Australian Government

Takeovers Panel

Reasons for Decision

Gloucester Coal Limited

[2009] ATP 6

Catchwords:

Reverse takeover bid – shareholder approval – scrip offer – competitive market – change in control – acquisition of a substantial interest

Corporations Act 2001 (Cth), sections 602, 611 (item 4), 611 (item 7), 629, 631, 657A, 657D

INTRODUCTION

1. The Panel, Paula Dwyer, Simon Mordant (sitting president) and Nerolie Withnall, made a declaration of unacceptable circumstances in relation to the affairs of Gloucester. The Panel considered that unacceptable circumstances existed because, under s657A[1] and contrary to the principles in s602, Gloucester shareholders were denied an opportunity to consider the merits of the proposed merger with Whitehaven, or alternatively the bid by Noble or any other control transaction for Gloucester, transactions that would have an effect on the control of, or the acquisition of a substantial interest in, Gloucester.

2. In these reasons, the following definitions apply.

Term	Meaning
Gloucester	Gloucester Coal Limited
Merger	Proposed takeover bid by Gloucester at 1 share for every 2.45 Whitehaven shares for all of the shares in Whitehaven announced on 20 February 2009
MIA	Merger Implementation Agreement entered into between Gloucester and Whitehaven in respect of the Merger
Noble	Noble Group Limited
Noble bid	Proposed cash bid at $4.85 per share for all the shares in Gloucester announced on 27 February 2009
Whitehaven	Whitehaven Coal Limited

3. In these proceedings, the Panel:

   (a) adopted the Panel's published procedural rules and

[1] All references are to the *Corporations Act 2001* (Cth) unless otherwise indicated

(b) consented to parties being represented by their commercial lawyers.

FACTS

4. Gloucester and Whitehaven are ASX listed companies (ASX codes GCL and WHC respectively). Noble is a foreign entity listed on the Singapore Stock Exchange (SGX code NOBL).

5. Noble owns or controls approximately 21.7% of the shares in Gloucester.

6. On 20 February 2009, Gloucester and Whitehaven announced that they had agreed to the Merger and had entered into the MIA. Prior to the announcement, the market capitalisation of Gloucester was $268 million and Whitehaven $619 million. If the Merger is successful and Gloucester acquires all the shares in Whitehaven, Whitehaven shareholders would hold approximately 67% of the shares in the post-merger Gloucester.

7. The Merger is subject to conditions, including an 80% minimum acceptance condition and the approval of the Foreign Investment Review Board.[2]

8. Collectively, approximately 74% of the shares in Whitehaven are represented by Whitehaven directors, their associates and entities with which they are connected.[3]

9. The Whitehaven directors recommended the Merger in the absence of a superior proposal for Whitehaven and indicated that they would accept the Gloucester offer in the absence of a superior proposal for Whitehaven. Four of the Whitehaven directors have entered into Pre-bid Acceptance Deeds with Gloucester "*in respect of 19.9% of the shares in Whitehaven under which Gloucester can require the relevant shareholders to accept its offer*."[4]

10. The Merger is not subject to Gloucester shareholder approval.

11. On 27 February, Noble announced its cash bid of $4.85 per Gloucester share subject to the Merger not proceeding and prescribed occurrences.

APPLICATION

12. By application dated 27 February 2009, Noble sought a declaration of unacceptable circumstances in relation to the affairs of Gloucester. Noble submitted that:

    (a) the Merger was a reverse takeover, which would effect a change in control of Gloucester without Gloucester shareholders having any say and without the Gloucester directors having the ability to recommend to shareholders a superior proposal and

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[2] Gloucester announced on 20 March 2009 that it had received FIRB approval

[3] There is disagreement as to the relevant interests of directors and their associates. We did not feel we needed to examine this

[4] On 23 March 2009 Gloucester announced that it has ceased to be a substantial holder of Whitehaven shares as the Pre-Bid Acceptance deeds had lapsed in accordance with their terms

(b) the Merger had been structured in a manner which locked out rival proposals for control of Gloucester and ensured that a change in control occurred in an anti-competitive environment.

13. Noble sought, and the Acting President of the Panel granted, an interim order restraining dispatch of Gloucester's bidder's statement until (among other things) the determination of the application. The interim order was made on the following bases:

(a) the directors of Whitehaven had stated that they would accept the bid

(b) the Merger is friendly, and the target may consent allowing early dispatch of the bidder's statement. But for this, the bidder's statement could not be dispatched

(c) the sitting panel was likely to decide the application by the time dispatch would normally be permitted without the target's consent so the delay was unlikely to cause significant harm and

(d) making the interim order maintained the status quo for the sitting panel to consider whether to conduct proceedings. The sitting panel had the power to revoke or vary the interim order.

14. Noble sought final orders to the effect that:

(a) the Merger be subject to a condition that no superior proposal for Gloucester was made

(b) Gloucester directors be required to consider whether the Noble bid was a superior proposal

(c) if the directors do not consider the Noble bid to be a superior proposal, the Merger be made subject to Gloucester shareholder approval and, if the shareholders reject the Merger, it be cancelled and

(d) such other orders the Panel considers appropriate.

DISCUSSION

15. In our view the Merger has an effect on the control, or potential control, of Gloucester or on the acquisition, or potential acquisition, of a substantial interest in Gloucester.

Background to shareholdings

16. The Pre-bid Acceptance Deeds show the "*total number of ordinary shares beneficially held in Whitehaven on an associate inclusive basis*" as:

FRC Whitehaven Holdings BV	131,650,000
AMCI International AG	108,128,920
HFFT Pty Ltd	31,143,795
Ranamok Pty Ltd	29,883,070

17. Collectively these interests approximate to 74% of the issued capital of Whitehaven.[5]

18. One Whitehaven director, Mr Krueger, is a director of FRC Whitehaven. Another director, Mr Mende, is connected with AMCI International. Another director, Mr Haggarty, is connected with HFFT. Another director, Mr Plummer, is connected with Ranamok. The submissions were not clear as to the various holdings and relationships.[6] There have been a number of public statements by Gloucester and Whitehaven (see the next paragraph) that confirm the figure of 74%. Whitehaven submitted that the statements are wrong. But they have not been corrected, and the submissions do not clearly show why they are wrong. We accept the public statements.

19. Therefore, in so far as Whitehaven made submissions that 74% is too high, we do not accept the submissions. For one thing, the submissions address relevant interests of the directors of Whitehaven rather than voting power. For another, the Pre-bid Acceptance Deeds show a total that is consistent with the joint announcement of the Merger on 20 February 2009 that "*Whitehaven directors have also indicated that they intend to accept the Gloucester offer in respect of their own shareholdings (which collectively represent 74% of Whitehaven shares) in the absence of a superior proposal*". They are also consistent with the joint presentation of Gloucester and Whitehaven on the Merger released on ASX on 20 February 2009 that says "*In the absence of superior offer, Whitehaven directors … intend to accept in respect of the shares they own or control (collectively 74% of Whitehaven shares).*" Moreover, Whitehaven's 2007 and 2008 annual reports and an Appendix 3X[7] show that Mr Krueger has a relevant interest in the shares held by FRC Whitehaven. Again we are told that these are wrong, but not why. They also remain uncorrected so far as we are aware.

20. 'AMCI Group' holds approximately 9.9% of Gloucester. Taking the above interests in Whitehaven and the existing interest in Gloucester, approximately 51%, perhaps more, of the shares in the post-merger Gloucester will be owned or controlled by Whitehaven directors and their associates.

21. FRC Whitehaven Holdings BV would acquire voting power in the post-merger Gloucester in excess of 20%. Mr Krueger, a director of FRC Whitehaven, based on the public announcements, would have voting power in the post-merger Gloucester in excess of 20%.

22. Gloucester and Whitehaven submitted that the acquisition by a Whitehaven shareholder of an interest in excess of 20% is permitted by s611 (item 4) and nothing in Chapter 6 prohibits the acquisition of a majority holding by Whitehaven shareholders or even the directors of Whitehaven. Therefore, they submitted, there was no basis for unacceptable circumstances. We do not go so far. Item 4 does not mean that there can never be unacceptable circumstances in a bid such as the Merger.

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[5] We did not need to, and do not, make any finding that the directors are associated with each other

[6] For example, we were told in a footnote to Whitehaven's submissions that Mr Mende has a relevant interest in shares held by AMCI International but not AMCI Investments. We were not told why. Compare the substantial holding notice of 26 May 2008 showing AMCI Investments and AMCI International as the 'AMCI Group' with a holding in Gloucester. We did not need to review this.

[7] Lodged with ASX under listing rule 3.19A on 4 June 2007

In our view the circumstances in this matter are unacceptable having regard to their effect. The reasons are as follows.

Gloucester shareholder consideration of the Merger

23. The Merger deprives Gloucester shareholders of the ability to consider very significant changes (or potential changes) in control of their company or the acquisition (or potential acquisition) of a substantial interest. It was designed to do so, as it was important to Gloucester and Whitehaven that one Gloucester shareholder, Noble, with a 21.7% interest in Gloucester, was specifically disenfranchised.

24. Whitehaven shareholders will hold approximately 67% of the shares in the post-merger Gloucester. The Board of the post-merger Gloucester will combine the directors of Whitehaven and Gloucester, with a majority from Whitehaven.

25. Both Gloucester and Whitehaven submitted that deal certainty was a key consideration when structuring the transaction. Noble's stake is sufficiently large to have a significant impact on the success of a takeover of Gloucester by Whitehaven and it could block compulsory acquisition. This was a significant factor in adopting this structure. In its submission, Gloucester said "*If the transaction could not have been structured in this way, or if the deal was subject to the approval of Gloucester's shareholders, there would simply have been no deal.*" Whitehaven specifically identified the need for the support of Noble as a reason for not structuring the transaction as a takeover of Gloucester or a scheme of arrangement by Gloucester. However this structure does not just exclude Noble, it excludes all Gloucester shareholders. While deal certainty may be a legitimate factor in the structuring of a transaction, we consider it unacceptable in this case if this is at the expense of Gloucester shareholders' right to consider a proposal that affects control of their company.

26. Moreover, with approximately 74% of Whitehaven held or controlled by its directors or their associates, the change in control of Gloucester under the Merger was effectively assured with the pre-bid agreement of the Whitehaven directors or their associates. This and the existing stake in Gloucester would give Whitehaven directors and their associates approximately 51%, perhaps more, of the shares in the post-merger Gloucester.

27. ASIC submitted that it is implicit in the wording of s602(b)[8] that proposals involving control transactions should be considered by shareholders of the relevant company (ie, by voting or acceptance). We agree. The Eggleston Principles require that shareholders have sufficient information to assess the merits of a proposal,[9] and time to consider a proposal,[10] that will affect the control of their company. These requirements would be meaningless, even with sufficient time and information, if the shareholders were given no opportunity to assess and decide upon the proposal. It is

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[8] Which refers to the right of shareholders to consider on an informed basis an acquisition of a substantial interest

[9] s602(b)(ii)

[10] s602(b)(iii)

therefore clear to us that Parliament intended for shareholders to consider control transactions. Chapter 6 is predicated on that very premise.

28. Gloucester submitted that transactions under which a bidder acquired a larger target are a long-accepted form of control transaction in Australia. We agree that such transactions may take place. Nevertheless, the specific circumstances facing Gloucester shareholders mean that decisions about control and ownership of the company, which generally should be the preserve of the shareholders,[11] have been removed from them.

29. Whitehaven submitted that it was legitimate to structure the transaction this way, even though it disenfranchised Noble, because Noble's ancillary trading interests (ie coal trading and blending profits) were such that it was unlikely to consider the merits of the Merger on the same basis as other Gloucester shareholders. It suggested that Noble would block the Merger to protect these profits. We do not think this is a reason for disenfranchisement. Further the structure disenfranchised all Gloucester shareholders. Noble submitted that s602 does not set down any principle that would support denying a shareholder the right to use a legitimately acquired shareholding to have a say in determining whether a control proposal should go forward. We agree. A shareholder is entitled to act in its own interests, and indeed, the (unknown) motives of other shareholders may have led them to oppose the Merger: that is their right as owners of the company.

30. Gloucester and Whitehaven submitted that Noble was seeking to overturn clear law and established practice and that to require bidder shareholder approval in this case would amount to 'regulatory ambush'. We do not agree. Section 657A empowers the Panel to consider whether a transaction that has an effect on the control of a company, or on the acquisition of a substantial interest in a company, is unacceptable having regard to the policy of Chapter 6, even if it does not breach any provision of Chapter 6. In any event, ASIC policy that has been available for at least 9 years makes it clear that transactions where a bidder acquires a larger target without the approval of its shareholders can raise regulatory issues. ASIC in its submissions also pointed to several occasions in the last 12 months where it has acted on its policy.

31. As noted earlier, one of the Whitehaven directors would acquire voting power in excess of 20% (ie, approximately 21.68% through the holding of FRC Whitehaven) in the post-merger Gloucester, which is a substantial interest.

32. Whitehaven submitted that the Merger substituted one 21% shareholder for another, and this does not amount to an acquisition of control. We disagree. If it were otherwise, the law would allow a large shareholder holding more than 20% to sell its stake to another person without shareholder approval. It doesn't.

33. Gloucester submitted that 21% does not represent control. It is, at the very least, a substantial interest. Circumstances can dictate that a holding of less than 20% is control, although we do not need to consider that here. The 21% in this matter exceeds the 20% level which Parliament set for the takeovers threshold. We do not accept Gloucester's submission. Gloucester also pointed to a number of possible

[11] Guidance note 12, paragraph 37

consequences of requiring shareholder approval for 'reverse takeovers'. We are not laying down a general rule for transactions commonly described as reverse takeovers, but applying the takeovers principles to the Merger.

Gloucester shareholder consideration of the Noble bid

34. In the alternative, s602(c) states that a purpose of Chapter 6 is to ensure that, as far as practicable, the holders of the relevant class of voting shares all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the company. The proposed Noble bid is such a proposal. We consider that Gloucester shareholders are also denied the opportunity to consider a real alternative proposal to the Merger in the Noble bid.

35. We think the Merger prevents an auction for control of Gloucester. The Gloucester bid for Whitehaven is likely to become unconditional shortly after dispatch of the bidder's statement because:

    (a) the directors of Whitehaven and their associates, who hold or control approximately 74% of Whitehaven, have indicated they would accept the Merger (which has an 80% minimum acceptance condition) in the absence of a superior proposal for Whitehaven and

    (b) the only other significant condition to Gloucester's offer proceeding was its approval by the Foreign Investment Review Board. While there were other conditions to the Merger, the MIA required that Gloucester must waive all of these conditions once the minimum acceptance and FIRB conditions have been satisfied.

36. Noble pointed to the MIA, which allowed Whitehaven directors a fiduciary out in the event of a superior offer for Whitehaven, but not a similar out for Gloucester directors in the event of a superior proposal for Gloucester.

37. We consider that the circumstances of the Merger are unacceptable having regard to the effect the Merger is having or is likely to have on competition for control, or potential control, of Gloucester. Absent intervention by the Panel, Gloucester shareholders will be unable to consider the Noble bid or any other alternative. Noble has not indicated that it would bid for the post-merger Gloucester, and it is not required to do so. It is entitled to bid for Gloucester on the basis that Gloucester does not change into something else. There have been other cases[12] (while the circumstances were different) where the Panel has taken action to remove the chilling effect of a transaction or a person's actions on the competitive market for control of an entity.

38. Gloucester and Whitehaven submitted that the Merger does not have an adverse effect on competition for control of Gloucester because it would 'open up' the Gloucester register and would render the post-merger Gloucester a more attractive takeover target. As Noble submitted, this misses the point. The circumstances before

[12] See for example *Consolidated Minerals 03* [2007] ATP 25 and *Babcock & Brown Communities Group* [2008] ATP 25

us concern the Merger and its effect on the acquisition of control of, or a substantial interest in, Gloucester in its current form. Consideration of bids for a post-merger Gloucester is speculative and irrelevant to these circumstances.

Conclusion

39. In our view the Merger has meant that Gloucester shareholders do not get to decide the future control of their company, or the acquisition of a substantial interest in their company, or have the opportunity to participate in the benefits of a proposal (namely the Noble bid or any alternative). In the circumstances of this case that is unacceptable. We think they should have that say. Accordingly we have decided that the Merger gives rise to unacceptable circumstances.

40. We asked Gloucester and Whitehaven for documentation, including any board submissions, and corporate and legal presentations, on the structure of, or alternatives to, the Merger. These were not provided. The parties provided reasons for refusing to provide the documents. We think the reasons they gave were unsatisfactory.

ORDERS

Power to make orders

41. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make "any order"[13] if 4 tests are met:

    (a) it has made a declaration under s657A. This was done on 17 March 2009.

    (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. For the reasons below, we do not think our orders unfairly prejudice any person.

    (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 17 March 2009. Each party made submissions and rebuttals.

    (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons, or ensure that a takeover or proposed takeover proceeds as it would have if the circumstances had not occurred. Requiring Gloucester to put the Merger to its shareholders protects their rights and interests. It also protects the interests of any potential bidder for Gloucester.

42. The primary order we made was that the Merger be subject to a vote of Gloucester's shareholders. This protects their rights and interests and, in our view, allows the Merger to proceed as it would have if the circumstances had not occurred.

43. Our orders require that the notice of meeting and explanatory memorandum contain all material information required for Gloucester shareholders to consider the Merger

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[13] Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

(including information known to Whitehaven, its directors and their associates and the parties to the Pre-bid Acceptance deeds), including information known to Gloucester about the Noble bid and information about the effect on the Gloucester shareholdings if the Merger proceeds (including the identities of the people who will have a substantial interest in Gloucester).

44. We also consider that Gloucester shareholders should only make this decision when all information in relation to the Merger is publicly available. We therefore ordered that Gloucester dispatch its notice of meeting on the same day that Whitehaven's target's statement in relation to the Merger is dispatched.

45. We considered who should be allowed to vote at the meeting. We decided that Whitehaven directors, parties to the Pre-Bid Acceptance Deeds and their associates should not vote. We accept ASIC's submission that, by analogy with a vote under s611 (item 7), persons with a direct involvement in a transaction should have their votes disregarded. Excluding a rival bidder, Noble in this case, from voting goes too far. Whitehaven and Gloucester submitted that Noble should not vote, but they characterised the shareholders' decision as a choice between the Merger and the Noble bid. We do not characterise it that way. We are requiring the Merger to be put to a vote.

46. We also accept ASIC's submission that Panel orders can require a person to do something contrary to a relevant provision in Chapter 6.[14] By making these orders we do not believe Gloucester will breach ss629 and 631.

47. Noble's bid is subject to a condition that the Merger not proceed. We included an order that Noble not rely on this condition until after the vote, and not at all if Gloucester's shareholders reject the Merger. It would be inappropriate for Noble to call on the Panel to allow Gloucester shareholders to consider the Merger but not proceed with its bid if the Merger is rejected. The reason is that a basis of Noble's application is that Gloucester shareholders are not being given an opportunity to participate in the benefits under the Noble offer (or any alternate proposal).

48. Lastly, Whitehaven cannot withdraw or otherwise seek to end the MIA by reason of the requirement of a vote by Gloucester shareholders. If a shareholder vote was included from the outset, the Merger would not have given rise to unacceptable circumstances. This order allows the Merger to proceed as it would have if the circumstances had not occurred, without making otherwise significant changes to the agreement.

49. Requiring Gloucester shareholder approval of the Merger is not fatal to the transaction, unless Gloucester shareholders so vote. Whitehaven and Gloucester have the opportunity to convince a simple majority of Gloucester shareholders that the Merger is in their interests. Noble's voting power, while significant, is not determinative of the outcome.

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[14] And see Guidance Note 4, paragraph 14

DECISION

Declaration

50. It appears to us that the circumstances are unacceptable having regard to:
    (a) the effect that we are satisfied the circumstances are having or will have on:
        (i) the control, or potential control, of Gloucester
        (ii) the acquisition, or proposed acquisition, of a substantial interest in Gloucester and
    (b) the purposes of Chapter 6 as set out in s602.
51. We think it is not against the public interest to make a declaration of unacceptable circumstances. We had regard to the matters in s657A(3).
52. A copy of the declaration is annexure A.

Orders

53. Following the declaration, we made final orders on 20 March 2009.
54. The final orders are annexure B.

Costs

55. We did not make any costs orders.

Simon Mordant
President of the Sitting Panel
Decision dated 17 March 2009
Reasons published 25 March 2009

Australian Government
Takeovers Panel

ANNEXURE A

Corporations Act

Section 657A

Declaration of Unacceptable Circumstances

Gloucester Coal Limited

CIRCUMSTANCES

1. Gloucester Coal Limited (**Gloucester**) announced a bid for Whitehaven Coal Limited (**Whitehaven**) on 20 February 2009 (**Merger**). Gloucester will offer 1 share for every 2.45 Whitehaven shares. If Gloucester acquires all the shares in Whitehaven, Whitehaven shareholders will hold approximately 67% of the shares in the post-merger Gloucester.
2. Gloucester and Whitehaven entered into a Merger Implementation Agreement.
3. Noble Group Limited (**Noble**) owns or controls approximately 21.7% of the shares in Gloucester. On 27 February, Noble announced a bid for Gloucester of $4.85 cash per share, subject only to the Merger not proceeding and prescribed occurrences.
4. Whitehaven directors and their associates collectively hold approximately 74% of the shares in Whitehaven. They have indicated that they will accept the Merger in the absence of a superior proposal for Whitehaven.
5. Four of the Whitehaven directors have entered into pre-bid acceptance agreements in respect of 19.9% of the shares in Whitehaven under which Gloucester can require the relevant shareholders to accept its offer.
6. Approximately 51% of the shares in the post-merger Gloucester will be owned or controlled collectively by Whitehaven directors or their associates. At least one of the directors will acquire voting power in excess of 20% in the post-merger Gloucester.
7. The Merger is not subject to shareholder approval by Gloucester shareholders.
8. By reason of the Merger, Gloucester shareholders are denied:
   (a) the ability to consider very significant changes in control of their company and
   (b) the opportunity to consider an alternative proposal by Noble.
9. It appears to the Panel that the circumstances are unacceptable having regard to:
   (a) the effect that the Panel is satisfied that the circumstances are having or will have on:
      (i) the control, or potential control, of Gloucester
      (ii) the acquisition, or proposed acquisition, of a substantial interest in Gloucester and
   (b) the purposes of Chapter 6 of the Act as set out in s602.

10. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3) of the Act.

DECLARATION

Under section 657A of the Act, the Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Gloucester.

Alan Shaw
Counsel
with authority of Simon Mordant
President of the Sitting Panel
Dated 17 March 2009

Australian Government
Takeovers Panel

ANNEXURE B

CORPORATIONS ACT
SECTION 657D
ORDERS

Gloucester Coal Limited

PURSUANT TO

1. A declaration of unacceptable circumstances in relation to the affairs of Gloucester Coal Limited (**Gloucester**) on 17 March 2009 and
2. Section 657D of the Corporations Act 2001 (Cth)

THE PANEL ORDERS

1. Gloucester seek shareholder approval for its bid for Whitehaven Coal Limited (**Whitehaven**) announced on 20 February 2009 in accordance with these orders.
2. Gloucester dispatch a notice of meeting and explanatory memorandum for the shareholder meeting referred to in paragraph 1 that includes the following:
   (a) a statement that Gloucester will disregard any votes cast on any resolution contemplated by paragraph 1 by any of the following persons:
      (i) Whitehaven directors
      (ii) associates of Whitehaven directors and
      (iii) any party to a Pre-Bid Acceptance Deed referred to in Gloucester's market release dated 19 February 2009 and their associates
   (b) all material information required for shareholders to consider the bid for Whitehaven, including:
      (i) information known to Whitehaven, its directors and their associates and any party to a Pre-Bid Acceptance Deed
      (ii) information known to Gloucester in relation to the proposed bid for Gloucester announced by Noble Group Ltd (**Noble**) on 27 February 2009 and
      (iii) information about the effect on the shareholdings of Gloucester shareholders if the bid for Whitehaven is successful and the identities of those persons who will have a substantial holding in Gloucester after the bid.
3. Gloucester:

(a) include a condition in its bid for Whitehaven that the bid is subject to approval of Gloucester shareholders (excluding those referred to in 2a above) by ordinary resolution and

(b) not waive this condition of its bid.

4. The notice for the meeting referred to in paragraph 1 be dispatched on the same date on which the target's statement for Gloucester's bid for Whitehaven is dispatched and the notice period for the meeting be the minimum required under s249HA.

5. Until Gloucester shareholders vote on the bid for Whitehaven, Noble not rely on any condition (other than a prescribed occurrence condition):

   (a) not to make a bid for Gloucester as announced or

   (b) to end its bid for Gloucester.

6. If Gloucester shareholders do not approve the bid for Whitehaven, Noble not rely on any condition (other than a prescribed occurrence condition):

   (a) not to make a bid for Gloucester as announced or

   (b) to end its bid for Gloucester.

7. Whitehaven not withdraw or otherwise seek to end its Merger Implementation Agreement with Gloucester by reason of the requirement of a vote by Gloucester shareholders.

Alan Shaw
Counsel
with authority of Simon Mordant
President of the Panel
Dated 20 March 2009