclosure Period was sufficient to amount to a relevant interest in the hedge shares.

(c) We do not find that either of the two investment banks was associated with Glencore concerning Austral Coal, although they were aware that Glencore already held nearly 5% of the shares in Austral Coal when it asked each of them to provide swap exposure for a further approximately 5%.

12. A person of Glencore's experience and commercial sophistication knew or could reasonably have assumed that the banks had no practical alternative but to hedge the filled swap positions with Austral Shares, which the banks in fact did.

13. The circumstance that Glencore failed during the Non-disclosure Period to disclose the existence and growth of its position had adverse effects on the market in which Glencore acquired its substantial interest in Austral Coal and in which Centennial acquired control of, and a substantial interest in, Austral Coal. The impact of those effects is sufficient, in monetary terms and on the Centennial bid, that the circumstances are unacceptable circumstances.

PANEL AND PROCESS

Prior History of the Matter

14. The first application to the Panel in relation to these events was made on 3 June 2005, and a declaration and orders were made on 28 June 2005: *Austral Coal 02* [2005] ATP 11. On 1 July 2005 Glencore applied for review of that decision. On 20 July 2005 the review Panel upheld the declaration and orders, with variations: Austral Coal 02(R) [2005] ATP 16.

15. Centennial's 3 June 2005 application to the Initial Panel sought a declaration that unacceptable circumstances existed in relation to the affairs of Austral Coal because of the failure by Glencore to make timely disclosure regarding equity swap arrangements it entered into relation to more than 5% of the shares in Austral Coal. Centennial applied for various interim and final orders.[1]

16. The Initial Panel decided that unacceptable circumstances existed:

    (a) from the time at which Glencore's direct holdings and the banks' hedge shares 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 (i.e. Glencore's direct holding and the shares subject to the swaps) 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 (the CSFB and ABN AMRO Swaps discussed below) to the market.[2]

17. Glencore's application for review of the Initial Panel's decision set out various submissions, including that:[3]

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

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

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

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

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

18. The Review Panel, conducting a *de novo* review, did not seek to address, and then redress or reject, each of Glencore's criticisms of the Initial Panel's decision. Rather, the Review Panel reconsidered the allegations and complaints raised by Centennial's

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1 *Austral Coal 02* at [42] – [44], [52] and [54]

2 ibid at [10] – [19] (summary of reasons) and [20] – [24] (summary of declaration and orders)

3 *Austral Coal 02(R)* at [23]

3 June 2005 application, with the advantage of the concerns Glencore had raised in its application for review and the submissions made by the parties in the Review proceedings.[4]

19. The Review Panel varied the decision of the Initial 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 the Initial 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.

20. The Review Panel ordered Glencore to offer to sell shares 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, in effect enabling those shareholders to reverse those transactions. The Review Panel made no orders directing the banks to sell Austral Coal shares to Glencore in the event that Glencore received more acceptances of the offers under the order than it could satisfy. However, the Review Panel told Glencore and the banks that it may do so if needed.[5]

21. On 14 September 2005 the Federal Court of Australia quashed the Review Panel's decision and directed the Panel to reconsider the review application: *Glencore International AG & Anor v Takeovers Panel and Ors* [2005] FCA 1290 (***Glencore v Panel***). These proceedings are that reconsideration.

Sitting Panel

22. The President of the Panel appointed Ms Kathleen Farrell (sitting President), Mr Peter Scott (sitting Deputy President) and Mr Denis Byrne as the sitting Panel for the Proceedings.

De novo review

23. We conducted a *de novo* review of the decision in Austral Coal 02.[6] The sitting Panel was provided with all submissions, rebuttals, primary evidence and key correspondence circulated to parties in the Austral Coal 02 proceedings and the Austral Coal 02(R) proceedings. We were also provided with all submissions and rebuttal submissions and other background information relating to those Proceedings. While the whole of the decision was subject to review, we concentrated on the matters raised by parties in submissions and the issues which had concerned Emmett J.

Process and Parties

24. We adopted the Panel's published procedural rules (**Panel Rules**), which are made under section 195 of the Australian Securities and Investments Commission Act 2001 (ASIC Act), for the purposes of the Proceedings and also applied the processes set

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[4] Austral Coal 02(R) at [25]

[5] ibid at [27]

[6] See *Humes Ltd v Unity APA* (1986) 11 ACLR 641 at 668 – 673.

out in the Australian Securities and Investments Commission Regulations 2001 (ASIC Regulations).

25. ASIC, Glencore, Centennial, CSFB and ABN AMRO were parties. We gave leave for each party to be represented by their commercial solicitors under section 194 of the ASIC Act.

26. Glencore undertook not to deal with the shares in Austral Coal it holds directly, or to unwind the swaps, without giving the Panel reasonable notice.[7]

Brief, submissions and rebuttals

27. In accordance with ASIC Regulations 20 and 22, the Panel provided parties with a brief (**Brief**) setting out a description of the facts underlying the Proceedings, which the Panel considered were not contentious based on its review of documents from proceedings in Austral Coal 02 and Austral Coal 02(R). The Brief requested parties to make comment on both the Panel's description of the facts and a number of specific questions to be addressed in these Proceedings.

28. The Panel received requests for additional time from parties in relation to various deadlines for submissions and rebuttals in the Proceedings. 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.

29. On 21 October, we invited further submissions on a point which we felt may not have been sufficiently raised by the brief. Those submissions were received on 24 October, and have been incorporated. On 27 October 2005, we made a declaration that the non-disclosure of Glencore's position constituted unacceptable circumstances in relation to the affairs of Austral Coal, and invited the parties to make submissions on what orders, if any, we should make.

Time limits

30. The Panel applied to the Federal Court for an order under section 657B extending the period in which it could make a declaration of unacceptable circumstances. On 19 October 2005, Finkelstein J made an order extending time until 28 October 2005.

FACTUAL BACKGROUND

31. Except where supporting evidence is cited, the findings in this section were proposed by the Panel in its brief and corrections proposed by parties have been incorporated, or they are derived from the relevant public documents.

Parties

32. Glencore is an international trader and supplier of commodities and is also an investor. Austral Coal is a miner of coking coal in southern New South Wales. It sells coking coal both domestically and internationally. Centennial is a miner and marketer of thermal coal. Credit Suisse First Boston International (**CSFB**) and ABN

[7] Email from Atanaskovic Hartnell to the Panel 15 September 2005.

AMRO Bank NV (**ABN AMRO**) are investment banks with substantial operations in Australia.

Centennial's bid for Austral Coal

33. Centennial and Austral Coal jointly announced a takeover bid by Centennial for Austral Coal on 23 February 2005, offering 10 Centennial shares for every 37 Austral Coal shares. The consideration was worth about $1.30 per Austral Coal share, though it varied from day to day with the market price of shares in Centennial. The bid was to be subject to a number of conditions, including a 90% minimum acceptance condition.

34. Centennial's bid was unanimously recommended by the directors of Austral Coal in the absence of a superior bid. The joint announcement stated:

> "*... the Directors of Centennial ... and the Directors of Austral Coal ... are pleased to announce that they have agreed to a merger of the companies through an offer of Centennial shares to Austral Coal shareholders. ... The proposed merger has the unanimous support of the Austral Board and, in the absence of a superior offer, the Austral Board recommends that Austral shareholders accept the offer.*"

35. Prior to Centennial's bid, Austral Coal had disclosed that it:

    (a) was in serious financial difficulties; and

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

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

37. 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.

38. Austral Coal lodged its target's statement on 21 March 2005, recommending acceptance of the Centennial bid. The target's statement was dispatched between 21 and 23 March 2005.

39. Centennial declared its bid unconditional on 23 March 2005 and announced that if an Austral Coal shareholder accepted before 7pm on 7 April 2005, they would participate in a Centennial unfranked dividend of $0.06 per Centennial share. As at the time of the announcement, Centennial had 9.6% relevant interest in Austral Coal.

40. Centennial's 23 March 2005 announcement stated:

> *"Centennial … announces that its takeover bid for Austral … has been declared to be free from all conditions. … Centennial is endeavouring to gain control of Austral as soon as possible to facilitate implementation of operational improvements and to resolve Austral's financial issues. Further, Centennial would like to provide Austral shareholders with the opportunity to participate in Centennial's interim dividend. To this end, Centennial will accelerate the timetable for providing the Offer consideration so that Austral shareholders who accept Centennial's Offer …no later than ... 7 April 2005 will be entitled to participate in Centennial's interim dividend … of 6 cents (unfranked) per Centennial share."*

41. Having regard to the ratio of the bid consideration, the value of the unfranked dividend was approximately 1.6 cents per Austral Coal share.

42. Also on 23 March 2005, Centennial's voting power in Austral Coal increased to 16.5% pursuant to an acceptance of the bid.[8] Thereafter, Centennial continued to acquire shares in Austral Coal pursuant to bid acceptances, announcing that it had acquired 30% on the morning of 4 April, 48% on 7 April (and 50% later that day), 66.7% on 8 April and 82.4% on 24 April.

43. On conversion of most of the Austral Coal convertible notes on 1 April 2005, the number of issued shares in Austral Coal increased by about 14%. Shareholdings were diluted a further 1% by subsequent conversions of notes. Except in relation to Glencore's announcement of the evening of 4 April 2005, references to percentages of Austral Coal shares are based on the number of shares on issue at the relevant date.

44. Centennial's voting power in Austral Coal is now approximately 85.76%. Centennial cannot currently proceed to compulsory acquisition of the outstanding shares in Austral Coal under Chapter 6A of the Act. The bid is still open, and is now due to close on 7 November 2005. Except that it has been declared free of the conditions and the closing date has been extended from time to time, the bid has not been varied.

45. The other remaining relevant interest holders in Austral Coal on 27 October 2005, the date of the declaration of unacceptable circumstances, were:

    (a) Glencore: 7.32%;

    (b) CSFB: 3.97%;

    (c) ABN AMRO: 2.43%; and

    (d) 170 public shareholders: 0.52%.

Glencore's direct holding

46. At 18 March 2005, Glencore[9] held 12,865,881 ordinary shares in Austral Coal, representing 4.88% of the issued shares at that time. On 24 March 2005, Glencore acquired a further 275,000 shares in Austral Coal. That acquisition took its total holding to 4.99% of the shares in Austral Coal. Glencore's shares were acquired by CSFB (2.3%) and Shaw Stockbroking (Shaw) (2.69%).

47. Apart from the small purchase on 24 March, Glencore did not buy shares in Austral Coal between 18 March and 4 April. During that period, it acquired swap exposure under cash-settled equity swaps with CSFB and ABN AMRO, discussed below.

Combined holdings and dilution by convertible note conversion

48. As at 21 March 2005, the aggregate holding of shares in Austral Coal of Glencore, together with the Austral Coal shares held by CSFB to hedge the CSFB Swap was 5.13%. As at 23 March 2005, the aggregate was 8.18%. As at 29 March 2005, the

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[8] See *Austral Coal 03* [1995] ATP

[9] Glencore's shares in Austral Coal are held by Fornax Investments Ltd, a wholly owned subsidiary of Glencore International AG.

aggregate (including shares held by ABN AMRO to hedge the ABN AMRO Swap) was 9.4%.

49. After dilution by the issue of shares by Austral Coal on 1 April 2005, at 4 April 2005, Glencore held 4.56% of the issued shares of Austral Coal, CSFB held 4.03% (as hedge shares)[10] and ABN AMRO held 2.46%. The aggregate of these holdings was then 33,222,745 shares, representing 11.05% of the issued shares of Austral Coal.

50. **Annexure B** sets out the holdings and acquisitions of Austral Coal shares by Glencore, CSFB, ABN AMRO and Centennial between 9 March and 21 April 2005.

Possible Glencore bid for Austral Coal

51. Leading up to, and during the period of acquiring exposure under, the Glencore Swaps, Glencore was considering whether to make a takeover bid for Austral Coal as one of a number of scenarios. Glencore's evidence is that it did not commence detailed planning or preparation for such a bid until 2 April 2005 (including preparing a draft bidder's statement). Glencore had, however, previously filed a notification with the Foreign Investments Review Board with respect to the acquisition of up to 20% of Austral Coal.

52. As discussed below, we find that both ABN AMRO and CSFB were aware of the possibility.

Glencore's announcements on 4 and 5 April 2005

53. Glencore's first public announcement about its holdings and the Glencore Swaps was made on the evening of 4 April 2005, when it published a statement to the media, and the morning of 5 April 2005 when the statement was published on ASX, including the following:

> *"Glencore… announces that, through a wholly owned subsidiary, it has acquired approximately 5 per cent of the ordinary shares in Austral Coal Limited.*
>
> *These shares have been acquired over recent weeks, with the last parcel of shares acquired having been acquired by Glencore today. A substantial shareholder notice would be filed with Austral and the ASX within the period prescribed under the Corporations Act.*
>
> *In addition, Glencore announces that it has entered into a number of cash settled equity swap agreements with well regarded investment banks. Glencore has no legal obligation to disclose these swap arrangements but it does so to assist the market. In aggregate, these swaps relate to approximately 7.4 per cent of the ordinary shares in Austral*
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> *Glencore is currently considering its position in relation to Austral and the takeover bid made for Austral 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 by a party other than Centennial."*

[10] References to CSFB's holding in Austral Coal shares are only to those Austral Coal shares acquired by CSFB to hedge its exposure to the Glencore Swaps, and do not include any shares held by CSFB for other purposes or in other roles.

54. The announcement stated that percentages had been calculated on the basis of the number of Austral Coal shares on issue before notes were converted on 1 April.

55. Glencore submitted to the Panel that it decided to make this announcement because on or about late afternoon of 4 April, Glencore had settled the terms of the swaps and had decided seriously to consider making a takeover bid for Austral Coal, or perhaps that another party with which Glencore had had intermittent discussions about Austral Coal might bid. The announcement was made because Glencore "desired to slow acceptances of Centennial's bid until it [Glencore] had made a decision whether to bid or not."[11]

Glencore substantial holding notices

56. Glencore lodged two substantial holder notices in relation to its relevant interests in Austral Coal on 6 and 19 April 2005 respectively. In the substantial holder notice lodged on 6 April 2005, Glencore disclosed it had acquired 6.42% in Austral Coal through on-market acquisitions between 9 March and 5 April 2005 at prices of between $1.26 and $1.39 per share. The covering letter to the notice also disclosed that "Glencore has entered into cash settled equity swap agreements with well regarded investment banks in respect of 6.49%" of Austral Coal.[12]

57. In the substantial holder notice lodged on 19 April 2005, Glencore disclosed that its relevant interest had increased to 7.42%, the additional shares having been acquired on-market at prices of between $1.32 and $1.40. This notice repeated the statement from the 6 April notice regarding Glencore's cash settled swaps with well regarded investment banks.

58. Further information in relation to the prices and dates on which Glencore acquired these further shares was included in a substantial holding notice mistakenly lodged by McNeil Nominees on 7 April 2005. It disclosed that the following numbers of shares were acquired at the prices noted:

    (a) 574,562 at VWAP of $1.33 on 4 April 2005;

    (b) 5,575,000 at VWAP of $1.36 on 5 April 2005; and

    (c) 2,512,883 at WVAP of $1.40 on 6 April 2005.

    The evidence indicates that Glencore bought no shares on 7 April 2005.

The CSFB Swap

59. Glencore approached CSFB in relation to an equity swap on around 10 March 2005. Glencore informed CSFB that it wished to acquire more than 5% swap exposure to Austral Coal. However, CSFB advised that it was only prepared to provide swap exposure of up to around 4.5%.

60. Emmett J described the swaps as follows in *Glencore v Panel* at [3]:

> *"A cash settled equity swap might be described as an arrangement between an investor and a bank whereby the bank agrees to pay the investor an amount equal to the*

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[11] Paragraph 16.3 of Glencore's submissions of 7 October 2005.

[12] The reduction, relative to the 4 April announcement, in the percentage of shares to which the swaps related is due entirely to dilution from the 1 April issue of shares.

> *difference between the value of a given number of equity securities at the time of the closing out of the swap and the value of those equity securities at the time when the arrangement was entered into. Under such an arrangement the investor does not acquire any interest in any equity securities and the investor has no right to call for delivery of equity securities or to require the bank to undertake any action involving the acquisition, holding or disposal of equity securities. Closing out of, and settlement under, such a swap will, depending on the terms of the arrangement, be either at the option of one party or be automatic. Of course, it would always be open to the parties to close out a swap by mutual agreement at any time."*

The description is equally applicable to both swaps.

61. Glencore and CSFB[13] executed a term sheet on 20 March 2005, which set out the indicative commercial terms and conditions of the CSFB swap (**CSFB Swap**) including the proposed face value of approximately $16 million (based on the "initial price" multiplied by the number of "reference shares"). The initial price was to be the average price at which CSFB acquired Austral Coal shares. A further amended term sheet was executed by the parties on around 25 March 2005, under which the initial price was to be calculated by a formula which had a value if, or to the extent that, CSFB did not acquire shares in Austral Coal, in order to "make it clear that there is no obligation on CSFB to purchase one Reference Share in order to make the pricing formula".[14] Both term sheets noted:

> *"The terms and conditions outlined herein are indicative and are subject to relevant internal approvals (including credit legal and compliance approvals) of [CSFB] and should not be construed as a commitment by [CSFB]"*

62. In the early stages of discussing the CSFB Swap, Glencore and CSFB discussed a proposal for Glencore to cross its physical holding of 4.6% of Austral Coal shares to CSFB. Ultimately, CSFB decided not to proceed with the proposed crossing.

63. On 24 March 2005, after the first term sheet had been signed, Glencore provided to CSFB a deposit by way of collateral of one-third of the intended nominal amount of the swap. The purpose of the collateral was to provide protection against possible default by Glencore under the CSFB Swap. No adjustments have been made to the collateral.[15]

64. CSFB acquired 12,100,060 Austral Coal shares (approximately 4.6% of the shares in Austral Coal then on issue) progressively between 21 and 30 March 2005 in order to hedge the swap exposure it progressively agreed to provide Glencore under the CSFB Swap.

65. On most trading days while CSFB was arranging swap exposure for Glencore, CSFB advised Glencore of the swap exposure that had been arranged (number of reference shares and initial price) and Glencore approved the swap exposure proposed to be arranged on the following trading day**.**

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[13] Who had already entered into an ISDA Master Agreement, as had Glencore and ABN AMRO.

[14] The correspondence and the documents are described more fully in *Austral Coal 02* [2005] ATP 13 at [108] to [123].

[15] Para 6.4 of Glencore's submissions dated 7 October 2005.

66. This process was set out in a witness statement dated 12 July 2005 (tendered by CSFB during the *Austral Coal 02(R)* proceedings) which stated at paragraphs [14] and [15]:

> *"The correct sequence of events is that, during the period from 21 March to 30 March 2005, CSFB progressively increased the size of the CSFB Swap on instructions from Glencore and, as a consequence, CSFB progressively acquired more Austral Coal shares to hedge its exposure under the CSFB Swap. That is, it was Glencore which decided each day the extent to which it wished to increase its swap for that day. The degree to which CSFB was willing to accept the risk that might flow from such instruction, was a matter for CSFB. Whether CSFB accepted such risk or not depended on the view reached by its hedge manager … as to the extent to which he could, or was willing to, hedge that risk.*
>
> *… I did not report to Glencore whether we had hedged our exposure under the CSFB Swap, how we had done so, or in what amount."*

67. Glencore's submissions in response to the first brief in the Austral Coal 02 proceedings confirm this sequence of instructions and swap exposure:

> *"Glencore was informed periodically by each of CSFB and ABN Amro of the amount of swap exposure that bank was prepared to offer Glencore. This suggested to Glencore that hedging arrangements were being put in place which had the effect of increasing over time the amount of exposure which each of the relevant Counterparties was prepared to accept."*

68. The value of the swap exposure CSFB provided to Glencore from time to time was never greater than the size of CSFB's physical holding in Austral Coal, as CSFB acquired hedge shares up to the proposed value of the swap.

69. After CSFB had agreed to provide all of the CSFB Swap, CSFB and Glencore executed the confirmation on 4 and 6 April 2005, respectively. The terms of the confirmation were a refinement of the terms set out in the term sheets. In particular, the round numbers in the term sheets for the number of reference shares, the value of the swap and the initial price were replaced with precise numbers corresponding with the number of hedge shares CSFB had acquired, the amount CSFB had paid for them and the average price per share, grossed up for commissions, taxes and other charges. The confirmation also contains terms designed to exclude any implication that Glencore had power over voting or disposal of any hedge shares held by CSFB.[16]

70. The final CSFB Swap related to a reference parcel of 12,100,000 Austral Coal shares and 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, including commissions, taxes and other charges). The 'final price' under the CSFB Swap is defined as 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 (including commissions, taxes and other charges).

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[16] The Panel has been provided with copies of both term sheets and of the confirmation. The successive documents are discussed and quoted at paragraphs [121] – [122] of *Austral Coal 02*.

71. The CSFB Swap is to expire in March 2008.[17] Further, the CSFB Swap provides that, if Austral Coal is delisted, the CSFB Swap would be cancelled as of the "Announcement Date".[18]

The ABN AMRO Swap

72. Glencore approached ABN AMRO in relation to an equity swap of up to 13 million (5%) of the shares in Austral Coal (**ABN AMRO Swap**) on around 24 March 2005. The proposed face value of the swap of 5% of the shares in Austral Coal was stated in the draft confirmation provided from ABN AMRO to Glencore in relation to the ABN AMRO Swap on 29 March 2005.

73. ABN AMRO acquired 7,407,302 (approximately 2.43% fully diluted) shares in Austral Coal progressively between 31 March and 4 April 2005 in order to hedge its exposure under the ABN AMRO Swap. The amount of swap exposure it agreed to provide to Glencore at any time was never more than the number of hedge shares it had acquired down to that time.

74. ABN AMRO reported daily to Glencore on the "swap exposure" which ABN AMRO had "obtained for Glencore"[19], as outlined in an email to Glencore on 30 March 2005:

> *"[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".*

Each trading day, Glencore approved the swap exposure ABN AMRO proposed to provide on the following trading day, for instance agreeing to a higher initial price.

75. The value of the swap exposure ABN AMRO provided to Glencore from time to time was never greater than the size of ABN AMRO's physical holding in Austral Coal, as ABN AMRO acquired hedge shares. The amount of swap exposure which ABN AMRO agreed to provide under the ABN AMRO Swap was ultimately halted at approximately 2.46%, after ABN AMRO had agreed to cease providing additional swap exposure to Glencore.

76. The ABN AMRO Swap, as confirmed on 4 April 2005, relates to a reference parcel of 7,407,302 Austral Coal shares, and an equity notional amount of $9,677,640.06. The initial price for the ABN AMRO Swap is $1.3065. The terms of the confirmation were a refinement of the terms set out in the draft confirmation. In particular, the round numbers in the draft for the number of reference shares, the value of the swap and the initial price were replaced with precise (lower) numbers corresponding with the number of hedge shares ABN AMRO had acquired, the amount ABN AMRO had paid for them and the average price per share, grossed up for commissions, taxes and other charges.

77. The 'final price' under the ABN AMRO Swap is defined as the volume weighted average price of Austral Coal shares over the 20 trading days immediately preceding

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[17] But, as Emmett J noted, it can be terminated earlier if the parties agree.

[18] Page 10 of CSFB Submissions of 7 October 2005.

[19] Emails from ABN AMRO to Glencore dated 31 March and 1 April 2005.

termination of the ABN AMRO Swap prior to termination, or such other final price as agreed by the parties.

78. The ABN AMRO Swap is to expire in March 2006.[20] In the event that Austral Coal is de-listed, the parties may, but are not obliged, to terminate the transaction on mutually acceptable terms. If this is not agreed, the transaction continues on the terms and subject to the conditions then in effect. [21]

POWER OF PANEL TO DECLARE UNACCEPTABLE CIRCUMSTANCES

79. The Panel may only declare circumstances in relation to the affairs of the company to be unacceptable circumstances if it appears to the Panel that the circumstances:

    (a) are unacceptable having regard to the effect of the circumstances on the control, or potential control, of the company or another company or the acquisition, or proposed acquisition, by a person of a substantial interest in that company or another company; or

    (b) are unacceptable because they constitute, or give rise to, a contravention of a provision of Chapter 6, 6A, 6B or 6C.

80. The Panel may only make a declaration if it considers that doing so is not against the public interest and after taking into account any policy considerations that the Panel considers relevant. The Panel must also have regard to, among other things, the purposes of Chapter 6 in section 602.

81. The Panel then considers whether the circumstances are unacceptable having regard to the effect of those circumstances within the terms of subsection 657A(2) and to the policy of Chapter 6 and other relevant policy considerations. In this regard, the Panel notes the following statement of Emmett J in relation to a finding of unacceptable circumstance within paragraph 657A(2)(a):

> *"… before the Panel considers whether it appears that particular circumstances are unacceptable, having regard to the effect of the circumstances, it is necessary to make a determination as to the effect of those circumstances. It is only unacceptability of the effect that must appear to the Panel and the Panel must make a finding as to that effect before it considers whether that effect is unacceptable. In a sense, it is a precondition of the making of a declaration that the Panel make a finding as to the effect, on control, or acquisition as, referred to in s 657A(2), that the relevant circumstances had. Thus, the Review Panel was required to make a finding that the circumstances will have some effect on either of those matters."*[22]

82. In determining what the effects were, the Panel may infer the notorious or well understood consequences of market events. In *Samic v Metals Exploration* the Full Court of the Supreme Court of South Australia held that the trial judge's discretion had miscarried, because he had failed to find that an increase in the bidder's shareholding from 20% to 28% under a defective Part C statement would deter rival bidders, for lack of evidence. King CJ (Cox J concurring on this point) said it "stood to reason" that the acquisition would deter rivals, and Olsson J said that it was "plain

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[20] But, as Emmett J noted, it can be terminated earlier if the parties agreed.

[21] ABN AMRO Submissions 7 October 2005, page 5.

[22] *Glencore v Panel* at [39].

common sense".[23] In *Metals Exploration v Samic*,[24] the majority of the High Court upheld the Full Court on this point, accepting that the deterrent effect had been established.

Relevance of section 671B

83. Section 671B 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. 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 relevant interests, represent 5% or more of the issued voting shares in the company. The notice must be given within two business days after the person becomes aware of the interest, or by 9.30 am on the next trading day if a takeover bid for the company is on foot.

84. Centennial submitted that unacceptable circumstances existed in relation to the affairs of Austral Coal during the Non-disclosure Period, because Glencore's failure to disclose the existence and growth of the aggregate of its direct holding and the banks' hedge shares breached section 671B of the Act. For reasons set out below, we do not find that Glencore or the banks contravened section 671B.

85. Alternatively, Centennial submitted that the failure to disclose the existence of Glencore's position led to unacceptable circumstances in the context of the Centennial bid and the creation of the swaps, because:

    (i) Glencore avoided compliance with section 671B by the device of using swap exposure instead of direct acquisitions, or

    (ii) the events frustrated the legislative policy which is set out in paragraphs 602(a) and (b) and underlies section 671B, which would have required disclosure of Glencore's position, but for a legislative oversight.

86. The difference between (i) and (ii) above is essentially whether the Panel finds in (i) that Glencore deliberately exploited the loophole supposed in (ii). Since the Panel's principal concern is always the effects of circumstances, rather than people's intentions,[25] it is sufficient to determine whether the events fell under a legislative oversight.

Effects of the Circumstances

87. The first question for the Panel was whether the failure to disclose the existence and growth of Glencore's position on 22 March and later led to unacceptable circumstances. This depends on two findings. First, whether that non-disclosure had effects on control (or potential control) of Austral Coal or on an acquisition (or proposed acquisition) of a substantial interest in Austral Coal. Second, if there are such effects, whether they are unacceptable in the light of relevant policy considerations.

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[23] *Samic Ltd v Metals Exploration Ltd* (1993) 11 ACLC 717, per King CJ at 723, per Olsson J at 731

[24] *Metals Exploration Ltd v Samic Ltd* (1994) 12 ACLC 752 at 762

[25] That is not to say the Panel is never concerned with intentions. Questions of association, and inferring likely effects from intended consequences are exceptions, each of which arises below.

88. The acquisitions (and proposed acquisitions) of substantial interests in Austral Coal which we have considered are Centennial's bid, the potential compulsory acquisition after that bid, and Glencore's acquisition of its direct holding and swap exposure. We have considered whether each of these should be characterised as an acquisition of a substantial interest, and then how that acquisition was affected by the circumstances. We then ask whether the inquiry reveals that the relevant circumstances affected control of Austral Coal. Finally, we ask whether in the light of the relevant policy considerations, any effect we have found on an acquisition (or proposed acquisition) of a substantial interest or on control is such as to indicate the existence of unacceptable circumstances.

89. For completeness, we add that we have not considered the effect of Glencore's failure to disclose its position on the bid it mooted making for Austral Coal. We accept Glencore's submissions that the only time when it seriously planned such a bid was over the weekend of 2nd and 3rd April, when it was probably already too late to make such a bid, as the flow of acceptances into the Centennial bid in the following week revealed.[26] In these circumstances, an attempt to identify the effects of the failure to disclose on Glencore's proposed bid would be unwarranted speculation.

90. For this purpose, we assume that any disclosure by Glencore would have recorded simply that it had acquired 4.9% of the shares in Austral Coal through a nominee and swap exposure to another 0.2% through a bank, with the relevant dates and prices, and that subsequent notices would have simply updated those figures. We do not assume that Glencore would have disclosed (as in the notices of 4 and 5 April it did) that it was contemplating bidding for Austral Coal.

91. On behalf of Glencore,[27] Mr Malcolm McComas, an experienced investment banker, made the following observations about the market for Austral Coal shares in the 3 months (18 November to 18 February 2005) prior to the announcement of Centennial's bid:

    (a) "an average of $3.0 million of Austral shares (at an average of 266 trades per day) were traded during that 63 day trading period;

    (b) the average value of each trade was approximately $11,287;

    (c) a total of $190 million of Austral shares were traded;

    (d) the volume weighted average price of all shares traded during this period approximately $0.80 per share."

92. After the Centennial bid was announced, the value of Austral Coal shares traded increased more than 100%. The volume weighted average price (**VWAP**) of the shares traded in the 21 trading days between the announcement of the bid and the day the bid was posted was around $1.31.

93. The principal determinant of Austral Coal's share price from 1 March 2005 to 8 April 2005 was Centennial's share price. From 1 March 2005 to 8 April 2005, the VWAP of Austral Coal shares tracked Centennial's implied bid value (calculated as 10/37 of

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[26] Although on 23 March 2005, Glencore made an application under the *Foreign Acquisitions and Takeovers Act* in relation to an acquisition of up to 20% of the shares in Austral Coal.

[27] Witness Statement dated 10 August 2005.

Centennial's VWAP on the same trading day) with a small discount for uncertainty relating to the success of Centennial's bid. The only occasions in March on which the VWAP of Austral Coal's shares was above Centennial's implied bid value were on 1 March, 7 March, 8 March, 10 March. 1 March can be explained by the heavy buying by Noble Group Ltd of 18,400,000 Austral Coal shares.[28]

94. Since the two companies have different businesses and operate in different parts of the coal market, there was no particular reason for their share prices to move together through a range of more than 10%, other than the bid. This history indicates that it was generally believed that the bid would be successful and that a higher bid was unlikely. Had the market expected the bid to fail, the price of Austral Coal shares is likely to have been less than the value of the bid. Had the market expected Centennial to be overbid, it is likely that the price of Austral Coal shares would have exceeded the bid value.

Effect of the 4 April announcement

95. The Panel notes the comment of Emmett J in *Glencore v Panel* at [43] that it was open to the Panel in *Austral Coal 02R* to consider the effect of Glencore's 4 April announcement. An analysis of the available facts is set out below together with a review of the relevance of those facts to these proceedings.

96. This assessment is a comparison between what actually happened and what we infer would have happened, if some circumstance or act had been different during the Non-disclosure Period. What it is convenient to refer to as the actual effect of Glencore's announcement of 4 April is actually a comparison between the recorded events of the days following 4 April and what we infer would have happened, had that announcement not been made. What would have happened in the absence of the announcement is inference, not ascertained historical fact.[29] The situation was changing in various ways over the relevant period, not least because shareholders were accepting the Centennial bid, and we can infer, but do not know as fact, how it would have developed in the absence of the Glencore announcement.

97. On 5 April, starting immediately after Glencore disclosed its interest in Austral Coal shares, to 1.44 pm on 7 April, when Centennial announced it had won control of Austral Coal, the price of Austral Coal shares rose and the price of Centennial shares fell, leading to a brief but clear divergence (by approximately 10 cents) between the price of Austral Coal shares and the value of the bid, the widest such divergence after 23 February. The price difference between the VWAP of Austral Coal shares and Centennial's implied bid value increased to 8.84 cents on 5 April 2005 and 11.25 cents on 6 April 2005. Over those two days, the VWAP of Austral Coal shares exceeded the value of the bid by nearly 10 cents. We infer that those price movements resulted from speculation on a rival bid or the acquisition of a larger stake (discussed in more detail below), quickly snuffed out by Centennial announcing that it had acquired majority control of Austral Coal at 1.44pm on 7 April.

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[28] Mentioned in *Austral Coal Ltd 03* [2005] ATP 15.

[29] On inference, see paragraph 83 above.

Mr McComas's Analysis

98. Mr McComas discussed the effect of the 4 April announcement, stating *"it is difficult to say with any certainty, exactly why the market reacted to Glencore's announcement in any particular way…"*.[30] In Mr McComas' view, it is likely that the buying by Glencore and ABN AMRO in the days preceding and after Glencore's announcement caused the VWAP of Austral Coal shares to increase above the implied value of Centennial's bid. In his view, the percentage increase in the VWAP of Austral Coal shares was modest either because the market did not think there was a real prospect of another competing takeover offer emerging, or that if any such takeover offer were to emerge, it would be at a small premium to the prevailing market price. Mr McComas based his conclusions on the following:

(a) from 4 April to 5 April, the VWAP of Austral Coal shares increased by 3% from $1.32 to $1.36. From 5 April to 6 April, it increased another 3% from $1.36 to $1.40;

(b) the VWAP of Austral Coal shares was above the implied value of Centennial's bid from 1 April to 4 April and continued this trend after the Glencore announcement. After that time, the VWAP of Austral Coal shares approximately tracked the implied value of Centennial's bid; and

(c) ABN AMRO and Glencore acquired approximately 55.6% (by volume) and 54.9% (by value) of Austral Coal shares traded from 1 April to 4 April and 4 April to 6 April, respectively.

Glencore's Analysis

99. Glencore, in its submissions, attributes the rise in the VWAP of Austral Coal shares above Centennial's implied bid value from 1 April to 6 April (inclusive) to the heavy buying by ABN AMRO on 1 and 4 April and by Glencore on 5 and 6 April. However, this theory can be dismissed for the following reasons.

(i) Heavy buying by Glencore and the banks during the Non-disclosure Period had not lifted the price of Austral Coal shares more than a cent or so above the implied value of the bid.

(ii) The price of Austral Coal shares stayed above the implied value of the bid on 7 April, although Glencore had withdrawn from the market, until Centennial announced at 1.44 pm that it had acquired control of Austral Coal, when it fell. Glencore offered the unconvincing explanation that the elevated price of Austral Coal shares on 7 April was an after-effect of its buying on the previous days.

(iii) Although there was heavy buying by ABN AMRO and Glencore between 1 April and 6 April, the total volume of shares traded on those days was not overly high when compared to the trading over the entire period in March. In fact, there are days in March (such as 29 March, 23 March and 16 March) on which the volume of shares traded was equally high if not higher and on each of these days, the VWAP of Austral Coal shares lagged

[30] At paragraph 11.

Centennial's implied bid value despite the fact that there was heavy buying.

(iv) While the fact that on 5 and 6 April Glencore purchased over 50% of the market turnover of Austral Coal shares helps to explain why the Austral Coal share price rose, Glencore's buying does nothing to explain why the Centennial share price then fell. Much of the 10 cent margin by which the Austral Coal share price exceeded the implied value of the bid on 5, 6 and 7 April was due to a fall in the Centennial share price. Speculation on a rival bid for Austral Coal could explain that fall, or why the Austral Coal price did not fall when the Centennial price did. Neither Mr McComas nor any of the parties suggested that Centennial then suffered any other setback, and none is apparent from its releases to ASX.

Conclusion – Speculation about Glencore

100. The evidence sits better with the explanation that the price of Austral Coal shares, relative to the price of Centennial shares, was at all times principally governed by takeover considerations – either the implied price of the Centennial bid, or speculation on a bid or acquisition of a blocking stake by Glencore. The only plausible reason for the further increase in the VWAP of Austral Coal shares above the implied value of Centennial's bid after Glencore's announcement is that it was caused by speculation about Glencore's intentions.

101. Reasonable market participants would have assumed that Glencore's swap exposure was hedged with Austral Coal shares. They would have been aware that there existed a real economic incentive for the swap counterparties to hold Austral Coal shares while Glencore held the swap exposure, such that a corresponding number of shares could not be traded or accepted in Centennial's bid. Accordingly, the market would have treated Glencore's swap exposure and direct holding as a combined stake and the swap shares as likely to be unavailable for acceptance into the Centennial bid, without Glencore's concurrence.

102. The market would have perceived Glencore as having a strategic, not merely financial, interest in Austral Coal, given the emergence of its interest during the course of the Centennial bid.

103. Disclosure of Glencore's identity would have fuelled speculation. Glencore is well known in this country as an investor in mines and metal refiners, but not as a portfolio investor. It controls Minara Minerals Ltd (formerly Anaconda Nickel) and its associate Xstrata plc recently acquired MIM Ltd, made an unsuccessful bid for WMC Resources Ltd and used to operate a vanadium mine in a joint venture with Precious Metals Australia Ltd. Had Glencore disclosed on the morning of 22 March 2005 that it had a 5.1% interest in Austral, there must have been speculation that Glencore meant to make a bid of its own, to have an associate bid, or to acquire a substantial interest, whether to divide up Austral with Centennial or to block the Centennial bid. There was no need for Glencore to state that it was considering a bid (as it in fact did on 4 April) for the market to infer this.

104. Prior to the disclosure of Glencore's position there was very little reason for arbitrageurs and hedge funds to be involved in the market for shares in Austral Coal.

The company had been shopped, it had financial difficulties and Centennial was the only and (from 23 March) unconditional bidder. On disclosure of Glencore's position, market participants such as arbitrageurs would have perceived an impending auction and may have sought to acquire Austral Coal shares.

105. Glencore's actual intentions are irrelevant to this issue. What matters is how the market would have perceived Glencore's position and the effect that disclosure of them would have had on the price of Austral Coal shares. Regardless of whether the market considered Glencore was building a springboard or blocking stake, the market would have assumed that Glencore would continue buying. This inference would have been strongly supported by disclosure of incremental 1% acquisitions, which would have further increased competition and price tension for Austral Coal shares.

106. Accordingly, we infer that the greater part of the movements of 5, 6 and 7 April in the Austral Coal share price, particularly relative to the Centennial share price, was due to speculation on a possible bid or on spoiling action by Glencore.

Effect of disclosure on 22 March and subsequently

Centennial's decisions regarding its bid

107. Centennial submitted that if Glencore had disclosed the existence and growth of its position on 22 March 2005 and thereafter, Centennial would have taken full account of the information available to it and could have chosen either to maintain a 90% minimum acceptance condition or to declare its offer unconditional regardless of Glencore's disclosure. While this possibility cannot be excluded, Centennial did not submit that it would have changed the decision or the timing of declaring the offer unconditional or led Centennial to vary its bid terms in any way. Centennial submitted that it was entitled to have made an informed decision and was denied the opportunity to do so.

108. Centennial could not have used its interim dividend as an inducement to accept the bid until 23 March, when it declared its bid unconditional. It could have declared its bid unconditional, even in the face of a bid by Glencore, with the option of accepting the Glencore bid if that bid was successful. In the absence of evidence or unequivocal submissions from Centennial that it would have changed its mind, the Panel is not inclined to infer that Centennial was likely to have changed its decision to declare the offer unconditional or vary its bid in any way having regard to Glencore's disclosure from 22 March 2005 or to speculate on what further effects would have flowed from such a decision.

109. Accordingly, the following analysis assumes that Centennial declared its offer unconditional on 23 March and accelerated the payment of its offer consideration such that shareholders who accepted before 7 April could participate in the dividend, as in fact it did. This in no way detracts from the fact that Centennial should have known of Glencore's position before it decided to declare its bid unconditional. Even if it had merely delayed its decision to declare the bid unconditional, that would have magnified the effect on competition in the market of Glencore's disclosure.

Market response to the disclosure

110. Mr McComas noted a number of possible reasons why and how the market would have interpreted the disclosure by Glencore of its position:

(a) the prospect of a competing takeover offer being announced by Glencore;

(b) the prospect of Glencore acquiring a blocking stake and potentially preventing Centennial from compulsory acquisition. Mr McComas notes that such speculation would be less likely if disclosure related to only 5%; and

(c) speculation that a person may be able to block compulsory acquisition may actually decrease the share price.

111. After the initial reaction, whether the market stayed high or the speculation dissipated would have depended heavily on Glencore's actions. If Glencore made no further announcement, Mr McComas thought that speculation in reaction to an announcement on 22 March would have subsided soon after 22 March. That is not unreasonable. If, however, Glencore had disclosed from day to day that it had bought additional shares or acquired additional swap exposure without positively denying that it would bid for Austral, in our view speculation on a rival bid or the building of a strategic stake would have continued for some days or weeks, perhaps until shareholders had to decide whether to risk allowing Centennial's bid to close without accepting it or when the deadline for accepting the offer and receiving the Centennial interim dividend neared.

112. Mr McComas' analysis of the effect of a single disclosure gives no support to the notion that a series of notices would not have led to any greater or more sustained rise in the Austral share price above the implied value of the bid. He chose not to answer the question, although it was squarely in issue.

113. Centennial submitted, and provided in support evidence from an associate director of Macquarie Securities, that if Glencore had disclosed its position, the Austral Coal share price would have increased.[31]

114. As mentioned above, Glencore's identity would have fuelled the speculation that normally attends the appearance of a new substantial shareholder during a bid, given that it is not generally recognised as a portfolio investor. We do not think that speculation on Glencore's likely actions would have been prevented by Austral Coal maintaining its support for Centennial's bid. The Austral Coal board could be relied on to support a higher bid, if one emerged. More to the point, if Glencore had not done so, the Austral Coal board should (and we infer that they would) have drawn their shareholders' attention to the prospect of a rival bid and (depending on Glencore's actions) may have advised them to delay accepting the Centennial bid.

115. Nor would that speculation have been greatly affected if Noble Group Ltd had accepted Centennial's bid for another 7% on 23 March, as in fact it did. A 17% stake would have been hardly more effective than a 9.6% shareholding in enabling Centennial to prevent Glencore from achieving majority control of Austral Coal.

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[31] Letter from Brett Clegg, Associate Director, Macquarie Securities (Australia) Ltd to Centennial's solicitors, 7 October 2005.

Had another bidder acquired control, Centennial is likely to have been able to resist compulsory acquisition without the additional shares.

116. Another factor which is unlikely to have affected such speculation is Austral Coal's financial situation. Austral Coal was in financial distress and had to refinance debt facilities at the end of March. However, Centennial had been aware of this when it made its bid, Austral Coal's lenders were aware of the bid and the mere appearance of another solvent bidder would not have made it more likely that Austral Coal would to go into external administration while the Centennial bid was open.

117. The Panel does not consider that the increase in the price of Austral Coal shares would have been dampened by speculation that Glencore was trying to block Centennial's bid. In this scenario, Centennial's bid was unconditional on 23 March and would be successful to the extent of Centennial's acceptances.

118. The effect of the announcement on the evening of 4 April is some indication of the likely effect, had Glencore disclosed the existence and growth of its position between 22 March and 4 April. The market in shares in Austral had changed greatly over the fortnight to 4 April, owing to Centennial's announcement of 23 March and the acceptances by Noble Group Ltd and others which followed it. There was much less scope for a rival bid than on 22 March, when Centennial had only 9.6% of the shares in Austral Coal and was by no means assured of obtaining control, should a rival bid emerge.

Price Effect of a 22 March Announcement

119. We find that the price of Austral Coal shares would have increased above the implied value of the Centennial bid on an announcement on 22 March of Glencore's position, that it would have continued higher for a few days if Glencore had made no further announcement, and that progressive announcements of 1% increments by Glencore would have tended to prolong and sustain the increase. The extent and duration of the increase are difficult to estimate precisely, but the price margin is likely to have been comparable with the margin of about 10 cents, or 7.5%, which opened up between the Austral Coal share price and the implied value of Centennial's bid on 5, 6 and 7 April (up until 1.44 pm). The increase is likely to have continued at around that level while Glencore continued to announce fresh acquisitions, or until Centennial acquired a majority of the Austral Coal shares.

120. It follows that shareholders who sold Austral Coal shares in the market during the relevant period received lower prices for their shares than they would have done had Glencore disclosed the existence and growth of its position on 22 March and subsequently.

Acceptances Effect of a 22 March Announcement

121. A consistent reaction of the market to speculation that there will be a competing bid is to hold back target stock from acceptance into the existing bid while awaiting developments, slowing acceptances for the existing bid, increasing the market price and putting pressure on the existing bidder to increase its bid price. As discussed above, this may result in the price of the target shares exceeding the value of the current bid.

122. Glencore itself desired that its announcement on 4 April would have the effect of "slow[ing] acceptances of Centennial's bid until it [Glencore] had made a decision whether to bid or not".[32] On the view taken by Glencore that section 671B did not require disclosure of the combined position, Glencore was not obliged to lodge a notice on 4 April, the notice it did lodge contained an unnecessary and speculative reference to a possible bid, and the percentages were inflated by using undiluted numbers.[33]

123. On 22 March, even on the basis that Centennial's bid would be successful, there was no urgency to accept the bid: it was still conditional and would be open for a month, there was no reason to expect that Centennial would provide the bid consideration until after the bid closed, and participation in Centennial's interim dividend was still a speculative benefit. Even after 23 March, when Centennial declared its bid free of conditions and announced that it would accelerate processing acceptances, the inducement of the dividend was worth only about 1.6% of the value of the bid. Many shareholders may have thought it worth giving up that benefit to keep open the option of accepting a higher bid, if one was likely to emerge.

124. Glencore's non-disclosure of its interest in Austral Coal contributed to the speed at which Centennial gained acceptances for its bid. During the period Glencore was acquiring swap exposure, Centennial received acceptances for over 25% of the shares in Austral Coal, taking its relevant interest from under 10% to 35%. Within two and a half days after Glencore's announcement, Centennial had acquired a majority of the shares in Austral Coal.

125. The effect on the rate of acceptances for the Centennial bid would have been much greater, if Glencore had disclosed its position on 22 March and thereafter. In that case, many of the acceptances would not have been sent as early as they were. Some may not have been sent at all. As the flow of acceptances into its bid is likely to have been slower if Glencore had showed its hand earlier, we infer that Centennial's bid was successful sooner, to a greater extent and possibly at a lower consideration than it would have been if Glencore had disclosed its position.

126. The market in which the Centennial bid proceeded during the Non-disclosure Period would have been more relevantly informed and competitive, and therefore more efficient, had Glencore disclosed the existence and growth of its position on 22 March and subsequently. The failure to disclose this information had the effect that the decisions Austral Coal shareholders made whether to accept the bid, hold their shares or sell them for cash were uninformed.

Is this an Effect on Control or a Substantial Interest?

127. The next step in the analysis is to inquire whether the effect which the circumstances have had on the progress of Centennial's bid is an effect on control of Austral Coal or on an acquisition of a substantial interest in Austral Coal. While we discuss the notion of a substantial interest below, the shares Centennial acquired during the Non-disclosure Period amount to a substantial interest on any view.

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[32] Paragraph 16.3 of Glencore's submissions of 7 October.

[33] That is, the numbers of Austral Coal shares held by Glencore and under swaps were given as percentages of the shares on issue before 1 April, not after the 14% dilution on that day.

128. The effect described above on decisions to accept the bid led to a corresponding affect on the acquisition of a substantial interest in Austral Coal by Centennial. Glencore's failure to disclose the existence and growth of its position affected market participants' decisions and thereby affected acceptances of Centennial's bid.

129. Glencore submitted that there was no relevant effect on control:

> *"Notwithstanding the above submissions on alleged possible deferral of acceptances, as a matter of law, such deferral is in any event not an "effect" within the meaning of that term in section 657A(2)(a), since that section is only concerned with the "actuality" of an acquisition/proposed acquisition etc, and not its timing."*

130. We do not agree with the characterisation of the effect as going only to timing, or that only the actuality of an acquisition is relevant, if by that is meant whether control is acquired or not. Chapter 6 is not concerned to promote or impede control transactions, except pursuant to its requirements as to how those transactions are executed. Its overriding policy is that acquisitions of control over shares take place in an efficient, competitive and informed market and specifically "to prevent substantial transactions on an uniformed market".[34] If an acquisition of a substantial interest in a company, affecting control, takes place in a market which is deficient in these respects because of the effects of circumstances identified by the Panel, the clear intention of section 657A is that the Panel should have power to declare those circumstances unacceptable.

131. Accordingly, the effect need not determine whether or not the acquisition proceeds. It is sufficient that it affect the character and timing of the acquisition of control. If it finds that identified circumstances have identified effects of on control, or on an acquisition of a relevant interest, the Panel must ask itself whether the circumstances have characteristics which should lead the Panel to brand the circumstances as unacceptable, having regard to relevant policy considerations. Those circumstances may be unacceptable because they detract from equal opportunity or from adequate information, or for other reasons. Conversely, the mere fact that a particular circumstance stops, impedes or facilitates an acquisition (or proposed acquisition) of control or of a substantial interest, such as a bid, has no bearing on whether that circumstance is unacceptable. For instance, the fairly frequent occurrence that a bid is stopped by the emergence of a higher bid is, of itself, far from objectionable.

132. To test this reasoning, assume that only one person is interested in bidding for a particular company and that on the facts the bid is sure to succeed. On the view taken by Glencore, provided only the bidder managed not to breach Chapters 6 to 6C, the Panel would have no power to intervene, regardless of inadequacies in access to information, astute avoidance of the provisions intended to ensure that all shareholders receive equal opportunities to benefit, or market manipulation, and no matter how many other laws the bidder broke or avoided. If there was a rival bid, however, the Panel could deal with those issues.

133. Emmett J quoted the Review Panel's finding that market participants may have made different decisions had Glencore's position been disclosed, without a finding as to what different decisions they may have made:

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[34] Paragraph 602(a) and *Re North Broken Hill Holdings Ltd* (1986) 4 ACLC 131 at 142, per Fullagar J

> "*The fact that market participants may have made different decisions means that the non-disclosure had an effect on Centennial's bid for the Company and, therefore, had an effect on the control or potential control of the Company and the acquisition or potential acquisition of substantial interests in the Company, at least by Glencore and Centennial and possibly others.*"

His Honour's only adverse comment on this finding was that the Review Panel had not identified the relevant effects. He cast no doubt on the logic.

134. On this basis, if the Panel finds (as it has) that the non-disclosure affected market participants' decisions, the Panel is entitled to infer that it had corresponding indirect effects on control (or at least potential control). The effects on control are the effects of the changed decisions of market participants on the process by which control moved.

Acquisitions of shares by Glencore, CSFB and ABN AMRO

135. There were three potential effects of disclosure of Glencore's position on the acquisition of shares by Glencore and the banks during the relevant period: quantity, price and speed of those acquisitions.

136. As regards quantity, in theory, Glencore and the banks might have acquired fewer shares than in fact they did, either because the liquidity was not available or because Glencore was not willing to pay more than it did, perhaps even allowing Centennial to proceed to compulsory acquisition. It is more consistent with Glencore's financial capacity, existing investment and objectives that it would have insisted on obtaining its desired level of economic exposure. In our view, the trading on 5 and 6 April indicates that there were enough sellers for cash in the market that Glencore would have succeeded in assembling a blocking stake, had it wished, although at a higher price than it actually paid.

137. The letter submitted by Centennial from an associate director of Macquarie Securities (Australia) Limited and quoted earlier opined that an effect of Glencore announcing its position would have been that Austral Coal stock would have been withdrawn from the market, with the result that Glencore and the banks would have found it difficult or impossible to acquire stock. We do not accept this conclusion. Whether the market becomes more liquid or less in such a situation depends on additional factors on which we have no evidence and an inadequate basis for inference, such as the extent of speculative buying.

138. Our conclusion is supported by expert evidence from Mr Harold Shapiro, Managing Director of Shaw Stockbroking, tendered by Glencore.[35] While Mr Shapiro does not deal with the hypothetical situation after a Glencore announcement on 22 March, in his opinion, Glencore could still have gone on to acquire a further 2.58% of the shares in Austral Coal (so that it held directly a 10% blocking stake) after its announcement of 4 April. On the basis of Austral Coal's share price in May, Mr Shapiro believed that the shares could have been acquired at below $1.40. This fails to address how much Glencore would have had to pay to acquire a blocking stake during the Non-disclosure Period.

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[35] Letter from Mr Shapiro of Shaw Stockbroking to Glencore's solicitors, 17 June 2005.

139. In addition to the expert opinion tendered in these proceedings, the contemporaneous evidence of correspondence from its legal adviser to Glencore on 23 March 2005 supports the inference that market speculation about a possible Glencore bid would have made it more difficult for Glencore and the banks to acquire shares at the prices they did:

> *"the possibility of a cash bid by a third party might desirably become more generally perceived. This ... would likely not assist Glencore in acquiring more Austral shares, if Glencore decided to keep going beyond its current 4.88% level. CSFB's possible purchases if it decides to make them to hedge its swap agreement might also be affected."*

140. We find that the speed and price of acquisitions by Glencore and the banks of Austral Coal shares during the Non-disclosure Period were affected by Glencore's non disclosure of its position. This affected the market in which the banks bought the hedge shares and Glencore bought Austral Coal shares on 24 March.

141. While the quantum of the effect on price belongs more to the question of orders, it is indicated by the margin between the Austral Coal share price and the indicative value of the bid on 5, 6 and 7 April, of about 10 cents. As found above, this margin is primarily explicable by reference to the reaction of the market to the disclosure of Glencore's position, and only secondarily to Glencore's buying on 5 and 6 April. The corresponding margin resulting from disclosure of Glencore's position and its growth on and after 22 March is likely have been greater. Glencore or the banks would have had to pay more to acquire Austral Coal shares during the Non-disclosure Period, by a proportionate amount.

142. Had the market been made aware of Glencore's position, it would been better informed, because it would have formed a truer appreciation of the nature of the demand in the market, more competitive, for the same reason, and more efficient, in that the prices paid for shares would have better reflected that demand.

143. Although the banks bought the hedge shares, not Glencore, the prices they paid for hedge shares affected Glencore's position beneficially, because those prices determined the initial prices under the swaps. The amount either bank pays to Glencore on close-out of the relevant swap depends on the difference between the initial price and the closing price, multiplied by the number of reference shares, so the lower the initial price the more likely Glencore is to close out at a profit and the greater any profit will be.

Conclusion on acquisition or proposed acquisition

144. For the reasons set out above, the Panel finds that Glencore's failure to disclose the existence and growth of Glencore's position had effects on acquisitions of a substantial interest in Austral Coal, both Centennial's acquisition of a controlling interest under its bid and Glencore's own acquisition of a smaller, but still substantial, interest.

145. The discussion of whether Glencore acquired a substantial interest in Austral Coal is below, following the discussions of the related concepts of relevant interest, association and voting power.

General adverse effect

146. In *North Broken Hill*, Fullagar J held that a finding of breach of the substantial shareholding provisions "is enough for the Court to determine the orders that are appropriate without the Court being bound to decide whether anyone in the market (or potentially in it) has otherwise suffered loss or damage".[36] While the decision was reversed on appeal, no doubt was cast on this holding.[37]

147. This passage was quoted with approval by Merkel J in his summary in *Terra Industries* of the principles governing the exercise of power to make orders where a breach of the substantial holding provisions had been established.[38] This summary was itself approved in general terms by the Full Court in *Flinders Diamonds*.[39]

148. The cases about remedies for breaches of the takeovers code, particularly the substantial holding and tracing notice provisions, establish that it is valid to infer from the default itself that the market is, and shareholders as a class are, adversely affected by such breaches.

Bubble Argument

149. Glencore submitted that an increase in the price of Austral Coal shares caused by disclosure of its position raising expectation that Glencore would make a bid would have been a bubble of unjustified speculation of a kind which the Panel should not encourage, Glencore having neither committed to nor made such a bid. The price of Austral Coal shares may have risen on speculation, and fallen when no bid emerged, leading to losses on the part of those who bought during the bubble. This would have been the opposite of an efficient, competitive and informed market. Glencore may have ceased to seek swap exposure, had such a bubble developed.

150. While it is true that adverse effect is the gist of unacceptable circumstances, the effects are often on the market, rather than on particular participants in that market. The distinction is meaningful: the market consists not only of all of the participants, but also of the webs which join them, of information flow, market usage and degrees of trust and reliance. Injury to those flows and this reliance is injury to the confidence of investors in the Australian securities market, over and above any loss or damage to individuals. This is well illustrated by the history and standing of ASIC's Policy Statement 25 *Takeovers: False and Misleading Statements*.[40]

151. Even Glencore did not know at the time that the speculation would have been unfounded. Had the flow of acceptances into Centennial's bid been checked by earlier news of a possible rival bidder, Glencore may have had an opportunity to bid. More generally, as ASIC pointed out, the market is the appropriate place for this sort of news to be assessed and priced. That is the legislative policy of Chapter 6C.

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[36] *North Broken Hill Holdings Ltd* (1986) 10 ACLR 270 at 286, per Fullagar J.

[37] *Crosley Ltd v North Broken Hill Holdings Ltd* (1986) 4 ACLC 432 is concerned only with the validity of the relevant tracing notices.

[38] *ASIC v Terra Industries Inc* (1999) 31 ACSR 186 at 207, [97(c)]

[39] *Flinders Diamonds Ltd v Tiger International Resources Ltd* [2004] SASC 119 at [63].

[40] On the objective of the takeovers code to support confidence in the Australian securities market, see Corporate Law Economic Reform Program *Proposals for Reform: Paper No. 4 Takeovers*, Canberra 1997, at pp 7 - 10

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152. It is convenient to deal here with a submission by Glencore, that the Panel should focus its assessment of effect on a suggestion in Emmett J's judgement about the process of ascertaining whether circumstances had an adverse effect:

> *"Steps might have been taken by the Review Panel to ascertain whether any person who sold shares was in fact adversely affected. Indeed, as indicated above, before making an order under s 657D, the Panel is required to give each person to whom the proposed order relates the opportunity to make submissions about the matter. That provision is primarily directed to ensuring procedural fairness. Nevertheless, persons who sold shares on ASX during the relevant period are persons to whom the orders relate. It would have been open to the Review Panel, for example, to issue a media release to the market inviting any person, other than [Austral Coal] or Centennial, who believed that he, she or it was adversely affected by the non-disclosure, to make submissions about the adverse effects suffered and about the orders that should be made as a consequence. To the extent that any person notified some detriment, as a consequence of having sold shares in [Austral Coal] in circumstances where that person would not have sold the shares if there had been disclosure of the relevant information, appropriate orders could then be moulded to protect the rights and interests of that person."*[41]

153. Emmett J did not overrule or distinguish *North Broken Hill*, *Terra Industries*, *Metals Exploration*[42] or the decision of the High Court in *ASIC v DB Management,*[43] not one of which was mentioned to his Honour. Accordingly, his Honour's remark has to be read as complementing those authorities.

154. His Honour's attention had been drawn to an invitation issued by the Panel in *Breakfree 04(R)* as follows.

> *'Since the Panel has received no submissions from people other than BreakFree, S8 and ASIC that orders should be made to remedy specific adverse effects of the events which it has considered, it will not decide whether to make orders until after 24 December, to allow anyone (other than BreakFree, S8 or ASIC) who believes they were adversely affected by those events to make submissions about the adverse effects and the orders that should be made. Any submissions should be received at the address below no later than 24 December 2003".*[44]

Breakfree 04 (R) concerned statements to the media which were found not to have been adequately checked and to have been misleading. However, the reasons for the decision show that the Panel had not been given grounds to infer that the market at large or any particular shareholder had been injured by or had reacted to (or might be inferred to have been injured by or to have reacted to) the statements in any particular way.

155. A series of decisions of the courts, reflecting clearcut legislative policy, establishes that in cases where substantial holdings have not been disclosed, or tracing notices

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41 *Glencore v Panel* at [47]

42 (1994) 12 ACLC 752, discussed above.

43 *Australian Securities and Investments Commission v DB Management Pty Ltd & Ors; Southcorp Wines Pty Ltd v DB Management Pty Ltd & Ors* [2000] HCA 7 at [45].

44 Panel Media Release TP 03/123 and *In the matter of Breakfree Limited 04(R)* [2003] ATP 42 at [77] and [78]. No submissions were received.

have not been given, the market in shares in the relevant company is injured (or shareholders as a class are injured) and in most cases an appropriate remedy is one designed to protect or restore that market or to protect shareholders as a class. Proof of injury to, and remedies in favour of, particular shareholders are the exception, not the rule. We take his Honour's remark to relate to the exceptional cases, and then only in the absence of better evidence of loss or damage.

156. Neither ASIC nor any other party has advised of having received complaints from investors. The Panel executive has received some phone calls from current shareholders interested in the outcome of the matter, but we do not regard them as being a fair sample of the shareholder body during the Non-disclosure Period.

RESTRAINT ON DISPOSAL OF THE HEDGE SHARES

157. Glencore had no power to dispose of the hedge shares. The banks had that power. The issue is the degree to which Glencore had power to control the exercise by the banks of their power to dispose of the hedge shares. While submissions largely dealt with whether Glencore had relevant interests in the hedge shares, the issue is wider, as the measure used by Chapter 6C of the Act is voting power, not relevant interest, and because the policy of Chapter 6C may be avoided by assembling a block of shares without falling within the technical concepts used by that Chapter to define voting power.

Economic incentive not to dispose of hedge shares

158. A real economic incentive existed during the Non-disclosure Period inhibiting the banks from disposing of the hedge shares. If Glencore merely preserved its rights under the swaps, CSFB or ABN AMRO could not sell their hedge shares outright without creating an open position, on which they risked losing a substantial amount of money. Glencore had a corresponding degree of power, by agreeing or declining to agree to early termination of the swaps, to control the exercise by the banks of their power to dispose of the hedge shares. Glencore needed to do nothing more to obtain or exercise the power. Nobody's concurrence was needed, and no condition needed to be satisfied, before it could be exercised. The impediment affected the principal means of disposal of the hedge shares, namely for the banks to sell them outright, without retaining a financial interest in them.

159. The fees the banks took to provide the swaps were small percentages of the exposure, and even a low probability of a substantial loss on an open position would have outweighed those fees. For instance, if there was a 10% risk that control of Austral Coal would pass (to Centennial or anyone else) at a price 25% higher than the initial price under the swap, a bank considering leaving the swap position open would have had to expect that its fees and interest would be offset against a probable 2.5% loss on the swap, which would have made the swap much less attractive to the bank. At the dates the swap terms were negotiated and particularly when CSFB first agreed to provide swap exposure, there was an appreciable risk that control would pass at a higher price. The risk reduced as more holders accepted Centennial's bid, but did not cease entirely until Centennial announced on 7 April (after the Non-disclosure Period) that it had acquired a majority of the shares in Austral Coal.

160. The banks in fact hedged at all relevant times, using Austral Coal shares. None of the evidence or submissions suggested that they ever thought seriously of doing otherwise. That CSFB wanted to be hedged with Austral Coal shares can be inferred from the proposal to cross 4.6% of Austral Coal shares from Glencore to CSFB before the CSFB Swap was entered into. CSFB said in submissions that it was not aware of any circumstances in which it would sell the hedge shares without retaining an option to call those shares if required. Glencore and the banks nonetheless referred us to various alternative hedges, which were attractive in theory, but impracticable.

Hedging alternatives

161. Glencore submitted that the banks were free to hedge their exposure in any way they chose, or not at all. It pointed to the notionally possible hedges and the attractions of investing equivalent capital in more attractive investments. In particular, it argued that there was no certainty that Glencore would bid for Austral Coal, and that Centennial shares would have made a satisfactory hedge.

162. ABN AMRO made the following submissions on its hedging alternatives:

> *"ABN AMRO does not hedge its position with physical stock in all cases. If there is a liquid market for options, convertible notes (such as those on issue at the time the bid was announced), futures or other derivatives …, then ABN AMRO may use these instruments to hedge its position instead. It could also hedge by means of a "back to back" swap with another counterparty regardless of the availability of derivatives in the market. Further if another client held or wanted to take a short equity swap position then this would provide an economic hedge for ABN ARMO, which would not have to hedge with physical stock."*

163. CSFB submitted as regards its hedging practice that:

(a) it would review its hedging strategy periodically, as this was a 3 year swap. In the long term it would reassess whether it may be better to construct an alternative hedge (in whole or part) through the purchase of a basket of other resource stocks (which may include Austral Coal shares) or an index through physical or derivative holdings;

(b) initially, it could have considered a back to back swap with another institution or acquiring long-dated exchange-traded options over other sector stocks; and

(c) although CSFB was willing at the outset to hedge with Austral Coal shares, it might not do so in the foreseeable future.

164. There were no securities or market traded derivatives which matched the risk profile of Austral Coal shares. Shares in other coal miners, or a sector or commodity index would not have done, as Austral Coal is a one-mine company, it was in financial difficulty (which called for a resolution, eg by a successful bid) and it was already subject to a bid. There were no exchange-traded options over Austral Coal shares. The convertible notes issued by Austral Coal would have been a reasonable substitute, except that CSFB was unable to acquire worthwhile quantities of them and they were liable to be redeemed if there was a bid. Any institution which wrote over-the-counter derivatives with which the banks could hedge would have faced the same problem.

165. It was submitted that it was open to the banks to accept Centennial's bid and rely on Centennial shares as a hedge for their open positions. If both banks accepted Centennial's bid, Centennial would be able to compulsorily acquire minority shares and delist Austral Coal, resulting in the CSFB Swap (but not the ABN AMRO Swap) automatically terminating.

166. The question is whether an alternative hedge was available in the fortnight between 22 March and 4 April 2005. Accepting for the sake of argument that it is true, it is not relevant that Centennial shares would now (in October 2005) be an adequate hedge. Shares in Centennial were not a viable hedge for swap over Austral Coal shares before it became certain that Centennial would obtain control of Austral Coal, without increasing the bid consideration. For so long as there was a risk that Centennial's bid would fail or be overbid, or after it closed without achieving compulsory acquisition, they were not an adequate substitute. If Centennial had been overbid or had increased its own bid by, say, 10%, to have hedged with Centennial shares would have been to lock in a 10% loss on the swap. During the Non-disclosure Period, it was not possible to exclude the risk of a higher bid or price, particularly if Glencore had disclosed its position.

Relevance of Banks' knowledge that Glencore was considering a takeover bid

167. What the banks knew of Glencore's intentions in relation to bidding for Austral Coal is relevant to their hedging decisions. If the banks were aware of a risk that Glencore would bid, even if only slight, it would have been irrational for them not to take that possibility into account in making their hedging decisions.

168. Glencore stated in its submissions in the Austral Coal 02 and Austral Coal 02R proceedings that it advised each bank that it was considering whether to make a takeover bid for Austral Coal. In these Proceedings, Glencore has clarified that a takeover bid was only one of a number of possible scenarios being considered and that Glencore did not seriously contemplate (or at least instruct lawyers to begin work on preparing documentation for) a bid until 2 April 2005. We accept these submissions.

169. The point is not, however, whether Glencore seriously intended to bid at the time that the banks were hedging their exposures: it is whether, in making their hedging decisions during the Non-disclosure Period, the banks could have ignored the risk that Glencore would bid for Austral Coal.

170. The primary evidence supports the inference that CSFB was aware of the possibility that Glencore would bid for Austral Coal. On 7 March 2005, for example, a Glencore executive emailed two CSFB officers who were later involved in the CSFB Swap explaining the importance of advising him of the highest price of Glencore's purchases in case "*we land up making a bid for the company*" in terms of the minimum bid price principle in section 621(3) "*if it all happens within 4 months of the purchase*".

171. ABN AMRO disclosed internal e-mails indicating that executives knew that Glencore was considering whether or not to make a bid for Austral Coal e.g. an email dated 26 March 2005 from an ABN AMRO executive to colleagues noting that Glencore had not yet decided whether to make a bid for Austral Coal.

172. We find that both banks were aware of the risk that Glencore would bid for Austral Coal, and that that awareness would have been a further incentive for the banks to acquire Austral Coal shares rather than rely on an imperfect alternative hedge.

Specific contractual terms

173. CSFB submitted that the terms of the CSFB Swap expressly provide that Glencore has no right or relevant interest in any ordinary shares of Austral Coal held or controlled by CSFB (whether as a hedge in respect of the CSFB Swap or otherwise through proprietary holdings), nor any power in relation to them, including without limitation, any power to control the sale of, or right to be consulted concerning the unwinding of those shares by CSFB.

174. The swap confirmation between ABN AMRO and Glencore includes a similar clause, cited by ABN AMRO as follows:

> *"Party B [being Glencore] acknowledges that, if any Shares are held by or for or otherwise controlled, by Party A [being ABN AMRO] (whether or not as part of any hedge in relation to this Transaction), Party B has no right or interest in any of those 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 shares by Party A or any decision by Party A with respect to the exercise by Party A of the right to vote attaching to any of those Shares"*

175. The Panel does not disregard these clauses as shams. However, beyond the written contractual terms, it is open to the Panel to consider the practical extent of Glencore's power to control disposal of hedge shares by the banks.[45] Thus in *NCSC v Brierley Investments Limited*, it was said:

> *"Equiticorp … does not, in my view, exclude the possibility that a person who has, as a matter of legal entitlement, only a potentiality to acquire power to control, may at the same time have an immediate factual power to control, based on arrangements and understandings, and further supported by the legal entitlement to which I have referred".*

Control exercisable by agreement

176. The Panel considered whether Glencore had power to control disposal of shares exercisable by means of an agreement in respect of the hedge shares within the meaning of paragraph 608(2)(b).

177. Centennial submitted that Glencore had an "ability to call for the hedge shares" once the swaps are terminated. Centennial tendered expert evidence from its adviser Macquarie Bank that, in relation to a company like Austral Coal with fairly small market capitalisation and relatively illiquid stock, a swap writer would always hedge its exposure with shares, the holder would generally be able to determine when the swap was closed out, and the holder could then, as a matter of market practice, elect to acquire the hedge shares at the closing price.[46]

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[45] (1988) 6 ACLC 995 at 1007, per Hodson J, similarly *Yandal Gold*, per Merkel J at [69]

[46] Letter from Mark Small, Executive Director, Macquarie Bank Limited, to Centennial's solicitors, 13 June 2005.

178. ABN AMRO submitted that there was no understanding between Glencore and ABN AMRO as to whether, and if so, how, ABN AMRO would hedge its swap exposure. The terms of the swap confirmation with ABN ARMO provide specifically that physical settlement is not an option.

179. ABN AMRO submitted that the notion that it would simply sell the hedge shares to the swap client assumed that it would take no steps whatsoever to maximise the price it received for the sale of its hedge shares if and when it decided to sell the shares, which is implausible. In submissions on ABN AMRO's standard unwind practice, ABN AMRO submitted that it would "*dispose of the hedge securities (if any) – either via general market trades, or crossing as principal if the sales desk locates a buyer/seller willing to transact at ABN AMRO's price levels*".

180. We do not find that there is an agreement between Glencore and the banks that the hedge shares will be available to Glencore once the swaps are terminated.

181. We have also considered an analogous question whether, during the Non-disclosure Period, Glencore as the swap holder, was in a privileged position to acquire the hedge shares, if and when the swap was unwound, because it would be able to pay any price for them, knowing that the money would come back to it in the form of the swap settlement. While agreeing that Glencore was in such a privileged position for so long as the banks held hedge shares, because the banks had the power not to hedge, we do not infer that during the Non-disclosure Period Glencore had power to acquire the hedge shares at a future time because of that power.

Power to control disposal vs. rights under contract

182. Glencore and the banks argued that Glencore could not have had relevant interests in the hedge shares during the Non-disclosure Period, because it had had no contractual or proprietary rights in respect of the shares. We do not accept this argument. Relevant interest is defined in terms of power, not of rights. Subsection 608(2) is clear that power wrongfully exercised may amount to a relevant interest. No court has ever held that power to control disposal of a share is not a relevant interest unless the power derives from a right to control disposal, and in *NCSC v Brierley Investments*, the Court was careful to leave it open that a relevant interest might exist on the basis of mere power.

183. Even where they exist, contractual rights over shares in a listed company can generally only be enforced by way of awards of damages, not by specific performance. That is, even under a contract to sell a share, the constraint on disposal of the share is having to pay the buyer an amount equal to the share's gain in value, much the same as the obligation undertaken by a bank writing a swap.

Did the economic incentive give rise to relevant interest?

184. The existence of the swaps did not impede the banks lending the shares or dealing with them in any other way which was consistent with their being able to retrieve the shares when the swaps mature or are unwound. The real imperative on the banks was to hedge (by any means available) and their need to hold Austral Coal shares resulted from the contingent fact that there was no other suitable hedge.

185. While it is a matter of fact and degree, the Panel is not persuaded that the power enjoyed by Glencore over disposal of the hedge shares during the Non-disclosure Period was sufficient to constitute a relevant interest. Despite the strong commercial incentive to retain the hedge shares, the exposures were not large ones for institutions as large as CSFB and ABN AMRO, it was always within their power to dispose of their hedge shares at any time during the Non-disclosure Period and they would have disposed of them, had they perceived it as being in their own interest to do so.

186. The Panel also notes, but does not rely upon, a passage in *W.P. Keighery Ltd v FCT* on the rather different issue whether a company was capable of being controlled by a particular person or group:[47]

> *"It is, of course, nothing to the point that the existence of the power of future redemption might conceivably have made the holders of the redeemable preference shares more willing than otherwise they would have been to comply with the wishes of Mr. and Mrs. Keighery. Clearly enough, the description of a company as "capable of being controlled" is not satisfied by the mere fact that a majority of shareholders, while not under any legal or equitable obligation to obey the directions of other persons, may possibly prove so anxious to retain shares which those other persons are able to eliminate that they will obey those directions against their own desires. A power in a person to provide shareholders with an incentive or inducement to exercise their voting power as that person may wish is not aptly described as making the company capable of being controlled by that person. The person must be able to dictate the decisions of the general meeting, through a preponderance of voting power which either is vested in him or is subject to his command".*

When Glencore obtained Swap Exposure

187. We discuss this issue here, instead of after the issue whether Glencore acquired a substantial interest, because the facts overlap with those discussed in the immediately preceding section.

188. Glencore has submitted that the swaps did not come into existence until 4 April, that they were disclosed the same day and that there was no interval during which the market traded, and people accepted the Centennial bid, in ignorance of the swaps. When Glencore might have disclosed the existence of its position depends on when it obtained *de facto* power to control the disposal of the hedge shares by the banks. This is not necessarily the same time as when legally binding relations arose between Glencore and each of CSFB and ABN AMRO in relation to swap exposure.

189. Glencore submitted that no legal relations were formed between it and either bank until 4 April 2005, when final confirmations were executed. Both CSFB term sheets were expressed to be non-binding. ABN AMRO's draft confirmation promised only that ABN AMRO would use "best endeavours" to offer exposure. Both the CSFB term sheets and the ABN AMRO draft confirmation were superseded by confirmations which differed from the initial documents in a number of details.

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[47] [1957] HCA 2 at [6], (1957) 100 CLR 66 at 85

190. Glencore characterised the process beginning with signature of the initial documents and ending with the confirmation of the hedged swaps as one of negotiation. We do not agree with this characterisation. Before either bank bought any hedge shares, the principal terms of the swap had been documented, discussion about those terms had essentially ceased and the bank had obtained internal authority for the transaction. While there were minor differences between the terms of the initial documentation and the signed confirmations, there is no evidence that the meantime was spent settling these details.[48]

191. What did take place in the meantime was that the banks acquired hedge shares and periodically advised Glencore that they would provide corresponding additional swap exposure. Glencore updated its instructions daily: for instance, it agreed with ABN AMRO to increase the price limit on Glencore's exposure.

192. The indicative amount, number of shares and price were all varied in the final documentation to accord with the swap exposure notified to Glencore in the meantime. These variations were all at the margin, except that ABN AMRO provided half as much swap cover as initially proposed, at Glencore's request.

193. Centennial pointed out that each bank required notarised evidence of Glencore's signatory's authority to sign the term sheet or confirmation, that Glencore paid CSFB a substantial amount as collateral and that ABN AMRO proposed to document the confirmations in tranches of about $5 million, for credit control reasons. Centennial submitted that this is evidence that the swaps had been agreed on from the time the CSFB term sheet was signed and the ABN AMRO draft confirmation was agreed. It concedes that the ABN AMRO swap may have been agreed only subject to ABN AMRO being able to acquire hedge shares[49] and that the CSFB Swap contract only came into existence when CSFB purchased the hedge shares.

194. As well as the points raised by Centennial, the following matters are all more consistent with contractual relations having come into existence on the basis of the term sheet and draft confirmation as swap exposure was progressively provided, and later being superseded by a more refined contract.[50]

    (a) the sheer amount of money ($25 million) expended by the banks before the confirmations were signed,

    (b) the process of providing the swaps, as described above,

    (c) the way in which that process determined the main differences between the term sheets and the draft confirmation, on the one hand, and the final confirmations, on the other hand,

    (d) the characterisation of the final documents as confirmations,

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[48] Glencore and CSFB agreed on 23 and 24 March to amend the initial price provision in the CSFB term sheet, as mentioned above, but this provision was not used in the confirmation.

[49] No doubt because ABN AMRO promised to use best efforts to arrange the swap. This plainly means that ABN AMRO would use best efforts to hedge its position, not that the swaps desk would plead with the credit committee.

[50] *Masters v Cameron* [1954] HCA 72, (1954) 91 CLR 353

(e) the fact that the effective dates of the confirmations (for fees and the swaps themselves) were the dates of the first execution, and

(f) the provision in the ISDA master agreements allowing the use of confirmations to document existing transactions,

195. Consistently with this view, a CSFB executive directed another officer to notify Glencore, after the swap was fully hedged and before it was confirmed, that Glencore was legally committed.[51]

196. It is also indicative that CSFB had already provided a service to Glencore pursuant to existing arrangements that CSFB advised Glencore that fees for the swap were due and payable on 1 April, after the swap was arranged, but before the confirmation was signed.[52]

197. Both CSFB and ABN AMRO agreed that it is normal practice for a swap counterparty to rely on oral arrangements in acquiring hedge shares. However, ABN AMRO's submission was qualified to the effect that ABN AMRO does not rely on oral arrangements as the basis for an enforceable swap. ABN AMRO tendered a statement by Mr Trevor Watson, Head of ABN AMRO Legal, which pointed to a situation in which ABN AMRO did not enforce an unconfirmed swap transaction and assumed the risk of loss on the hedge position. We do not doubt Mr Watson's evidence, but:

(a) it was not supported by legal analysis or detailed narration,

(b) in the letter mentioned below, Mr Small stated that in a similar case, Macquarie Bank "would take vigorous action to enforce the holder's obligation" to confirm the swap, and

(c) it went to whether the bank could enforce an unconfirmed swap against the client, not to whether the client could rely on an unconfirmed swap as against the bank.

198. In our view, it is unduly simplistic to ask whether the swap agreements existed and applied in relation to the number of reference shares eventually agreed upon, or in their final form, at any time before the banks had completed buying hedge shares.

199. The facts set out above point to the banks having been authorised by Glencore to arrange swap coverage on agreed terms, but to the banks having agreed to arrange swap coverage only when and if they had acquired the hedges they required and in amounts and at initial prices which would be adjusted to reflect the price at which hedges had been acquired. On this view, Glencore agreed to take the swap exposure which was arranged by each bank consistently with its orders, as varied and updated from time to time, but could at any time cancel so much of the order as had not been filled. We note Glencore's initial concession that either bank would have looked to Glencore to compensate it, if Glencore had decided not to proceed with a swap after the bank had bought hedge shares.

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[51] *Austral Coal 02 (R)* at [47]: "advise him that he [Glencore] is legally obliged on the aggregate TRS [total return swap] notional".

[52] CSFB Submissions 7 October 2005, paragraph 7: "CSFB expected to receive payment for fees on 1 April 2005 for provision of the swap facility to Glencore. Fees were in fact received on 8 April 2005."

200. This view of the legal relations is consistent with general broking industry practice. We think it significant that each bank used, both internally and in communications with Glencore, the normal broking terminology of filling orders and that in submissions ABN AMRO drew an analogy between a buy order to a broker for shares and agreeing draft terms for an equity swap. It is also supported by evidence tendered by Centennial from an Executive Director of Macquarie Bank, that:

> *"it is normal market practice for swap counterparties to proceed on the basis that a swap holder is contractually bound by swap arrangements once the holder has placed its oral order and the swap counterparty has either acquired securities to hedge its swap exposure or otherwise changed its position".*[53]

201. This view reconciles the evidence that the initial documentation did not bind the banks to filling the orders, and that Glencore could cancel parts of the orders which had not been executed (as it did, as regards ABN AMRO) and the evidence that the banks and Glencore treated that documentation as a basis for legal relations (Glencore did authorise the banks to write swap exposure, within certain limits and subject to its right to cancel further exposure).

202. Glencore has submitted that, until it took up those offers by executing the confirmations, the banks had merely offered it swap exposure. Even on its preferred view, Glencore had at all relevant times offers which were not withdrawn and which it could convert into contracts by the simple act of accepting them. Accordingly, if the banks disposed of the hedge shares, they risked having unhedged open positions. Glencore's power to accept the banks' offers was not precarious, as the banks' positions were fully hedged and by its acceptance, Glencore would assume an obligation to cover the banks' interest costs.

203. On either of these bases, in this context we reject Glencore's submission that "*either one has a binding contract or one does not. If one does not have a contract, one has nothing and accordingly it is not appropriate to talk about a 'swap arrangement' short of a binding differences contract."* It is perfectly possible to have one set of legal obligations at one moment, and for that set to transmute into a different set including a new contract at a later moment, when offers are accepted, conditions are satisfied, options are exercised or authorities are acted upon.

Association

204. A person has a substantial holding in a company if the person and their associates have between them relevant interests in 5% or more of the voting shares in the company. Whether or not Glencore had relevant interests in the hedge shares, the banks plainly did. After Glencore's position exceeded 5% on 21 March 2005, if Glencore was associated with the banks, that position constituted a substantial holding in Austral Coal.[54]

205. Glencore was associated with either bank, if Glencore and the bank were:

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[53] Letter by Mark Small of Macquarie Bank to Centennial's solicitors, 6 October 2005.

[54] The facts do not raise issues of association through common control or through relevant agreements concerning control over the composition of the board of Austral Coal. Had either bank been associated with Glencore, it would have been a substantial shareholder in its own right.

(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") (paragraph 12(2)(b)); or

(b) acting in concert in relation to [the conduct of] the affairs of Austral Coal (paragraph 12(2)(c)).[55]

206. The *Austral Coal 02* Panel discussed the law on association at [224] to [245] of its reasons and said that Glencore and the banks arguably were associates, but did not rely on that view for its decision. Glencore's analysis of the law is not greatly at variance with that discussion, though Glencore submits that it was not associated with either bank at the relevant times. For present purposes, it is sufficient to apply that analysis, without repeating it.

207. ASIC submitted that it was open to the Panel to find that Glencore and each of the banks were associates because they entered into a relevant agreement with the purpose of Glencore controlling Austral Coal. ASIC also submitted that it would be open to the Panel to find that Glencore and the banks had a common purpose of controlling Austral Coal.

208. Centennial submitted that the conduct of Glencore and the banks was evidence that Glencore was acting in concert with, and had a relevant agreement with, each of the banks to carry out a strategy to achieve the common objective of obtaining control over a sufficient number of shares to constitute a substantial interest in Austral Coal.

209. Glencore pointed out that the banks provided swap exposure to Glencore in ways which were consistent with their own interests, but not otherwise, and that Glencore did not disclose its plans to either bank, which it did not retain as advisers on the matter. It also argued that, to the extent the banks were aware of Glencore's overall objectives, for them to provide their usual services with that knowledge was not to make Glencore's objectives their own.

210. CSFB strenuously denied being associated with Glencore and stated that its motivation for entering into the CSFB Swap was to profit from its margin and fees on the swap. It also submits that the hedge was established in accordance with its usual procedures and without reference to Glencore. In the light of the evidence considered above, this submission oversimplifies what actually happened. CSFB pointed out, with more justification, that the terms of the CSFB Swap were drafted so as to avoid giving Glencore a relevant interest in the CSFB hedge shares.

211. ABN AMRO absolutely denied any allegation that it had a purpose of Glencore or anyone else controlling Austral Coal. ABN AMRO submitted that it was not even acting in an advisory or investment banking role for Glencore. It noted in rebuttal submissions:

> *"This was an ordinary commercial transaction on which ABN AMRO intended to earn fees and other profit for itself. It has no wider "purpose" in common with Glencore, nor did it act in concert with Glencore. Claims to the contrary are entirely unsupported by the evidence"*

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[55] See discussions of concert in *National Foods Ltd 01* [2005] ATP 8 at [55], *LV Living.Ltd* [2005] ATP 5.

212. Although throughout the Non-disclosure Period Glencore was considering a bid as one of a number of options, the Panel does not find that Glencore had a probable or an established plan to bid for Austral Coal before 2 April. In the absence of such a plan on Glencore's behalf, the Panel does not find that Glencore and the banks had a relevant agreement or common objective in relation to a proposal that Glencore should acquire control of Austral Coal.

213. However, association in relation to the conduct of the affairs of a company relevantly includes an agreement to acquire a relevant interest in shares that will enable one of the associates to influence the conduct of the affairs of the relevant company or the outcome of a transaction affecting control of the company.[56] Assembling a parcel large enough in practice to block compulsory acquisition is conduct which relates to the conduct of the affairs of Austral Coal, because it goes to whether, if its bid was otherwise successful, Centennial would be able to run Austral Coal as a wholly-owned subsidiary, or whether the directors of Austral Coal must in that case concern themselves with the interests of minority shareholders.

214. There is ample evidence that CSFB intended to acquire a hedge parcel of just under 5%, in the knowledge that Glencore also had a parcel of nearly 5%. There is no direct evidence that CSFB intended that the combined parcel be sufficient to block compulsory acquisition, but everyone in the Australian securities market is aware of the significance of a 10% parcel which lies outside the reach of a bidder.

215. To block compulsory acquisition, in addition to the holdings of Glencore and CSFB, there needed to be another parcel aligned with Glencore, or enough holders who were inactive or opposed to compulsory acquisition that holders of 10% of the shares in Austral Coal would not accept the bid. Neither assumption was unreasonable for CSFB, particularly when Glencore was paying the bills, or for Glencore, which was seeking to arrange a second swap through ABN AMRO.

216. This analysis does not require that CSFB was contractually or otherwise committed to following through a shared plan to the bitter end. It is part of the concept of association through acting in concert or a relevant agreement that the parties to the concert or other agreement may be free to reconsider and withdraw. [57] It would be enough that throughout the Non-disclosure Period, the parties by consent co-operated for the time being towards an agreed objective.

217. The evidence is in the end insufficient to establish that CSFB shared Glencore's inferred objective, namely to block compulsory acquisition. It was aware of Glencore's objective and that its provision of hedged swap exposure contributed materially to achieving that objective, but there is no direct evidence that CSFB agreed to assist, agreed or accepted instructions to hedge the swap with Austral Coal shares, or otherwise stepped outside the ordinary course of its business to oblige Glencore.

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[56] *Flinders Diamonds Ltd v Tiger International Resources Inc* [2004] SASC 158 at [127], per Williams J

[57] *FCT v Lutovi Investments Pty Ltd* [1978] HCA 55; (1978) 140 CLR 434; (1978) 22 ALR 519, per Gibbs and Mason JJ at [17] (CLR 444), Murphy J concurring "an arrangement may be informal as well as unenforceable and the parties may be free to withdraw from it or act inconsistently with it, notwithstanding their adoption of it".

218. The evidence for association is much stronger in relation to CSFB than it is for ABN AMRO, as the relationship between CSFB and Glencore was more extensive and continued over the whole of the Non-disclosure Period. Further, the correspondence between Glencore and CSFB supports the inference that the CSFB swap exposure was structured to avoid the disclosure requirements.[58] ABN AMRO must have understood this effect of the structure, but there is no evidence that they adopted Glencore's objective as their own.

219. The Panel does not find that Glencore was associated with ABN AMRO or, on balance, with CSFB.

Relevance of Intermediary Role

220. We were pressed with submissions that the banks could not have been associates of Glencore, because they were involved only as intermediaries. That raises a number of issues, on which we touch briefly.

221. For Glencore and CSFB to be associates, it is not necessary that CSFB had the same ultimate objective as Glencore in relation to the stake. They must have co-operated to achieve the same objective and that objective must have related to control or influence over the conduct of the affairs of Austral Coal. If this requirement is satisfied, it does not matter that the associates had different ulterior objectives: in the one case, to enjoy the relevant measure of control or influence; and in the other, to earn a fee for providing a service. For instance, one union has been held to be acting in concert with another, by lending assistance to industrial action concerning workers who were members of the second union, but not the first.

222. Where a putative associate is an intermediary or other fee earner, we must ask whether the putative associate is within an exception in paragraph 16(1)(a), because the intermediary is merely acting on behalf of the other person, in the proper performance of functions attaching to a professional capacity or business relationship. Had CSFB come within the inclusive part of the definition, this exception would not have taken it out.

223. Glencore submitted that "on behalf of" must be read widely. [59] We agree: it may even be read widely enough to correspond with the attribution rule in section 52. It makes no difference. As CSFB and Glencore have insisted many times, CSFB's position under the CSFB Swap and its acquisition of the hedge shares were not taken on behalf of Glencore, but as principal and counterparty to Glencore.

224. For future reference, we note that the difference between two parties having a common purpose and one party being aware of the other's purpose is less clear than it might at first seem, for two reasons. Although parties A and B do not act in concert because A pursues interests or objectives which merely happen to coincide with those of B, without any agreement or consent,[60] the lines are blurred where A agrees with B in terms which, although they do not refer to B's objective, nonetheless entail

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[58] See quotations from internal emails in *Austral Coal 02* at [83].

[59] Citing *Heine Management Ltd v ASC* (1992) ACSR 578, per Hayne J.

[60] *FCT v Lutovi Investments Pty Ltd* [1978] HCA 55, (1978) 140 CLR 434, *Flinders Diamonds Ltd v Tiger International Resources Ltd* [2004] SASC 119.

that it will thereafter be in A's interest to achieve the same objective as B, or an objective which will in fact facilitate B's achievement of B's objective. In criminal law, from which the concept of acting in concert is derived, the scope of a common purpose is effectively widened by the availability of advertent recklessness as a mental element.[61]

Glencore's knowledge of hedging activities

225. Each of the banks has submitted that it did not advise Glencore of its purchases of hedge shares, and Glencore has submitted that neither bank advised it of its purchases of hedge shares, from day to day. We do not reject these submissions, but it is clear that each bank reported progress to Glencore daily, and obtained updated instructions, while they were providing swap coverage.

226. Glencore states that it requested information on the banks' hedging activities on or about 4 April to assist it in drafting the 4 April announcement of its direct holding and swap position. In submissions made to the Panel in the Austral Coal 02 proceedings, Glencore stated at page 11:

> *"In addition, Glencore (through its legal adviser Atanaskovic Hartnell) enquired as to the hedging activity of both ABN Amro and CSFB for the purposes of disclosure of the notional number of shares covered by the Glencore Swaps in assisting Glencore to prepare the Glencore media release 4 April and the substantial holder notices dated 6 April 2005 and later, and was provided information from ABN Amro and CSFB for this purpose".*

This statement is curious. The 4 April announcement mentions the swaps, but not that they were hedged. And on Glencore's view, there was no reason why it should mention the hedges, or even be made aware of them.

227. However, as discussed elsewhere in these reasons, the practical reality was that the banks would acquire Austral Coal shares to hedge their exposure under the Glencore Swaps. Glencore, as a sophisticated market participant, would have known as much. We infer that Glencore, being interested and having available to it, sought and obtained information from other sources as to the banks' acquisitions of hedge shares during the period in which swap exposure was increasing.

228. Glencore did not deny that it knew at the relevant times how many shares the banks had acquired, and in fact mentioned in submissions that it was monitoring CSFB's trading in Austral Coal shares:

> *"Glencore also occasionally obtained information on CSFB purchases of Austral shares in relation to the impact of such purchases on the initial price of the differences contract, and for the purposes of monitoring trading activity".*

229. CSFB reported to Glencore the increasing exposure it had arranged. The corresponding communication from ABN AMRO was so explicit that the swap exposure it was providing corresponded with purchases of hedge shares that Glencore terminated the order.

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[61] See for instance *Gillard v R* [2003] HCA 64, (2003) 202 ALR 202.

230. We infer that Glencore was aware of the banks' progressive acquisitions of shares in Austral Coal and that their purchases matched in number and price the swap exposure they were agreeing to provide, day by day. Both CSFB and ABN AMRO bought their hedge shares through their own broking arms. The banks did not provide increased swap exposure in round millions, such as a credit committee might have approved (such as the tranches of $5 million proposed by ABN AMRO's credit staff), but in precise amounts and at prices which corresponded with the relevant bank's acquisitions on the previous trading day. The likelihood that at least CSFB would hedge with Austral Coal shares was flagged by its discussions with Glencore concerning the proposed crossing to CSFB of Glencore's initial 4.5% of shares in Austral Coal.

231. In pure theory, the broking arms could have been buying for other clients, but from the nature of the swaps, the banks' role in them and the detailed correspondence between the swaps the banks wrote and their purchases Glencore had reason to be, and we infer that it was, highly confident that each bank had bought shares to match and hedge the exposure it agreed to provide to Glencore, day by day.

232. Accordingly, we infer that Glencore was aware that during the period in which the swap exposure was increasing the banks were hedging their exposure under the Glencore Swaps by acquiring shares in Austral Coal, and that the swap exposure the banks actually provided was hedged, when it was provided.

SUBSTANTIAL INTEREST

233. Unacceptable circumstances may have occurred if the objectives of Chapters 6 and 6C were frustrated by the failure to disclose Glencore's position, whether or not there was a contravention and whether or not Glencore or the banks sought consciously to avoid compliance with section 671B, if that failure had effects on control of Austral Coal or on an acquisition of a substantial interest in Austral Coal and those effects are such as to render the circumstances unacceptable. The policy of Chapter 6C is one of the policy considerations the Panel is entitled to take into account. It may be avoided by assembling a block of shares without falling within the technical concepts used by that Chapter to define voting power.

234. Centennial's bid led to it obtaining control of Austral Coal and a substantial interest in that company, on any view.

235. It is not as clear-cut that Glencore's position was a substantial interest, or became one, during the Non-disclosure Period. Since the number of shares comprised in them is quite large enough to require disclosure under section 671B, we need to examine three closely related issues:

    (i) whether Glencore's position is as cohesive as interests which section 671B requires to be disclosed,

    (ii) the application of the policy of paragraph 602(b)(i) that shareholders in a company should be aware of the identity of anyone who proposes to acquire a substantial interest in the company; and

(iii) the application of the policy of paragraph 602(a) that control of shares in a company should be acquired in an efficient, competitive and informed market.

236. These require us to resolve whether Glencore's position constitutes a substantial interest, and how closely it resembles substantial holdings which section 671B requires to be disclosed.

237. The phrase "substantial interest" has been used in legislative expressions of the Eggleston Principles since 1980, but has never been defined. It was not used in its present sense in the Eggleston Report itself.[62] The measure of control of a company used by Chapters 6 and 6C of the Act is voting power. This is a defined concept, wider than relevant interest: a person's voting power is the aggregate of the voting shares in which that person and their associates have relevant interests.

238. Substantial interest is used in sections 602 and 657A. It is neither relevant interest nor voting power: it is a third concept. From its use in expressing the policy of Chapter 6 and in an anti-avoidance concept, we infer that it relates to aggregations of interests in shares, as do relevant interest and voting power, but that it is wider than either of those concepts, and free of their technical limitations. In legislation much of which is about the notional aggregation of interests held by different people, it would have been self-defeating to have based the anti-avoidance provisions of Chapter 6 on a concept of what the Chapter was about which was more restrictive than the operative provisions.

239. The courts have looked at the notion of a substantial interest many times, and have never placed any restrictions on what may qualify as a substantial interest, as regards size, nature or ownership, other than limitations which flowed directly from the requirement that a substantial interest be a step along the way to control.

240. Courts have several times held that parcels of this order were substantial interests, even before the substantial holding disclosure threshold was lowered from 10% to 5% in 1991. Rather than treating control as an absolute concept as if section 50AA applied, the takeovers code is consistently concerned with fine gradations of control. Chapter 6 regulates acquisitions of shares conferring increments of voting power across the whole range from 20% to 90% voting power. Chapter 6C requires disclosure of voting power across the whole from range from 5% to 100%. Panels have consistently explained the relationship between unacceptable circumstances and control in terms of increments in control, as have the Courts.[63]

The Quantum of a Substantial Interest

241. A fairly consistent approach to this concept has been followed ever since in *Elders IXL v NCSC,* Marks J had to consider whether to uphold a declaration under section 60 of CASA, and rejected a submission that a parcel of 4.4% of the shares in BHP was a substantial interest:

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[62] It is used in reference to a draft provision, which was not enacted in a similar form, in a cross-reference to the provisions relating to disclosure of substantial shareholdings, corresponding with current Chapter 6C.

[63] For further discussion, see *Village Roadshow Ltd (No. 2)* at [30] to [40]]

> *The acquisition of 4.4% of the shares in BHP was not of a "substantial interest" within the meaning of sec. 60(1)(b) and (c) or (3)(b) and (c). It is unnecessary to give definitive meaning to the expression "substantial interest" within the subsection. At the very least, in my opinion, it must be understood in the context of the Take-overs Code. It may well be that its meaning cannot be defined by reference to a stated percentage or a minimum percentage, but that the question as to what is or is not a "substantial interest" is to be determined according to the circumstances of a particular case. But its meaning in a particular case must attach to a step in the direction of take-over or change in corporate control. It is not to be considered in a vacuum as relating solely to size. The size must have relationship to a threat or potential threat to the stability of corporate control. Here, the acquisition by Beid has not been shown to relate to take-over by Beid or any associate. It was merely a purchase of shares.*[64]

242. In the circumstances of *Humes Ltd v Unity APA Ltd* (1986) 11 ACLR 641 at 681, 8% was a substantial interest in Humes

243. In *BIL v ASC*, BIL submitted that an acquisition of 3% of the voting shares in a company, by a person who already held 19.98%, could not constitute an acquisition of a substantial interest.[65] Emmett J applied the passage cited above and held that whether the acquisition of the parcel of 3% constituted the acquisition of a substantial interest was an issue which the ASC and the Panel were entitled to assess on the facts, under the principle that a substantial interest needs to be "a step in the direction of take-over or change in corporate control", despite submissions that 3% can never be a substantial interest, because of the creep rule, and that an acquisition of 3% of Fairfax was not a step on the way to control, because of the other substantial holdings in that company. Emmett J said at 1349:

> *"As a matter of language, therefore, I consider that an interest not greater than 3 per cent is capable of being a substantial interest."*

And at 1351:

> *"Having regard to the clear policy of section 618 [now item 9 of section 611], arbitrary though it may be, the ASC and the Panel would be slow to make a declaration where an acquisition is made in accordance with section 618 and relates to a small proportion of the issued shares in a company. Nevertheless, I do not consider that, simply because conduct is authorised by section 618, it is not capable of constituting unacceptable circumstances."*

244. The Panel in *Fairfax*, applying *Elders IXL* and *Brierley*, but not explaining why the parcel was important to control, found that the 3% parcel considered by Emmett J in the latter case had in fact been a substantial interest. It made no declaration for other reasons.[66]

245. In *Ballarat Goldfields*, the sitting Panel said that 9.54% of the voting shares in Ballarat Goldfields would be a substantial interest in that company. At paragraph [27], the Panel explained why the parcel was material to control:

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[64] *Elders IXL Ltd v National Companies and Securities Commission* (1986) 4 ACLC 465 at 477 – 478.

[65] *Brierley Investments Limited v Australian Securities Commission* (1997) 15 ACLC 1341

[66] *Re Australian Securities Commission and John Fairfax Holdings Ltd* (1997) 15 ACLC 1457 at 1470

> *"we particularly considered the wide spread and small size of shareholdings in BGF. BGF has 8,500 shareholders, the two largest (including Rexadis [the person proposing to acquire the 9.54% parcel]) hold a little over 4% each and the top 20 shareholders hold approximately 22.4% of its shares …".*

246. In *Wesfi*, the Panel took the view that to be a substantial interest, a parcel of shares had to be significant in the context of corporate control, but its acquisition need not effect a change of control. On the evidence, an acquisition of 1.9% of the voting shares in a target company had not constituted an acquisition of a substantial interest, because there were much larger parcels of shares in the company.[67]

247. In *Pinnacle 11*, the review Panel found that a transfer of 3.11% of the shares in Pinnacle to a bidder which had already acquired 32% of the ordinary shares "had the potential to have a significant effect on the control of Pinnacle".[68]

248. In *Intercapital*, Marks J held that an acquisition of 13.5% of the voting shares in a company, through the acquisition of the units in a trust and the corporate trustee, was properly to be regarded as an acquisition of a substantial interest for the purposes of section 60 of CASA.

What is a Substantial Interest

249. In all of the preceding cases, the proposed substantial interest was a proprietary interest, though often indirect or equitable. Only one case seems to be relevant to the issue whether a substantial interest must be proprietary, though it deals with the related concept of a "controlling interest".

250. In *NCSC v BIL*, Hodgson J held that one company had a "controlling interest" in another under what is now paragraph 608(3)(b), where the "interest" was not proprietary, because it was held through intervening companies, without even a chain of shareholdings.[69] Having already found that Rainbow had indirect control of Stanley Park, his Honour said:

> *Although I accept that in many contexts "interest" means proprietary interest, I do not think a "controlling interest" within sec. 9(5) of the Acquisition Code needs to be a proprietary interest, for the reasons advanced by Mr Bennett. I think that in ordinary language Rainbow can be said to have an indirect interest in Stanley Park; and accordingly, in my view, Rainbow did, at material times, have a controlling interest in Stanley Park.*

251. The reasons advanced by Mr Bennett are summarised on page 1006, and include:

> *… the use in the Acquisition Code of the phrase "relevant interest" suggests that the legislature was intending the word "interest" to be used in a wide sense.*

Components of a Substantial Interest

252. There seems to be only one discussion of whether it is possible to add together different acquisitions of interests in a company to arrive at an acquisition of a substantial interest, just as one can add together relevant interests held by different

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[67] *Re ASIC and Wesfi Ltd* (1999) 17 ACLC 1690

[68] *Pinnacle VRB Ltd No. 11* [2001] ATP 23 at [18]

[69] *NCSC v Brierley Investments Limited* (1988) 6 ACLC 995 at 1008

people in different ways to arrive at aggregated voting power.[70] *Intercapital* concerns a section 60 declaration made on the basis that offerees under a bid (which had been stopped indefinitely by administrative action) would not have equal opportunities to share in benefits accruing to shareholders under an acquisition of a substantial interest, because a pre-bid acquisition of 13.5% had been made at a price higher than the bid price. Marks J held at 247 that it was not open to compare the opportunities afforded to some shareholders under the pre-bid transaction with those proposed to be afforded to others under the proposed bid, because they were different acquisitions of substantial interests:

> *The only answer to this submission provided on behalf of the defendant is that the acquisition of the "substantial interest" under the take-over scheme cannot be regarded separately from the acquisition of the 13.5 percent from MEH. I think this answer is not acceptable. It is true that a person might acquire more than one substantial interest and that the sum of them is also a "substantial interest". If, however, sec. 60(3)(d) [now paragraph 602(c)] is to apply to the latter then a shareholder who sold at a higher or lower price than another anywhere along the way could be capable of activating the section, no matter what the time lapse between acquisitions. This would make the Code unworkable, particularly in a market as volatile as the one we have experienced in recent years. The regulatory policy, on the other hand, in respect of differential treatment can easily be seen as reflected in sec. 16(2)(g) [now section 621].*
>
> *In my opinion the acquisition of the 13.5 per cent is properly to be regarded as an acquisition of a "substantial interest" … The take-over scheme which is not yet on foot may well be another. Section 60(3)(d), while referable to different transactions in the acquisition of a substantial interest, is not referable to different acquisitions of substantial interests.*

253. Marks J held that it would make CASA unworkable, and cannot have been intended, to take together as the acquisition of one substantial interest, acquisitions of interests at widely different times. But the reasons support taking together simultaneous and co-ordinated acquisitions. *Intercapital* has never been followed, or distinguished.

254. When the Panel raised this issue with parties, CSFB replied (and Glencore concurred) that acquisitions by different people of different interests could not be taken together as constituting the acquisition by one person (i.e. Glencore) of a substantial interest. This is entirely at odds with the function of the concept of a substantial interest as relating to increments and aggregation of interests bearing on control.

255. Similar arguments have been rejected by the courts in relation to acquisitions of relevant interests. As with relevant interests, if Parliament legislates about acquisitions of substantial interests, it directs us to adapt our notions of what constitutes an acquisition to the nature of the thing to be acquired, not cut down the

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[70] *Intercapital Holdings Ltd v NCSC* (1988) 6 ACLC 243, explained by the High Court in *Sagasco Amadeus Pty Ltd v Magellan Petroleum Australia Ltd* (1993) 11 ACLC 452 at 456 as principally concerned with taking together acquisitions at widely separated times. The point that an acquisition of a substantial interest can be made up of several transactions seems to be assumed in *Keygrowth Ltd v Mitchell* (1990) 3 ACSR 476, as pointed out in Rodd Levy *Takeovers Law and Strategy*, 2nd ed, Sydney, Law Book Co, 2002 at page 244 and in Ian Renard & Joseph Santamaria *Takeovers and Reconstructions in Australia* at [223].

idea of the thing to something commensurate with a limited notion of what constitutes acquisition[71].

Conclusion on Substantial Interest

256. We found above that Glencore's swap exposure gave it a degree of *de facto* power to prevent the banks from disposing of the hedge shares. Although not enough to give rise to relevant interests over those shares, the banks' economic incentive not to dispose of the shares has enabled Glencore to prevent Centennial from achieving compulsory acquisition. Glencore's degree of control over disposal of the hedge shares and the aggregate size of Glencore's swap exposure and its direct holding are such that it is appropriate to consider Glencore's position as one substantial interest for the purposes of sections 602 and 657A.

257. This degree of de facto control is more effective than voting power over the same number of shares need have been, and the block of shares is correspondingly more cohesive. An association, which is one of the elements of voting power, can be founded on consensual co-operation, from which either associate is free to withdraw.[72] The banks had entered into swap agreements from which they were not free to withdraw and for the duration of which they assumed roles in which their retention of the hedge shares was more reliable and predictable than if they had been associates controlling the same numbers of shares.

258. The result is that Glencore can maintain a block of shares with an identifiable effect on a transfer of control, because the existence of this block has prevented Centennial from acquiring 100% of the shares in Austral Coal and would, if disclosed between 22 March and 4 April, have been perceived as having that potential effect and would in other ways have affected the market in which control was acquired. Accordingly, Glencore's position constitutes a substantial interest, disclosure of the existence and growth of which would have affected the market in Austral Coal shares in definite ways.

259. In our view, there is so great an overlap between the defined concept of voting power and the extent and nature of the power to control disposal which Glencore has under the Glencore Swaps that:

    (i) Glencore's direct interest, together with its interest in the hedged swaps, constitutes a substantial interest in Austral Coal; and

    (ii) it is open to the Panel to find that unacceptable circumstances exist under paragraph 657(2)(a) because that substantial interest was accumulated during a takeover bid, without disclosure to the market.

UNACCEPTABLE CIRCUMSTANCES

260. Because of Glencore's failure to disclose its position, the market in shares in Austral Coal during the Non-disclosure Period was less efficient, competitive and informed than it should have been, as discussed above, and shareholders in Austral Coal were

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[71] *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (2002) 41 ACSR 325 at [36], 342 - 343, following *Aberfoyle Ltd v Western Metals Ltd* (1998) 84 FCR 113, 156 ALR 68, 28 ACSR 187.

[72] *FCT v Lutovi*, quoted above.

not aware of the identity of a person who proposed to acquire a substantial interest in that company. These imperfections are reflected in effects of some consequence on the prices paid in that market and the rate and ease of acquisitions of Austral Coal shares under the Centennial bid and the banks' hedging purchases during the Non-disclosure Period. Accordingly, it is open to us to make a declaration of unacceptable circumstances, and we turn to consider whether it would be contrary to the public interest to do so.

Policy of substantial holding provisions

261. The Panel is also directed to have regard to any policy considerations that the Panel considers relevant. Whether Glencore's non disclosure undermined the purposes of the substantial holding provisions of the Act is a relevant policy consideration.

262. A person has a substantial interest, if the person, together with their associates, has relevant interests in 5% or more of the voting shares in the relevant company. They have a relevant interest if they have power to dispose, or control the exercise of a power to dispose of, the share. The power can be positive (that is, power to force the disposal of the share) or negative (that is, power to prevent a person from disposing of share, in some or all circumstances). The power may be indirect and unenforceable, and need not be related to a particular share. There must be some true or actual measure of power to control disposal of the share, and not merely control that is minor, peripheral or merely hypothetical, theoretical or notional.[73]

263. ASIC submitted that the substantial holding notice requirements should be treated as the litmus test for determining the kind of information that is required for the market to be fully informed about a substantial holding and interest. We agree, though a benchmark might be a better analogy.

264. The policy of the provisions requiring disclosure of interests in shares was described, with particular reference to the context of a bid, in an early decision on failure to comply with a tracing notice.[74]

> *"If an intending raider amasses a large parcel of shares secretly, then he does so in a manner ipso facto at odds with the strong policy of the legislation, because a large number of shares are transferred in a market which is not sufficiently informed. It is, for instance, part of the policy of the legislature, albeit incidentally, to oppose the secret buying and hoarding of shares for the purpose either of "spring-boarding a take-over" or of selling out at a large profit to some other raider provoked by the first secret buyer.*
>
> *… I would have thought that prima facie it was a distinct disadvantage to ordinary and relatively small shareholder, as well as larger ones, to be selling their shares in ignorance of the fact that a particular known market raider was rapidly acquiring a huge parcel of shares for use as a springboard for one or both of the two objects earlier discussed. …*

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[73] Subsections 608(1) and (2), *Yandal Gold* at [73], citing for these refinements *Re Kornblum's Furnishings Ltd* [1982] VR 123, *TVW Enterprises Ltd v Queensland Press Ltd* (1983) 7 ACLR 821, *North Sydney Brick & Tile Co Ltd v Darvall* (1986) 10 ACLR 822, and *Corumo Holdings Pty Ltd v C Itoh Ltd* (1992) 10 ACLC 428.

[74] *Re North Broken Hill Holdings Ltd* (1986) 10 ACLR 270 at 284 per Fullagar J. This decision was reversed on another ground: *Crosley Ltd v North Broken Hill Holdings Ltd* (1986) 4 ACLC 432.

> *… [IEL's] intention in the end is likely to have been to buy NBH shares for less than they are intrinsically and potentially worth, or to sell them later on for more than their present price, or both. If its identity had been disclosed to the market generally, the people in the market would have divined these intentions at once and without difficulty and they would thereupon have become materially informed dealers and potential dealers in the shares coveted by IEL instead of being materially uninformed. The legislature obviously regards this kind of lack of information as a grave disadvantage, to be avoided at great cost to a secret buyer, and that is quite enough for the court which is not bound to decide whether anyone in the market (or potentially in it) has otherwise suffered loss or damage."*

265. The market in which the Centennial bid proceeded during the Non-disclosure Period would have been more relevantly informed and competitive, and therefore more efficient, had Glencore disclosed the existence and growth of its position on 22 March and subsequently. The failure to disclose this information had the effect that the decisions Austral shareholders made whether to accept the bid, hold their shares or sell them for cash were uninformed.

Avoidance and Loopholes

266. We do not consider that a declaration would result in "regulatory ambush", as submitted by Glencore. The issue of disclosure of equity swaps came before the Panel in 1997. This year the issue has been the subject of significant market commentary. Various international regulators require disclosure of cash-settled equity swaps. In any case, the Panel does not consider itself restricted from making declarations of unacceptable circumstances in novel circumstances.

267. Glencore argues that:

    (i) the Panel should not adopt an "incremental" view of what disclosure is necessary for an informed market;

    (ii) it is always possible to argue that additional information existed, and that its disclosure could have been useful in trading decisions;

    (iii) some "information" is positively detrimental to the market, such as speculation;

    (iv) the legislature has decided that other classes of information may be withheld, although it might be useful to other people's trading decisions, such as one's own trading intentions;

    (v) people are entitled to keep their business affairs to themselves, unless a law positively requires disclosure; and

    (vi) unless the Panel finds that it squarely breached the substantial holding disclosure rules there is no applicable law which requires Glencore to disclose the relevant parts of its affairs.

268. There is some force in this argument. The Panel should not require information to be disclosed (or declare it unacceptable that it was not disclosed) just on the basis that it would influence investment decisions. However, the Panel can appropriately require disclosure of information where specific statutory requirements have been avoided, or suffer from loopholes.

269. The difference between avoiding compliance with the Act and complying with it is often elusive. Successful avoidance involves conduct which is consistent with the letter of the Act, but not with the intention of Parliament when it passed the Act. To avoid unnecessarily pejorative findings, let us deal with loopholes instead of avoidance.

Whether Swaps Overlooked

270. Assuming that section 671B did not during the Non-disclosure Period require Glencore to disclose information about its position, there is a loophole if Parliament:

    (a) intended that a share would be included in a person's voting power, if the person had the kind and degree of power to restrain disposal of the share that Glencore has under the swaps, but

    (b) failed to legislate for cash-settled swaps, because they had not been thought of.

271. If, however, Parliament turned its attention to cash-settled swaps and decided to exclude them from the relevant interest regime, the omission is deliberate.

272. Cash-settled equity swaps were a relatively new form of instrument which was not in such common use when Chapters 6 and 6C were enacted in 1999. Subsection 608(9) was amended by broad brush consequential provisions of the *Financial Sector Reform Act 2001*, but the legislative background to those amendments to the definition of "derivative" suggests that Parliament did not turn its mind to the impact of equity derivatives on Chapter 6.

273. It is noted above that the legislative background to those amendments suggests that Parliament deferred consideration of the impact of equity derivatives on Chapter 6. The relevant report notes that "the Advisory Committee understands that this mater is being considered by Treasury in its review of the takeover provisions, pursuant to the *Corporate Law Economic Reform Program*." [75] Our research has not uncovered any further consideration by legislature and we infer that it was not considered.

274. Accordingly, there is no compelling argument that there is a legislative policy not to require disclosure of interests under cash-settled equity swaps.

Chapters 6 to 6C not a Code

275. More generally, the existence of the Panel's jurisdiction implies that Chapters 6 to 6C are not a code, because the Panel may declare circumstances to be unacceptable, even where there has been no contravention. The flexible nature of the Panel's jurisdiction provides scope to deal with instruments which are novel, or which were overlooked by Parliament.

276. In this context and in the absence of an express exclusion for a comparable interest, and where that interest arises under a new form of instrument which was not in such common use when Chapters 6 and 6C were enacted, there is no compelling argument that the legislative policy is not to require disclosure of interests of that kind.

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[75] Paragraph 8.118 of the CASAC 1997 Report entitled 'Regulation of On-exchange and OTC Derivatives Markets'

277. On the contrary, the existence of the Panel's jurisdiction implies that Chapters 6 and 6C are not a code, because the Panel may declare circumstances to be unacceptable, even where there has been no contravention of Chapter 6, 6A, 6B or 6C.[76] The High Court dealt with a similar argument about what is now section 655A as follows:

> *The majority in the Full Court also found support for their conclusion in the principle of interpretation that "an express reference to one matter indicates that other matters are excluded. It has often been pointed out that the principle is not of universal application and the assistance to be gained from it varies widely. It is of least assistance when a question arises concerning the meaning of a statutory power to modify or vary the legislation in which the absence of reference to a particular matter is relied upon. Whatever the precise scope of the power given by s 730, its existence assumes that there is something about the express provisions of Ch 6 that may require modification or variation.*[77]

278. While the Panel's function is to supplement the requirements of Chapters 6 to 6C, rather than to modify or vary them, by parity of reasoning the existence of section 657A, no less than that of section 655A, implies that the legislature did not regard Chapters 6 to 6C as being relevantly self-contained and complete.

279. If further evidence of this is required, we note the following statements:

> *The purpose of this provision [section 60 of CASA] is to discourage activities which would frustrate the aims of the code. This is to be achieved by the NCSC having power to act in those circumstances where it considers that the acquisition or conduct does not satisfy certain criteria in the clause.*[78]
>
> *The Panel will retain its existing jurisdiction to enforce compliance with the spirit of the law.*[79]
>
> *"unacceptable circumstances may not involve any contravention of the Law"*[80]
>
> *Further, Part 6.9 [of the Corporations Law, now Part 6.10]… provides some flexibility in the regulation of the acquisition of shares in circumstances where the literal operation of the regulatory regime is either unnecessarily restrictive or ineffective to achieve the object of Chapter 6. …it is clear enough that the regime involving the Panel established by Part 6.9 is designed to ensure regulation of the acquisition of shares over and above the provisions contained in the balance of Chapter 6 …*[81]

280. In the light of the foregoing, we consider that a declaration of unacceptable circumstances is entirely consistent with the legislative policy underlying the substantial holding notice provisions and the legislative purpose of the Panel.

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[76] Subsection 657A(1)

[77] *Australian Securities and Investments Commission v DB Management Pty Ltd* [2000] HCA 7 at [42].

[78] Explanatory Memorandum to the *Companies (Acquisition of Shares) Bill 1980*, para 170.

[79] Second Reading Speech introducing the CLERP Bill, House of Reps Hansard, Thursday 3 December 1998, page 997.

[80] *Cullen v Wills, Adler and Jooste (in their capacity as members of the Corporations and Securities Panel)* (1991) 9 ACLC 1450 at 1458 per Black CJ, Sweeney and Burchett JJ concurring.

[81] *Brierley Investments Limited v Australian Securities Commission* (1997) 15 ACLC 1341 at 1348, per Emmett J, rejecting a submission by Mr Bathurst QC.

Panel Draft Guidance Note on Equity Derivatives

281. In March 2005, 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.

282. Prior to receipt of the Centennial Application, the sub-committee had circulated a copy of a draft version of the Guidance Note to the members of the wider Panel for their comments prior to publishing it for public consultation. The draft Guidance Note was also provided to ASIC and to relevant officers in the Department of Treasury.

283. 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 Proceedings. The Panel notes that a copy of draft Guidance Note was circulated to all parties during the Austral Coal 02 proceedings on a confidential basis.

284. The Panel advised all parties that Mr Byrne was one of the Panel members of the sub-committee. Mr Byrne has not participated in Guidance Note discussion during these Proceedings. None of the parties objected to his taking part in these proceedings.

Affairs of the company

285. A declaration of unacceptable circumstances must relate to the affairs of the company. Since a bid or other acquisition of a substantial interest has a real relation to the future conduct of the affairs of the target company, this requirement will generally be satisfied if the other requirements for a declaration are satisfied. The requirement is satisfied in this case.

Public interest

286. We find that it is in the public interest to make a declaration of unacceptable circumstances in this case. The interests of the market as a whole, and particularly of those participants who sold shares in Austral Coal, suffered actual detriment as a result of the non disclosure due to the lower price of Austral Coal shares during the Non-disclosure Period. Those lower prices were an advantage to Glencore, enabling it to obtain a lower initial price for the swaps and therefore a higher profit from the swap on unwind.

287. It is also important that the Panel clarify that it considers swap exposure is information which should be disclosed to the market, particularly during a control transaction. The Panel has been mindful of the impact of its decision on the swaps market. We conclude that the benefits from making the declaration outweigh the compliance time and costs to future swap holders.

288. ASIC submitted that it would be in the public interest for the Panel to make a declaration, if it found that unacceptable circumstances had occurred, to help set appropriate standards of disclosure in Australia regarding cash-settled equity swaps. We agree.

289. Accordingly, on 27 October 2005, we made the declaration of unacceptable circumstances attached as **Annexure A**.

Orders

290. As we made a declaration of unacceptable circumstances, we considered the review of the orders made in the Initial Proceedings. Those orders were similar to the orders made in the Review Proceedings and quashed in *Glencore v Panel*. We invited submissions on orders on 27 October 2005, directing attention to the possibility of an order that Glencore disgorge the unrealised profit it appeared to have made as a result of Glencore and the banks buying in an uninformed market during the Non-disclosure Period, along the lines of the order made in *Australian Securities and Investments Commission v Yandal Gold Pty Ltd & Ors* (1999) 17 ACLC 1126.

SUPPLEMENTARY REASONS ABOUT ORDERS

291. When we declared on 27 October 2005 that circumstances in relation to the affairs of Austral Coal were unacceptable, we indicated to parties the orders we then thought appropriate to deal with the circumstances identified in the declaration, having regard to the history of the matter and the current situation of Austral Coal, and invited submissions on the orders we should make.

292. The Panel's power to make orders under section 657D of the Corporations Act contemplates that the Panel has made a declaration that unacceptable circumstances exist and empowers the Panel to make orders (including remedial orders) which:

    (a) protect the rights or interests of any person affected by those circumstances; or

    (b) ensure that a takeover bid or proposed takeover bid in relation to securities proceeds (as far as possible) in a way that it would have proceeded if those circumstances had not occurred.

293. The applicable principles to be extracted from the cases are as follows.

    (a) One of the primary objectives of Chapters 6 and 6C is to ensure that the acquisition of shares in listed companies takes place in an efficient, competitive and informed market.

    (b) The primary purpose of the substantial shareholder provisions is to maintain an informed market in the shares of listed companies and to prevent substantial transactions on an uninformed market. It includes, but is not limited to, preventing secret dealings for takeover advantage.

    (c) Neither the legislature nor the Court has distinguished between orders which are strictly remedial (concerned with injury already incurred) and those which are strictly protective (concerned to ward off anticipated future injury).

    (d) In none of the cases has the court inquired into individual investors' loss or damage. Instead, in every case, the adversely affected investors have been dealt with as a class.

    (e) The exercise of the Panel's discretion requires it to consider a range of possible remedies and select the appropriate one in the circumstances of the case, bearing in mind the realities of the market.

(f) The orders to be made are remedial and protective rather than punitive.

(g) The Panel cannot make an order, if it is satisfied that the order would unfairly prejudice any person. Not all prejudice is unfair. Whether prejudice is unfair depends on a balancing of the interests of the different people involved and the legislative policy. It is appropriate to take into account the consequences of the conduct of a person affected by an order and their degree of culpability, including whether they acted dishonestly or recklessly or whether their conduct was honest and inadvertent.

(h) In general, the Panel ought, so far as possible and subject to unfair prejudice, return those interested to where they would have been if the unacceptable circumstances had not occurred.

(i) Where to do so will subserve a remedial or protective order, it is generally appropriate to deprive a wrongdoer of any advantage resulting from their wrongdoing.

(j) It is not appropriate to reverse the outcome of a takeover bid, if offerees have made free and informed acceptances.

(k) The Panel should not take a narrow or technical view of the rights and interests of the affected shareholders.

Basis for Orders

294. The mischief which constitutes unacceptable circumstances and which orders address always has adverse effects on the market in shares in the target as a whole, as well as on individual participants in that market, such as accepting shareholders and people who trade on market. Although adverse effect is the gist of unacceptable circumstances, the Panel is directed to deal with the effects of circumstances on the efficiency and other overall properties of the market in shares. Where conduct adversely affects the market, it affects all those who participate in that market, and remedies which rectify the state of the market are the most appropriate, where they are available.

295. Unacceptable circumstances may also have specific effects on a particular class of participants in the market, so that the Panel needs to decide whether and how far a particular class of investors has been adversely affected. In cases where the court has found that a person has offended against the market, with particular effect on a certain class of investors, it has protected that class by making orders dealing with the market situation, typically an order cancelling market trades or allowing acceptances of a bid to be withdrawn, without any inquiry into individual circumstances.

Start Again Order

296. The best sort of order, if it works, is an order which restores the parties to the positions they would have been in, but for the unacceptable circumstances.

297. All people who considered whether to buy, sell or hold shares in Austral Coal from 22 March to 4 April (including whether and when to accept the Centennial bid) did so without access to information regarding the existence and growth of Glencore's

substantial interest in Austral Coal shares. An order which restored all parties to the position they were in at 22 March would allow all of those people to reconsider the decisions they made at that time, with the benefit of fuller information.

298. No such order can now be made. It would require two elements, the first being an order reversing acceptances into Centennial's bid, and the second reversing trades on market. There is no scope for an order rolling back Centennial's bid, and there has been none, since before the application was made. Centennial made the application at first instance in *Austral Coal 02* in June, two months after the relevant events. By then Centennial already had acquired 85% of the shares in Austral Coal. Acceptances for 50% of the shares were received after 4 April, when the existence of the Glencore interest was disclosed, and before Centennial made its application. Centennial had issued shares to accepting offerees, and many of those shares had been traded.

299. None of the parties and shareholders can be put back into the position they were in during the period from 22 March until 4 April without returning these acceptances, but it would be unfair and impracticable to compel former shareholders to return the consideration and accept their Austral Coal shares back. To give each former shareholder the option of rescinding their acceptance would not be unfair to that shareholder, but it would be unfair to Centennial and to other shareholders, many of whom will have accepted on the basis of a certain existing level of acceptances. It would also be ineffective in restoring the *status quo*, not least because it would be impracticable for many of the shareholders to return the shares issued to them as consideration, and the dividends on those shares. It would also be contrary to the cases which have indicated that it is inappropriate to reverse the outcome of a bid.

Vesting Orders

300. The market in Austral Coal shares traded without full information during the non-disclosure period. The absence of that information (and of market responses to it) adversely affected all shareholders and all people who traded in Austral Coal shares during the non-disclosure period, in that they could have made adequately informed decisions whether and how to trade, if they had had that information. It also affected decisions by other people whether to trade in Austral Coal shares. While there was some speculative trading in Austral Coal shares during and just after the non-disclosure period, there is likely to have been more speculative trading in Austral Coal shares, if Glencore's position had been known.

301. In many of the substantial shareholding cases concerning similar problems, orders were made to vest the relevant shares in the Commission for sale. Even if the substantial holder never discloses their position, once the substantial holding has been dispersed, the market can recover its equilibrium, because there is no longer a substantial holding about which it is uninformed. In *Bank Leumi*,[82] *Village Roadshow*[83]

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[82] *Australian Securities Commission v Bank Leumi Le-Israel* (1995) 18 ACSR 639

[83] *Re Village Roadshow Limited 02* [2004] ATP 12, (2004) 22 ACLC 1332

and *Bligh Ventures*,[84] the controllers of the relevant blocks still had not been disclosed when the parcels were ordered to be sold.

302. Such an order has not been needed in order to ensure that there are no undisclosed substantial parcels since 5 April 2005, when the existence of Glencore's position was disclosed. Indeed, in November 2005, there can hardly be said to be a market in shares in Austral Coal. While the shares are still quoted, trades are sporadic, bids and asks are often wide apart, and the market is highly illiquid. Accordingly, the principal effects of the order would be punitive. In *North Broken Hill,*[85] *Terra Industries*[86] and *Bligh Ventures*, the Court made vesting orders under a power to make any order that seemed just, including punitive orders, but the Panel does not have that power.

303. In *Metals Exploration v Samic*,[87] where a bidder had acquired shares under what is now item 2 of section 611, after serving a non-complying Part C statement which had deterred other bidders and pressured other shareholders to sell, the majority in the High Court said that it might be appropriate to make a divestiture order with the objectives of removing that deterrent and pressure, to protect the interests of persons affected and ensure that the policy of the legislation in bringing about an informed market was implemented, at the same time depriving the bidder of an advantage it would not have obtained, had it complied with the law. Since it is too late to restore a functioning market, however, a divestiture order cannot have remedial effects on the market such as were identified by the High Court.

304. As well as being ineffective in restoring an informed market in shares in Austral Coal, a divestiture order would also have the deficiencies identified by Emmett J in *Glencore International AG v Takeovers Panel*, that its effects on both Glencore and shareholders would not be proportionate to their respective gains and losses from the non-disclosure.[88]

Protective Orders

305. With the exception mentioned in the next section, neither the Panel nor the parties has been able to propose an order which would be both practicable and effective to protect or restore the rights or interests of individual participants in the market which were affected during the non-disclosure period. Glencore's failure to disclose its position adversely affected the processes and state of the market during that period, but it is too late to restore the market by divestment or other orders.

306. Centennial submits that the cases support orders to take away an advantage obtained improperly. That is true, although the Panel may only take away that advantage for the purpose of preventing or correcting the effect of unacceptable circumstances on the market in shares in Austral Coal or on a bid for Austral Coal or to protect

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[84] *Re Bligh Ventures Ltd: Australian Securities and Investments Commission v Merkin Investments Ltd* (2001) 38 ACSR 648

[85] *Re North Broken Hill Holdings Ltd* (1986) 10 ACLR 270

[86] *Australian Securities and Investments Commission v Terra Industries Inc* (1999) 17 ACLC 905.

[87] *Metals Exploration Ltd v Samic Ltd* (1994) 12 ACLC 752.

[88] Glencore also submitted that it would be inappropriate to require it to divest shares in favour of people who had sold on market, because those people had elected to sell for cash, rather than take the benefits and detriments of retaining their shares.

particular investors adversely affected by the circumstances, and not for its own sake or as punishment.

307. In Centennial's view, the advantage which was improperly obtained was control over a blocking stake, and the remedy is to force Glencore or the banks to accept the bid for enough shares that it ceases to be a blocking stake. We do not agree. We have found that the advantage wrongfully obtained was not that the blocking stake was obtained at all, but that it was obtained sooner and more cheaply than it would have been, had Glencore made full disclosure. By requiring Glencore to disgorge an amount approximating its savings on the acquisition of the blocking stake, we really are taking away the fruit of its actions.

308. Centennial submitted that it would be appropriate for the Panel to make an order facilitating compulsory acquisition of remaining shares in Austral Coal, as such an order would enable its bid to proceed as it would have done, in the absence of the unacceptable circumstances resulting from Glencore's failure to disclose its position. We do not agree. Centennial effectively accepted the risk that legal, acceptable conduct would prevent it from obtaining enough acceptances to reach the threshold for compulsory acquisition. It knowingly accepted a risk of buying a controlling interest but not achieving compulsory acquisition, when it declared its bid unconditional when it had an interest in Austral Coal of less than 10%, the more so as (as Centennial acknowledged in submissions) it was already aware that someone (it was CSFB) was buying Austral Coal shares. It knowingly took an additional risk by letting 2 months pass after it learned of Glencore's acquisitions before making the application which started these proceedings. There is nothing objectionable about either of those decisions, but Centennial took the benefit of each of them, and must accept their downsides.

309. The effects of the missing information on some people can be measured in money. People who sold shares in Austral Coal at current market prices during that time received lower prices than they might have done otherwise, by about 6.7 cents per share. People who bought shares in Austral Coal on market made corresponding savings. As discussed below, we have made orders addressing the effects on those who sold.

310. Some of the other effects are real, and are dealt with in our declaration, but cannot be measured in money or addressed by orders. Centennial benefited because its bid faced less resistance than it would have done, and it came under less pressure to increase its bid than it would have done, had Glencore's position been disclosed. On the other side of the coin, shareholders may have been offered higher prices for shares in Austral Coal under Centennial's bid or another bid, had Glencore's position been disclosed, but the experiment was never tried. Had Centennial made its application promptly, these effects might have been able to be addressed by orders requiring disclosure and perhaps reversing acquisitions by Glencore, Centennial or both, but it is now too late to re-play the history. To avoid any uncertainty, we repeat that we do not find that Glencore would not have been able to acquire a blocking stake if it had made proper disclosure.

311. Other effects are more speculative and we have not relied on them in making our declaration or addressed them by orders. Centennial may possibly not have declared

its bid unconditional, although it has never asserted unequivocally that it would have retained its conditions. Like all market participants, it was entitled to know that Glencore had acquired a position of over 5% by 23 March, when it made its decision to declare the bid unconditional. Had it known, it is likely to have taken additional time to make that decision.

Restitutionary Orders

312. Having excluded the more usual and ordinarily preferable types of orders, we are left with one possibility. As mentioned above, it is open to the Panel in a proper case to make an order transferring any benefit from a party who obtained it by their wrongdoing to shareholders adversely affected by that wrongdoing. Glencore having caused unacceptable circumstances and obtained a quantifiable advantage by not disclosing its interest, and there being a corresponding detriment to an identifiable group of investors, an order may be made like the order in *Yandal Gold*[89] requiring Glencore to disgorge the benefit in favour of those investors.

Unfair Penalty Issue

313. We first digress to deal with an issue of principle which Glencore has raised, that by penalizing Glencore for action which the Panel does not find to have been illegal, the Panel is retrospectively applying new rules to that conduct. We have already addressed the general issue that the Panel may declare circumstances to be unacceptable which result from certain conduct, although that conduct is lawful and has never been declared unacceptable in a previous decision or policy statement.

314. In cases concerning remedies for breaches of Chapter 6, the courts have held that whether it is fair to inflict prejudice on a person depends in part on whether the breach was deliberate or reckless, on the one hand, or inadvertent, on the other hand. By analogy, it is relevant to whether the Panel should make an order adversely affecting someone whether the person was aware that they ran a risk of being declared to have created unacceptable circumstances.

315. Glencore must have been aware that what it was doing was controversial.

    (a) It made its initial approach to CSFB the day after BHP Billiton Ltd had disclosed a swap position in WMC Resources Ltd of under 5%, not accompanied by a direct holding. This disclosure gave rise to considerable media commentary.[90]

    (b) Glencore's conduct and its correspondence with the banks indicate that it used the swaps for the purpose of acquiring economic exposure to Austral Coal without triggering the substantial holding disclosure provisions. Glencore

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[89] *Australian Securities and Investments Commission v Yandal Gold Pty Ltd* (1999) 17 ACLC 1126, upheld in *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* [2002] FCA 307, (2002) 41 ACSR 325.

[90] In the *Australian* on 9 March, Bryan Frith remarked that the WMC swap was "further evidence that the rules need to be changed to ensure greater disclosure relating to equity swaps in takeover situations" and the Street Talk column in the *Australian Financial Review* mentioned in the context of *Fairfax* and the policy of Chapter 6C that Deutsche may have been "treading a fine line" in writing the swap. On 10 March, John Durie in the *Australian Financial Review* discussed the policy and legal issues and the position in the UK. In the *Australian* on 11 March, Mr Frith discussed the same issues at length, commenting that "it is only a matter of time before the Takeovers Panel is asked to rule" on a swap.

bought shares outright until it almost reached the 5% disclosure threshold, then acquired swap exposure through first one bank and then the other, neither bank reaching the 5% threshold, until Glencore chose to disclose its position and reverted to buying shares outright.

(c) The Courts and the Panel have repeatedly dealt with breaches of the substantial holding provisions by vesting undisclosed shares. Those provisions apply in more stringent form during a takeover bid.

(d) The Panel in *Fairfax* had said that informed markets required swaps to be disclosed.[91]

(e) At all times Glencore acted on expert Australian legal advice.

(f) Glencore is not a stranger to the Panel's jurisdiction, having taken a leading part in the long series of matters concerning Anaconda Nickel Ltd in 2003, in which it was represented by the same firm as in this matter. It sought three declarations of unacceptable circumstances and one vesting order, and a declaration of unacceptable circumstances was sought against it.

316. In a related submission, Glencore argued that the Panel should not apply what it characterised as a new rule requiring disclosure of equity swaps until the Panel had given the market advance details of the new rule and a period to adapt, such as the 3 months proposed in the UK in connection with the introduction of new rules regarding disclosure of swaps.[92]

317. But we have not introduced a new rule. Instead we have applied an old and general rule regarding unacceptable circumstances to a subject-matter which is new in Panel proceedings, at the first opportunity. If the Panel is to give 3 months' notice of the unacceptability of each objectionable innovation, its function will be reduced to the melancholy tedium of closing stable doors after each successive horse bolts.

Glencore's Benefit

318. We have found that Glencore obtained a benefit by not disclosing its position until the evening of 4 April. Disclosure of the presence of a new substantial holder and potential bidder[93] would have driven up the price of shares in Austral Coal, so that it would have cost the banks more to acquire hedge shares, and the initial price under the Glencore swaps would have been higher. Any gain from buying cheap accrued in the first instance to the banks, but they passed that benefit on to Glencore in the form of a lower initial price for the swaps. Correspondingly, everyone who sold on market (not just to Glencore or the banks) during the non-disclosure period sold cheaper than they might have done, had the market been informed.

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[91] *Re Australian Securities Commission and John Fairfax Holdings Ltd* (1997) 15 ACLC 1457 at 1473: "Market knowledge of swap agreements could have an impact on an efficient, competitive and informed market. Desirably, in a fully informed market, swap agreements should be disclosed."

[92] The proposed new rule in the UK in effect extends existing Rule 8.3 of the City Code, which already requires disclosure of swaps during takeover bids.

[93] Not that in a substantial holder notice or similar, Glencore would have been required to indicate that it might bid, as in fact it did on 4 April, but that market participants would have inferred Glencore's possible intentions from its identity and its late appearance and progress as a substantial holder.

319. Since Glencore and the banks bought 19.5 million shares on market during the non-disclosure period, out of turnover of 35.5 million shares,[94] the aggregate losses to sellers were greater than the gain to Glencore, and the order will only partially compensate sellers. Since a disgorgement order is an appropriate exercise of the power, but an award of damages is not, the amount to be paid depends on Glencore's gain, not the sellers' losses. It is far too late to contemplate depriving other buyers of windfall profits they made by buying during the non-disclosure period. Given that normal and proper practice in ASX trading is to sell without regard to the identity of the buyer, it would be invidious to discriminate in favour of those sellers who happened to sell to Glencore or the banks.

320. In theory, part of Glencore's gain could also be distributed to people who accepted the Centennial bid between 22 March and 4 April, as they also dealt in the market affected by the failure to disclose Glencore's position. It would be inconsistent with the policy of Chapter 6, however, to top up some shareholders who accepted a bid and not others, the bid itself having treated accepting shareholders equally.

Calculating the Gain

321. Centennial submits that we cannot infer that Glencore and the banks would have acquired a blocking stake at the higher prices they would have had to pay, had Glencore disclosed its position. Our conclusion, as set out in our reasons for making the declaration, is that Glencore could have acquired a parcel of at least 10%, despite disclosing its position, and that the advantage it gained by non-disclosure was acquiring its position as quickly and as cheaply as it did.

322. We have calculated the amount that Glencore gained by estimating how much Glencore (or the banks, had Glencore acquired swap exposure after disclosing its position) would have had to pay to buy the same number of shares as it and the banks actually acquired during the non-disclosure period, had Glencore disclosed its position during that period, relative to the prices they in fact paid during that period.

323. Our thinking on remedies has to start from two discordant starting points:

    (a) the fact that Glencore actually acquired certain physical and derivative exposure during the non-disclosure period, and

    (b) the inference that, in the circumstances of the market for Austral Coal shares at the time, it could only have acquired equivalent exposure at a higher price, or more slowly, had it disclosed its position.

324. Had Glencore in fact disclosed its position, Glencore and the banks (if applicable) would have had to adjust their trading to the market in which they were acquiring shares. It follows that there is a degree of unreality in applying the prices Glencore would have had to pay under conditions of full disclosure to the acquisitions it actually made without full disclosure. However, that tension between recorded and inferred facts is inherent in the exercise of inferring how much Glencore would have had to pay to acquire its position, had it made full disclosure.

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[94] 26.5 million, if one large crossing is excluded.

Would Glencore have persisted?

325. We have been provided with no sufficient basis to infer that Glencore would have been deterred from acquiring a blocking stake by having to pay higher prices. Had the price of Austral Coal shares risen in response to announcements by Glencore of its growing position, Glencore may have decided to stop or slow acquiring exposure. But there is no reason to conclude that it would have been unable to acquire at least 10% of the diluted capital.

326. During the non-disclosure period a significant number of shares in Austral Coal (35.5 million, including a crossing of 9 million) were sold at prices ranging from $1.24 to $1.34 and a volume-weighted average price of about $1.30 per share. It is reasonable to infer that those shares would have been available to buyers in the market (including Glencore) once Glencore's position was disclosed, albeit at higher prices. This view is supported by the trading which actually occurred after 4 April.

327. There is evidence that Glencore had decided not to bid for Austral Coal at more than $1.40 per share. For so long as Glencore wanted to keep open the option of a cash bid at no more than $1.40, it had to limit its own buying to prices no more than $1.40. In practice, it bought shares at up to that price and acquired swap exposure at lower prices.

328. When and if Glencore decided to acquire only a blocking stake, the price discipline would have become much looser, because the higher price would have applied to no more than 5% of the shares in Austral Coal, as against a possible 95% under a bid. The amount that Glencore spent to acquire a 12.4% position in Austral Coal would have been adequate to acquire a 10% blocking stake, had Glencore chosen to do so, even at prices much higher than it and the banks paid during the non-disclosure period.

Would the Austral Coal price have fallen?

329. Glencore has suggested that, rather than rising, the Austral Coal share price may have fallen in reaction to disclosure of Glencore's position. The price of a target's shares may fall below the value of a bid, if the market perceives a risk that the defeating conditions of the bid will be triggered, because accepting shareholders are not sure to receive the bid consideration. If (as we have inferred) Centennial would have declared its bid unconditional despite Glencore's disclosure, there is no reason to infer that Austral Coal's share price would have fallen relative to the value of the bid: even if the market had doubts about whether the bid would succeed, accepting shareholders would still receive shares in Centennial.

330. It is possible, however, that the value of the bid (i.e. the market price of Centennial shares) would have fallen in reaction to the disclosure of Glencore's position because, for instance, of concern that Centennial would increase the value of its bid or lose the benefits of acquiring Austral Coal.[95] Any such concern would have reflected an expectation that Austral Coal would be acquired for a price higher than Centennial's

[95] Glencore's expert witnesses suggested that this was a cause of the margin which opened up between the Austral Coal share price and the value of the bid on 5, 6 and 7 April.

then bid, so would have resulted from the same cause as an Austral Coal share price higher than the value of the bid.

331. Had the market perceived that Glencore would block compulsory acquisition by Centennial, but that it would not bid, the Centennial share price might have fallen and taken the Austral Coal share price down with it. We have no basis for inferring that Glencore would have communicated that it had settled for a blocking stake, other than by ceasing to acquire shares once it had 10%. Accordingly, we have no basis to infer that Glencore would have acquired shares in a market depressed by the information that it was merely building a blocking stake. Absent a perception that Glencore had made such a decision (and in fact it appears not to made such a decision before 6 April), speculative buying and holding would have tended to support the price of Austral Coal shares, relative to the implied value of the bid.

Measuring the Price Advantage

332. On measurement, Glencore submitted that we should take account only of the difference between the prices which Glencore and the banks actually paid and the price to which Austral Coal's shares would have increased as a result of Glencore's announcement, which would have been the price the market believed Glencore would be willing to pay if it made a bid for Austral Coal.

333. That is, we should not measure the price difference relative to Centennial's implied offer price, taking into account the fall in Centennial's share price on 5, 6 and 7 April, because speculation in the market as to Glencore's intentions would have broken the nexus between the prices of Austral Coal and of Centennial shares.

334. This argument is basically valid, i.e. we should only be concerned with what the market price of Austral Coal shares would have been. However:

    (a) in a practical sense when we draw inferences from what actually happened on 5, 6 and 7 April, we can't ignore the implied value of Centennial's bid as a benchmark (eg if Austral Coal's share price had gone up after disclosure but stayed in line with Centennial's price, we would not infer that all or possibly any of the increase was a result of the disclosure),

    (b) it doesn't follow from this argument that the only impact of earlier disclosure would have been a fall in Centennial's price with no increase in Austral Coal's share price, and

    (c) the market would have speculated about a higher bid from Glencore and also about an increase in Centennial's bid.

335. On this approach, we can calculate a best estimate of the price advantage Glencore obtained by its non-disclosure by comparing the volume-weighted average price of the shares in Austral Coal which Glencore and the banks in fact bought during the non-disclosure period (which was $1.3065)[96] with the actual volume-weighted average prices of all shares in Austral Coal traded on 5 and 6 April and on 7 April before Centennial's announcement (which was $1.3733)[97]. That comparison implies

[96] The volume-weighted average price of the market as a whole over the non-disclosure period was a little lower.

[97] The price paid by Glencore for shares in Austral Coal on 5 and 6 April was almost precisely the same.

that Glencore's position was acquired for about 6.7 cents per share less than it would have cost, had Glencore disclosed its position.[98]

336. The number of shares that Glencore and the banks acquired after 21 March and before 5 April was 19,705,669. At 6.7 cents per share, the aggregate saving on those shares was $1,320,280.

Factors Left out of Account

337. In arriving at this amount, we make no allowance for the effect of Glencore's buying on the Austral Coal share price on 5 and 6 April, for two reasons. First, we are not convinced that the effect was a large one. Although neither Glencore nor the banks bought on that day, the volume-weighted average price on 7 April before Centennial's announcement was $1.387, which is higher than the volume-weighted average price over 5 and 6 April, implying that Glencore's buying on those days did not materially support the price of Austral Coal shares.[99] Secondly, the same effect would have been present, had Glencore disclosed its position. Glencore would have had to buy a large number of shares, even had it chosen to obtain only a blocking stake, and its buying would have had a similar tendency to increase the price of Austral Coal shares, in addition to any other influences at work.

338. We have applied the same price differential of 6.7 cents per share to purchases at all times during the non-disclosure period, despite submissions by Centennial that the speculative potential of the disclosure of Glencore's position was highest at the *beginning* of that period, and by Glencore that the speculative potential of the disclosure of Glencore's position was highest at the *end* of that period.

339. Centennial's argument was based on the greater likelihood of Glencore bidding at a time when acceptances of its own bid were still low. Glencore's argument was based on speculation increasing as a result of the cumulative effect of its announcing increasing holdings and of the supply of shares in Austral Coal being reduced by Glencore's buying for cash and by acceptances for Centennial's bid.

340. We do not think it appropriate to attempt to weight prices on different days for the inferred greater or less effect of one or other of these factors, because the effects to which they referred tend to offset one another. We also observe that the events of 5, 6 and 7 April demonstrate that on those days the speculative potential of disclosure of Glencore's position was still considerable and there were then still many holders willing to sell for cash, if there were buyers at acceptable prices.[100]

Beneficiaries

341. We have identified the relevant class of beneficiaries as people who sold on SEATS, as they sold at the current market price. We are aware of one very large overseas crossed trade which was reported to the market during the non-disclosure period, at

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[98] And does not involve an assumption that Glencore would have paid more than $1.40 for shares during the non-disclosure period.

[99] These prices also refute the conclusions of Glencore's expert witnesses that the disclosure of Glencore's position would not have led to Austral Coal shares trading above $1.35.

[100] Which refutes the view taken by Glencore and its expert witnesses that the flow of acceptances into the Centennial bid meant there was a shortage of shares available for cash at that time.

a price well under the then market price, which we infer was influenced by considerations other than the current market price. We have left it open to ASIC to seek supplementary orders if, for instance, a different distribution mechanism should be adopted, or it appears that certain vendors should be included in the distribution or excluded from it. As a general principle, we propose to exclude only sales which were made away from the market and merely reported to the market.

342. Once the relevant sales are identified, ASIC may make the distribution by paying the money to the broker for each affected seller, with advice identifying the relevant client.

Terms of Order

343. For the reasons set out above, we have ordered that Glencore pay $1,320,280 to ASIC for distribution between all people who sold shares in Austral Coal on the ASX market from 22 March to 4 April (both inclusive), at an equal amount per share sold.

344. Since ASIC should not be out of pocket for acting as trustee, we have ordered Glencore to pay ASIC $10,000 on account of these costs. ASIC should refund any excess. If the order costs more to administer, ASIC may apply for an order for additional costs. These proceedings having been necessitated by the decision in *Glencore v Panel* and not having been unduly prolonged, we do not propose to make any other order for costs.

345. The Panel consents to the parties withdrawing the undertakings they gave to preserve the status quo during the proceedings.

Kathleen Farrell
President of the sitting Panel
Decision dated 27 October 2005
Reasons published 15 November 2005

ANNEXURE A – DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

Corporations Act
Section 657A
Declaration of Unacceptable Circumstances

In the matter of Austral Coal Limited 02 (RR)

Under subsection 657EA(4) of the Corporations Act 2001, the Takeovers Panel hereby **revokes** the declaration of unacceptable circumstances made on 28 June 2005 in the matter of Austral Coal Limited 02 and **makes** the following declaration.

Background

Centennial's Bid for Austral Coal

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

B. On 22 March 2005, Centennial disclosed a relevant interest in 9.6% of the Austral Coal Shares then on issue.

C. On 23 March 2005 Centennial announced that it had declared its offers unconditional and that acceptances of its bid received by 7 April 2005 would be processed in time that the Centennial shares issued to the accepting offeree would rank for an interim dividend. .

D. On the morning of 5 April 2005, Centennial disclosed a relevant interest in 34.34% of Austral Coal Shares then on issue (equivalent to 39.7% prior to dilution by an issue on 1 April on conversion of convertible notes).

E. On 7 April 2005 at 1.44 pm, Centennial announced that it had acquired a majority of the Austral Coal Shares.

Glencore's Purchases of Shares in Austral Coal

F. In March 2005 and early April 2005, Glencore International AG (**Glencore**) was considering acquiring a strategic stake of the order of 10% or more in Austral Coal (through a nominee for a subsidiary).

G. Prior to 21 March 2005, Glencore acquired 12,865,881 voting shares in Austral Coal (**Austral Coal Shares**) representing approximately 4.9% of Austral Coal Shares then on issue.

H. On 24 March, Glencore bought a further 275,000 Austral Coal Shares, taking its holding to 4.99% of Austral Coal Shares then on issue.

I. On 4 April, Glencore bought a further 574,562 Austral Coal Shares, taking its holding to 4.6% of Austral Coal Shares then on issue.

J. On 5 April, Glencore bought a further 5,575,000 Austral Coal Shares, taking its holding to 6.4% of Austral Coal Shares then on issue.

K. On 6 April, Glencore bought a further 2,512,883 Austral Coal Shares, taking its holding to 7.2% of Austral Coal Shares then on issue.

The CSFB Swap

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

M. From time to time between 21 March 2005 and 30 March 2005, CSFB agreed to provide Glencore with swap exposure over numbers of reference shares, at initial prices, which corresponded with the numbers and prices of Austral Coal Shares it had purchased to hedge its exposure under the CSFB Swap (**CSFB Hedge Shares**) up to those times.

N. The terms of the CSFB Swap were set out in a term sheet signed on 20 March 2005, and in an amended term sheet signed on 24 March. On 4 April, they were confirmed in similar terms, adjusted to reflect the extent of swap exposure actually provided and the initial price. The term sheets were expressed to be non-binding, but were signed by an authorised signatory for Glencore before CSFB provided any swap exposure.

O. From the times between 21 March and 30 March that CSFB agreed to provide swap coverage to Glencore under the CSFB Swap and throughout the period from the morning of 22 March 2005 to the evening of 4 April 2005 (the **Non-disclosure Period**), there was a strong economic incentive for CSFB to hedge its exposure under the CSFB Swap by purchasing and retaining CSFB Hedge Shares (which CSFB did) , giving Glencore a degree of de facto control over the disposal of the CSFB Hedge Shares, whether or not as a matter of law there was a binding contract before 4 April.

P. Circumstances which contributed to this incentive included the actual and likely volatility of the price of Austral Coal Shares and the absence of satisfactory alternative hedges for CSFB's swap exposure.

Q. 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 for the first time.

R. Between 22 March 2005 and 30 March 2005, CSFB acquired a further 11,448,865 Austral Coal Shares as CSFB Hedge Shares, so that the CSFB Hedge Shares were then approximately 4.6% of Austral Coal Shares then on issue.

S. During the Non-disclosure Period, Glencore did not disclose any interest in the CSFB Hedge Shares acquired by CSFB during the period from 21 March 2005 to 30 March 2005, or any interest in swap arrangements with CSFB referrable to corresponding numbers of Austral Coal Shares.

The ABN AMRO Swap

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

U. From time to time between 31 March 2005 and 4 April 2005, ABN AMRO agreed to provide Glencore with swap exposure over numbers of reference shares, at initial prices, which corresponded with the numbers and prices of Austral Coal Shares it had purchased to hedge its exposure under the ABN AMRO Swap (**ABN AMRO Hedge Shares**) up to those times.

V. The terms of the ABN AMRO Swap were set out in a draft confirmation before ABN AMRO provided any swap exposure to Glencore, and on 4 April confirmed in similar terms, adjusted to reflect the extent of swap exposure actually provided and the initial price.

W. From the times ABN AMRO agreed to provide Glencore with swap exposure under the ABN AMRO Swap and throughout the remainder of the Non-disclosure Period, there was a strong economic incentive for ABN AMRO to hedge its exposure under the ABN AMRO Swap by purchasing and retaining ABN AMRO Hedge Shares (which ABN AMRO did) , giving Glencore a degree of de facto control over the disposal of the ABN AMRO Hedge Shares, whether or not as a matter of law there was a binding contract before 4 April.

X. Circumstances which contributed to this incentive included the actual and likely volatility of the price of Austral Coal Shares and the absence of satisfactory alternative hedges for ABN AMRO's swap exposure.

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

Z. Between 31 March 2005 and the evening of 4 April 2005, Glencore did not disclose any interest in the ABN AMRO Hedge Shares acquired by ABN AMRO during this period, or any interest in swap agreements with ABN AMRO referrable to corresponding numbers of Austral Coal Shares.

First Public Disclosure of these Positions

AA. On the evening of 4 April and the morning of 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 a further 7.4% of Austral Coal Shares. These percentages were based on the number of shares on issue before 1 April, and became 4.4% and 6.5% after dilution by the issue on 1 April.

BB. During the Non-disclosure Period, the aggregated number of Austral Coal Shares comprised in Glencore's holding, the CSFB Hedge Shares and the ABN AMRO Hedge Shares (the Combined Holding) increased from 5.1% to 12.5% (before dilution) or 11.05% (after dilution).

Relation to Price of Austral Coal Shares

CC. Throughout the Non-disclosure Period, the price of Austral Coal Shares on the stock market of Australian Stock Exchange Ltd was always close to the implied value of the Centennial Offer, based on the current price of shares in Centennial on that market.

DD. Between the morning of 5 April 2005 and the time on 7 April 2005 when Centennial announced that it had acquired a majority of the Austral Coal Shares, the price of Austral Coal Shares was approximately 10 cents higher than the attributed value of the Centennial bid.

Circumstances and Effects

Having regard to the background set out above, the Panel finds that:

1. Having regard to the degree of power that Glencore was able to exert over:

   (a) disposal by CSFB of the CSFB Hedge Shares by reason of the CSFB Swap, and

   (b) disposal by ABN AMRO of the ABN AMRO Hedge Shares by reason of the ABN AMRO Swap,

   in the context of the circumstances of Austral Coal and the Centennial bid for Austral Coal after the Combined Holding exceeded 5% of all Austral Coal Shares and throughout the Non-disclosure Period:

   (c) Glencore's direct shareholding in Austral Coal and its swap exposure together constituted a substantial interest in Austral Coal; and

   (d) the existence and growth of Glencore's substantial interest during the Non-disclosure Period was information which was relevant to the market in Austral Coal Shares in the same way and to the same degree as would have been the existence and growth of a substantial holding within the meaning of section 671B of the Act comprising the same numbers of Austral Coal Shares from time to time.

2. Throughout the Non-disclosure Period, Glencore had every reason to believe that the swap positions were hedged with Austral Coal shares.

3. Shareholders in Austral Coal did not during the Non-disclosure Period know the identity of Glencore as a person who proposed to acquire, and was actively acquiring, a substantial interest in Austral Coal.

4. Had shareholders in Austral Coal and the rest of the market in Austral Coal Shares been aware during the Non-disclosure Period of the existence and growth of Glencore's substantial interest and of the connection of Glencore with that substantial interest, then throughout the Non-disclosure Period:

   (a) buyers and sellers in that market would have been more relevantly informed as to the extent and nature of demand for Austral Coal Shares, including the potential demand for Austral Coal Shares to hedge swap exposures; and

   (b) other buyers and sellers are likely to have entered that market, with the result that there would have been more competition to buy and sell Austral Coal Shares in that market; and

(c) that market would have operated more efficiently than it did to price and allocate Austral Coal Shares.

5. These circumstances have also affected adversely the acquisition by Centennial of control of Austral Coal and of a substantial interest in Austral Coal, by causing those events to occur in a market which was less efficient, competitive and informed than it should have been.

6. Having regard to trading in Austral Coal Shares during the Non-disclosure Period and on 5, 6 and 7 April, throughout the Non-disclosure Period prices paid in that market for Austral Coal Shares would have been higher than in fact they were, if shareholders in Austral Coal and the rest of the market in Austral Coal Shares had been aware during the Non-disclosure Period of the existence and growth of Glencore's substantial interest and of the connection of Glencore with Glencore's substantial interest.

   This circumstance:

   (a) has affected adversely the acquisition by Glencore of a substantial interest in Austral Coal, by causing that acquisition to occur in a market which was less efficient, competitive and informed than it should have been; and

   (b) has affected adversely the interests of persons who sold Austral Coal Shares on the market operated by Australian Stock Exchange Limited during the Non-disclosure Period; and

   (c) has correspondingly benefited Glencore, through lower initial prices under the CSFB Swap and the ABN AMRO Swap, which increase the prospect of Glencore making profits at the close-out of the swaps.

7. Having regard to the effect of the circumstances mentioned in these findings on the acquisition of substantial interests in Austral Coal by both Centennial and by Glencore and of control of Austral Coal by Centennial and to the commercial considerations mentioned above and the legislative policy of Chapter 6 as set out in section 602, the Panel finds that those circumstances are unacceptable circumstances in relation to the affairs of Austral Coal.

8. It is not against the public interest to declare that the circumstances mentioned in these findings are unacceptable circumstances.

Under section 657A of the Corporations Act 2001, the Takeovers Panel declares that the circumstances mentioned in findings in this instrument are unacceptable circumstances in relation to the affairs of Austral Coal.

Signed by George Durbridge (at the direction and with the authority of the sitting Austral Coal 02 (RR) Panel)

27 October 2005

ANNEXURE B – TABLE OF SHAREHOLDINGS AND ACQUISITIONS

Date	Event	Source and Comment	Totals	Percent	Centen'l Percent [101]
7 March	CSFB buys 1,755,238 shares for Glencore	4 April list[102] Glencore's Submissions	Glencore 1,755,238	Glencore 0.7%	9.6%
8 March	CSFB buys 738,869 shares for Glencore	4 April list Glencore's Submissions	Glencore 2,494,107	Glencore 0.9%	9.6%
9 March	CSFB buys 2,648,894 shares for Glencore	4 April list Glencore's Submissions	Glencore 5,143,001	Glencore 2.0%	9.6%
10 March	Shaw buys 675,000 shares for Glencore	6 April SHN, 4 April list, Shaw contract note[103] These shares were to be crossed to CSFB	Glencore 5,818,001	Glencore 2.2%	9.6%
Saturday 12 March					
Sunday 13 March					
14 March	CSFB buys 1,154,179 shares for Glencore	6 April SHN. The 4 April list mentions only 1,154,179 of these. Glencore's Submissions	Glencore 6,972,180	Glencore 2.6%	9.6%
16 March	Shaw buys 5,250,000 shares for Glencore	6 April SHN, 4 April list, Shaw contract note. These shares were to be crossed to CSFB	Glencore 12,222,180	Glencore 4.6%	9.6%
17 March	Shaw buys 643,701 shares for Glencore	6 April SHN, 4 April list, Shaw contract note These shares were to be crossed to CSFB	Glencore 12,865,881	Glencore 4.9%	9.6%
Saturday 19 March					
Sunday 20 March					
21 March	CSFB buys 651,195 (swap)	4 April list	CSFB 651,195	CSFB 0.2%	9.6%
22 March	CSFB buys 788,750 (swap)	4 April list	CSFB 1,439,945	CSFB 0.55%	9.6%
23 March	CSFB buys 7,250,000 (swap)	4 April list	CSFB 8,689,945	CSFB 3.3%	9.6% **Bid Unconditional**

[101] As disclosed in the latest substantial holder notice available on the relevant day.

[102] List compiled by Glencore on 4 April, Volume 5, Glencore documentation, Bundle 3, pages 11 and 12

[103] Shaw contract notes sent by Glencore to CSFB on 20 March, Volume 5, Glencore documentation, Bundle 8, pages 26-33

Date	Event	Source and Comment	Totals	Percent	Centen'l Percent [101]
24 March	CSFB buys 1,264,712 (swap)	4 April list	CSFB 9,954,657	CSFB 3.8%	16.5%
24 March	Shaw buys 275,000 shares for Glencore	6 April SHN, 4 April list	Glencore 13,140,881	Glencore 4.99%	16.5%
Friday 25 March (Easter Friday)					
Saturday 26 March					
Sunday 27 March					
Monday 28 March (Easter Monday)					
29	CSFB buys 1,662,410 (swap)	4 April list	CSFB 11,617,067	CSFB 4.4%	16.5%
30 March	CSFB buys 482,993 (swap)	4 April list.	CSFB 12,100,060	CSFB 4.6%	16.5%
31 March	ABN-Amro buys 1,710,645 (swap)	4 April list, 31 March email ABN AMRO to Glencore[104]	ABN 1,710,645	ABN 0.65%	19.1%
1 April	ABN-Amro buys 4,110,488 (swap)	4 April list, 1 April email ABN AMRO to Glencore[105]	ABN 5,821,133	ABN 2.2%	22.6%
1 April	Austral issues 37,143,281 shares on conversion of notes[106]	4 April Appendix 3B	Total issued 300,606,746	Diluted % Glencore 4.4% CSFB 4.0% ABN 1.9%	22.6%
Saturday 2 April					
Sunday 3 April					
4 April	ABN-Amro buys 1,586,169 (swap)	4 April list, which gives a total to date of 33,222,876 shares	ABN 7,407,302	ABN 2.5%	29.99%
4 April	Shaw buys 574,562 shares for Glencore	6 April SHN, 4 April list	Glencore 13,715,443	Glencore 4.6%	29.99%
5 April	Shaw buys 5,575,000 shares for Glencore	6 April SHN.	Glencore 19,290,443	Glencore 6.4%	34.34%

[104] Glencore documents, page 15 of bundle 13

[105] Glencore documents, page 17 of bundle 13

[106] According to the Appendix 3B notices, these shares rank equally with other ordinary shares in all respects, and were issued at $0.5344 each, at a conversion ratio of 1.029217 shares per note with a 55 cent face value. In all, 41,125,408 shares were issued on conversion of the notes, and the remaining 51,801 notes redeemed. Austral announced on 24 March that the right to convert had been triggered by the bid, which applied to the new shares.

Date	Event	Source and Comment	Totals	Percent	Centen'l Percent [101]
5 April	Glencore announces that it has acquired approximately 5% and has swaps over 7.4%, based on 263.4 million shares.	5 April announcement. The implied number of shares under swaps is 19.5M, as in 4 April list and SHN.			34.34%
6 April	Glencore gives notice of holding 19,290,443 shares and swaps over 6.49% (19.5M, based on 300,606,746 on issue)	6 April SHN. The change in the percentage under swaps is due to dilution from the 1 April issue. The implied 19.5M shares under swap is in line with 19,507,362 for CSFB and ABN-Amro in 4 April list.			42.0%
7 April	Centennial announces that it has over 50% acceptances				48%
8 April	Austral issues 71,839 shares on conversion of notes	8 April Appendix 3B	Total Issued 300,678,585		65.7%
Saturday 9 April					
Sunday 10 April					
Saturday 16 April					
Sunday 17 April					
19 April	Glencore acquires 3,012,883 shares	19 April SHN. Broker not stated.	Glencore 22,303,326	Glencore 7.42%	70.3%
19 April	Glencore gives notice of holding 22,303,326 shares and swaps over 6.49% (i.e. 19.5M)	19 April SHN (Implied 19.5M shares checks with 4 April list)			70.3%
20 April	Austral issues 3,566,364 shares on conversion of notes	20 April Appendix 3B	Total issued 304,244,949		78.31%
21 April	Austral issues 237,954 shares on conversion of notes	22 April Appendix 3B	Total issued 304,482,903		80.00%
Saturday 23 April					
Saturday 24 April					
Monday 25 April (Anzac Day)					

ANNEXURE C - ORDERS

Corporations Act
Section 657D
Final Orders
Revocation of Orders

In the matter of Austral Coal Limited 02 (RR)

Pursuant to section 657D(3) of the Corporations Act 2001 and pursuant to a declaration (the **Declaration**) of unacceptable circumstances made by the sitting Panel on 27 October 2005, the Takeovers Panel hereby **revokes** the orders (the **Orders**) made by the Sitting Panel in the matter of Austral Coal 02 on 1 July 2005 and **makes** the following orders.

1. Within 7 days after the date of this order, or such further period as the Panel may order on an application made within 7 days, Glencore International AG (**Glencore**) shall pay to Australian Securities and Investments Commission (**ASIC**) the sum of $1,330,280.
2. ASIC is to hold $1,320,280 of this amount on trust to distribute it, not less than 7 days after the date of this order, as an equal amount per share to each person who sold shares in Austral Coal Ltd by a sale which was effected on the SEATS trading platform of Australian Stock Exchange Ltd (**ASX**) or reported to ASX between 22 March 2005 and 4 April 2005 (both inclusive), other than the transaction reported as an overseas crossed trade of 9,181,076 shares at a price of $1.23 each on 29 March 2005.
3. ASIC may give effect to order 2 by arranging to pay the appropriate amount to the broker who acted for the vendor in each relevant sale, with a message identifying the sale and advising the broker that the payment is for the benefit of the vendor under that sale, except that the broker may deduct from the payment its reasonable costs of effecting the payment.
4. ASIC may deduct from the remaining $10,000 the expenses reasonably incurred by it in giving effect to these orders, including without limitation the value of staff time and any fees charged by ASX for arranging the necessary payments. The balance (if any) is to be refunded to Glencore.
5. Any party to these proceedings may apply for further orders amending, supplementing or clarifying these orders, including without limitation orders about the distribution of the fund and the costs of the distribution.

Signed by George Durbridge, at the direction and with the authority of the sitting Austral Coal 02(RR) Panel

14 November 2005

ANNEXURE D – PRINCIPLES ABOUT REMEDIES

1. The Panel's power to make orders under section 657D of the Corporations Act contemplates that the Panel has made a declaration that unacceptable circumstances exist and empowers the Panel to make orders (including remedial orders) which:

   (a) protect the rights or interests of any person affected by those circumstances; or

   (b) ensure that a takeover bid or proposed takeover bid in relation to securities proceeds (as far as possible) in a way that it would have proceeded if those circumstances had not occurred.

2. The operative words of paragraph (a) are relevantly the same as those of former section 739 of the Corporations Law, which applied when the Court found that a person had contravened a provision of Chapter 6 in the context of a bid. In such a case, the Court had power to make such orders as the Court considered necessary or desirable to protect the interests of a person affected by the relevant bid, including a remedial order.

3. While former section 739 referred to protecting the rights and interests of people affected by a bid, and paragraph 657D(2)(a) refers instead to protecting the rights and interests of people affected by unacceptable circumstances, orders would only be made to protect the rights and interests of people affected by both a bid or other acquisition of a substantial interest and unacceptable circumstances.

4. The former section 739 power was defined by reference to the former section 737 power in *Metals Exploration Ltd v Samic Ltd*.[107] If, by acquiring shares on-market under a defective Part C statement, MEX had breached the 20% rule in what is now section 606, the Court had the wider power to make any order it considered just, under former section 737. The High Court held that MEX's breach attracted only the power in section 739, not that in section 737. It set aside orders which were intended to ensure compliance with the Law and to prevent MEX from gaining any advantage from its contravention, because those factors were more relevant to the section 737 discretion than that under section 739.[108]

5. The majority in the High Court said:

   > 42. MEX is correct in contending that, in making orders under s.739, the Court is limited to the making of such orders as it thinks necessary or desirable to protect the interests of a person affected by the takeover scheme or announcement. That power does not extend to the making of an order by way of punishment of a party who contravenes the relevant provisions of the Law. Nonetheless, so long as the overriding object of the proposed order is to protect the interests of a person so affected, it is legitimate to take account of the seriousness of the contravention and the consequences which flow from it in deciding what form of order shall be made.

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[107] (1994) 12 ACLC 752, per Mason CJ and Gaudron and McHugh JJ. Deane and Toohey JJ dissented on whether the bidder had contravened former section 615.

[108] At page 762. The issue was whether by issuing the defective Part C statement, MEX had breached what is now section 606, as well as what is now section 636. The power to make any order which seemed just applied to a breach of the substantial shareholding provisions, as well as to breaches of the 20% rule. Other breaches attracted only the power to make protective orders.

43. MEX argues that, in the case of a contravention of s.750, the only order needed to protect the interests of persons so affected is an order requiring the service of a Pt C statement which conforms to the statutory requirements. The answer to the argument is that, if by culpable conduct the offeror has secured an advantage which the offeror would not have obtained had it complied with the statutory prescription designed to achieve an efficient and informed market, then it is permissible to make such order as will protect the interests of persons affected and ensure that the policy of the Law in bringing about an informed market is implemented and, at the same time, deprive the offeror of any advantage which it would not have obtained had it complied with the Law.

44. Once that is accepted, it must follow that, in cases in which contravention of s.750 has led to the acquisition of shares to the detriment of shareholders in the target company as, for example, by deterring competing offers, then an order for divestiture will be permissible if it is considered desirable for the protection of shareholders in the target company. And we do not see why the making of an order for divestiture should be limited to cases in which shares have been acquired by way of acceptance of offers pursuant to the takeover announcement. An offeror, under cover of a takeover announcement, might make a market purchase pursuant to s.620(2),[109] having failed to serve a Pt C statement or having served a non-complying Pt C statement, thereby deterring other bidders and exerting pressure on shareholders to sell. In such situations, it may be appropriate to make an order for divestiture in lieu of setting aside the transactions for purchase of shares.

6. The following discussion of the principles governing orders under section 657D is based on Merkel J's summary of the principles governing remedies in *Terra Industries*,[110] brought up to date and adapted to the different regime under which the Panel operates.

Objectives

7. One of the primary objectives of Chapter 6 is to ensure that the acquisition of shares in listed companies takes place in an efficient, competitive and informed market.[111]

8. The primary purpose of the substantial shareholder provisions is to maintain an informed market in the shares of listed companies and to prevent substantial transactions on an uninformed market.[112] It includes, but is not limited to, preventing secret dealings for takeover advantage.[113]

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[109] The access to market exception to section 606, now item 2 of section 611.

[110] *Australian Securities and Investments Commission v Terra Industries Inc* (1999) ACLC 905 at 923 - 924. The case concerns failure to lodge substantial holding notices about 12.9% of the shares in Coms 21 Ltd, a listed company. This summary was approved by the Full Court in *Flinders Diamonds*.

[111] *Re North Broken Hill Holdings Ltd* (1986) 10 ACLR 270 at 282-283 per Fullagar J, *Brunswick NL v Blossomtree Pty Ltd* (1992) 10 ACLC 542 at 549, *Gjergja & Atco Controls v Cooper* (1986) 4 ACLC 359 at 364 per McGarvie J and at 371 per Ormiston J and *Australian Securities Commission v Mt Burgess Gold Mining Co NL* (1995) 13 ACLC 271 at 276 per Lee J.

[112] *Metals Exploration Ltd v Samic Ltd* (1994) 12 ACLC 752 at [43], *Australian Securities Commission v Bank Leumi Le-Israel (Switzerland)* (1996) 21 ACSR 474 at 479 per Lehane J on appeal, citing *North Broken Hill Holdings* at 282-283 per Fullagar J, *Brunswick v Blossomtree* at 549.

[113] *Brunswick v Blossomtree* at 549.

General Nature of Orders

9. The discretionary power to make remedial and protective orders includes power to make orders which advance the principal objectives of the statutory scheme.[114]

10. Neither the legislature nor the Court has distinguished between orders which are strictly remedial (concerned with injury already incurred) and those which are strictly protective (concerned to ward off anticipated future injury). In conferring power to make orders designed to protect rights and interests, the Act specifically includes power to make orders which are remedial in name and nature.[115]

11. Although the power is to make orders protective of affected people, in none of the cases has the court inquired into individual investors' loss or damage, let alone their action in reliance, mitigation, consequential loss or other aspects of the causation or quantum of damage comparable with what would be undertaken in a tort case. Instead, in every case, the adversely affected investors have been dealt with as a class. Given the Panel's obligation to dispose of proceedings promptly and the number of investors who may be affected, no other course is open to the Panel, or could have been intended.[116]

12. It may be appropriate to make orders with a view to removing adverse effects on the market, even where no order is justified to remedy adverse effects on individual market participants.[117]

13. Whenever it has declared that unacceptable circumstances exist, the Panel is empowered to make any order "calculated to conduce to the attainment of purchases on an informed market or calculated to set aside now and discourage in the future purchases made on an uninformed market".[118]

14. The exercise of the Panel's discretion requires it to consider a range of possible remedies and select the appropriate one in the circumstances of the case, bearing in mind the realities of the market.[119] Considerations relevant to particular classes of orders include the following:

    (a) In general, the Panel ought, so far as possible and subject to unfair prejudice, return those interested to where they would have been if the unacceptable

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[114] *Keygrowth v Mitchell* (1991) 9 ACLC 260 at 275, per Nathan J, *Australian Securities Commission v Bank Leumi Le-Israel* (1995) 18 ACSR 639 at 690 per Sackville J at first instance and on appeal at 487 – 488 per Lehane J

[115] Subsection 657D, and former sections 737, 739 and 742 of the Corporations Law.

[116] In addition to the decisions cited in the body of the reasons at paragraphs 82 and 152-155 "if it was necessary for every person affected to be joined before the Court could exercise its powers under sec. 14, then the grant of such power in most cases would be illusory" *Monarch Petroleum*, per Nicholson J at 262.

[117] In *Metals Exploration v Samic* the High Court regarded it as open to order divestiture of shares acquired under the defective Part C statement, although there was no longer any question of setting aside the relevant sales, the vendors having taken their chances before the statement was published.

[118] *North Broken Hill Holdings Ltd* at 286 per Fullagar J.

[119] *Bank Leumi Le-Israel* at 489 per Lehane J on appeal: "the question, what is the appropriate remedy, is a discretionary one which in each case will have to be answered according to the particular circumstances; there is in my view no general rule".

circumstances had not occurred.[120] The sort of order which is suitable depends on the sort of mischief it addresses. For instance:

(i) misinformation or a deficiency of information can be addressed by publishing more or better information;

(ii) a springboard wrongly obtained can be taken away by forcing a delay or a sale;[121]

(iii) confusion or deception of investors can be addressed by allowing them to rescind acceptances of a bid, or by cancelling acceptances.

(iv) Accordingly, paragraph 657D(2)(a) (back on track) is in effect a subset of paragraph (b) (protective).

(b) In particular, where that will subserve a remedial or protective order, it is generally appropriate to deprive a wrongdoer of any advantage resulting from their wrongdoing.[122]

(c) However, it would not be appropriate to reverse the outcome of a takeover bid, if offerees have made free and informed acceptances. When *Samic* was at first instance, Debelle J remarked that if a bidder had once acquired a majority of the shares in a target under a bid which complied with the applicable law:

"it would be very difficult for the Court to [order the bidder to dispose of the shares or not to vote them]. To make such an order would be to stand in the path of the decision made by shareholders to dispose of their shares. That is a decision for the shareholders, not the Court."[123]

Rights and Interests to be Protected

15. The Panel should not take a narrow or technical view of the rights and interests of the affected shareholders.

(a) In *Boral v TU*,[124] the injurious effect of a contravention on the interests of shareholders was that it depressed the willingness of a rival bidder to increase its bid price in order to attempt to obtain compulsory acquisition.

(b) In *Samic*,[125] the Full Court held that shareholders in the target company had been prejudiced by on-market acquisitions by a bidder of shares taking its shareholding from 19.88% to 28.29%, after the bidder had made a takeover announcement and served a defective Part C statement, because those

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120 "The obvious solution", as Ormiston J put it in *Gjergja v Cooper*. *Corebell v NZ Insurance* (1988) 13 ACLR 349 at 354, per Marks J, *Yaramin Pty Ltd v Augold NL* (1987) 5 ACLC 783 and *National Companies and Securities Commission v Monsoon Nominees Pty Ltd* (1990) 9 ACLC 43, *Yandal Gold* at [119], *Albert v Votraint* at 494.

121 *Metals Exploration v Samic* at [43], *Albert v Votraint* at 494, *Boral Energy Resources Ltd v TU Australia (Queensland) Pty Ltd* (1998) 16 ACLC 1199 at 1231.

122 *Metals Exploration v Samic* at [43], *ICAL Ltd v County Natwest Securities Aust Ltd & Transfield (Shipbuilding) Pty Ltd* (1988) 6 ACLC 467, per Bryson J, *Edensor* at [45] – [46].

123 *Samic Ltd v Metals Exploration Ltd (No. 2)* (1993) 11 ACLC 624 at 625, following *ICAL v County Natwest* at 500.

124 At 1229, per Santow J.

125 *Samic Ltd v Metals Exploration Ltd* (1993) 11 ACLC 717 per King CJ at 723 – 724, Cox and Olsson JJ relevantly concurring.

acquisitions tended to deter any prospective rival bidder. In remitting the matter to the Full Court for further consideration, the majority in the High Court agreed that this was a relevant consideration, although there was no need to make orders for the protection of individual vendors. [126]

(c) In *Yandal Gold*,[127] Merkel J held that shareholders in Great Central Mines Ltd had been damaged by an illegal consortium to make a joint bid, with a springboard of 40%, preventing any possible counter-bid, and ensuring that the joint bid was successful.

(d) A failure to comply with the substantial shareholding provisions results in a lack of information and therefore, an uninformed market which is of itself, a "grave disadvantage".[128]

Remedial and Protective, not Punitive

16. The orders to be made are remedial and protective rather than punitive.[129] In addition to the statement of principle in *Metals Exploration v Samic* quoted above:

(a) In *Flinders Diamonds*, the Full Court of the Supreme Court of South Australia held that current section 1325A, which provides that, where someone has breached a provision of Chapter 6 "The Court may make any order or orders (including a remedial order) that it considers appropriate", does not authorise the Court to make an order which is punitive in nature or goes beyond what is necessary to protect the interests of people affected by the breach and ensure compliance with the objectives of Chapter 6.[130]

(b) In *Bligh Ventures Ltd*, Mandie J rejected as "unduly punitive in all the circumstances" a submission that ASIC retain the net profit on sale of shares vested in it, instead of paying it to the nominee of the defaulting substantial shareholder.[131]

(c) In *Albert v Votraint* at 494, Marks J declined to vest shares which had been lawfully acquired (as well as those which had been illegally acquired), as that would have been unduly punitive.

17. Appellate courts have expressly held that orders could be protective or remedial, and not merely punitive, which deprived a bidder of an advantage obtained by culpable conduct, protected persons affected by the conduct and ensured an informed market was appropriate where the bidder had by illegal means been able to:

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126 *Metals Exploration v Samic* at [44], quoted above.

127 At [133] – [134], approved in *Edensor* at [45] - 46]

128 *Re North Broken Hill Holdings Ltd* (1986) 10 ACLR 270 at 284

129 *Metals Exploration v Samic*, quoted above. By contrast, the former power to make such orders as seemed just included power to make orders that ensured that those who contravened the provisions did not enjoy the benefits of their contravention or orders which rendered their efforts fruitless: *National Companies and Securities Commission v Monarch Petroleum NL* (1984) 2 ACLC 256 at 264 per Nicholson J, *Mt Burgess Gold Mining Co NL* (1995) 13 ACLC 271 at 276 and *Gjergja v Cooper* at 216 per Ormiston J.

130 *Flinders Diamonds Ltd v Tiger International Resources Inc* [2004] SASC 119 at [66] to [70]

131 (2001) 38 ACSR 648 at [53]

(a) acquire shares in the 20%-90% range in an uninformed market[132] or

(b) mount a successful bid at a lower price than it might otherwise have had to pay, where the order was to disgorge a benefit improperly obtained.[133]

18. However, the majority in Metals Exploration v Samic referred to the seriousness of the contravention and of the consequences which flowed from it as relevant considerations in granting remedial and protective relief which advances the objects of the relevant provisions.[134]

Avoid Unfair Prejudice

19. Subsection 657D(1) restricts the Panel's powers to make remedial orders by providing that an order cannot be made if the Panel is satisfied that it would unfairly prejudice any person.

(a) Whether prejudice is unfair depends on a balancing of the interests of the different people involved and the legislative policy.[135]

(b) The fact that a person is prejudiced by an order does not, of itself, establish that the order is unfair,[136] even if the person is innocent.[137] Recipients of windfall gains have been summarily deprived of them, without evidence of fault.[138]

(c) Whether prejudice is unfair may depend upon the extent to which the order is necessary or appropriate to give effect to the relevant legislative policy and whether evidence is presented as to the precise nature of the prejudice said to have been suffered.[139]

(d) In considering whether prejudice to a person is unfair and whether the Panel should exercise its power in a particular case, it is appropriate to take into account the degree of culpability of the person, including whether the person acted dishonestly or in a manner that can be characterised as reckless[140] or, on the other hand, whether their conduct was honest and inadvertent.[141]

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[132] *Metals Exploration Ltd v Samic Ltd* (1994) 12 ACLC 752 at 763, 181 CLR 109 at 127-128 at [50]

[133] *Yandal Gold*: there were bidder board papers to substantiate the advantage, and expert evidence to quantify the benefit. On appeal, the Full Court expressly found that the orders would have been supportable under section 739 as well as section 737: *Edensor* at [50].

[134] *Metals Exploration Ltd v Samic Ltd* at 763 (ACSR), 127 – 128 (CLR).

[135] *Gjergja v Cooper* at pp 363 – 364, per McGarvie J, *Glencore v Panel* at 52, per Emmett J.

[136] *Waldron v MG Securities (Australasia) Ltd* [1975] VR 508 at 532; *Gjergja* at 362 - 363 per McGarvie J, at 373 – 374 per Ormiston J and *Bank Leumi Le-Israel* at 691 per Sackville J at first instance.

[137] *Gjergja v Cooper* at 373 - 374

[138] *National Companies and Securities Commission v Monarch Petroleum NL* (1984) 2 ACLC 256 at 263 - 264, *Australian Securities Commission v Mt Burgess Gold Mining Company NL* (1995) 13 ACLC 271 at 276 - 277.

[139] *Bank Leumi Le-Israel* at 691, per Sackville J, as explained by Merkel J in *Yandal Gold* at [120], ".. the order to be made is that which the Judge regards as the fairest order, having regard to the various interests to be reconciled and the considerations relevant to the exercise of discretion. If there has been a valid exercise of discretion, any prejudice from the resulting order is a prejudice which the Court validly considered it fair to impose in the circumstances. It is therefore not unfair prejudice." *Gjergja v Cooper*, per McGarvie J at 362

[140] *NCSC v FAI Traders Insurance Co Ltd* (1988) 13 ACLR 85, *Bank Leumi Le-Israel* at 692 per Sackville J at first instance and at 488 per Lehane J on appeal.

[141] *Metals Exploration v Samic* at 762 agreeing with King CJ in the Full Court ("contravention proceeded from reckless indifference to the statutory policy of ensuring an informed market and to the interest of those

20. In deciding how parties would be prejudiced by an order, the Panel needs to have regard to the realities of the situation, including market conditions. For instance:

    (a) the orders in *Albert v Votraint* took account of the prejudice to a bidder of being compelled to sell shares where there was only one buyer,[142]

    (b) the orders in *Albert v Votraint*,[143] *Allgas*,[144] *Gjergja v Cooper*[145] and *Bank Leumi*[146] all relied in part on the fact that shares could be sold into current takeover bids.

Measure of Compensation

21. In *Yandal Gold*, Merkel J rejected a submission that the bid consideration (which had been depressed by contravening actions) should be topped up to a fairer price, as the joint bidders were under no obligation to offer a fair price.[147]

22. Even under the former section 737 power to make such orders as seemed just, it would have been wrong to attempt to award damages or directly to compensate the target shareholders by reason of the contraventions or to impose a fine or penalty. [148]

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affected by the proposal in having adequate information and … that reckless indifference proceeded form self-interest"), *Gjergja v Cooper* at 361 per Murray J, at 364 per McGarvie J, and at pp 373 – 374 per Ormiston J.

[142] At 495.

[143] At 494.

[144] At 1233

[145] At 368 per McGarvie J, 374 per Ormiston J

[146] At 691 – 692, on appeal at 489.

[147] at [125], [138]

[148] *Edensor* at [49]. This passage is not entirely easy to follow, particularly in the light of *Metals Exploration v Samic*.