



Australian Government

Takeovers Panel

**Reasons for Decision
Macarthur Coal Limited
[2010] ATP 3**

Catchwords:

Decline to commence proceedings – disclosure – efficient, competitive and informed market - failure to disclose – funding arrangements – interim order – material omission – other material information – scheme of arrangement – section 602 principles – shareholder approval – share issue – undertaking – substantial holding – competing proposal

Corporations Act 2001 (Cth), sections 602, 657A, 657E

ASIC Regulation 21(1)

Multiplex Prime Property Fund 04 [2009] ATP 21, Blue Energy Ltd [2009] ATP 15, International All Sports Limited 01R [2009] ATP 5, Perilya Limited 02 [2009] ATP 1, Golden Circle Limited 02 [2007] ATP 24, PowerTel Limited 01 [2003] ATP 25

INTRODUCTION

1. The Panel, Hamish Douglass (sitting President), Paula Dwyer and David Friedlander declined to conduct proceedings on an application by Peabody Energy Corporation in relation to the affairs of Macarthur Coal Limited. The application concerned the meeting of Macarthur shareholders to consider the Gloucester/Noble transactions. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable, given the nature of the Revised Peabody Proposal, the information already available to shareholders and the timing of the Revised Peabody Proposal and its Panel application.
2. In these reasons, the following definitions apply.

EGM	Extraordinary General Meeting of Macarthur shareholders scheduled for 12 April 2010 to consider the Gloucester/Noble Transactions
Gloucester	Gloucester Coal Limited
Gloucester Offer	Macarthur bid for Gloucester announced on 22 December 2009
Gloucester/Noble Transactions	Gloucester Offer and proposed acquisition by Macarthur of certain assets from Noble announced on 22 December 2009
Initial Peabody Proposal	Indicative proposal by Peabody to Macarthur announced on 31 March 2010
Macarthur	Macarthur Coal Limited
Major Shareholders	CITIC Group (and related entities), ArcelorMittal S.A (and related entities) and POSCO A/C
Noble	Noble Group Limited
Peabody	Peabody Energy Corporation

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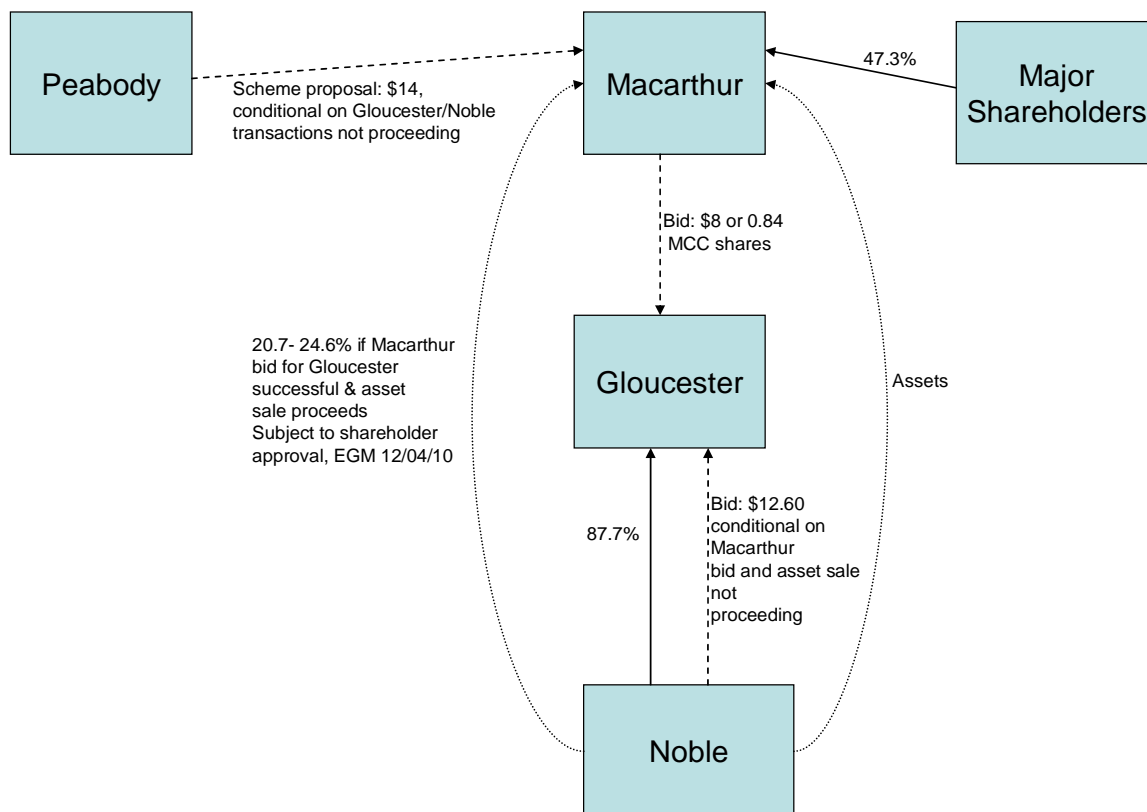
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Revised Peabody
Proposal

Revised indicative proposal by Peabody to Macarthur
announced on 6 April 2010

FACTS

3. The following diagram summarises the relevant parties and transactions:



4. Macarthur and Gloucester are ASX listed companies (ASX code: MCC and GCL respectively). Noble is a Singapore listed entity. Peabody is a U.S. incorporated entity.
5. The Major Shareholders together control approximately 47.3% of the shares in Macarthur.
6. On 22 December 2009 Macarthur announced the Gloucester/Noble transactions. These included a takeover bid by Macarthur for all the shares in Gloucester and also a proposal to acquire certain assets from Gloucester's major (87.7%) shareholder, Noble.
7. The notice of meeting stated that Noble will obtain Macarthur shares in relation to its acceptance of the Macarthur bid and in consideration for the assets, acquiring between 20.7% and 24.6% of Macarthur's expanded share capital.

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8. The Macarthur bid is conditional, among other things, on Macarthur shareholder approval at the EGM for the issue of shares to Noble.¹
9. On 26 February 2010, Macarthur lodged its notice of meeting documentation for the EGM. The documentation included an independent expert's report opining on the transactions with Noble. It included the conclusion that the transaction was not fair, but reasonable² and valued Macarthur shares in the range between \$9.84 and \$12.49.³
10. On 30 March 2010, Peabody made, on a confidential basis, a "non-binding indicative proposal" to the Macarthur board to acquire by scheme of arrangement "a controlling interest" in Macarthur. Proposed was a cash price of \$13 per share for all of the shares in Macarthur, with an option for the Major Shareholders to retain their existing holdings.
11. The proposal was conditional on support from the Major Shareholders, the Gloucester/Noble transactions not proceeding, due diligence and entry into an implementation agreement that would include the support of the Macarthur board for the transaction. The proposal stated that:

"We are highly confident in our ability to finance this transaction through a combination of cash on hand, available capacity under Peabody's existing credit [facilities] and issuance of debt and equity securities".
12. In the proposal, Peabody stated that it had already initiated discussions with the Major Shareholders and was seeking to engage with the Macarthur board to progress its proposal.
13. On 31 March 2010, Macarthur announced that it had received the Initial Peabody Proposal and that the board did not consider it to be in the best interests of shareholders, citing the proposal's conditionality and the improved outlook for coal markets, and stating that the proposal did not represent an adequate premium to Macarthur's recent trading prices.
14. On 6 April 2010, Peabody wrote to the Macarthur board with a revised proposal, increasing the proposed consideration to \$14 per share and removing the condition that the proposal be supported by the Major Shareholders. The other conditions to the Initial Peabody Proposal remained. The letter also required that Macarthur both confirm by 5pm 7 April 2010 that it would defer the EGM and also take steps necessary to facilitate due diligence. Macarthur disclosed the Revised Peabody Proposal later that day.
15. On 6 April 2010, Noble announced its intention to acquire all the shares in Gloucester not held by it (approximately 12.3%) pursuant to a cash takeover bid at \$12.60 per share. The bid would be conditional, among other things, on the Gloucester/Noble

¹ under item 7 of s611. References are to sections of the Corporations Act 2001 (Cth) unless otherwise indicated

² see page 4 of the report

³ see section (VI) of the report

transactions not proceeding. The announcement also stated that Noble remained “committed” to the Gloucester/Noble transactions proceeding.

16. On 7 April 2010, Macarthur announced that its board had rejected the Revised Peabody Proposal and continued to recommend that shareholders vote in favour of the Gloucester/Noble transactions at the EGM and had determined not to defer that meeting.
17. On 7 April 2010, Peabody published a full page advertisement in *The Australian Financial Review*, with the heading:

*“Macarthur Shareholders: You deserve the opportunity to consider Peabody Energy’s Proposal

Peabody Urges Macarthur Board to Delay 12 April Shareholder Meeting”*.⁴
18. On 8 April 2010, Macarthur made an announcement in further response to the Revised Peabody Proposal and in response to statements by Peabody.
19. Proxy appointments for the EGM are due at 11am on Saturday, 10 April 2010.

APPLICATION

20. By an application dated 7 April 2010, Peabody sought a declaration of unacceptable circumstances. Peabody submitted that Macarthur shareholders have not been provided with sufficient information to assess the relative merits of the Gloucester/Noble Transactions and the Revised Peabody Proposal. Peabody further submitted that, if such information were to be provided, Macarthur shareholders would have insufficient time to consider the Gloucester/Noble Transactions in light of the new information.
21. Peabody submitted that the following constituted unacceptable circumstances:
 - (a) the failure by Macarthur to provide its shareholders with additional information in relation to the Revised Peabody Proposal including, among other things, updated information in relation to the Gloucester/Noble transactions taking into account the Revised Peabody Proposal, and sufficient information to allow shareholders to compare the relative merits of the Revised Peabody Proposal and the Gloucester/Noble transactions and
 - (b) the failure by Macarthur to postpone the EGM does not permit additional disclosure to be made and to allow its shareholders to consider all relevant information.

⁴ *The Australian Financial Review*, 7 April 2010, p11. Peabody published two further advertisements in *The Australian Financial Review* on 8 April 2010, p17 and 9 April 2010, p49

Interim order sought

22. Peabody sought an urgent interim order that the EGM be postponed until its application is determined. We decided on 9 April 2010 not to make the interim order, for the reasons set out below.

Final orders sought

23. Peabody sought final orders, including to the effect that:
- (a) Macarthur make additional disclosure in relation to the Revised Peabody Proposal including, among other things, an updated independent expert's report and, if the Macarthur board continues to recommend the Gloucester/Noble transactions despite the revised Peabody proposal, detailed reasons for maintaining that recommendation and
 - (b) the EGM be postponed to a date that is not less than 10 business days after the date on which Macarthur dispatches the additional information.

DISCUSSION

Information

24. Peabody submitted that the EGM vote is “*effectively a vote between two control/substantial interest proposals*” and the “*information provided to Macarthur shareholders in the notice of meeting does not allow them to make an informed decision between the two competing proposals*”.
25. Peabody also submitted, among other matters, that the independent expert report should be updated taking into account the Revised Peabody Proposal and any other relevant developments or new information since the date of the report. Macarthur submitted that the independent expert is not aware of any reason to cause its report to be updated, and neither is the Macarthur board. Macarthur also submitted that the independent expert has an obligation to update its report if it believes it is required to do so due to changed circumstances, and it has not advised Macarthur that it needs to do so.
26. On 9 April 2010, in response to a new proposal from New Hope Corporation Limited, Macarthur announced that the independent expert has confirmed that as its report “*essentially compared the relative value of Macarthur scrip and the assets to be acquired by Macarthur (rather than the absolute value of Macarthur shares today) it is not aware of any reason to cause the conclusions contained in its report to be updated, and neither is the Macarthur board*”.
27. Macarthur, Noble and Gloucester submitted that the Revised Peabody Proposal is non-binding, indicative and highly conditional. Peabody submitted that Macarthur’s statements in its 8 April 2010 announcement exaggerated the conditionality of the Revised Peabody Proposal. However we note that the Revised Peabody Proposal is:

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- (a) conditional on Peabody entering into an implementation agreement with Macarthur, satisfactory completion of a limited due diligence review and the Gloucester/Noble Transactions not proceeding
 - (b) expressed by Peabody to be 'indicative' and 'non-binding'
 - (c) not subject to section 631, which would require Peabody to make a formal offer and
 - (d) not capable of acceptance by Macarthur or its shareholders.
28. Given the nature of the Revised Peabody Proposal and the information already in the market (including announcements by Macarthur and advertisements by Peabody), we consider that shareholders have sufficient information about the Revised Peabody proposal to be able to consider the Gloucester/Noble Transactions at the EGM.⁵

Interim order and timing

29. In *Golden Circle Limited 02*, the Panel stated:

"In deciding whether to commence proceedings, the Panel (among other things) weighs up the possible prejudice to each of the parties affected by any action it might take. When an application is made late in a process, the prejudice to one or other party is likely to be greater and the Panel requires more cogent reason to intervene".⁶

30. As the Gloucester/Noble transactions were announced on 22 December 2009, we do not consider that the application was made in a timely manner given the scheduled date for the meeting. Given the nature of the Revised Peabody Proposal and our conclusions in relation to disclosure, we decided early on 9 April 2010 not to make an interim order, and we remain of that view. We consider in this case that the decision whether or not to postpone the EGM properly rests with the directors of Macarthur.⁷

DECISION

31. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

32. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

⁵ The Panel reached a similar conclusion in *PowerTel Limited 01* [2003] ATP 25 at [26]

⁶ [2007] ATP 24 at [14d]. See also *Multiplex Prime Property Fund 04* [2009] ATP 21 at [31], *Blue Energy Ltd* [2009] ATP 15 at [30]

⁷ See *Perilya Limited 02* [2009] ATP 1 at [27] and *International All Sports Limited 01R* [2009] ATP 5 at [31]

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**Hamish Douglass
President of the sitting Panel
Decision dated 9 April 2010
Reasons published 10 April 2010**