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22 May 2017

Dear Sirs and Madam,

### Glencore's corporate reporting regarding coal: potential legal risks

We write to you in relation to information contained in Glencore plc's (**Glencore**)<sup>1</sup> 2016 Annual Report and incorporated documents regarding its position on climate change and the risks of climate change to its business.

ClientEarth are legal experts in climate risk and corporate reporting. We undertake legal research, and work with institutional investors, companies and lawyers in relation to the legal implications of the risks posed by climate change to companies and the financial system as a whole.

In our opinion some of the statements made in Glencore's 2016 Annual Report:

- rely on assumptions about the future for coal markets (particularly thermal coal) that have been challenged by independent expert analysis;
- omit information about significant market trends that may depress demand for its coal products; and
- may, therefore, provide investors with a misleading impression of the impact of the low carbon transition on Glencore's coal business.

We are also writing to a number of investors who may acquire, hold or dispose of Glencore's securities, to inform them of their legal rights, if, in the future, Glencore's statements or omissions are found to have been recklessly or fraudulently prepared and cause loss to shareholders.<sup>2</sup> A copy of that letter to investors is attached.

### Disclosure is material to investors

Glencore is heavily exposed to the coal market. Although its business is diversified, its coal business contributes significantly to its EBITDA<sup>3</sup> and thermal coal provides a large proportion of revenues for its marketing business.<sup>4</sup> Glencore acknowledges this by disclosing that reductions in commodity prices and fluctuations in demand are its 'foremost risk'.<sup>5</sup> In 2016, the company

1 As defined on page 132 of the company's 2016 Annual Report, for the purpose of its consolidated financial statements. Available at [http://www.glencore.com/assets/investors/doc/reports\\_and\\_results/2016/GLEN-2016-Annual-Report.pdf](http://www.glencore.com/assets/investors/doc/reports_and_results/2016/GLEN-2016-Annual-Report.pdf) Accessed 3 May 2015.

2 Should it be shown in the future to contradict internal forecasts or knowledge, which were dishonestly withheld from investors. Section 90A of the Financial Services and Markets Act 2000 provides shareholders who have purchased, held or acquired shares on the LSE with the right to claim compensation in certain circumstances.

3 In 2016 this was \$USD2.36 billion (before adjusting for the impact of a \$980 million loss made by a hedging transaction), see page 71 of the Annual Report.

4 Page 16 of 'Climate change considerations for our business' (2016), see link at note 2.

5 Page 37 of 2016 Annual Report.

reported impairments of over \$1 billion relating to oil and gas assets primarily resulting from a reduction in management's long-term oil price assumptions, specific production and reserve related issues.<sup>6</sup>

The UK financial regulator asserts that it is not the role of reporting to serve as a marketing tool, and companies should ensure the annual report paints a picture that balances the good with the less good.<sup>7</sup> Equally, it is crucial that capital expenditure on resource conversion is subject to robust corporate governance.

Guidance from the UK financial regulator<sup>8</sup> states that analysis of risks should be tailored to the business model, strategy and principal risks and 'be undertaken with an appropriate level of prudence, i.e. weighing downside risks more heavily than upside opportunities'.<sup>9</sup>

The *Task Force on Climate-related Financial Disclosures* believes that scenario analysis requires a neutral examination of a range of scenarios that cover 'a reasonable variety of future outcomes, both favourable and unfavourable'.<sup>10</sup>

### Glencore's disclosures regarding its coal business

Glencore's reporting for 2016 makes the following statements in relation to the risks to its coal business from the transition to a low carbon economy<sup>11</sup>:

- "[w]e expect our coal business to remain viable and do not believe our coal assets will become stranded";
- "[t]he International Energy Agency's modelling of the commitments made as part of the 2015 Paris agreements shows that absolute demand for coal will continue to grow";
- "[u]nder every policy scenario, demand for coal will be sustained by the building of low-cost, coal-fired electricity generation in developing economies, underpinning the consumption of 120 to 140 billion tonnes of coal between 2013 and 2030"; and
- "[l]ow emission technologies can ensure that fossil fuels can play a significant role in reducing global emissions while continuing to play a vital role in delivering secure and reliable energy for industry and households".<sup>12</sup>

Analysis relevant to these statements is found in the 'coal case study' contained in the document "[c]limate change considerations for our business 2016."<sup>13</sup> The conclusions of Glencore's

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<sup>6</sup> Page 119 of Annual Report. Note that this meets the CarbonTracker Institute's definition of a 'stranded asset'.

<http://www.carbontracker.org/resources/>

<sup>7</sup> Stephen Haddrill, 2016. Speech at Climate Disclosure Standards Board - Comply or Explain: Review of FTSE 350 companies.

<https://www.frc.org.uk/Our-Work/Publications/FRC-Board/Speech-by-Stephen-Haddrill-CEO-CDSB-s-Comply-or.pdf>

<sup>8</sup> In relation to the UK Corporate Governance Code.

<sup>9</sup> Financial Reporting Council, 2014. Guidance on Risk Management, Internal Control and Related Financial and Business Reporting, p.19.

<sup>10</sup> Task Force on Climate-related Financial Disclosures, 2016. Recommendations of the Task Force on Climate-related Financial

Disclosures. [https://www.fsb-tcf.org/wp-content/uploads/2016/12/16\\_1221\\_TCFD\\_Report\\_Letter.pdf](https://www.fsb-tcf.org/wp-content/uploads/2016/12/16_1221_TCFD_Report_Letter.pdf)

<sup>11</sup> Transition risks will arise from regulatory action on climate change (as a result of the implementation of the Paris Agreement or other climate commitments) or state action on other environmental problems like air pollution, or as a result of increased competition from disruptive technologies including renewables and other lower-carbon technologies. Bank of England, *The impact of climate change on the UK insurance sector*, Sept 2015.

<sup>12</sup> Page 31 of 2016 Annual Report.

<sup>13</sup> Available at [http://www.glencore.com/assets/sustainability/doc/sd\\_reports/2016-Climate-change-considerations-for-our-business.pdf](http://www.glencore.com/assets/sustainability/doc/sd_reports/2016-Climate-change-considerations-for-our-business.pdf) accessed 18 May 2017.

analysis regarding thermal seaborne coal demand are repeated in an updated version of that document which was released on 16 May 2017.<sup>14</sup>

## Omissions from disclosures

In our opinion, the above statements in the Annual Report regarding coal provide the reader with the impression that demand will sustain the seaborne thermal coal market, and do not reflect the full extent of potential risks to Glencore's coal business.

Glencore's view is contradicted by multiple independent analyses of thermal coal markets, including the latest research from the IEA, which acknowledges that thermal coal demand in China may have peaked.<sup>15</sup> It is also contradicted by other industry participants, including Royal Dutch Shell,<sup>16</sup> and Glencore's competitor Anglo American.<sup>17</sup>

Glencore omits from its analysis detailed discussion of the following important trends that are likely to affect its coal business:

- coal-fired power faces stiff competition from disruptive technologies including cheaper renewables and gas;<sup>18</sup>
- Chinese demand for seaborne coal may have peaked<sup>19</sup> and India is reducing its dependence on imported coal (acknowledged by the IEA, which notes that there is no 'second' China<sup>20</sup>);
- Chinese planned re-structuring of its steel industry to address overcapacity reducing demand for coking coal<sup>21</sup>;

14 Available at [http://www.glencore.com/assets/sustainability/doc/sd\\_reports/2017-Climate-change-considerations-for-our-business.pdf](http://www.glencore.com/assets/sustainability/doc/sd_reports/2017-Climate-change-considerations-for-our-business.pdf) accessed 18 May 2017. This document appears to be incorporated by reference into the Strategic Report, and could arguably therefore be treated by investors as 'published information' as defined in the Financial Services and Markets Act 2000.

15 IEA, Outlook of Global Coal Markets, 20 Sept 2016 available at <https://coaltransitions.files.wordpress.com/2016/09/iea-outlook-global-coal-markets.pdf> See also the IEA's mid-term coal market report 2016 at <https://www.iea.org/newsroom/news/2016/december/medium-term-coal-market-report-2016.html>

16 Shell believes that gas will play a role as a transition fuel and is likely to replace coal as the preferred fuel for electricity generation in Asia, see Shell 2016 Annual Report at page 54-56, available at <https://reports.shell.com/annual-report/2016/servicepages/download-centre.php> accessed 8 May 2017.

17 Anglo American has stated that "...fossil fuels will be increasingly contested by society and, as a result, the role of thermal coal will decline. We are therefore unlikely to make any significant future commitments to thermal coal in the long term. See <http://www.angloamerican.com/~media/Files/A/Anglo-American-PLC-V2/documents/climate-change-supplement.pdf> at page 14.

18 As discussed in Cornot-Gandolphe, S 'The role of coal in Southeast Asia's power sector and implications for global and regional coal trade' Oxford Institute for Energy Studies, OEIS Paper CL4, Dec 2016, pages 15-17, which notes that there is a real contest in Asia between renewables, gas and coal driven by cost, climate change and air pollution concerns, available at <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/12/The-role-of-coal-in-Southeast-Asias-power-sector-CL-4.pdf>. See also <http://www.mckinsey.com/business-functions/sustainability-and-resource-productivity/our-insights/how-technology-is-reshaping-supply-and-demand-for-natural-resources> and <https://www.bloomberg.com/news/articles/2016-12-15/world-energy-hits-a-turning-point-solar-that-s-cheaper-than-wind> and <https://www.bloomberg.com/news/articles/2017-01-03/for-cheapest-power-on-earth-look-skyward-as-coal-falls-to-solar> and <http://www.carbontracker.org/here-comes-the-sun-cost-reductions-of-indias-solar-revolution-should-serve-as-warning-to-coal-investors/>

19 China currently has massive over investments in coal fired power, with 895GW of capacity being used less than half the time, despite planning another 610GW of new capacity. See Carbon Tracker Initiative, 'Chasing the Dragon: China's coal overcapacity crisis and what it means for investors' November 2016, available at <http://www.carbontracker.org/report/chasing-the-dragon-china-coal-power-plants-stranded-assets-five-year-plan/>, which notes that China may become an exporter of coal in the medium term. See also Green F & Stern N, (2017) 'China's changing economy: implications for its carbon dioxide emissions', Climate Policy, 17(4); Green, F, 'Beyond peak coal? The new outlook for China's carbon emissions' available at <http://www.lse.ac.uk/GranthamInstitute/news/beyond-peak-coal-the-new-outlook-for-chinas-carbon-emissions/> See also IEA, Outlook of Global Coal Markets, 20 Sept 2016 available at <https://coaltransitions.files.wordpress.com/2016/09/iea-outlook-global-coal-markets.pdf> See also Qi et al, China's post-coal growth, Nature Geoscience (2016) available at <http://www.nature.com/ngo/journal/vaop/ncurrent/abs/ngo2777.html> See also <http://reneweconomy.com.au/coal-hit-as-chinas-energy-transition-gathers-pace-18419/>

20 India's coal and power Minister said recently he wants to rapidly reduce that country's dependence on imported coal within 2-3 years, see <https://www.bloomberg.com/news/articles/2016-04-25/india-s-energy-minister-wants-to-cut-coal-imports-to-nothing> Note also that the IEA's *Medium-Term Renewable Market Report* forecasts 13% additional growth for renewables to 2021 <https://www.iea.org/newsroom/news/2016/october/iea-raises-its-five-year-renewable-growth-forecast-as-2015-marks-record-year.html>

- the low chances of HELE<sup>22</sup> together with CCS becoming a viable and widely used technology before 2030 due to its high cost compared to cleaner technologies;<sup>23</sup>
- the highly exposed nature of many Asian nations to physical climate risks (and the need to control air pollution) may spur governments to act decisively to move away from coal.<sup>24</sup>

These disruptive factors are neither disclosed nor discussed. This casts doubt on the accuracy of the statements in Glencore's 2016 Annual Report, particularly the conclusions that the building of new coal-fired power generation will continue in developing economies, and that demand for coal will rise under 'every policy scenario'.

### Potential for future claims

The statements set out above appearing in the Annual Report are published information and are therefore covered by the shareholder compensation framework set out in S90A and Schedule 10A, Financial Services and Markets Act 2000.

Glencore's statements in relation to future coal demand are contradicted by independent analyses of seaborne thermal coal markets. Some of the claims made in these documents appear to demonstrate a selective reading of current market trends. We have set out some evidence indicating that Glencore's demand assumptions, particularly post-2020, are optimistic.

In our opinion, this suggests there is a potential risk that evidence may arise in the future which demonstrates that a person discharging managerial responsibilities within Glencore knew or was reckless as to whether these statements were untrue or misleading<sup>25</sup>, or knew an omission to be a dishonest concealment of a material fact. We note that disclaimers are unlikely to be effective in the case of recklessness or fraud.<sup>26</sup> Consequently, if investors suffer loss as a result of relying on these statements, there may be grounds for a compensation claim against the company.

Such evidence might include internal memorandum, email correspondence, or consultant reports on climate-related risks to the company (as occurred in the New York Attorney General's investigation of Peabody Energy Corporation<sup>27</sup>) which prove there was a reckless or dishonest state of mind on the part of the person discharging managerial responsibilities in the preparation of the company's disclosures.

A compensation claim of just this type is currently being undertaken in the UK by shareholders in Tesco in relation to certain financial information published by the company in its annual report.<sup>28</sup> We note that ExxonMobil remains under investigation by the New York Attorney General for

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21 <http://energydesk.greenpeace.org/2016/12/02/coking-coal-price-china-australia/>

22 High efficiency, low emissions.

23 See <https://www.bloomberg.com/news/articles/2016-12-15/world-energy-hits-a-turning-point-solar-that-s-cheaper-than-wind> Note that even the Minerals Council of Australia acknowledges that HELE together with CCS is actually currently more expensive than renewables, page 11 of Minerals Council of Australia, New Generation Coal Technology: Why HELE coal fired power generation is part of Australia's energy solution, available at

[http://www.minerals.org.au/file\\_upload/files/publications/Why\\_HELE\\_is\\_part\\_of\\_Australias\\_energy\\_solution\\_FINAL.pdf](http://www.minerals.org.au/file_upload/files/publications/Why_HELE_is_part_of_Australias_energy_solution_FINAL.pdf)

24 As suggested in Cornot-Gandolphe, S 'The role of coal in Southeast Asia's power sector and implications for global and regional coal trade' Oxford Institute for Energy Studies, OEIS Paper CL4, Dec 2016 p14. Also see this research on cancelled coal capacity indicating that this trend may have already commenced [http://sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/final%20boom%20and%20bust%202017%20\(3-27-16\).pdf](http://sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/final%20boom%20and%20bust%202017%20(3-27-16).pdf)

25 Paragraph 3(2), Schedule 10A Financial Services and Markets Act 2000.

26 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6.

27 <https://ag.ny.gov/press-release/ag-schneiderman-secures-unprecedented-agreement-peabody-energy-end-misleading>

<https://ag.ny.gov/pdfs/Peabody-Energy-Assurance-signed.pdf>

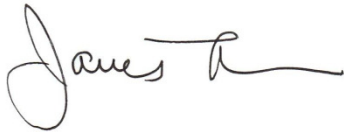
28 <http://www.benthamerurope.com/en/tesco-plc-overview>

potential fraudulent disclosures regarding climate risk.<sup>29</sup> This has been acknowledged as a foreseeable risk by leading Australian and English counsel at a recent event considering the legal implications of the energy transition.<sup>30</sup>

We have recommended that your shareholders ask certain questions relation to the above analysis, as set out in the attached letter.

Please direct any response or inquiries regarding this letter to Alice Garton, Company and Financial Lead, ([agarton@clientearth.org](mailto:agarton@clientearth.org)) and Jon Bennett, Communications Manager ([jbennett@clientearth.org](mailto:jbennett@clientearth.org)).

Yours faithfully,



**James Thornton**  
**Chief Executive Officer**  
**ClientEarth**

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<sup>29</sup> The latest on this ongoing investigation is available here: <https://insideclimatenews.org/news/07032017/exxonmobil-climate-change-research-rex-tillerson-ny-attorney-general-pwc>, see also ClientEarth's Investor Briefing on the same: <http://www.documents.clientearth.org/library/download-info/clientearth-investor-briefing-exxon-sued-in-us-for-allegedly-misleading-investors-on-climate-risk/>

<sup>30</sup> <https://www.lawyersweekly.com.au/news/20852-environmental-litigation-going-to-happen>

## Annex 1 – Letter to investors

General Counsel & Head of Sustainability  
Investor

22 May 2017

Dear Sir and/or Madam,

### Glencore's corporate reporting regarding coal: potential legal risks

ClientEarth are legal experts in climate risk and corporate reporting. We undertake legal research, and work with institutional investors, companies and lawyers in relation to the legal implications of the risks posed by climate change to companies and the financial system as a whole.

We are writing to inform you of concerns relating to information published by Glencore plc (**Glencore**) regarding its position on climate change and the risks of climate change to its business. In our opinion some of the statements made in Glencore's 2016 Annual Report:

- rely on assumptions about the future for coal markets (particularly thermal coal) that have been challenged by independent expert analysis;
- omits information about significant market trends that may depress demand for its coal products; and
- may, therefore, provide investors with a misleading impression of the impact of the low carbon transition on Glencore's coal business.

We enclose a copy of our letter to Glencore setting out this evidence which was sent to Glencore last week along with a draft of this letter to investors. In its response, Glencore did not refute any of the information outlined in our letter.

This letter is being sent to you as an investor who may acquire, hold or dispose of Glencore's securities to warn you of the risks of relying on Glencore's recent disclosures regarding the impact of the low carbon transition on its coal business, and to remind you of your legal rights, should certain statements be found, in the future, to have been recklessly or fraudulently prepared, and cause you loss.<sup>31</sup>

### Legal framework

For Glencore's securities trading on the Main Market of the London Stock Exchange, the applicable shareholder compensation framework is set out in S90A and Schedule 10A, Financial Services and Markets Act 2000. In summary, it provides shareholders with the right to recover losses they suffer as a result of reliance on misleading information.

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<sup>31</sup> An example would be where external statements were found in the future to contradict internal forecasts or knowledge, which were dishonestly withheld from investors. Section 90A of the Financial Services and Markets Act 2000 provides shareholders who acquire, continue to hold or dispose of shares with the right to claim compensation in certain circumstances.

Glencore is liable to pay compensation to an investor who:

- acquires, continues to hold or disposes of Glencore securities in reliance on “published information”<sup>32</sup>; and
- suffers loss in respect of the Glencore securities as a result of any untrue or misleading statement in that published information, or the omission from that published information of any matter required to be included in it.<sup>33</sup>

Glencore may have to pay compensation if a person discharging managerial responsibilities knew or was reckless as to whether a statement was untrue or misleading<sup>34</sup>, or knew an omission to be a dishonest concealment of a material fact.<sup>35</sup>

### What you can do

As you are aware, investors are bound by legal duties to act in the best interests of their clients or ultimate beneficiaries. These legal duties may extend to how actively you engage with companies and, if reliance on misleading information results in loss, may oblige you to recover such losses through a shareholder compensation framework.<sup>36</sup>

In order to mitigate the risk of loss which may need to be recovered, we recommend that you review your stewardship and engagement with Glencore (and other companies in this sector). This may include asking the following questions:

- What is the value at risk in the *Ambitious Action Scenario* and how does the company plan to manage this risk?
- Does Glencore management have any other material relevant to its scenario modelling, including third party reports, assumptions or datapoints that have not been published, and if so why?
- How is the company managing its exposure to coal demand destruction in Asia?
- What price assumptions underpin the company’s assessment of the competition coal-fired power generation faces from renewable and gas power?
- What are the company’s assumptions about the deployment of HELE<sup>37</sup> and CCS<sup>38</sup> technology? What is its investment in these technologies compared to new coal? Over what specific timeframe does Glencore expect these technologies to be deployed at a commercial scale, and what price assumptions underlie this analysis?
- Does Glencore management think that the conclusions that made regarding the company’s coal business in its 2016 Annual Report represent a prudent analysis, weighing downside risks more heavily than upside opportunities?
- As a director of Glencore, are you confident you have exercised reasonable care, skill and diligence due care in your review of third party reports (including those set out in the

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<sup>32</sup> Certain information which Glencore publishes to the market by recognised information service (Paragraph 2, Schedule 10A Financial Services and Markets Act 2000).

<sup>33</sup> Paragraph 3(1), Schedule 10A Financial Services and Markets Act 2000

<sup>34</sup> Paragraph 3(2), Schedule 10A Financial Services and Markets Act 2000

<sup>35</sup> Paragraph 3(3), Schedule 10A Financial Services and Markets Act 2000

<sup>36</sup> Such as the shareholder compensation framework set out in S90A and Schedule 10A, Financial Services and Markets Act 2000.

<sup>37</sup> High efficiency, low emissions.

<sup>38</sup> Carbon capture and storage.

ClientEarth letter), scenarios and assumptions relevant to the conclusions made regarding the company's coal business in Glencore's 2016 Annual Report?

Please direct any response or inquiries regarding this letter to Alice Garton, Company and Financial Lead, ([agarton@clientearth.org](mailto:agarton@clientearth.org)) and Jon Bennett, Communications Manager ([jbennett@clientearth.org](mailto:jbennett@clientearth.org)).

Yours faithfully,

**James Thornton**  
**Chief Executive Officer**  
**ClientEarth**

*Disclaimer: The information and opinions in this letter are not intended to constitute legal, investment or other professional advice. A decision to invest or divest in any financial instrument should not be made on the basis of the content of this letter and this letter should not be relied upon as a substitute for specific advice relevant to your particular circumstances.*