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The Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Parliament House
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Dear Sir

Corporations Amendment (Takeovers) Bill 2006: submission

Thank you for your invitation of 18 October 2006 to make a submission on the draft Bill. For ease of reading I have marked up the amendments (appendix 1). My submission to the Committee expands on my submission to Treasury (appendix 2).

1 Definition

The purpose of the amendment to include a definition of ‘substantial interest’ is said to be to counter the possible effects of the decisions in *Glencore International AG v Takeovers Panel* [2005] FCA 1290 and *Glencore International AG v Takeovers Panel* [2006] FCA 274.

The Panel in the Glencore case said that the meaning of ‘substantial interest’ should be derived from its context. Emmett J held that ‘substantial interest’ must be construed in its context.¹ The Panel noted that courts had referred to ‘substantial interest’ as a step along the way to control (taken from *Elders IXL v NCSC*²). Emmett J also adopted this concept.³

The Panel said that ‘substantial interest’ was a third concept that was “*neither relevant interest nor voting power*”.⁴ I do not take them to be saying that it cannot be a relevant interest or voting power. Emmett J held that it “*entails an interest that can be a relevant interest or a positive power or right in relation to voting shares.*”⁵ This is the point of difference between the Panel and the 2006 *Glencore* decision. So, while the meaning of ‘substantial interest’ was not beyond doubt even before the Panel⁶, the Panel concluded that Glencore’s swap exposure gave Glencore a substantial interest. The court concluded that it did not. The Panel said that Glencore had a degree of *de facto* power to prevent the banks from disposing of the hedge shares, not enough for a relevant interest but a degree of control that, taken with its direct holding, amounted to a ‘substantial interest’. The court said that it could not reconcile this with the Panel’s finding that there was no relevant interest (ie no power to dispose, or control the disposal, of the banks’ shares).

¹ [2006] FCA 274 at para 84.

² *IXL Ltd v National Companies and Securities Commission* (1986) 4 ACLC 465 at 477 – 478

³ [2006] FCA 274 at para 83 and para 84.

⁴ *Austral Coal Limited 02(RR)* [2005] ATP 20 at para 238.

⁵ [2006] FCA 274 at para 85.

⁶ *Austral Coal Limited 02(RR)* [2005] ATP 20 at para 235. The Panel said: “It is not as clear-cut that Glencore’s position was a substantial interest, or became one, during the Non-disclosure Period.”

The definition intends to fix this difference. I have reservations about the definition because it does not advance the meaning. It merely tells you what a substantial interest need not be. I also have reservations that by establishing ‘substantial interest’ as an independent (“third”) concept, the original intention to make ‘relevant interest’ the widest possible form of ‘involvement’ in voting shares is negated. I do not think ‘substantial interest’ should be established as a third concept. I think ‘relevant interest’ should do the work. There is a body of established learning on this concept and it has become well understood in the market. Introducing a new concept may have unintended consequences that will perhaps require yet more legislative intervention.

Emmett J sounds a similar warning. He says:

*If the purposes of Chapter 6 include regulating the acquisition and notification of substantial interests, and that concept is something different from, and broader than, a relevant interest or voting power, it is remarkable that the balance of Chapter 6 regulates the acquisition of relevant interests by reference to voting power. One consequence would be that that purpose of Chapter 6, as set out in s 602, is, to an important extent, not achieved by the detailed provisions of Chapter 6 that follow.*⁷

I do not think the *Glencore* decision necessarily precludes another case finding like circumstances to constitute a relevant interest. Emmett J’s conclusion that protection from a contingent contractual obligation was not a substantial interest (which must mean he concluded it was not a relevant interest or positive power or right) did not have the benefit of argument about the meaning of ‘relevant interest’, but rather appeared to flow from an acceptance of the Panel’s decision that there was not a relevant interest.

The *Glencore* matter involved non-disclosure. A possibility that could be explored is to specifically require disclosure of hedging positions in Chapter 6C, regardless of whether a relevant interest has been created. This may avoid problems for hedging banks regarding the disclosure of confidential client information that the existence of a relevant interest would create (ie, because the client’s holding and the banks hedge would need to be aggregated for the client).

In summary, the definition is not very helpful, it establishes a “third concept”, it does not seem necessary to establish a third concept to cater for *de facto* control when a relevant interest can exist under an unenforceable agreement (ie, *de facto* control), and if the existing definition of ‘relevant interest’ does not go far enough it is the concept that should be amended.

2 Section 657A(2)(a)

The purpose of this amendment is said to be two-fold:

- To make the test the Panel’s satisfaction, and
- To allow the Panel to take account of past, present or likely future effects of circumstances.

I believe that the drafting of the provisions should be simplified (indeed, for all the amendments) but support the amendment.

While I think that the Panel will still need “*some probative material on which the Panel can base a conclusion as to a particular effect*”⁸, as an expert tribunal “*entitled to make an evaluation based upon its experience and expertise as to the effect of*

⁷ [2006] FCA 274 at para 90.

⁸ *Ibid.*

*particular circumstances*⁹ it will presumably be harder to challenge (even more so in respect of likely future effects).

3 Section 657A(2)(b)

The purpose of this amendment is said to be to allow the Panel to declare circumstances to be unacceptable having regard to the purposes of the takeovers provisions in section 602. I regard this as clarification and support it. I think the amendment may go further in that paragraph (c) refers to “likely to constitute a contravention” or “likely to give rise to a contravention” (perhaps a difficult distinction). The basis on which the Panel might find future possible breaches is unclear. Are additional facts needed? Can they be assumed? Nevertheless, I support this amendment.

4 Section 657D(1)(a)

I support this amendment.

5 Section 657D(2)(a)

The amendment allows the Panel to make orders affecting one lot of rights if it finds another lot of rights affected. There is no guidance for the Panel as to what might constitute ‘other rights or interests’ that it can legitimately protect. Nevertheless, I support this amendment.

6 Section 657EA

I support this amendment.

7 Transition

The amendments apply in relation to an application on foot at the time they take effect. This is so even if the circumstances to which an application relates arose before the amendments. A substantial interest exists now if a relevant interest or ‘positive power or right’ is established (*Glencore*). The definition negates that requirement, but persons may have acted in reliance on it. Moreover, any Panel proceedings already underway could shift ground part way through if the amendment takes effect before they are concluded. This might create an injustice. Therefore, I do not think the definition of ‘substantial interest’ (if it proceeds) should operate on circumstances that occur before the definition is introduced.

As disclosed in my submission to Treasury, I acted as counsel to the Panel on two occasions, one of them during the first *Glencore* review (ie, when Austral Coal 02(R) was judicially reviewed).

Yours faithfully



Alan Shaw
Consultant

⁹ Australian Pipeline Limited v Alinta Limited [2006] FCA 1378 at para 146 per Emmett J

APPENDIX 1
Amendments by the Draft Bill

New definition

***substantial interest:** an interest in a company, listed body or listed managed investment scheme may be a substantial interest in the company, body or scheme even if it is not constituted by one or more of the following:*

- (a) *a relevant interest in securities in the company, body or scheme;*
- (b) *a legal or equitable interest in securities in the company, body or scheme;*
- (c) *a power or right in relation to:*
 - (i) *the company, body or scheme; or*
 - (ii) *securities in the company, body or scheme.*

657A(2)(a)

The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:

- (a) *are unacceptable having regard to the effect ~~of the circumstances that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:~~*
 - (i) *the control, or potential control, of the company or another company; or*
 - (ii) *the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company; or*

657A(2)(b)

The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:

- ...
- (b) *~~are unacceptable because they constitute, or give rise to, a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C.~~ are otherwise unacceptable (whether in relation to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have in relation to the company or another company or in relation to securities of the company or another company) having regard to the purposes of this Chapter set out in section 602; or*
- (c) *are unacceptable because they:*
 - (i) *constituted, constitute, will constitute or are likely to constitute a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C; or*
 - (ii) *gave or give rise to, or will or are likely to give rise to, a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C.*

657D(1)(a)

The Panel may make an order under subsection (2) if it has declared circumstances to be unacceptable under section 657A. It must not make an order if it is satisfied that the order would unfairly prejudice any person. Before making the order, the Panel must give:

- (a) *~~each person to whom a proposed order relates~~ each person to whom the proposed order would be directed; and*

657D(2)

The Panel may make any order (including a remedial order but not including an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C) that it thinks appropriate to:

- (a) *protect the rights or interests of any person affected by the circumstances if the Panel is satisfied that the rights or interests of any person, or group of persons, have been or are being affected, or will be or are likely to be affected, by the circumstances—protect those rights or interests, or any other rights or interests, of that person or group of persons; or*

New section 657EA(5)

- (5) *Despite section 657B, the Panel can only make a declaration under section 657A after conducting a review under this section if the declaration is made within:*
- (a) *3 months after the circumstances in relation to which the declaration is made occur; or*
- (b) *1 month after the application for review was made; whichever ends last. The Court may extend the period on application by the Panel.*

**APPENDIX 2
Submission to Treasury on Draft Bill**

Paragraph	Agree?	Comment
Definition	Reservations	While the definition of ‘substantial interest’ may negative the effect of the decision in Glencore, it does not assist in better defining the term ‘substantial interest’ or in setting its limits.
657A(2)(a)	Yes	The amendment also replaces actual effect with the Panel’s opinion on the effect on control.
657A(2)(b)	Yes	
657D(1)(a)	Yes	
657D(2)(a)	Yes	The reference to ‘other rights or interests’ is open-ended.
657EA	Yes	
Transition	Partly, yes	I do not think the definition of ‘substantial interest’ (if it proceeds) should operate on circumstances that occur before the definition is introduced.