Takeovers Panel

MEDIA RELEASE

No: 58/2005

Monday, 25 July 2005

AUSTRAL COAL LIMITED 02(R) – DECLARATION OF UNACCEPTABLE CIRCUMSTANCES AND FINAL ORDERS

The Panel announces today that it has made a declaration of unacceptable circumstances and final orders relation to the *Austral Coal Limited 02* matter (see Media Release TP05/50).

Glencore International A.G. and Fornax Investments Limited (together, **Glencore**) applied under section 657EA of the *Corporations Act 2001*(**Act**) on 1 July 2005 to review the decision of the Austral Coal 02 Panel (**Initial Panel**) on 28 June 2005 to make a declaration that unacceptable circumstances existed in relation to the affairs of Austral Coal Limited and to make orders remedying those unacceptable circumstances. The Initial Panel's decision was made following an application to the Panel by Centennial Coal Company Limited on 3 June 2005 in relation to the affairs of Austral Coal.

SUMMARY

1. In mid to late March 2005, Glencore entered into cash settled equity swaps (**Glencore Swaps**) with Credit Suisse First Boston International (**CSFBi**)[1] and ABN AMRO Bank NV, Australia Branch (**ABN AMRO**) (together, the **Banks**) over Austral Coal shares. At the time Glencore entered into the Glencore Swaps, Centennial had announced a takeover bid for Austral Coal on 23 February 2005, offering 10 Centennial shares for every 37 Austral Coal shares. Centennial's bid was unanimously recommended by the directors of Austral Coal in the absence of a superior bid.
2. The Panel has decided that Glencore's failure to disclose to the market, from 9.30 a.m. on 22 March 2005 until 4 and 5 April 2005, the fact that the combination of Glencore's holding of voting shares in Austral Coal and the swap exposure agreed to be provided under the Glencore Swaps (**Combined Holding**) [2] exceeded 5% of the voting shares in Austral Coal, constituted unacceptable circumstances.
3. The Panel has further decided that Glencore's failure to disclose to the market, from 9.30 a.m. on each relevant trading day between 23 March and 5 April 2005, any increase of 1% or more of the Combined Holding, also constituted unacceptable circumstances.

[1] For ease of reference in this media release, the Panel refers to **CSFB** as including CSFBi and other members of the Credit Suisse First Boston group involved in the transactions giving rise to the Proceedings.
[2] In the present case, Glencore's exposure under the Glencore Swaps was determined by the number of Hedge Shares acquired by the Banks. See discussion from paragraph 59.

4. The Panel considers that the existence and size of the Glencore Swaps, the identity of Glencore as the common entity behind the Combined Holding, and Glencore's holding as a material part of the Combined Holding, was information which, had it been announced, would have had an effect on the control or potential control of Austral Coal, an effect on the acquisition or potential acquisition of substantial interests (at least by Glencore and Centennial, and possibly by others), and an effect on the efficiency, competitiveness and information available to the market for control over Austral Coal shares. Accordingly the Panel considers that the information set out earlier in this paragraph is the information which the market would have expected, and needed, in proper disclosure by Glencore of the Combined Holding.

5. The Panel decided that it was unnecessary to decide whether or not unacceptable circumstances existed between 5 April 2005 and 1 July 2005. Although the Panel considers that Glencore failed to disclose all of the salient features of the Glencore Swaps to the market in its disclosures on 4 and 5 April 2005, the quantum of the Combined Holding was then disclosed and sufficient disclosure has since been made, particularly in the Media Release announcing the decision of the Initial Panel on 1 July 2005.

6. The Panel has varied the decision of the Initial Panel by making the declaration at Annexure A and has varied the orders of the Initial Panel by substituting the orders set out in Annexure B (**Restoration Order**). In summary, the orders require Glencore:

   (a) to make offers (**Restoration Offers**) to all persons who sold Austral Coal shares between 9.30 a.m. on 22 March 2005 and 9.30 a.m. on 5 April 2005 (**Non Disclosure Period**) by transactions (**Uninformed Transactions**) which were reported to Australian Stock Exchange Limited (**ASX**):

      (i) to sell to those persons the same number of Austral Coal shares which those persons sold in any Uninformed Transaction (the persons may accept the offers in whole or part);

      (ii) at a price per share no higher than that of the relevant Uninformed Transaction; and

   (b) to hold those Restoration Offers open for one month, during which time a person is entitled to withdraw the acceptance; and

   (c) to make a public announcement (in a form approved by the Panel) of the existence and terms of the Restoration Offers.

7. The Panel will allow Glencore to make one application to the Panel for a variation of the Restoration Order in relation to any particular Uninformed Transaction. The Panel will consider any application, after seeking submissions from any person whose interests would be affected by the proposed variation of the Restoration Order. The Panel will also allow Glencore to apply for further orders if it receives acceptances it must fulfil for more shares than it has.

8. At this stage, the Panel has made no orders concerning the Glencore Swaps.

PROCESS

SITTING PANEL

9. The President of the Panel appointed Mr. David Gonski AO, Mr. Norman O'Bryan SC and Professor Ian Ramsay (sitting President) as the sitting Panel for this matter.

DE NOVO REVIEW

10. As a review Panel, the Panel conducted a de novo review of the Initial Panel's decision in Austral Coal 02.

CENTENNIAL REQUEST FOR INTERIM ORDERS

11. Centennial requested that the Panel make interim orders restraining Glencore and its affiliates from selling or otherwise disposing of Centennial shares until any orders made by the Austral 02R Panel have taken effect. The Panel decided and advised the parties that it did not consider that the request was relevant to the scope of its review function in this matter and it was taken no further in the Proceedings.

ORDERS OF THE INITIAL PANEL

12. The Panel extended the stay of those parts of the orders made by the Initial Panel which it had stayed. The period was first extended from 8 July to 15 July, then to 22 July and finally to 26 July 2005.

FACTUAL BACKGROUND

13. Centennial announced a takeover bid for Austral Coal on 23 February 2005, offering 10 Centennial shares for every 37 Austral Coal shares. Centennial's bid was unanimously recommended by the directors of Austral Coal in the absence of a superior bid.

14. Centennial's bid followed public revelations that Austral Coal:

    (a) was in serious financial difficulties; and

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

15. When Centennial's bid was announced Austral Coal had 263,463,465 ordinary shares and 40,000,000 convertible notes on issue. Under both the normal terms of the Convertible Notes and because of the Centennial takeover, the Convertible Notes were able to be converted at times during the Centennial takeover bid period. On 23 February 2005 Austral announced that the convertible notes would become convertible into ordinary shares when Centennial's bid became unconditional. Most of the convertible notes were converted on 1 April 2005. Austral Coal issued 41,125,408 shares on conversion of the convertible notes and currently has 304,588,873 ordinary shares on issue.

The various percentage holdings of Austral Coal shares mentioned below have been affected by the conversion.

16. 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.

17. 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.

18. Austral Coal lodged its target's statement on 21 March 2005, recommending the Centennial bid and dispatched it between 21 and 23 March 2005.

19. Centennial declared its bid unconditional on 23 March 2005. On 24 March 2005, Centennial announced that its relevant interest in Austral Coal had increased to 16.5%.

20. On 4 April 2005 Centennial announced that its relevant interest in Austral Coal had increased to 30%. On 5 April 2005 Centennial announced that its relevant interest in Austral Coal had increased to 34.3% and on 6 April 2005 Centennial announced that its relevant interest in Austral Coal had increased to 42.04%.

21. On 7 April 2005 Centennial announced that its relevant interest in Austral Coal had increased to 48%.

22. On 8 April 2005 Centennial announced that its relevant interest in Austral Coal had increased to 66.7%.

23. On 24 April 2005 Centennial announced that its relevant interest in Austral Coal had increased to 82.4%.

24. Centennial's relevant interest in Austral Coal is today approximately 85.4%. It cannot currently proceed to compulsory acquisition of the outstanding shares in Austral Coal under Chapter 6A of the Act.

25. The other remaining relevant interest holders in Austral Coal today are:

    (a) Glencore: 7.32%;

    (b) CSFB: 4.03%;

    (c) ABN AMRO: 2.43%; and

    (d) 230 public shareholders: 0.79%.

26. Glencore acquired 4.9% of the shares in Austral Coal before 21 March 2005[3].

27. CSFB acquired its holding progressively between 21 and 30 March 2005 in order to hedge its exposure under an equity swap which it entered into with Glencore (**CSFB Swap**). The face value of the swap was stated in the term sheet and confirmation issued in relation to the CSFB swap. The value of the swap exposure which CSFB was prepared to offer Glencore gradually increased between 21 and 30 March 2005. The value of the swap exposure CSFB was prepared to offer Glencore was limited to the size of CSFB's physical holding in

[3] Based on the number of Austral Coal shares on issue at the time. Due to the issue of new Austral Coal shares on the conversion of the convertible notes that percentage is now less than 4.9%.

Austral Coal from time to time, as CSFB acquired Hedge Shares up to the agreed value of the swap.

28. The evidence was clear that CSFB's acquisition of Austral Coal hedge shares preceded its confirmation of the swap exposure it would offer Glencore from time to time and that exposure never exceeded the number of hedge shares previously acquired by CSFB.

29. ABN AMRO acquired its holding progressively between 31 March and 4 April 2005 in order to hedge its exposure under an equity swap which it entered into with Glencore (**ABN AMRO Swap**). The proposed face value of the swap was stated in the draft confirmation provided from ABN AMRO to Glencore in relation to the ABN AMRO Swap. The final (lower) face value was stated in the confirmation subsequently issued in relation to the ABN AMRO Swap. The value of the swap exposure which ABN AMRO was prepared to offer Glencore gradually increased between 31 March and 4 April 2005. The value of the swap exposure ABN AMRO was prepared to offer Glencore was limited to the size of ABN AMRO's physical holding in Austral Coal from time to time, as ABN AMRO acquired Hedge Shares.

30. The evidence was clear that ABN AMRO's acquisition of Austral Coal hedge shares preceded its confirmation of the swap exposure it would offer Glencore from time to time and that exposure never exceeded the number of hedge shares previously acquired by ABN AMRO.

31. Glencore made no public announcement about any of the holdings of itself, CSFB or ABN AMRO, or the Glencore Swaps, until the evening of 4 April 2005, when it published a statement to the media, and the morning of 5 April 2005, when it announced to the market through ASX, that it held approximately 5% of Austral Coal and had entered into equity swap agreements with "well regarded investment banks" in respect of a further approximately 7.4% of Austral Coal's expanded capital on that date.

32. Glencore also announced in its media release on 4 April, and to ASX on 5 April, 2005 that it was "considering its position" in respect of Austral Coal and Centennial's bid, and that its considerations then included "the possibility of a cash takeover bid being made for Austral Coal by a party other than Centennial".

33. Glencore lodged two substantial shareholder notices in relation to its relevant interests in Austral Coal on 6 and 19 April 2005 respectively.

34. Prior to the commencement of the Initial Panel's proceedings, Glencore did not make any other public announcement about the matters noted above.

FINDINGS BASED ON FINDINGS OF FACT AND SUBMISSIONS

35. When Glencore negotiated and agreed its equity swap arrangements with CSFB and ABN AMRO between 21 March and 4 April there was no readily available or liquid market in any security with which CSFB or ABN AMRO could efficiently or reliably hedge their exposures under their respective swaps, other than Austral Coal shares.

36. Had CSFB and ABN AMRO not hedged their respective swap positions by acquiring shares in Austral Coal there was a real and material risk that they would be left without an effective hedge, particularly in the event that Centennial continued to increase its relevant interests in Austral Coal in March and April 2005 (as was in fact occurring) or in the event that Glencore (or any other bidder) commenced a rival takeover bid (as Glencore had informed both CSFB and ABN AMRO it was considering). A rival takeover bid by Glencore (an industry buyer) or anyone else, especially an unconditional cash bid, would likely significantly increase Austral Coal's share price and decrease the shares available to the Banks for hedging their exposures under the swaps.

37. It was highly unlikely that either CSFB or ABN AMRO would expose themselves to these risks and it was therefore highly likely that they would hedge their risks under their respective swaps by acquiring shares in Austral Coal, as they in fact did. Indeed the Panel observed that both CSFB and ABN AMRO separately and independently told Glencore that they were only prepared to offer swap capacity to the limited extent that they were *already* fully hedged by their holdings of Austral Coal shares.

38. Had the market been promptly informed about the existence and the salient terms of the Glencore Swaps, and the fact that Glencore was the common entity behind the Combined Holding, the market is likely to have concluded that CSFB and ABN AMRO would hedge their respective exposures under the swaps by acquiring Austral Coal shares, particularly having regard to the facts set out above, the Centennial takeover bid and the identity of Glencore.

39. The Panel found that the Combined Holding (12.4% of Austral Coal shares at its highest) substantially reduced the free float of Austral Coal shares, particularly in light of Centennial's unconditional takeover bid and the increasing number of reported acceptances into that bid. Non-disclosure of the Combined Holding thereby materially affected the control or potential control of Austral Coal because the market was not aware that the number of shares available to be traded or accepted into Centennial's bid had been materially reduced.

40. Disclosure of the Combined Holding was material to the question whether the market for control over Austral Coal shares operated in a manner which was efficient, competitive and informed. This is because the Hedge Shares were being withdrawn from the market without any information about the Combined Holding being disclosed to the market. The Panel considered that many Austral Coal shareholders would have reassessed their investment decisions in light of this information.

41. Non-disclosure of the Combined Holding until the time of Glencore's announcements on 4 and 5 April 2005 affected the market for control or potential control of Austral Coal and caused the market for control over Austral Coal shares to operate in a manner which was not efficient, competitive and informed between 21 March 2005 (being the first date on which CSFB acquired Austral Coal shares to hedge the CSFB swap and the date on which the Combined Holding exceeded 5%) and 5 April 2005 (being the first trading day after Glencore's announcement).

ANALYSIS

42. The Panel considers that the existence and size of the Glencore Swaps, the identity of Glencore as the common entity behind the Combined Holding, and Glencore's holding as a material part of the Combined Holding, was information which, had it been announced, would have had an effect on the control or potential control of Austral Coal, an effect on the acquisition or potential acquisition of substantial interests (at least by Glencore and Centennial, and possibly by others), and an effect on the efficiency, competitiveness and information available to the market for control over Austral Coal shares. The Panel considers that the information set out earlier in this paragraph is the information which the market would have expected, and needed, in proper disclosure by Glencore of the Combined Holding.

43. The Panel considers that disclosure of the Combined Holding would have had an effect, in part, because the market would have seen acquisition of the Hedge Shares as a commercially highly likely, if not inevitable, consequence of the circumstances surrounding Austral Coal at the time, and also, critically, a consequence of Glencore being the common entity behind the Combined Holding. The Panel considers that Glencore's identity as an industry buyer rather than a financial buyer supports this conclusion.

44. Having found that unacceptable circumstances existed as a consequence of non-disclosure of the Combined Holding, the Panel considered the effects of making a declaration of unacceptable circumstances on the parties involved, the market for Austral Coal shares and the persons most likely affected by the non-disclosure and the decision of the Panel. The Panel decided that it making a declaration of unacceptable circumstances in these Proceedings would not be against the public interest.

UNACCEPTABLE CIRCUMSTANCES

45. The Panel considers that the non-disclosure of the Combined Holding constituted unacceptable circumstances having regard to its effect on:

    (a) the control, or potential control of Austral Coal; and/or

    (b) the acquisition, or proposed acquisition, of a substantial interest in Austral Coal.

Control or Potential Control

46. The Panel considers that the gradual acquisition of the Combined Holding affected the control or potential control of Austral Coal by withdrawing from the market for Austral Coal shares, 12.4% (at the highest possible number) of the voting shares in Austral Coal, at a time when Centennial's takeover bid was proceeding and the market reasonably anticipated that control of Austral Coal might soon pass to Centennial or to another bidder. Glencore was the common factor in the acquisition of the Combined Holding and apparently the only party with full knowledge of its existence, size, ownership and commercial features.

47. Disclosure of the Combined Holding would have identified Glencore as a possible alternative bidder for Austral Coal and revealed the existence of significant parcels of Austral Coal shares controlled by Glencore, CSFB and ABN AMRO respectively. The market would have identified Glencore as a natural potential bidder for Austral Coal, or blocker of Centennial's bid. The market would also have identified CSFB and ABN AMRO not as likely bidders or blockers of any bid, but as likely traders of the Austral Coal shares they held when they had no further economic need for their hedges.

48. The Panel considers that the market would have reasonably concluded that the Hedge Shares were acquired to hedge the Glencore Swaps. Non-disclosure of the Combined Holding meant that the market was not aware that the number of shares available to be traded or accepted into Centennial's bid had been materially reduced, with a consequent significant change in the 'balance of power' in the potential control of Austral Coal.

49. The market would have been particularly interested to know of Glencore's role in the Glencore Swaps (and the commercially highly likely, if not inevitable, acquisition of the Hedge Shares), especially having regard to Glencore's own direct holding. Considering the Combined Holding, market participants would have made an assessment about Glencore's intentions and would have factored this assessment into their own decisions whether to buy, sell (on-market or by accepting Centennial's bid) or hold Austral Coal shares. Market participants are likely to have speculated about the possibility of a rival cash takeover bid by Glencore, or, at the least, the possible purchase of shares at higher prices to build a position.

50. Austral Coal shareholders may have made different decisions in relation to their acceptance of Centennial's bid if they had been aware of the Combined Holding. Accordingly, non-disclosure of the Combined Holding had an effect on Centennial's bid and therefore an effect on control or potential control of Austral Coal.

51. CSFB argued that, even if Glencore had direct control over the disposal and voting of the largest possible percentage of the Combined Holding of Austral Coal shares (12.4%), Glencore could not be regarded as having control, or potential control, of Austral Coal. The Panel does not consider this argument to be an answer to the conclusions reached above. The Panel considered the *effect* of the circumstances on control or potential control of Austral Coal. The Panel does not regard it as decisive of that question whether Glencore itself could be regarded as exercising control or potential control of Austral Coal. It is clear from the 20% threshold in section 606 and the 5% threshold in section 671B, that the legislature regards the effect on control of holdings well below actual control as being material to the potential control of a company. The Panel has addressed this issue previously.[4]

52. In summary, the Panel considers that the Combined Holding, once it reached 5% or more, in the circumstances of Austral Coal at the time, had an effect on the control or potential control of Austral Coal. The existence of the Combined Holding was not disclosed to the market in a timely manner, and that lack of

[4] See, for example, *Village Roadshow Limited 02* [2004] ATP 12.

disclosure was unacceptable given the effect of non-disclosure on the control or potential control of Austral Coal.

Acquisition of a substantial interest

53. The Panel considers that the non-disclosure of the Combined Holding affected the acquisition or proposed acquisition of a substantial interest in Austral Coal for essentially the same reasons as were identified above in connection with the effect on control. The Combined Holding at its highest possible number represented 12.4% of the shares in Austral Coal. In the Panel's view this was a substantial interest, and Glencore was the common factor in its acquisition and apparently the only party with full knowledge of its existence, size, ownership and commercial features. The Panel considers that this would have affected Glencore's decisions and behaviour in connection with acquisitions or proposed acquisitions of substantial interests in Austral Coal.

54. Further, the non-disclosure of the Combined Holding may also have affected the behaviour of Centennial, or other persons, who may have been considering the acquisition of a substantial interest in Austral Coal at this time. The outcome of Centennial's bid was by no means certain in late March – early April 2005. Other bidders may have emerged had the market in Austral Coal been more liquid or more fully informed. Because it seems only Glencore knew about the Combined Holding and its commercial features, Glencore had an information advantage over other market participants which in the Panel's view affected the acquisition or proposed acquisition of a substantial interest in Austral Coal.

Efficient, competitive and informed market

55. In making its decision as to whether unacceptable circumstances existed, the Panel has had regard to the purposes of Chapter 6, as set out in section 602 of the Act, and specifically to the purpose that acquisition of control of the voting shares in a listed company should take place in an efficient, competitive and informed market.

56. If the Combined Holding had been disclosed when it reached 5%, the market would have made its own assessment as to Glencore's likely intentions and behaviour towards Austral Coal. Glencore's identity as the holder of the Glencore Swaps was also material to the market because it would be perceived as an industry buyer whose interest in Austral Coal was likely to be strategic, not merely financial. The market would consider that, because of the possible strategic and other advantages to Glencore of acquiring Austral Coal, Glencore might be more willing to pursue Austral Coal at a higher price or on more attractive terms than those offered by Centennial.

57. The Panel considers that many Austral Coal shareholders would have reassessed their investment decisions in light of the information and may have made different investment decisions in the Non-Disclosure Period. It is impossible to tell exactly whether or how they would have changed their investment decisions in light of the information, but the Panel considers that they should have had the information when they made their investment decisions.

58. Therefore, the Panel finds that non-disclosure of the Combined Holding until the time of Glencore's announcements on 4 and 5 April 2005 caused the market for control over Austral Coal shares to operate in a manner which was not efficient, competitive and informed.

ASPECTS OF THE GLENCORE SWAPS

Acquisition of Hedge Shares

59. The Panel considers that it was commercially highly likely, if not inevitable, that the Banks would hedge their exposure under the Glencore Swaps by acquiring Austral Coal shares. The Panel considers that the Banks clearly conveyed to Glencore that they would provide increased swap exposure to Glencore only as they progressively acquired Hedge Shares, and that was in fact what happened.

60. The Panel considers that there were a number of factors particular to Austral Coal's circumstances in late March – early April 2005, and to Glencore, which made it commercially highly likely, if not inevitable, that the Banks would fully hedge their exposure under the Glencore Swaps by acquiring Austral Coal shares. Those factors included:

    (a) there were no exchange traded derivatives (such as futures contracts or options) over Austral Coal shares;

    (b) Austral Coal had only one mine, so the volatility of its share price was affected by mine factors specific to Austral Coal, against which no other hedge is available;

    (c) Austral Coal produced only one product (coking coal), so its share price was likely to move differently to companies which had different (e.g. thermal coal) or more diversified energy products;

    (d) Austral Coal had recently encountered difficulties with the longwall operations in its mine, which made it potentially more volatile than other coal mining stocks;

    (e) Austral Coal had recently experienced some financial difficulties, which was likely to increase the risk associated with its shares relative to other coal mining companies;

    (f) there are no publicly traded Australian coking coal indices which might have closely correlated values for the purpose of hedging;

    (g) there were no companies with closely correlated share prices;

    (h) Centennial shares were not a reliable hedge because the nature or the ratio of the bid consideration might change, disrupting the correlation of the hedge, and the Banks had been informed that Glencore was considering a possible takeover bid for Austral Coal which may disrupt the correlation between the Austral Coal and Centennial share prices;

    (i) Austral Coal convertible notes were not an efficient hedge because they were relatively illiquid and therefore the Banks were unlikely to be able to acquire sufficient numbers of convertible notes to hedge the Glencore Swaps. The evidence before the Panel was that Glencore requested CSFB

to try to acquire Austral Coal convertible notes on Glencore's behalf as an alternative to acquiring physical shares over the period 7 to 18 March 2005 but that CSFB had been unable to acquire an acceptable number of Austral Coal convertible notes;

(j) Austral Coal convertible notes were also not an efficient hedge because there was a redemption provision in the terms of the convertible notes which allowed them to be redeemed for cash, thereby eliminating any correlation with the value from time to time of Austral Coal shares;

(k) Austral Coal was the subject of a takeover bid by Centennial which was likely to make its share price more volatile and reduce its correlation with other stocks;

(l) Centennial's announcements of the steadily increasing acceptances into its bid, once the bid was declared unconditional, meant that the market in Austral Coal was becoming progressively less liquid, increasing the likelihood of the Banks acquiring a direct physical shareholding hedge;

(m) Glencore had advised both Banks that it was considering making a rival takeover bid for Austral Coal which had an even greater potential to make Austral Coal's share price more volatile, thereby reducing its correlation with other stocks and further reducing the liquidity of the market in Austral Coal shares; and

(n) the identity of Glencore as an industry buyer was known to the Banks, and they would have surmised, even if they had not been told, that it was possible that Glencore may make a rival takeover offer.

Retaining the Hedge Shares

61. The same factors which caused the Banks to decline to increase the swap exposure they were prepared to extend to Glencore under the Glencore Swaps beyond the number of Austral Coal shares they had been able to acquire, made it commercially highly likely, if not inevitable, that until the Glencore Swaps terminated or decreased in size, the Banks would hold the Hedge Shares. Therefore Glencore could be reasonably certain that no other person (e.g. Centennial, another rival bidder or anyone else) would be able to acquire the Hedge Shares while the Glencore Swaps remained on foot.

62. The Banks also needed to retain the Hedge Shares during the life of the Glencore Swaps because Glencore's own actions, whether in acquiring further Austral Coal shares to increase its position, announcing its identity (as an industry buyer) on the Austral Coal register, or announcing its own takeover bid for Austral Coal, might have increased the amounts payable under the Glencore Swaps. In the absence of an effective hedge, the Banks would be materially exposed to the actions of the other counterparty to the swaps.

When did the unacceptable circumstances commence?

63. The Panel considers that unacceptable circumstances commenced when the Combined Holding exceeded 5% and Glencore did not make disclosure of the Combined Holding to the market on the following day.

64. The Panel considers that 5% (and each 1% increase thereafter) is an appropriate threshold to use in this case for assessing the significance to the potential control of Austral Coal and for the market for control over Austral Coal shares. This is because:

    (a) 5% (and each 1% increase thereafter) is a well-known statutory substantial holding threshold. Hence the market would reasonably expect to be informed about a Combined Holding greater than that threshold;

    (b) because of the Panel's earlier findings as to the high commercial likelihood, if not inevitability, of the Banks fully hedging the Glencore Swaps with Austral Coal shares, the effect of the Glencore Swaps on the availability of the Hedge Shares to the market and other potential acquirers was similar to Glencore acquiring the Hedge Shares directly; and

    (c) the legislature has decided that a holding of more than 5% in a listed company may affect the potential control of a company and is therefore material information required for the market to operate in an efficient, competitive and informed manner. Clearly, in some circumstances 5% will not materially affect control of a company. However, the Panel considers that in the present case a Combined Holding of more than 5% of Austral Coal could materially affect control or potential control of Austral Coal and the market for control over Austral Coal shares.

65. Austral Coal was at the time subject to a takeover bid. Accordingly disclosure of the acquisition of a substantial holding in Austral Coal was required to be made on the trading day following the acquisition. Similarly, the Panel considered that this time limit was also appropriate for disclosure of the Combined Holding.

66. Accordingly, the Panel has concluded that the non-disclosure of the Combined Holding until the time of Glencore's announcements on 4 and 5 April 2005, gave rise to unacceptable circumstances between 9.30 a.m. on 22 March 2005 (being the day after the first date on which CSFB acquired Austral Coal shares to hedge the CSFB Swap and the date on which the Combined Holding exceeded 5%) and 9.30 a.m. on 5 April 2005 (being the first trading day after Glencore's announcement).

When did the Glencore Swaps come into existence?

67. The Banks and Glencore submitted that the Glencore Swaps did not come into existence until the final confirmations were executed by the relevant parties; that is, 4 or 6 April 2005. Glencore submitted that no unacceptable circumstances can be found to have existed because, as soon as the Glencore Swaps came into existence, Glencore promptly announced their existence to the market on the evening of 4 April 2005.

68. The Panel does not consider decisive in this case the question of when the swaps became legally enforceable. The Panel is concerned with the commercial substance of the swaps, not their legal form. The Panel considers that the evidence is quite clear that Glencore and the Banks had reached commercial understandings or arrangements to proceed with the Glencore Swaps at the

time each Bank started buying Hedge Shares to support their offers of swap exposure to Glencore under the Glencore Swaps.

69. For example, the Panel notes that evidence from the CSFB broker who was Glencore's primary contact, states:

> "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."

70. This evidence is consistent with all contemporaneous email communications produced to the Panel, namely that the CSFB Swap, for all practical and commercial purposes, existed from 21 March 2005. The Panel found that an arrangement or understanding for the CSFB Swap existed between Glencore and CSFB at the time that CSFB commenced buying Hedge Shares, ultimately rising to a value of $15.86 million.

71. The comments are also consistent with the documentary records of ABN AMRO when agreeing the basis on which it would commence buying several millions of dollars of Austral Coal shares (ultimately approximately $9.7 million). Like CSFB, by the time that ABN AMRO commenced buying Austral Coal shares, an arrangement or understanding for an equity swap existed between Glencore and ABN AMRO.

DISCLOSURE OF TERMS OF GLENCORE SWAPS

72. Centennial asked the Panel to make a declaration and orders in relation to the failure of Glencore to disclose details of the Glencore Swaps.

73. Centennial submitted that, although Glencore disclosed the existence of the Glencore Swaps on 4 April 2005, it failed to disclose other information which Centennial submitted to the Panel was analogous to the information which is required under the substantial holding notice provisions.

74. When the Initial Panel received Centennial's 3 June 2005 application, it was faced with a real question of an alleged deficiency of information in the market for control over Austral Coal shares, albeit of a materially lesser severity than for the period between 21 March 2005 and 4 April 2005. The question whether more information was required was then a real issue. However, by the time this Review Panel came to consider the parties' submissions and rebuttals on the Glencore review application made on 30 June 2005, the Media Release announcing the decision of the Initial Panel had been published, including full details of the swaps.

75. The Panel considers that Glencore did fail to disclose to the market all of the salient features of the Glencore Swaps in its disclosures on 4 and 5 April 2005. However, because of the disclosures by the Initial Panel on 1 July 2005, and because the acquisition of Hedge Shares had ceased after 4 April 2005, the Panel decided that no remedial orders were necessary or appropriate with respect to that matter. Therefore the Panel decided it was unnecessary for it to further

address the issue of whether unacceptable circumstances existed between 5 April 2005 and 1 July 2005.

DECISION LIMITED TO FACTS

76. The Panel emphasises that it is not intending by this decision to state any general rule about whether unacceptable circumstances may arise in other cases where equity swaps or similar transactions occur. In different circumstances, non-disclosure of swaps may not constitute unacceptable circumstances. Each such case must be considered on its own facts, as the Panel has done here.

NO RELIANCE ON BREACH OF CORPORATIONS ACT

77. The Panel's decision on unacceptable circumstances in these Proceedings does not depend upon, and is not based upon, a finding of any breach of the Corporations Act.

ORDERS

78. The Panel has varied the decision and the orders of the Initial Panel by making a new declaration of unacceptable circumstances varying that of the Initial Panel and substituting final orders to redress the unacceptable circumstances which it has found exist to the extent that is now reasonably possible. The orders are attached at Annexure B.

79. The Panel accepts that it cannot determine exactly what would have happened in the market if Glencore had properly disclosed the existence of the Combined Holding. Even if the Panel could determine what would have happened in the market, it cannot return to their previous positions all persons who traded in the uninformed market.

80. The Panel's orders seek to give the persons who sold their Austral Coal shares in that uninformed market an opportunity to buy back the shares they sold and then reassess their positions in light of the information which has now emerged and which the Panel considers they should have had before they sold. The Panel considers that giving the persons affected the choice is the appropriate form of order.

Centennial

81. The Panel accepts that Centennial was also entitled to proper disclosure of the Combined Holding at the time when Centennial declared its offers free from defeating conditions.

82. However, the Panel considers that Centennial knowingly took the risk that it might end up at the end of its takeover bid unable to compulsorily acquire all of the outstanding shares in Austral Coal. The Panel noted that Centennial declared its offer free of all conditions when it held only 9.6% of Austral Coal. Although the unacceptable circumstances found in these proceedings were not circumstances that Centennial might reasonably have expected to face, it was quite foreseeable that it could have faced a 10% holder who acquired Austral Coal shares after Centennial had decided to declare its bid free from conditions.

83. On that basis, although Centennial appears to have been harmed by the unacceptable circumstances, the harm, when considered in light of the risks Centennial knowingly took, does not in the Panel's view warrant any order to facilitate Centennial achieving compulsory acquisition of Austral Coal through acquisition of the Hedge Shares.

Restoration Order

84. The Panel has made a Restoration Order to protect the interests of those persons who sold Austral Coal shares during the Non-Disclosure Period in transactions reported to the ASX (**Affected Sellers**). The Panel has ordered Glencore to make Restoration Offers for one month to those Affected Sellers.

85. The Panel will allow Glencore to make one application to the Panel for a variation of the Restoration Order in relation to any specific sale of Austral Coal shares which occurred during the Non-Disclosure Period. Glencore should provide its reasons and full supporting evidence for any such contention or request. If the Panel receives an application from Glencore it will notify all parties in these Proceedings and then seek submissions from any person whose interests the proposed variation of the Restoration Order would affect.

Glencore Swaps

86. Glencore submitted that the Restoration Order should not operate to require it to make Restoration Offers where Glencore may not have sufficient Austral Coal shares to meet all possible acceptances (referred to below as the **shortfall**).

87. The Panel had taken this issue into account when considering the Restoration Order and was concerned not to make any order which would be impossible for Glencore to comply with.

88. The Panel cannot speculate as to how many of the Affected Sellers will give acceptances to Glencore under the Restoration Offers, and therefore the extent of the shortfall (if any). However, the Panel considers that if there is a shortfall, Glencore may be able to meet any shortfall in a number of ways, including by acquiring Austral Coal shares on-market, agreeing with either or both Banks to acquire Hedge Shares as part of unwinding the Glencore Swaps or by the Panel making an order under section 657D(3) that CSFB or ABN AMRO (or both) sell a number of Hedge Shares to Glencore to meet the shortfall.

89. Therefore, at this stage, the Panel does not consider that there is any need to make any other order concerning the existence, operation or maintenance of the Glencore Swaps. However, the Panel will reconsider this matter if there is in fact a shortfall.

Glencore shares and Hedge Shares

90. To ensure that the status quo is maintained, the Panel has ordered that, except as contemplated by these orders or with the consent of the Panel:

    (a) Glencore must not sell or otherwise dispose of Austral Coal shares until the orders are completed;

(b) CSFB must not sell or otherwise dispose of its Hedge Shares until the orders are completed; and

(c) ABN AMRO must not sell or otherwise dispose of its Hedge Shares until the orders are completed.

Listing of Austral Coal

91. The Panel has ordered that Austral Coal and Centennial do all things necessary to maintain Austral Coal as a listed entity on ASX during the period of the Restoration Order and for a period of one month after the period for which the Restoration Order operates.

Shareholder communication

92. If, during the Restoration Offer period, Centennial or Glencore communicates with any person who may be an Affected Seller concerning the Panel's orders or accepting Centennial's bid for Austral Coal, Centennial or Glencore must provide the Affected Seller's contact details to the other party by 9.30 a.m. on the next business day after contact was made.

Acquisitions of Austral Coal shares during and after Restoration Order

93. The Panel has made no order restricting any person from acquiring Austral Coal shares during or after the operation of the Restoration Order. The Panel regards it as important that it limits as much as possible the interference its orders make in the normal operations of the market, while protecting the interests of those persons who have been affected by the unacceptable circumstances it finds.

94. The Panel considers that it would adversely affect the efficiency of the market for control over Austral Coal shares if it were to remove, by its orders, one or more possible buyers of Austral Coal shares, including Glencore. Removing a potential buyer or buyers of Austral Coal shares may also adversely affect the interests of any person who exercises their rights under the Restoration Order.

95. The Panel recognizes that the outcome of this decision may be that Glencore may acquire some or all of any Austral Coal shares which are restored to their sellers under the Restoration Order. The Panel considers that, had Glencore made proper disclosure of the existence of the Combined Holding, there would have been no objection to Glencore acquiring such shares on-market at the time.

96. Centennial submitted that, if Glencore had made proper disclosure, the Banks, would not have been able to acquire some, any or all of the Hedge Shares on-market at the prices which Glencore wished during the Non-Disclosure Period. The Panel did not consider these arguments persuasive and therefore the Panel made no order that all of the Hedge Shares be disposed of.

The Panel will publish its reasons in the Austral Coal 02R proceedings in due course.

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Corporations Act
Section 657A and 657EA
Declaration of Unacceptable Circumstances

In the matter of Austral Coal Limited 02R

WHEREAS

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

B. Before 21 March 2005, Glencore International AG or its subsidiaries (**Glencore**) acquired approximately 4.9% of shares in Austral Coal.

C. On or before 21 March 2005, Glencore entered into an equity swap arrangement in relation to Austral Coal shares with Credit Suisse First Boston (**CSFB**), the practical effect of which was that CSFB confirmed the swap exposure it offered Glencore from time to time as it acquired Austral Coal shares as a hedge.

D. On 31 March 2005, Glencore entered into a similar equity swap arrangement with ABN AMRO with the same practical effect (the swaps in recitals C and D collectively **Glencore Swaps**).

E. On 21 March 2005, CSFB acquired approximately 0.2% of Austral Coal shares, as a hedge.

F. Between 22 March 2005 and 30 March 2005, CSFB acquired a further approximately 4.4% of Austral Coal shares (at that time) as a hedge.

G. Between 31 March 2005 and 4 April 2005, ABN AMRO acquired approximately 2.8% of Austral Coal shares as a hedge.

H. On 4 and 5 April 2005, Glencore disclosed that it held approximately 4.9% of Austral Coal shares and, in addition, had entered into equity swap arrangements with well regarded investment banks in regard to 7.4% of Austral Coal shares.

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

1. Glencore's failure to disclose to the market, from 9.30 a.m. on 22 March 2005 until 4 and 5 April 2005, the fact that the combination of Glencore's holding of voting shares in Austral Coal and the swap exposure agreed to be provided under the Glencore Swaps (**Combined Holding**) exceeded 5% of the voting shares in Austral Coal; and

2. Glencore's failure to disclose to the market, from 9.30 a.m. on each relevant trading day between 23 March and 5 April 2005, any increase of 1% or more of the Combined Holding;

constitute unacceptable circumstances in relation to the affairs of Austral Coal Limited.

Professor Ian Ramsay

President of the Sitting Panel

Dated 20 July 2005

Orders

under sections 657D and 657EA of the Corporations Act 2001 (Cth)

In the matter of Austral Coal Limited 02(R)

Pursuant to:

(a) sections 657D and 657EA of the *Corporations Act 2001* (Cth) (the **Act**); and

(b) a declaration of unacceptable circumstances in relation to the affairs of Austral Coal Limited (**Austral Coal**) made by the Takeovers Panel on 20 July 2005,

the Panel varies the decision reviewed and makes the following orders in substitution for the orders made on 1 July 2005:

Restoration Order

1. Glencore International AG (**Glencore**) must make or cause to be made an offer to sell Austral Coal shares to each person who sold Austral Coal shares in a transaction reported to Australian Stock Exchange Limited (**ASX**), which sale took place between 9.30 am on 22 March 2005 and 9.30 am on 5 April 2005.

2. The offers must:
   (a) be unconditional, except to the extent that Glencore may apply to the Panel under these orders, including for an order that a sale or sales be excluded from the Restoration Order.
   (b) be contained in an announcement to ASX,
   (c) be contained in newspaper advertisements in a national newspaper and a newspaper in each Australian state and territory,
   (d) be made within two weeks of the date of this order,
   (e) clearly identify the class of persons to whom they are made (affected sellers),
   (f) be for an equivalent number of Austral Coal shares to the number that the affected seller sold,
   (g) be at a price no higher than the price at which the affected seller sold, not adjusting for commission or other costs of sale,
   (h) remain open for at least one month, during which time an affected seller is entitled to withdraw the acceptance,

(i) set out that the affected seller may accept the offer, in whole or part, by sending an acceptance to Glencore at a specified Australian address, to be received by no later than the specified time,

(j) specify that affected sellers whose sales are not excluded from the Restoration Order will receive within 3 business days after the end of the offer period or within 1 business day of the Panel's order (whichever is later):

(A) confirmation of the acceptance,

(B) advice as to the amount payable,

(C) a request for payment and for a certified copy of the contract note (or other acceptable evidence) of the sale, which must be given to Glencore within 5 business days, and

(D) any further information necessary to allow processing of the acceptance,

(k) specify that affected sellers whose sales are excluded from the Restoration Order by the Panel will be sent notification within 1 business day of the Panel's order, and

(l) specify a contact telephone number and an address to which queries can be directed.

3. The Panel will approve the content (and in the case of the advertisements the proposed placement, layout and size) of the draft announcement and newspaper advertisements, which must be given to the Panel for its approval before publication. The Panel will allow parties an opportunity to comment on the proposed announcement and advertisements.

4. Glencore must complete the transfer to affected sellers whose sales are not excluded from the Restoration Order within 2 business days after the 5 business days in paragraph 2(j) have elapsed.

Ancillary orders

5. Glencore must provide a clear and reasonable mechanism for resolving disputes over:

(a) who is entitled to accept the offer and in relation to which sales, and

(b) technical deficiencies in an acceptance.

6. Glencore is entitled to make one application to the Panel for a variation of the Restoration Order in relation to specific sales which it says the Restoration Order should not apply to. The application by Glencore:

(a) must be made within 2 business days after the end of the offer period,

(b) must be copied to all parties and any other person who may be affected by the proposed variation, and

(c) must set out its reasons and full supporting evidence for the request. The Panel will seek submissions from any person whose interests the proposed variation would affect.

7. The Panel may determine that a sale or sales be excluded from the Restoration Order.

8. In addition to the application in paragraph 6, Glencore may apply to the Panel for further or supplementary orders if it receives acceptances for more Austral Coal shares than it owns or can obtain. Any application should address (among other things) why Glencore could not obtain enough shares from the market or by acquisition of Hedge Shares (as defined in the decision letter of 20 July 2005**)**.

9. Glencore must give the Panel a copy of any notification it gives to an affected seller whose sale or sales were excluded from the Restoration Order by the Panel. Glencore must do so at the time of giving the notification.

10. Centennial Coal Company Limited (**Centennial**) and Austral Coal must use their best endeavours to maintain the listing of Austral Coal on ASX during the period of the Restoration Order and for a period of one month after the end of the offer period.

11. Austral Coal must facilitate the making of the announcement to ASX.

12. If, during the offer period, Centennial or Glencore communicates with any person who may be an affected seller, concerning these orders or accepting the Centennial offer for Austral Coal shares, it must provide the person's contact details to the other party by 9.30am on the next business day after contact was made.

13. Except as contemplated by these orders or with the consent of the Panel:

(a) Glencore must not sell or otherwise dispose of Austral Coal shares until the orders are completed,

(b) Credit Suisse First Boston International must not sell or otherwise dispose of its Hedge Shares until the orders are completed, and

(c) ABN AMRO Bank NV must not sell or otherwise dispose of its Hedge Shares until the orders are completed.

Professor Ian Ramsay

President of the sitting Panel

Dated 25 July 2005