THE TAKEOVER PANEL

ASIA RESOURCE MINERALS PLC (FORMERLY BUMI PLC)

STATEMENT OF PUBLIC CRITICISM OF CREDIT SUISSE, FRESHFIELDS AND HOLMAN FENWICK WILLAN

1. Introduction

1.1 This statement relates to the conduct of four advisers that were involved in the acquisition by Vallar plc ("Vallar") of interests in two Indonesian coal mining companies from PT Bakrie & Brothers Tbk and Long Haul Holdings Limited (together, the "Bakrie Group") and from PT Bukit Mutiara ("Bukit Mutiara", together with the Bakrie Group, the "Indonesian Parties") in 2011. Vallar was the predecessor entity of Bumi plc ("Bumi"), which later in 2011 became Vallar's holding company.

1.2 The completion of these transactions (together, the "Indonesian Transactions") resulted in a serious breach of Rule 9.1 of the City Code on Takeovers and Mergers (the "Code").

1.3 Vallar's financial adviser in connection with the Indonesian Transactions was J.P. Morgan Limited ("J.P. Morgan") and its English law legal adviser was Freshfields Bruckhaus Deringer LLP ("Freshfields"). Both of the Indonesian Parties used Credit Suisse (Singapore) Limited and Credit Suisse Securities (Europe) Limited ("Credit Suisse") as their financial adviser and Holman Fenwick Willan LLP ("HFW" and, together with J.P. Morgan, Freshfields and Credit Suisse, the "Advisers") as their English law legal adviser in relation to the Indonesian Transactions.

1.4 In summary, the Panel has ruled that the conduct of the Advisers gave rise to a number of separate breaches of important provisions of the Introduction to the Code (the "Introduction"). The Panel has further ruled that, in the case of Credit Suisse, Freshfields and HFW, their respective conduct was sufficiently serious to merit the issue by the Panel of a statement of public censure in accordance with Section 11(b) of the Introduction.

1.5 This statement explains the basis for the Panel's rulings in this matter. Each of Credit Suisse, Freshfields, HFW and J.P. Morgan has consented to the publication of this statement.

2. Background

(a) Vallar, the Indonesian Parties and the Indonesian Transactions

2.1 Vallar was formed in March 2010 with the stated objective of acquiring a single major company, business or asset with significant operations in the global metals, mining and resources sector. In July 2010, Vallar completed an Initial Public Offering ("IPO"), raising approximately £707 million in gross proceeds. Vallar's shares were listed on the standard listing segment of the Official List.

2.2 On 16 November 2010, Vallar announced that it had agreed to acquire:

(a) an approximately 25 per cent interest in PT Bumi Resources Tbk ("Bumi Resources") from the Bakrie Group (the "Bumi Resources Transaction"); and

(b) an approximately 75 per cent interest in Berau Coal Energy Tbk ("Berau") from Bukit Mutiara (the "Berau Transaction").

2.3 Bumi Resources is an Indonesian natural resources company whose shares have been listed on the Indonesia Stock Exchange since its IPO in 1990. At the time of the Indonesian Transactions, its assets included a 70 per cent indirect interest in PT Arutmin Indonesia, the fourth largest thermal coal producer in Indonesia, and a 65 per cent indirect interest in PT Kaltim Prima Coal, the largest thermal coal producer in Indonesia.

2.4 The Bakrie Group had acquired a controlling 59 per cent shareholding in Bumi Resources in 1997. This shareholding was then sold down over time, culminating in the Bumi Resources Transaction.

2.5 The Bakrie Group is part of a wider group of associated companies whose business interests include oil and gas, mining, agriculture, telecommunications, metals and infrastructure. The Bakrie Group includes 10 companies listed on the Indonesia Stock Exchange and is one of Indonesia's oldest and largest business conglomerates.

2.6 Berau is an Indonesian coal mining holding company whose shares have been listed on the Indonesia Stock Exchange since its IPO in 2010. Prior to its IPO, Berau was majority-owned by Bukit Mutiara, which had acquired its interest in Berau in 2009.

2.7 Bukit Mutiara partially financed its acquisition of Berau in 2009 using an unsecured and subordinated loan of $300 million extended by Bumi Resources (the "Berau Acquisition Loan").

2.8 At the time of the Indonesian Transactions, Berau's principal asset was a 90 per cent indirect holding in Berau Coal, the fifth largest thermal coal producer in Indonesia.

2.9 Bukit Mutiara is a private holding company which is owned by PT Recapital Advisers, a private Indonesian investment group.

2.10 The aggregate consideration for the Indonesian Transactions was approximately $3 billion, to be made up of a combination of cash and new Vallar shares. As regarded the new Vallar shares, the Bakrie Group was issued with new Vallar shares carrying 30 per cent of the voting rights of Vallar less a single voting ordinary share on completion of the Bumi Resources Transaction on 4 March 2011. In addition, the Bakrie Group was issued with further new Vallar shares, the voting rights of which were suspended. Bukit Mutiara was issued with new Vallar shares carrying approximately 20.4 per cent of the voting rights of Vallar on completion of the Berau Transaction on 8 April 2011. Accordingly, on completion of the Indonesian Transactions, the Bakrie Group and Bukit Mutiara acquired interests in shares carrying, in aggregate, more than 30 per cent of the voting rights of Vallar.

2.11 The completion of the Indonesian Transactions was not made subject to the grant of a dispensation from the Panel under Note 1 of the Notes on Dispensations from Rule 9 (a "Whitewash" dispensation) and nor did it result in the Indonesian Parties making a general offer for Vallar in accordance with Rule 9.1. (The concept of a Whitewash dispensation is explained in paragraph 3.8 below.)

(b) The Panel's concert party ruling

2.12 On 19 December 2012, the Panel published PS 2012/9, in which it ruled that the Indonesian Parties were acting in concert and that they had been acting in concert both at the time that they acquired shares carrying, in aggregate, more than 30 per cent of the voting rights in Vallar, as well as subsequently.

2.13 The Panel explained that, in the circumstances, it was not requiring the Indonesian Parties to make a general offer for Bumi (which had since become Vallar's holding company) in accordance with Rule 9.1. Instead, the Panel ruled that the percentage interests of the Indonesian Parties (and any persons acting in concert with them) in Bumi shares should be reduced by way of the disposal of a sufficient number of shares such that these interests represented, in aggregate, less than 30 per cent of the voting rights of Bumi.

2.14 The Panel further ruled in PS 2012/9 that, pending the completion of the sell-down referred to in the preceding paragraph, the number of voting rights that could be exercised at any general meeting of Bumi by the Indonesian Parties (and any persons acting in concert with them) be limited to less than 30 per cent of all of the voting rights exercisable at any such meeting.

2.15 Each of the Indonesian Parties and Bumi accepted the Panel's rulings. In compliance with the Panel's sell-down requirement, Bukit Mutiara subsequently disposed of all of its interests in Bumi shares, thereby reducing the percentage interests of the Indonesian Parties in Bumi shares to shares representing, in aggregate, less than 30 per cent of the voting rights of Bumi.

(c) The Panel's subsequent investigation

2.16 In PS 2012/9, having noted that the Indonesian Transactions could have been the subject of a Whitewash dispensation, but were not, the Panel went on to state that it was undertaking a separate investigation into why it was not previously made aware of the existence of the concert party between the Indonesian Parties, and why a Whitewash dispensation was not sought in relation to the Indonesian Transactions.

2.17 As noted above, the Panel has ruled that, as a result of their respective conduct in relation to the Indonesian Transactions, a number of important provisions of the Introduction to the Code were breached by the Advisers.

2.18 The Panel has further ruled that, in the case of Credit Suisse, Freshfields and HFW, their respective conduct was sufficiently serious to merit the issue by the Panel of a statement of public censure in accordance with Section 11(b) of the Introduction.

3. Relevant Code provisions

(a) The definition of 'acting in concert'

3.1 The Code defines persons 'acting in concert' as comprising persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate control of a company or to frustrate the successful outcome of an offer for a company. A person will have control of a company, for these purposes, if he is interested in shares carrying, in aggregate, 30 per cent or more of the voting rights of that company, irrespective of whether such interest or interests give *de facto* control. The Code supplements the definition of acting in concert with a statement of certain situations where a presumption arises that parties are so acting, unless the contrary is established.

3.2 The Code does not prohibit persons from acting in concert. Rather, the term describes a state of affairs existing between two or more persons which may be relevant as regards their conduct in relation to an offeree company.

3.3 The application of the term has been the subject of a number of Panel statements. In the case of *Guinness/Distillers* (PS 1989/13), the Panel explained that:

> "*The nature of acting in concert requires that the definition be drawn in deliberately wide terms. It covers an understanding as well as an agreement, and an informal as well as a formal arrangement, which leads to co-operation to purchase shares to acquire control of a company. This is necessary, as such arrangements are often informal, and the understanding may arise from a hint. The understanding may be tacit, and the definition covers situations where the parties act on the basis of a 'nod or a wink'. Unless persons declare this agreement or understanding, there is rarely direct evidence of action in concert, and the Panel must draw on its experience and common sense to determine whether those involved in any dealings have some form of understanding and are acting in co-operation with each other. In a typical concert party case, both the offeror and the person alleged to be acting in concert with it are declaring that, notwithstanding the circumstances, they have no understanding or agreement. The Panel has to be prepared realistically to recognise that business men may not require much by way of formal expression to create such an understanding. It is unnecessary for the Panel to know everything that actually passed between the parties in a take-over. In addition, the judgment required in an acting in concert issue must usually be made in the context of the assertions and arguments of persons whose interests will not be served by a finding of acting in concert – this is because such a finding inevitably entails consequences under the Code, often to the benefit of offeree company shareholders, which is the object of the concept, with a cost to the offeror.*".

3.4 The Takeover Appeal Board endorsed the approach to determining whether persons are acting in concert that was established in the *Guinness/Distillers* case, as set out above, in its decision in 2010 in the case of *Principle Capital Investment Trust Plc* (TAB Statement 2010/1).

3.5 The term 'acting in concert' appears throughout the Code, but is particularly relevant to the application of Rule 9.1 (as recognised by the opening sentence of the Notes on Rule 9.1). Where persons are regarded by the Panel as acting in concert, the resulting aggregation of their interests in shares will be relevant in determining whether such persons have incurred an obligation to make a general offer under Rule 9.1.

(b) Rule 9.1

3.6 Rule 9.1 is one of the Code's most important Rules. It provides that (save with the Panel's consent) when any person acquires, whether by a series of transactions over a period of time or not, an interest in shares which (taken together with shares in which persons acting in concert with him are interested) carry 30 per cent or more of the voting rights of a company, that person must make a general offer for all of the remaining shares in the company other than those already owned by him or persons acting in concert with him.

3.7 In seeking to protect minority shareholders' interests, Rule 9.1 reflects a fundamental requirement of General Principle 1 of the Code, namely that if a person acquires control of a company, the other holders of securities must be protected.

(c) Note 1 of the Notes on Dispensations from Rule 9

3.8 Note 1 of the Notes on Dispensations from Rule 9 provides that the Panel will normally waive the obligation to make a general offer under Rule 9.1 that would otherwise result from the issue of new securities as consideration for an acquisition or a cash subscription, if there is an independent vote at a shareholder meeting. To be effective, this shareholder resolution must be approved by a majority vote of independent shareholders of the offeree company voting on a poll. This approval is known as a "Whitewash".

3.9 It is for the offeree company which is issuing the relevant shares to seek this waiver of the obligation to make a general offer under Rule 9.1. The person or group of persons acting in concert who would, but for such waiver, incur an obligation under Rule 9.1 cannot seek this waiver. This is because it is the offeree company which

must convene the shareholder meeting at which the Whitewash will be sought. It is also the offeree company which must ensure that the circular convening the shareholder meeting includes competent independent advice (to the offeree company) regarding the relevant transaction, the controlling position that it will create and the effect this will have on shareholders generally.

(d) Section 2(a) of the Introduction: Nature and purpose of the Code

3.10 Section 2(a) of the Introduction explains that the Code provides an orderly framework within which takeovers are conducted and that the Code is also designed to promote the integrity of the financial markets, in conjunction with other regulatory regimes.

3.11 Section 2(a) also explains that the Code has been developed since 1968 to reflect the collective opinion of those professionally involved in the field of takeovers as to appropriate business standards and as to how fairness to offeree company shareholders and an orderly framework for takeovers can be achieved.

(e) Section 2(b) of the Introduction: General Principles and Rules

3.12 Section 2(b) of the Introduction explains that the Code is based on a number of General Principles, which are essentially statements of standards of commercial behaviour. There are six General Principles, each of which is expressed in broad, general terms, and the Code does not define the precise extent of, or the limitations on, their application. The General Principles are applied in accordance with their spirit in order to achieve their underlying purpose.

3.13 Section 2(b) goes on to explain that, in addition to the General Principles, the Code contains a series of Rules, which include the remaining sections of the Introduction. Section 2(b) also explains that, whilst most of the Rules are expressed in terms less general than the General Principles, they are nevertheless not framed in technical language. As with the General Principles, the Rules fall to be interpreted so as to achieve their underlying purpose: not only the letter but also the spirit of the Rules must be observed.

(f) Section 3(f) of the Introduction: Code responsibilities and obligations

3.14 Section 3 of the Introduction sets out certain Rules relating to the companies, transactions and persons to which the Code applies. In particular, Section 3(f) of the Introduction states:

> "*The Code applies to a range of persons who participate in, or are connected with, or who in any way seek to influence, intervene in, or benefit from, takeovers or other matters to which the Code applies. The Code also applies to all advisers to such persons and all advisers in so far as they advise on takeovers or other matters to which the Code applies. Financial advisers to whom the Code applies have a particular responsibility to comply with the Code and to ensure, so far as they are reasonably able, that their client and its directors are aware of their responsibilities under the Code and will comply with them and that the Panel is consulted whenever appropriate.*".

3.15 The Panel's most recent public reference to Section 3(f) of the Introduction may be found in its statement of public criticism of *Kraft Foods Inc.* (PS 2010/14). In PS 2010/14, the Panel specifically noted the particular responsibility of financial advisers to ensure that their clients and their clients' directors are aware of their Code responsibilities, and the fundamental importance of this to the Panel's system of regulation.

(g) Section 6(b) of the Introduction: Interpreting the Code – rulings of the Executive and the requirement for consultation

3.16 Section 6 of the Introduction sets out the Rules by reference to which the Executive issues guidance and rulings on the Code's interpretation, application and effect. In particular, Section 6(b) of the Introduction provides:

> "*When a person or its advisers are in any doubt whatsoever as to whether a proposed course of conduct is in accordance with the General Principles or the rules, or whenever a waiver or derogation from the application of the provisions of the Code is sought, that person or its advisers must consult the Executive in advance. In this way, they can obtain a conditional ruling (on an ex parte basis) or an unconditional ruling as to the basis on which they can properly proceed and thus minimise the risk of taking action which might, in the event, be a breach of the Code. To take legal or other professional advice on the interpretation, application or effect of the Code is not an appropriate alternative to obtaining a ruling from the Executive.*".

3.17 The requirement for consultation with the Executive imposed by Section 6(b) of the Introduction is of fundamental importance to the Panel's system of regulation. Prior consultation allows parties and their advisers to operate with clarity as to the outcome of their conduct under the Code. It also minimises the risk of such conduct resulting in breaches of the Code which may not be capable of being remedied satisfactorily after the event. In addition, consultation with the Panel ensures the objective application of the General Principles and the Rules by an independent regulator on a consistent basis and in accordance with their underlying purpose. Consultation also enables the Executive, where appropriate, to seek the views of other parties who may

be affected by its decisions and whose views may not have been sought by the parties to the transaction or their advisers.

3.18 As noted in the Panel's statement in the *Guinness/Distillers* case (PS 1989/13), referred to above, the judgment that must be applied by the Panel in determining whether persons are acting in concert requires the Panel to draw on its experience and common sense, in circumstances where there may be no direct evidence of persons acting in concert. It therefore follows that Section 6(b) of the Introduction is of particular significance in cases where there is doubt as to whether the Panel will regard persons as acting in concert.

(h) Section 9(a) of the Introduction: Dealings with and assisting the Panel

3.19 Section 9 of the Introduction sets out the Rules by reference to which persons dealing with the Panel must provide it with information and assistance. In particular, Section 9(a) of the Introduction provides:

> "*The Panel expects any person dealing with it to do so in an open and co-operative way. It also expects prompt co-operation and assistance from persons dealing with it and those to whom enquiries and other requests are directed. In dealing with the Panel, a person must disclose to the Panel any information known to them and relevant to the matter being considered by the Panel (and correct or update that information if it changes). A person dealing with the Panel or to whom enquiries or requests are directed must take all reasonable care not to provide incorrect, incomplete or misleading information to the Panel.*".

3.20 The Panel's objective is to reach decisions promptly, having taken account of the particular circumstances of a case, so that the parties to a transaction can rely on those decisions. In order to operate effectively, and to achieve that objective, the Panel expects all persons dealing with it to do so in an open and co-operative way, and to take all reasonable care not to provide incorrect, incomplete or misleading information.

3.21 The requirements of Section 9(a) of the Introduction are of particular significance where the Panel is concerned about the possible existence of an undisclosed concert party.

4. Relevant Facts

(a) The inception of the Indonesian Transactions

4.1 Following its IPO in July 2010, and consistent with its stated objective, Vallar was actively reviewing a number of possible acquisition targets in the global metals, mining and resources sector.

4.2 The Indonesian Transactions were proposed to Vallar and the Indonesian Parties by J.P. Morgan in late October 2010. In early November 2010, principals from Vallar and the Indonesian Parties met to agree the key commercial terms for the Indonesian Transactions, as described above. J.P. Morgan attended this meeting. Freshfields and HFW were instructed by the time of this meeting but did not attend it.

4.3 Vallar wanted the execution of legal agreements in relation to the two Indonesian Transactions to be inter-conditional.

4.4 Work on the execution of the Indonesian Transactions began immediately after this meeting, with the principals targeting the simultaneous execution of legal agreements and the announcement of the Indonesian Transactions by not later than 15 November 2010. Credit Suisse was instructed by the Indonesian Parties to act on the Indonesian Transactions at this point.

(b) The execution of the Indonesian Transactions

4.5 The final terms of the Indonesian Transactions were negotiated and agreed in the two week period between the principals having agreed the key commercial terms and the deadline for execution and announcement of the Indonesian Transactions. This included a series of all-parties meetings in Singapore between 9 and 16 November 2010.

4.6 During this time, J.P. Morgan made initial contact with the Panel with respect to the Indonesian Transactions in a telephone call on 12 November 2010. After that initial contact, Freshfields engaged in further consultation with the Panel with respect to the Indonesian Transactions. This consultation was conducted with a view to obtaining the Panel's confirmation that it had no objection to the Bakrie Group being issued with suspended voting shares in order to allow it to receive more than 29.9 per cent of the enlarged share capital in Vallar without having to seek a Whitewash.

4.7 However, the Panel was not consulted by any of the Advisers as to whether it might regard the Indonesian Parties as acting in concert. Nor was the Panel made aware of connections between the Indonesian Parties known to the Advisers which the Panel considers to have been relevant to that question:

(a) the Indonesian Parties were using the same financial adviser (Credit Suisse), the same UK legal advisers (HFW) and the same Indonesian legal advisers to advise them on the Indonesian Transactions;

(b) Bumi Resources, which was regarded as being under the Bakrie Group's control for Indonesian takeover law purposes, had part financed Bukit Mutiara's acquisition of Berau in 2009 by way of the Berau Acquisition Loan. Under the terms of the Berau Acquisition Loan, Bumi Resources' consent was required before Bukit Mutiara could sell any of its shares in Berau. Further, in connection with its entry into the Berau Acquisition Loan, Bumi Resources had been granted associated marketing rights over Berau's coal output; and

(c) Bukit Mutiara had agreed that $100 million of a $150 million break fee which the Bakrie Group had agreed to pay Vallar would be paid out of funds that were to be paid by Vallar to Bukit Mutiara pursuant to the terms of the Berau Transaction, and then used by Bukit Mutiara to pay down the Berau Acquisition Loan. The relevant funds were placed in an escrow account and were to be paid out to either Bumi Resources or Vallar depending on whether the Bumi Resources Transaction completed or not (the "Break Fee and Escrow Arrangements").

4.8 In this regard, the Panel also notes, in particular, that each of Credit Suisse, HFW and J.P. Morgan had pre-existing relationships with the Indonesian Parties. For instance, Credit Suisse and J.P. Morgan had both acted on Berau's IPO in 2010. Credit Suisse had also advised on and partially financed Bukit Mutiara's acquisition of Berau in 2009 (with the remaining acquisition funding being provided by the Berau Acquisition Loan, described above). HFW had advised Bukit Mutiara on this acquisition and, in that capacity, had drafted the agreement documenting the Berau Acquisition Loan.

4.9 All of the Advisers knew that the Indonesian Transactions would trigger a requirement for a mandatory offer to be made under Rule 9.1 of the Code if the

Indonesian Parties were regarded by the Panel as acting in concert. For instance, Freshfields identified the question of whether the Indonesian Parties would be regarded by the Panel as acting in concert in a list of items to be resolved before the announcement of the Indonesian Transactions. Further, the consequence of the Indonesian Parties being regarded by the Panel as acting in concert in terms of triggering a mandatory general offer was identified in Vallar's board briefing materials, copied to both Freshfields and J.P. Morgan, for the board meeting at which the Vallar board gave formal approval to proceed with the Indonesian Transactions. Equally, HFW advised the Indonesian Parties in written advice as to the possibility of them being regarded by the Panel as acting in concert, and the consequences of this, and advised that Vallar should be asked to seek a Whitewash in order to address this concern. This advice was copied to Credit Suisse.

4.10 The SPAs entered into by each of the Indonesian Parties in connection with the Indonesian Transactions contained warranties that they were not acting in concert with any other person in relation to the shares they were being issued in Vallar. HFW's subsequent explanation to the Panel for not deleting or amending these warranties was that the Indonesian Parties confirmed to HFW that they were content to give them, having been satisfied by their discussions with Vallar that they would not be regarded by the Panel as acting in concert. HFW assumed that the concert party risk had been addressed by Credit Suisse. However, HFW did not check with Credit Suisse at the time or later whether this assumption was correct.

4.11 For its part, Credit Suisse has informed the Panel that it raised the question of whether Vallar should seek a Whitewash in respect of the Indonesian Transaction with both Vallar and the Indonesian Parties during meetings in Singapore on or about 10 November 2010. Credit Suisse was told that the Bakrie Group had agreed with Vallar that there would be no Whitewash in connection with the Indonesian Transactions. Credit Suisse therefore assumed that Vallar and its advisers had addressed the possibility that the Indonesian Parties might be regarded by the Panel as acting in concert, though Credit Suisse did not verify this assumption with either J.P. Morgan or Freshfields.

4.12 On 16 November 2010, the Indonesian Transactions were signed and announced.

(c) Following the announcement of the Indonesian Transactions

4.13 Following the announcement of the Indonesian Transactions, Credit Suisse took steps to agree the terms of a $1.345 billion loan to the Bakrie Group (the "Jumbo Loan"). One of the purposes of the Jumbo Loan was to provide the Bakrie Group with the funding required to refinance the third party loans in respect of which its shares in Bumi Resources had been pledged, so that the shares could be released from these security arrangements. Without this release, the Bakrie Group would not have been able to complete the Bumi Resources Transaction.

4.14 Credit Suisse required a security package in respect of the Jumbo Loan which included a pledge over shares representing just over 50 per cent of the enlarged share capital of Vallar. However, the number of Vallar shares to be issued to the Bakrie Group pursuant to the terms of the Bumi Resources Transaction was not sufficient to enable the Bakrie Group to meet this requirement. To meet this shortfall, it was initially proposed that Bukit Mutiara would pledge in favour of Credit Suisse some of the new Vallar shares that it was to receive on completion of the Berau Transaction, in exchange for which Bukit Mutiara would receive compensation from the Bakrie Group, the details of which were to be agreed.

4.15 In connection with Credit Suisse's documentation of the Jumbo Loan, its external lawyers reviewed the SPAs entered into in relation to the Indonesian Transactions. Having reviewed these agreements, Credit Suisse's external lawyers raised concerns with Credit Suisse about whether the Panel had been consulted about the possibility that the Indonesian Parties might be regarded by the Panel as acting in concert.

4.16 This issue was then raised with Credit Suisse in London. They were immediately concerned about the manner in which the possibility that the Indonesian Parties might be regarded by the Panel as acting in concert had been dealt with prior to the announcement of the Indonesian Transactions. On being asked by Credit Suisse how the matter had been dealt with pre-announcement, HFW confirmed that:

(a) discussions with the Panel prior to the announcement of the Indonesian Transactions had been undertaken exclusively by Vallar and its advisers;

(b) the concept of acting in concert had been explained to the Indonesian Parties and the Indonesian Parties had concluded that they were not acting in concert;

(c) HFW understood the issue to have been discussed with Vallar and its advisers, who agreed that the Indonesian Parties were not acting in concert; and

(d) there were warranties to this effect in both SPAs.

4.17 Credit Suisse nevertheless remained concerned about the possibility that the Indonesian Parties might be regarded by the Panel as acting in concert, and further enquiries were made within Credit Suisse to ascertain the nature of the relationship between the Indonesian Parties. An internal credit paper from 2009 relating to the Berau Acquisition Loan was identified which suggested that Credit Suisse had at that time viewed the commercial relationship between the Indonesian Parties as being particularly close. Credit Suisse also obtained more up-to-date information from those in Credit Suisse who had direct relationships with the Indonesian Parties. Credit Suisse then determined in late December 2010 that it was necessary to consult the Panel in relation to their concerns about the possibility that the Indonesian Parties might be regarded by the Panel as acting in concert.

4.18 Between late December 2010 and early January 2011, Credit Suisse prepared a draft written submission to the Panel which sought confirmation that the Indonesian Parties would not be regarded by the Panel as acting in concert. The draft submission:

(a) explained that Bukit Mutiara would pledge in favour of Credit Suisse some of the new Vallar shares that it was to receive on completion of the Berau Transaction;

(b) made it clear that this was being done in order to provide collateral for the Jumbo Loan; and

(c) disclosed the fact that there had been prior business dealings between the Indonesian Parties, including the Berau Acquisition Loan.

4.19 In early January, Credit Suisse sent its draft written submission to HFW and the Bakrie Group. HFW shared it with Freshfields, who in turn briefed Vallar. The Bakrie Group then informed Credit Suisse that, following discussions with Vallar, it had been decided that the Panel should not be approached in relation to the proposed share pledge. At this stage, a change to the structure by which collateral for the Jumbo Loan was to be provided was proposed: Bukit Mutiara would instead forward-sell to the Bakrie Group the same number of shares that were to have been subject to

the pledge described above so that the Bakrie Group itself (not Bukit Mutiara) could then pledge these shares to Credit Suisse (the "Forward-sale Arrangements").

4.20 The proposed change to the structure for providing collateral for the Jumbo Loan did not, however, allay Credit Suisse's concerns. In particular, it remained concerned not only about the proposed provision by Bukit Mutiara of collateral for the Jumbo Loan (i.e. by way of the Forward-sale Arrangements), but also about the wider relationship between the Indonesian Parties.

4.21 Although Credit Suisse did not rule out consulting the Panel, it decided that it would try to deal with these concerns in the first instance by:

(a) making further enquiries of those within Credit Suisse who had direct relationships with the Indonesian Parties, with a view to satisfying themselves that the Indonesian Parties were not acting in concert; and

(b) speaking to Freshfields and J.P. Morgan in order to establish what exactly had been said to the Panel about the concert party issue prior to the announcement of the Indonesian Transactions.

4.22 Credit Suisse therefore arranged separate calls with Freshfields and J.P. Morgan on 7 and 10 January 2011 respectively to discuss this issue. On the call with Freshfields, Credit Suisse was informed that Freshfields had not considered the Indonesian parties to be acting in concert and had not, therefore, discussed this possibility with the Panel prior to the announcement of the Indonesian Transactions. On the call with J.P. Morgan, Credit Suisse was informed that, having considered and performed due diligence into the issue, J.P. Morgan did not regard the Indonesian Parties as acting in concert, and had not, therefore, discussed the possibility with the Panel prior to the announcement of the Indonesian Transactions. J.P. Morgan reminded Credit Suisse that the Indonesian Parties had been prepared to give warranties to the effect that they were not acting in concert. J.P. Morgan also confirmed that it was aware of the Berau Acquisition Loan and had taken this into account in coming to this conclusion, although it was not established by Credit Suisse whether J.P. Morgan had brought the existence of the Berau Acquisition Loan to the attention of the Panel (in fact J.P. Morgan had not seen the need to do so). On both calls, Credit Suisse, for its part, did not mention that it had concerns as to whether the Panel might regard the Indonesian Parties as acting in concert, nor did it disclose the internal Credit Suisse credit committee paper referred to in paragraph 4.17 above.

4.23 Following these calls and after further discussing the matter with those internally who had knowledge of the Indonesian Parties, Credit Suisse's London team confirmed internally that they were satisfied that the possibility that the Indonesian Parties would be regarded by the Panel as acting in concert had been properly dealt with by Freshfields and J.P. Morgan prior to the announcement of the Indonesian Transactions. However, Credit Suisse's view was that the Panel should still be consulted as to whether the Forward-sale Arrangements might bring the Indonesian Parties into concert. Freshfields also advised Vallar that the Panel should be consulted as to whether the Forward-sale Arrangements might bring the Indonesian Parties into concert.

(d) Preparation of a consultation with the Panel on the Forward-sale Arrangements

4.24 During January 2011, Freshfields and HFW prepared for the consultation with the Panel on the Forward-sale Arrangements. In anticipation of a telephone call with the Panel in relation to the Forward-sale Arrangements, on 19 January 2011, HFW prepared a draft paper (the "Positioning Paper") to assist in forming the basis of a script which Freshfields would itself prepare for the purposes of consulting the Panel. In preparing the Positioning Paper, HFW's focus was on whether the Forward-sale Arrangements would bring the Indonesian Parties into concert. The Positioning Paper gave an account of both the terms of the Forward-sale Arrangements and what was said to be the commercial background to those arrangements, including as follows:

(a) Bukit Mutiara was looking to sell some of the shares that it would receive on completion of the Berau Transaction in order to capitalise on a recent increase in Vallar's share price (HFW had been informed of this by the Bakrie Group); and

(b) the Bakrie Group wished to increase its Vallar shareholding because it continued to consider coal to be a strategic asset and saw further upside potential in Vallar.

4.25 Whilst the Positioning Paper referred to the fact that the Forward-sale Arrangements would help the Bakrie Group to "*receive better terms for its financing*", this was, in the Panel's view, wrongly presented as being ancillary to their stated purpose. In fact, the purpose of the Forward-sale Arrangements was the provision of collateral for the Jumbo Loan and the actual number of Vallar shares to be sold pursuant to the

Forward-sale Arrangements had been calculated by reference to Credit Suisse's specific security requirements. This was not disclosed in the Positioning Paper.

4.26 The Positioning Paper also did not disclose any other connections between the Indonesian Parties, such as the Break Fee and Escrow Arrangements and the Berau Acquisition Loan.

4.27 On 26 January 2011, Freshfields and HFW held a call with Credit Suisse to discuss the Forward-sale Arrangements and the consultation with the Panel. Credit Suisse was then sent the Positioning Paper the following day. Around this time, Credit Suisse and HFW engaged in discussions (both internally and with each other) regarding potential amendments to the terms of the Forward-sale Arrangements, to ensure that they could be demonstrated as having been agreed on an "*arm's length*" basis. In the event, no changes were in fact made to the terms of the Forward-sale Arrangements.

4.28 It was agreed that Freshfields would lead the proposed telephone call with the Panel to present the Forward-sale Arrangements. Freshfields prepared their script for these purposes, based on HFW's draft Positioning Paper, on 27 January 2011. Freshfields shared it with Credit Suisse on the day before the call, 1 February 2011, and Credit Suisse confirmed that it agreed with the script.

(e) The consultation with the Panel on the Forward-sale Arrangements

4.29 On 2 February 2011, Credit Suisse, Freshfields and HFW attended a telephone call with the Panel by which the Forward-sale Arrangements were presented to the Panel and its guidance sought. During the call, which was led by Freshfields and in substance followed Freshfields' script, Credit Suisse confirmed that it did not regard the Indonesian Parties as coming into concert as a result of the Forward-sale Arrangements because they were on "*arm's length terms*".

4.30 In keeping with its standard practice, the Panel asked the advisers on the call to provide it with a written submission setting out the points raised on the call.

4.31 Following this call, HFW prepared the draft written submission requested by the Panel, the contents of which were also based on Freshfields' script. Credit Suisse and Freshfields each reviewed the draft written submission and provided comments to HFW.

4.32 The written submission was sent to the Panel on 3 February 2011. The background to the Forward-sale Arrangements was described in the written submission in the following terms:

> "*Under the Berau part of the transaction, Recapital is selling out about half of its Berau holding for cash and acquiring Vallar shares for the rest, whilst under the Bumi part of the transaction BNBR and Long Haul* [i.e. the Bakrie Group] *are rolling all of their position in Bumi* [Resources] *into Vallar shares.*
>
> *Recapital would now also like to cash out more of its position and sell a portion of its shares in Vallar for cash to Long Haul at closing of the Berau part of the transaction.*
>
> *Accordingly, Recapital and Long Haul propose to enter into an agreement under which Recapital will agree to sell about half of the Vallar shares it will receive on closing of the sale of Berau to Long Haul, conditional on that closing taking place.*".

4.33 Towards the end of the written submission, reference was made to the proposed pledge in favour of Credit Suisse of the shares to be acquired by the Bakrie Group under the Forward-sale Arrangements, but only in the context of its potential impact on the suspended voting structure, as follows:

> "*Separately BNBR and Long Haul* [i.e. the Bakrie Group] *are negotiating a credit agreement with Credit Suisse, part of the security for which includes a pledge over shares in Vallar, including those acquired by Long Haul. It is considered unlikely by the parties that the security for the loan facility will be enforced. However, if it was, the Suspended Voting Ordinary Shares acquired by the lenders on enforcement would become voting shares in their hands in accordance with the usual conversion terms of the shares.*".

4.34 The written submission to the Panel stated that it was considered that there were no concert party issues arising from the Forward-sale Arrangements. The submission did not, however, disclose any other relationships between the Indonesian Parties such as the Berau Acquisition Loan or the Break Fee and Escrow Arrangements.

4.35 The Panel considers that this written submission did not properly explain the purpose of the Forward-sale Arrangements, in that it wrongly gave the impression that the Forward-sale Arrangements were being undertaken because Bukit Mutiara was seeking to monetise its prospective interests in Vallar and that discussions in relation to the Forward-sale Arrangements had been initiated by Bukit Mutiara (which was not, in fact, the case).

4.36 Whilst the written submission referred to the fact that the Vallar shares that were subject to the Forward-sale Arrangements would be pledged in favour of Credit

Suisse, it did not explain that the provision of collateral for the Jumbo Loan in this way was, in fact, the purpose of the Forward-sale Arrangements; nor did it disclose that the number of Vallar shares to be sold pursuant to the Forward-sale Arrangements had been calculated by reference to the amount of security required for the Jumbo Loan. Moreover, the written submission did not disclose other connections between the Indonesian Parties (for example, the Break Fee and Escrow Arrangements and the Berau Acquisition Loan) which the Panel considers to have been relevant to the question of whether the Indonesian Parties would be regarded by the Panel as acting in concert.

4.37 The Panel considers that the information set out in this written submission – particularly as regards the explanation of the purpose of the Forward-sale Arrangements and the absence of disclosure of other connections between the Indonesian Parties – stands in contrast to the information set out in the draft written submission that had been prepared by Credit Suisse around a month earlier, and shared with both HFW and Freshfields, which disclosed that the Indonesian Parties had had *"business dealings in the past"* and disclosed the fact of the Berau Acquisition Loan, but which had not, in the event, been sent to the Panel following the intervention of Vallar and the Bakrie Group.

4.38 Following some further discussions with Freshfields and HFW on consequential changes to the Bakrie Group's suspended voting shares in Vallar, the Panel provided its final approval of these changes on 16 February 2011.

5. The Panel's conclusions in relation to Code breaches

5.1 The Panel's conclusions in relation to the conduct of each of the Advisers and their respective breaches of the Code are set out below.

(a) Failure by advisers to consult the Panel in accordance with Section 6(b) of the Introduction

5.2 Section 6(b) imposes an obligation upon a relevant person or its advisers to consult the Panel if they are in "any doubt whatsoever" as to whether a relevant proposed "course of conduct" is in accordance with the Code: once that very low threshold of doubt is reached (i.e. once a person or its advisers are in "any doubt whatsoever"), the Panel must be consulted.

5.3 Once an adviser is aware of facts which create any doubt whatsoever, the Section 6(b) obligation to consult the Panel is triggered, regardless of whether the adviser in question subsequently reaches the judgment that the course of conduct in question is likely to be in accordance with the Code. That is because:

(a) the system of regulation imposed by the Code designates the Panel as the sole body which is competent to conduct a factual investigation into whether a proposed course of conduct is in accordance with the Code. Once the trigger is pulled, the relevant matters pass into the Panel's domain;

(b) the Panel alone is sufficiently independent and impartial for this purpose; and

(c) the Panel alone has the power to request relevant information for these purposes.

5.4 The importance of consulting the Panel in the case of a potential concert party situation was highlighted in the *Guinness/Distillers* decision. As that decision establishes, the Panel is uniquely placed to undertake the appropriate investigation and to make the appropriate assessments.

5.5 Each of the Advisers knew of facts or connections between the Indonesian Parties which the Panel considers were relevant to the concert party issue, and which should have been brought to the Panel's attention on the basis described above, before the signing and announcement of the Indonesian Transactions, rather than those Advisers relying on their own judgement or that of another adviser as to whether the Indonesian Parties were acting in concert.

5.6 The Panel has concluded that, prior to the announcement of the Indonesian Transactions, J.P. Morgan ought to have pursued the matter further at the time by taking additional steps to inquire as to whether the Indonesian Parties were acting in concert and consulting the Panel on the concert party issue.

5.7 The Panel has further concluded that, prior to the announcement of the Indonesian Transactions, Credit Suisse and HFW should have consulted the Panel about the concert party issue and should not have relied on assumptions as to the conduct or judgement of others.

5.8 The Panel has also concluded that, following the announcement of the Indonesian Transactions, when Credit Suisse in London became involved in the Indonesian Transactions and re-examined the concert party issue, Credit Suisse was again

obliged to ensure that the Panel was consulted. Though Credit Suisse sought to address its concerns by further discussing the matter with those internally who had knowledge of the Indonesian Parties and also with Vallar's advisers, Freshfields and J.P. Morgan, the Panel does not consider that this relieved Credit Suisse of its obligation to consult the Panel.

5.9 The Panel has therefore concluded that in not consulting the Panel, each of Credit Suisse, HFW and J.P. Morgan did not satisfy the requirements of Section 6(b) of the Introduction.

5.10 As regards Freshfields' role prior to the announcement of the Indonesian Transactions, the Panel considers that Freshfields could have done more regarding the concert party issue but makes no finding of breach in relation to Section 6(b) of the Introduction.

(b) Failure by financial advisers to discharge their "particular responsibility" to advise their clients in accordance with Section 3(f) of the Introduction

5.11 The Panel considers that, prior to the announcement of the Indonesian Transactions, Credit Suisse did not make it clear to the Indonesian Parties that it was not permissible under the Code to take a commercial decision on the regulatory question as to whether Vallar needed to seek a Whitewash.

5.12 The Panel has therefore concluded that Credit Suisse did not satisfy the requirements of Section 3(f) of the Introduction by not ensuring, so far as they were reasonably able, that their clients were aware of their responsibilities under Rule 9.1 of the Code and complied with them.

5.13 The Panel considers that J.P. Morgan did not advise its client, Vallar, to consider seeking a Whitewash in order to address the possibility that an obligation on the part of the Indonesian Parties to make a general offer for Vallar under Rule 9.1 might arise in connection with the Indonesian Transactions (or that, in the absence of an offer being made, control of Vallar would pass to an undisclosed concert party without the other holders of Vallar shares being protected).

5.14 The Panel has therefore concluded that J.P. Morgan did not satisfy the requirements of Section 3(f) of the Introduction by allowing Vallar to rely on warranties and failing to consult the Panel as to the possibility that the Indonesian Parties would be regarded by the Panel as acting in concert, and seeking a Whitewash if they were so regarded.

(c) Failures by Credit Suisse, Freshfields and HFW in presenting the Forward-sale Arrangements to the Panel in accordance with Section 9(a) of the Introduction

5.15 Following the announcement of the Indonesian Transactions, all three of Credit Suisse, Freshfields and HFW were aware of the commercial background to the Forward-sale Arrangements, and their purpose, as described above.

5.16 The Panel has also concluded that, in dealing with the Panel in relation to the Forward-sale Arrangements, Credit Suisse, Freshfields and HFW did not take all reasonable care to ensure that the commercial background to the Forward-sale Arrangements, and their purpose, was fairly presented to the Panel.

5.17 Specifically, Credit Suisse, Freshfields and HFW did not ensure that the direct and causative connection between the collateral requirements under the Jumbo Loan and the Forward-sale Arrangements, of which they were each aware, was properly explained to the Panel.

5.18 The Panel has also concluded that each of Credit Suisse, Freshfields and HFW did not ensure that the Panel was provided with all of the facts in their respective possession regarding connections between the Indonesian Parties.

5.19 The Panel has concluded that, by failing to disclose to the Panel information known to it and which the Panel considers to have been relevant to the possibility that the Indonesian Parties would be regarded by the Panel as acting in concert, and in not taking all reasonable care not to provide the Panel with incorrect, incomplete or misleading information relating to the Forward-sale Arrangements and their purpose, each of Credit Suisse, Freshfields and HFW did not satisfy the requirements of Section 9(a) of the Introduction. However, the Panel accepts that there was no intention on the part of Credit Suisse, Freshfields or HFW to mislead the Panel.

6. Disciplinary action

6.1 The Panel has concluded that each of Credit Suisse's, Freshfields' and HFW's respective conduct, as described in this statement, was sufficiently serious to merit the issue of a statement of public censure of each of Credit Suisse, Freshfields and HFW in accordance with Section 11(b) of the Introduction.

6.2 Each of Credit Suisse, Freshfields and HFW are hereby publicly criticised, accordingly.

6.3 The Panel has concluded that J.P. Morgan's conduct, as described in this statement, was disappointing but not sufficiently serious to merit public criticism.

7. Conclusions

7.1 In concluding this statement, the Panel wishes to remind practitioners and other persons to whom the Code applies of the following points:

- The Panel system of regulation relies on parties and their advisers consulting the Panel whenever they are in any doubt whatsoever as to the application of the Code.

- The need to consult with the Panel in cases of doubt is particularly acute where there are doubts as to whether parties may be acting in concert.

- To take legal or other professional advice as to whether parties are acting in concert, or to rely on warranties or representations from those parties to the effect that they are not acting in concert, can never be an alternative to such consultation.

- Whenever the Panel is consulted, it is paramount that all relevant facts are disclosed and no relevant facts are withheld.

- Whilst the Code applies to all types of advisers, financial advisers have a particular responsibility under Section 3(f) of the Introduction to comply with the Code and to ensure, so far as they are reasonably able, that their client and, in the case of a company, its directors, are aware of their responsibilities under the Code and will comply with them and that the Panel is consulted whenever appropriate. The Panel's public criticism of Freshfields and HFW for their respective breaches of the Code that are described in this statement should not be taken to mean that there has been any change in this well established principle. Rather, that criticism is based on the specific facts described in this statement.

5 November 2015