



Australian Government

Takeovers Panel

MEDIA RELEASE

No: 30/2009

Wednesday, 29 April 2009

Gloucester Coal Limited 01R(a) and 01R(b) - Declaration of Unacceptable Circumstances and Orders

The review Panel has made a declaration of unacceptable circumstances (Annexure A) and final orders (Annexure B) in relation to applications dated 19 March 2009 by Whitehaven Coal Limited and Gloucester Coal Limited (see [TP09/23](#)). The applications were heard together.

Background

On 20 February 2009, Gloucester announced a bid for Whitehaven offering 1 Gloucester share for every 2.45 Whitehaven shares (**Merger**). At the time, the market capitalisation of Whitehaven was approximately 2.3 times that of Gloucester.

Gloucester and Whitehaven entered a Merger Implementation Agreement (**MIA**).

The MIA, but not the Merger as announced, provides a fiduciary out to Gloucester. In the announcement there was no condition that the bid for Whitehaven was subject to there being no superior proposal emerging for Gloucester.

On 27 February 2009, Noble Group Limited announced a bid for Gloucester of \$4.85 cash per share, subject only to the Merger not proceeding and prescribed occurrences.

Declaration

The review Panel considered that the circumstances of the Merger without a condition in the bid allowing Gloucester not to proceed with its bid if a superior proposal for it is made or announced were unacceptable.

The review Panel considered that unacceptable circumstances existed because, contrary to the principles in sections 602(a) and (c), the Merger acted as a lock up device of Gloucester.

The review Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in section 657A(3).

Orders

The review Panel revoked the initial Panel's declaration and orders requiring a Gloucester shareholders meeting and replaced them with a declaration and orders to the effect that Gloucester's bid for Whitehaven be subject to a condition that no superior proposal is made for Gloucester.

The sitting Panel was Michael Ashforth, Geoff Brunson and Alison Lansley (sitting president).

The Panel will publish its reasons for the decision in due course on its website www.takeovers.gov.au.

Allan Bulman
Director, Takeovers Panel
Level 10, 63 Exhibition Street
Melbourne, VIC 3000
Ph: +61 3 9655 3597
allan.bulman@takeovers.gov.au



Australian Government

Takeovers Panel

Annexure A

Corporations Act

Section 657A

Declaration of Unacceptable Circumstances

Gloucester Coal Limited 01R

The Takeovers Panel revokes the declaration made on 17 March 2009 in relation to the affairs of Gloucester Coal Limited (**Gloucester**) and substitutes this declaration.

CIRCUMSTANCES

1. On 20 February 2009, Gloucester announced a bid for Whitehaven Coal Limited (**Whitehaven**) offering 1 Gloucester share for every 2.45 Whitehaven shares (**Merger**). At the time, the market capitalisation of Whitehaven was approximately 2.3 times that of Gloucester.
2. Gloucester and Whitehaven entered a Merger Implementation Agreement (**MIA**). The MIA included the following terms:
 - (a) Gloucester and Whitehaven release an agreed bid announcement
 - (b) exclusivity provisions including a 'No Talk' provision. In substance, this was that each party must not (among other things) participate in discussions or negotiations in relation to a third party proposal, unless:
 - (i) it was unsolicited
 - (ii) not to do so would reasonably be likely to involve a breach of directors' duties and
 - (iii) before any binding arrangement is entered, the other party is given an opportunity to match the terms.
3. The Merger was structured as a takeover of Whitehaven by Gloucester because (among other reasons):
 - (a) it offered deal certainty. Noble Group Limited (**Noble**) could not use its 21.7% shareholding in Gloucester to block the bid
 - (b) it minimised completion risk. The directors of Whitehaven and their associates, and FRC Whitehaven Holdings BV, indicated that they would accept the Merger in the absence of a superior proposal for Whitehaven. This largely fulfills the Merger's 80% minimum acceptance condition
 - (c) it offered capital gains tax and accounting treatment advantages and
 - (d) Whitehaven requested it and this made the Merger an agreed deal.
4. On 27 February 2009, Noble announced a bid for Gloucester of \$4.85 cash per share, subject only to the Merger not proceeding and prescribed occurrences.

5. While the MIA included a fiduciary carve out for Gloucester from the 'No Talk' provision, the announcement of the bid did not include a condition that the bid was subject to no superior proposal emerging for Gloucester.
6. As a consequence:
 - (a) the fiduciary carve-out in the MIA has limited or no effective operation
 - (b) the Gloucester board is unable to consider the Noble bid or any alternative proposal for Gloucester in its pre-Merger form
 - (c) by reason of (b), there is no prospect of Gloucester shareholders having an opportunity to participate in any benefits accruing through the Noble bid or any other alternative proposal for Gloucester
 - (d) the acquisition of control over voting shares, and therefore the potential control of, or the acquisition of a substantial interest in Gloucester, will not take place in an efficient, competitive and informed market.
7. It appears to the Panel that the circumstances are unacceptable having regard to:
 - (a) the effect that the Panel is satisfied that the circumstances have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Gloucester
 - (ii) the acquisition, or potential acquisition, by a person of a substantial interest in Gloucester and
 - (b) the purposes of Chapter 6 of the Act set out in s602.
8. 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 Alison Lansley
President of the Sitting Panel
Dated 29 April 2009



Australian Government

Takeovers Panel

Annexure B

Corporations Act

Section 657D

Orders

Gloucester Coal Limited 01R

PURSUANT TO

1. A declaration of unacceptable circumstances in relation to the affairs of Gloucester Coal Limited (**Gloucester**) on 29 April 2009 and
2. Section 657D of the Corporations Act 2001 (Cth)

THE PANEL ORDERS

The orders made on 20 March 2009 are revoked and the following substituted:

Amended bid terms

1. Gloucester's bid for Whitehaven Coal Limited (**Whitehaven**) announced on 20 February 2009 be subject to a condition to the effect that no superior proposal for Gloucester is made or announced.

In this condition, a proposal is a superior proposal if:

- (a) the independent directors of Gloucester form the opinion, reasonably formed in good faith and for a proper purpose based on their fiduciary duties, that it is more in the interests of Gloucester's shareholders than Gloucester's bid for Whitehaven and
 - (b) it is conditional on Gloucester's bid for Whitehaven not proceeding or otherwise lapsing or being withdrawn.
2. The condition in paragraph 1 is not waivable for 21 days after the first offer under Gloucester's bid for Whitehaven is made. If, within that time, a superior proposal (as defined in order 1) has been made or announced then it cannot be waived at all unless that superior proposal lapses or does not otherwise proceed.

Amended Merger Implementation Agreement

3. The Merger Implementation Agreement between Gloucester and Whitehaven dated 19 February 2009 be amended by inserting the following clauses:
 - (a) at the end of clause 5.4 - *"Nothing in this clause 5.4 requires either Gloucester or Whitehaven to take, or refrain from taking, any action if to do so would be inconsistent with any order of the Takeovers Panel."*

- (b) at the end of clause 7.2(b) - "*(3) waive the condition in paragraph 3(j) of Schedule 2 before the earliest time permitted under any order of the Takeovers Panel.*"
- (c) at the end of clause 7.2(c) - "*(3) paragraph 3(j) of Schedule 2 being waived.*"
- (d) after clause 6.8 - "*6.9 Gloucester is not liable to Whitehaven for any breach of this agreement that is a direct or indirect result of compliance with any order of the Takeovers Panel.*"
- (e) at the end of schedule 2, item 3 -
"No superior proposal for Gloucester
(j) Before the end of the Offer Period no superior proposal for Gloucester is made or announced.
In this condition, a proposal is a superior proposal if:
 - (i) *the independent directors of Gloucester form the opinion, reasonably formed in good faith and for a proper purpose based on their fiduciary duties, that it is more in the interests of Gloucester's shareholders than Gloucester's bid for Whitehaven and*
 - (ii) *it is conditional on Gloucester's bid for Whitehaven not proceeding or otherwise lapsing or being withdrawn.*"

Noble condition

- 4. If the independent directors of Gloucester, in the exercise of their duties, form the view, and announce, that the proposed Noble bid (or as may be increased) is a superior proposal for Gloucester, and that its bid for Whitehaven will not proceed, Noble:
 - (a) is not to rely on the condition referred to in paragraph 1 of attachment 1 to its announcement dated 27 February 2009 and
 - (b) must free its bid of that condition.

Announcement

- 5. Gloucester must:
 - (a) announce to ASX and
 - (b) include in its bidder's statement
 the amendment required to the terms of its announced bid.

Consideration of proposal

- 6. The independent directors of Gloucester must consider any proposal made or announced as soon as practicable.

Alan Shaw
Counsel
with authority of Alison Lansley
President of the review Panel
Dated 29 April 2009