



Tuesday, 15 November 2005

Austral Coal 02(RR) – Decision on Orders and Reasons for Decision

The Takeovers Panel has now made orders in the matter of Austral Coal 02 (RR) and released its reasons for making a declaration of unacceptable circumstances and orders in that matter. Under the orders, with one exception everyone who sold Austral Coal shares on ASX from 22 March to 4 April (inclusive) will receive a payment of about 5 cents per share, from an amount of \$1.3 million to be paid by Glencore.

The matter concerns an application by Centennial Coal Company Ltd originally made on 3 June 2005 ([TP05/47](#)) for a declaration of unacceptable circumstances and orders in relation to the affairs of Austral Coal Limited. Centennial's complaint was about the failure by Glencore International AG from 22 March to 4 April 2005 to disclose that it had a position in Austral Coal comprising over 5%, increasing to 11.4% of the shares in Austral Coal, during the takeover by Centennial of Austral Coal. Glencore's interests were held partly in shares and partly in hedged cash-settled swaps written by two investment banks.

Background

Glencore did not disclose the existence of either its direct holding or the hedged 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.

During the period from the morning of 22 March 2005 until the evening of 4 April 2005 (the **non-disclosure period**), acceptances for Centennial's bid 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.

Previous Proceedings

In initial proceedings on an application by Centennial, the Panel declared 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. The Panel made orders designed to remedy the effects of those circumstances.

That decision was reviewed by the Panel and largely confirmed. That decision on review was quashed by the Federal Court, because it appeared to have been made without taking into account several relevant factors.

The Present Decision

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, the sitting Panel 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 and orders.

The Panel found that during the bid Glencore had accumulated a substantial interest in Austral Coal comprising direct holdings and the hedged swaps without disclosure, with the following effects:

- 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. Austral Coal shareholders were unaware of the identity of a person who proposed to acquire a substantial interest in the company and Glencore acquired its position in a market which was less informed and competitive and therefore less efficient than it would have been.;
- Centennial's 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 intended that its 4 April announcement would check the progress of the bid, but left it too late.

The Panel did not, however, find that Glencore or the banks contravened the substantial holding provisions of the Act.

Effects on the Market and Investors

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.

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.

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 Coal 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.

- 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.
- 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 the sitting Panel was 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.
- The sitting Panel did not find that either of the two investment banks was associated with Glencore concerning Austral Coal, although each of them was aware that Glencore already held nearly 5% of the shares in Austral Coal when it asked them to provide swap exposure for approximately a further 5%.

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 Coal shares, which the banks in fact did.

Glencore's failure 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.

The Panel assessed the effect on market prices of Glencore's non-disclosure on the basis of the difference between the prices obtaining during the non-disclosure period and prices during 5, 6 and 7 April (after Glencore announced its position and until Centennial announced that it had acquired a majority of the shares in Austral Coal) at about 6.7 cents per share acquired by Glencore or one of the banks over the non-disclosure period. The amount by which Glencore benefited from the non-disclosure was \$1,320,280.

Orders

Following its declaration of unacceptable circumstances, the Panel has made orders to remedy the unacceptable circumstances that it found. A copy of the orders is attached to this release.

The orders require Glencore to make a cash payment in favour of people who sold on market from 22 March 2005 to 4 April 2005 (both inclusive). The payment will translate to about 5 cents for each share sold in the relevant period (more shares were sold than were bought by Glencore and the banks). One large crossing was excluded from participation, because the shares were traded below market. At present, the Panel is not aware of any other vendors who should be excluded. With that exception, every vendor who sold Austral Coal shares by a transaction on (or reported to) SEATS from 22 March to 4 April (inclusive) will be eligible to participate. It is presently proposed that payment will be made through vendors' brokers.

Making an order for a cash payment allows the remedy to approximate the amount of the gain to Glencore from the non-disclosure, although it only partially compensates selling shareholders for their losses.

The orders do not require Glencore to offer to sell shares in Austral Coal to people who sold on market in the period during which Glencore failed to disclose a substantial position in Austral Coal. The Austral Coal 02RR Panel has found that such an order would be ineffective in restoring an informed market in shares in Austral Coal.

The Panel has decided to make no order affecting the outcome of Centennial's bid for Austral Coal, whether by enabling acceptances to be withdrawn, topping up the consideration received by shareholders who accepted during the non-disclosure period, or requiring Glencore or either of the banks holding hedge shares to accept the bid, possibly triggering compulsory acquisition of the remaining shares in Austral Coal. To allow acceptances to be withdrawn would unfairly prejudice Centennial and possibly accepting shareholders. To top up some shareholders and not others would be inconsistent with the equal opportunity policy of the takeovers code. While the Panel found that Glencore obtained its blocking stake more cheaply and sooner than it would have done, if it had disclosed its position, Centennial's decision to declare its bid unconditional early in the offer period exposed it to the risk that a blocking stake might be acquired.

Reasons for the Panel's decision will be published on its website today.

The sitting Panel is made up of Kathleen Farrell (sitting President), Peter Scott (sitting Deputy President) and Denis Byrne.

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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 disbursements. 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