



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
MMA Offshore Limited  
[2017] ATP 21**

**Catchwords:**

*Declaration – undertaking – rights issue – effect on control*

*Corporations Act 2001 (Cth), sections 602; 657A*

*Guidance Note 17: Rights issues; ASIC Regulatory Guide 6 – Takeovers: Exceptions to the general prohibition; ASIC Regulatory Guide 189 – Disclosure relief for rights issues*

*Yancoal Australia Limited 04R & 05R [2017] ATP 16; Resource Generation Limited [2015] ATP 12; Echo Resources Limited [2015] ATP 8; Wollongong Coal Limited [2014] ATP 21; Gondwana Resources Limited [2014] ATP 9; Warrnambool Cheese and Butter Factory Co Hold Ltd [2013] ATP 16; Rey Resources Limited [2009] ATP 14; Gloucester Coal Limited 01 [2009] ATP 6; Rivkin Financial Services Limited 02 [2005] ATP 1*

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	NO	YES	YES	NO	YES

**INTRODUCTION**

1. The Panel, Bruce Cowley, James Dickson (sitting President) and Bruce McLennan, conducted proceedings on an application by Halom Investments Pte Ltd and made a declaration of unacceptable circumstances in relation to the affairs of MMA Offshore Limited. The application concerned a 1 for 1 non-renounceable pro-rata entitlement offer and an institutional placement. The Panel considered that in this case the timing of, and the quantum of new shares issued under, the placement and the institutional component of the entitlement offer would have the effect of disenfranchising part of the share register of MMA Offshore Limited for MMA Offshore Limited’s 2017 annual general meeting, and therefore declared the circumstances unacceptable.

2. In these reasons, the following definitions apply.

AGM	MMA’s 2017 annual general meeting
Equity Raising	the equity raising announced by MMA on 16 November 2017, consisting of a 1 for 1 accelerated non-renounceable pro-rata entitlement offer and an institutional placement
Halom	Halom Investments Pte Ltd
institutional entitlement offer	the institutional component of the 1 for 1 accelerated non-renounceable pro-rata entitlement offer
MMA	MMA Offshore Limited
retail entitlement offer	the retail component of the 1 for 1 accelerated non-renounceable pro-rata entitlement offer

## FACTS

3. MMA Offshore Limited is an ASX listed company (ASX code: MRM).
4. On 27 October 2017, MMA issued a notice that the AGM would be held on 30 November 2017 and that persons who were registered holders of fully paid ordinary shares of MMA at 4:00pm (Perth time) on 28 November 2017 would be entitled to attend and vote at the AGM. The business to be considered at the AGM included resolutions regarding changes to the MMA board, which were requisitioned by the applicant.
5. On 16 November 2017, MMA announced the Equity Raising, consisting of a 1 for 1 accelerated non-renounceable pro-rata entitlement offer to raise approximately \$74.6 million and a \$22.4 million institutional placement to existing and new investors.
6. The timetable for the Equity Raising provided that allotment and normal trading of new shares issued under the placement and institutional entitlement offer would occur on 27 November 2017 and that allotment of new shares under the retail entitlement offer would occur on 11 December 2017. Therefore, shares issued under the placement and institutional entitlement offer would be able to be voted at the AGM while shares issued under the retail entitlement offer would not be able to be voted at the AGM.

## APPLICATION

### Declaration sought

7. By application dated 17 November 2017, Halom sought a declaration of unacceptable circumstances. Halom submitted that the design of the Equity Raising distorted the voting power of retail and other non-institutional shareholders at the AGM, which had the potential to change the outcome of the vote on the resolutions to replace two directors of MMA.

### Interim orders sought

8. Halom sought interim orders that the settlement and allotment date of the new MMA shares to be issued under the placement and institutional entitlement offer be postponed until the Panel made final orders.

### Final orders sought

9. Halom sought final orders to the effect that:
  - (a) the allotment of the new shares to be issued under the placement and institutional entitlement offer be postponed until after the record time for determining voting entitlements at the AGM or the holders of the new shares be prohibited from casting any votes at the AGM in respect of those shares and
  - (b) MMA restructure the Equity Raising to be renounceable with a facility for eligible shareholders to apply for additional shares under a shortfall facility with only the remaining shortfall shares being delivered to the underwriter or sub-underwriters after applications from eligible shareholders were exhausted.

## DISCUSSION

### Timing of the Equity Raising

10. Halom submitted that the interrelationship of the timing of the Equity Raising and the timing of the AGM amounted to unacceptable circumstances. Halom noted that the timetable of the Equity Raising was contrary to ASIC's stated policy in ASIC Regulatory Guide 189 – *Disclosure relief for rights issues*,<sup>1</sup> which cautions companies conducting an accelerated rights issue against scheduling a general meeting during the period between allotment to institutional investors and allotment to other investors, if the early allotment to institutional investors would distort voting.
11. The Equity Raising, Halom submitted, would have the effect of “shutting out” the retail shareholders from exercising their “full voting rights” at the AGM while the placement participants and institutional shareholders, underwriters and sub-underwriters would have enhanced voting rights. Halom considered that the effect on voting entitlements had the potential to change the outcome of the vote on the resolutions proposed by Halom. It submitted that the voting power of MMA's shareholders allocated to the retail entitlement offer was approximately 61% (excluding Halom) and, once the new shares were allotted under the placement and institutional entitlement offer, would be approximately 40%.
12. We agree with the approach enunciated by the Panel in *Resource Generation Limited*<sup>2</sup> that “the fact that an application involves a proposal to reconstitute a board of directors does not take it outside the purview of the Panel. If, in the context of issues regarding the composition of a company's board, there is an accumulation or exercise of voting power possibly in contravention of s606, without proper disclosure under Chapter 6C or in otherwise unacceptable circumstances, those issues may be treated as control issues for the purposes of s657A”.
13. In this matter, we consider that the size<sup>3</sup> and timing of the accelerated component of the Equity Raising clearly raises control issues that are properly within the purview of the Panel.<sup>4</sup> This is particularly so where some institutions will obtain or increase substantial holdings<sup>5</sup> as a result of the placement and institutional entitlement offer.
14. We consider that the timing of the Equity Raising has the potential to distort voting at the AGM and that this is unacceptable.

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<sup>1</sup> At [RG 189.33]. See also ASIC Regulatory Guide 6 – *Takeovers: Exceptions to the general prohibition* at [RG 6.80]. This was raised with ASIC prior to the Equity Raising in MMA's application for approval of a nominee for the purposes of section 615 of the *Corporations Act 2001* (Cth). Unless otherwise specified, all statutory references are to the *Corporations Act 2001* (Cth) (as modified by ASIC) and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter

<sup>2</sup> [2015] ATP 12 at [48]

<sup>3</sup> In total the accelerated component of the Equity Raising would have been approximately 27.1% of the total number of shares that could be voted at the AGM

<sup>4</sup> See *Echo Resources Limited* [2015] ATP 8 at [41], citing *Riokin Financial Services Limited 02* [2005] ATP 1; *Wollongong Coal Limited* [2014] ATP 21 at [20], citing *Gloucester Coal Limited 01* [2009] ATP 6 at [30]

<sup>5</sup> See *Wollongong Coal Limited* [2014] ATP 21 at [19] and *Gondwana Resources Limited* [2014] ATP 9 at [37]

15. Halom submitted that the timing of the Equity Raising was particularly egregious in this case as there did not appear to be any immediate need for the Equity Raising to be completed prior to the AGM.
16. Halom queried whether the proxies received by MMA before it announced the Equity Raising may have indicated that Halom's resolutions were likely to be passed. However this was not borne out by the proxy information provided by MMA (noting that this did not include proxies from Halom and only a relatively small number of proxies had been received).
17. MMA submitted that the Equity Raising had been structured and timed to deliver financial certainty to MMA, including to secure changes to its existing debt facilities. It noted that Halom itself had asserted that there was a genuine need for funds,<sup>6</sup> and that the timing of the launch of the Equity Raising was principally driven by negotiations in respect of the proposed amendments to MMA's existing debt facilities.
18. MMA further submitted that the MMA board of directors considered that, when balancing the overall effect on voting at the AGM arising from timing of the Equity Raising and the benefits of completing the Equity Raising and securing the amendments to MMA's debt facilities, it was in the best interests of all MMA shareholders that MMA undertook the Equity Raising on the proposed timetable and in the 2017 calendar year.
19. Decisions of directors to issue shares must, of course, be made in accordance with their duties to act in the best interests of the company and for proper purposes. It is important that directors pay close attention to the constraints imposed by those and other legal obligations in circumstances similar to this case. In this matter, the Panel was not asked, or in a position, to determine whether the MMA directors had acted in breach of directors' duties and we note that there was also no restriction on Halom or any other person raising any such allegation before the court.<sup>7</sup> The Panel's focus in relation to capital raising is primarily on the effect on control.<sup>8</sup> In our view, the distorting effect in this case of a timetable that allowed voting of the accelerated, but not retail, component of the Equity Raising was clearly unacceptable. Whether the structure was otherwise unacceptable is discussed below.

### Structure of the Equity Raising

20. Halom submitted that the Equity Raising would significantly shift the balance of control of MMA due to the combination of features of the Equity Raising. Halom pointed to the placement, size of the Equity Raising, high offer price (relative to the

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<sup>6</sup> This is a relevant factor as to whether a rights issue may give rise to unacceptable circumstances – see Guidance Note 17: *Right issues* at [7]

<sup>7</sup> Section 659B of the *Corporations Act 2001* (Cth) restricts person from commencing court proceedings in relation to a takeover bid or proposed takeover bid before the end of the bid period, however there was no takeover bid or proposed takeover bid for MMA on foot

<sup>8</sup> *Yancoal Australia Limited 04R & 05R* [2017] ATP 16 at [34]; *Warrnambool Cheese and Butter Factory Co Hold Ltd* [2013] ATP 16 at [67]-[68]

20 day volume weighted average trading price on ASX and theoretical ex-rights price), non-renounceability and lack of a shortfall facility of the rights issue.

21. In response, MMA highlighted that its shares had been trading at a premium since the announcement of the Equity Raising. MMA submitted that it was not expected that any shareholder (including Halom, the underwriter or any sub-underwriter) would increase its voting power in MMA above 20% as a result of the Equity Raising. It also submitted that it considered that it would be impractical to restructure the Equity Raising and re-launch a renounceable rights issue in time to secure the proposed amendments to MMA's existing debt facilities.
22. We were not provided with any information that resulted in us concluding that the underwriter, sub-underwriters, placees and institutional shareholders who participated in the institutional entitlement offer were anything other than generally independent institutions who were not associated with MMA,<sup>9</sup> and that the Equity Raising was fully underwritten by a professional underwriter.<sup>10</sup> On this basis, and due to the agreement by both parties that MMA did need to conduct an equity raising to recapitalise, we were reluctant to take any action that may jeopardise the Equity Raising.

## DECISION

### Declaration

23. It appears to us that the circumstances are unacceptable:
  - (a) having regard to the effect 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 MMA or
    - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in MMA or
  - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602.
24. Accordingly, we made the declaration set out in Annexure A and consider that it is not against the public interest to do so. We had regard to the matters in section 657A(3).

### Undertaking

25. We considered the orders sought by Halom to the effect that the placees and participants in the institutional offer (collectively, **Institutional Applicants**) be restricted from voting the shares issued to them as part of the placement and institutional entitlement offer. However, we were concerned that such orders would be unfairly prejudicial to the Institutional Applicants. We note that MMA

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<sup>9</sup> Note that directors and senior management of MMA also participated in the institutional entitlement offer

<sup>10</sup> Similarly to *Rey Resources Limited* [2009] ATP 14, we considered that the sub-underwriting arrangements were a sufficient dispersion strategy such that a shortfall facility was not required in this instance (although would have been preferable). See also Guidance Note 17: *Right issues* at [20]-[21]

submitted that the Institutional Applicants had committed to subscribe for the new shares on the basis that they would be allotted to them on 27 November 2017 and, consistent with the rights and entitlements of other fully paid ordinary shares in MMA then on issue, would carry a right to vote, including at the AGM. We did not consider that it would be appropriate in the current matter to disenfranchise the Institutional Applicants because the retail shareholders were disenfranchised, and considered that rather it would be better to enfranchise all of the share register of MMA.

26. We received submissions in relation to possible final orders and then accepted an undertaking from MMA (Annexure B) in lieu of making final orders. MMA undertook to:
- (a) announce to ASX, before the market opened on 27 November 2017, that the AGM will be postponed to 19 December 2017, the proxy cut-off time will be extended to 10:30am (Perth time) on 17 December 2017 and entitlement to vote at the AGM will be determined at 7:00pm (Sydney time) on 17 December 2017
  - (b) conduct a poll on all resolutions to be considered at the AGM and
  - (c) otherwise do all that is reasonably necessary to postpone the AGM as described above.
27. While we accepted this undertaking from MMA (in lieu of making orders) in the unusual circumstances of this matter, we agree with the concerns expressed in ASIC policy<sup>11</sup> regarding the potential for early allotment to institutional investors in an accelerated rights issue to distort voting at a meeting. We would be concerned if the timetable initially adopted by MMA in this case were to occur again in another instance.

**James Dickson**  
**President of the sitting Panel**  
**Decision dated 26 November 2017**  
**Reasons given to parties 11 December 2017**  
**Reasons published 14 December 2017**

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<sup>11</sup> See ASIC Regulatory Guide 6 – *Takeovers: Exceptions to the general prohibition* at [RG 6.80]

## Takeovers Panel

Reasons - MMA Offshore Limited  
[2017] ATP 21

### Advisers

Party	Advisers
Halom	Arnold Bloch Leibler, Gilbert + Tobin
MMA	Ashurst



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## **Annexure A**

### **CORPORATIONS ACT SECTION 657A**

### **DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

**MMA OFFSHORE LIMITED (MMA)**

#### **CIRCUMSTANCES**

1. On 25 September 2017, MMA announced that it had received correspondence from Halom Investments Pte Ltd (**Halom**), giving notice that Halom intended to move resolutions at the next AGM of MMA to:
  - (a) remove Mr Anthony Howarth and Mr Jeffrey Weber from the office of director of MMA and
  - (b) appoint Mr Jeffrey Mews and Mr Ajaib Hari Dass as directors of MMA.
2. On 27 October 2017, MMA issued a notice of annual general meeting to be held on 30 November 2017 (the **AGM**), which included the proposed resolutions in paragraph 1. The notice of meeting disclosed that:

*The Company has determined that persons who are registered holders of fully paid ordinary shares of the Company (Shares) at 4.00pm (Perth time) on Tuesday, 28 November 2017 will be entitled to attend and vote at the AGM.*
3. On 16 November 2017, MMA announced a \$97 million equity raising (**Equity Raising**) which included a 1 for 1 accelerated non-renounceable pro-rata entitlement offer at \$0.20 per share to raise approximately \$74.6 million and a \$22.4 million institutional placement to existing and new investors at \$0.20 per share. A timetable for the Equity Raising provided that allotment and normal trading of new shares issued under the placement and institutional entitlement offer would occur on Monday, 27 November 2017 and allotment of new shares under the retail entitlement offer would occur on Monday, 11 December 2017. Therefore, shares issued under the placement and institutional entitlement offer could be voted at the AGM while shares issued under the retail entitlement offer could not.
4. Institutional and other shareholders who were considered sophisticated or professional investors were invited to participate in the institutional entitlement



offer, including MMA directors and senior management and Halom.<sup>12</sup> Applications were received under the placement and institutional entitlement offer totalling approximately 27.1% of the total number of shares which could be voted at the AGM. By participating in the institutional entitlement offer, one shareholder's voting power will increase from 10.4% to 13.8%. By participating in both the placement and the institutional entitlement offer, another shareholder's voting power will increase from 3.1% to 6.4%.

## EFFECT

5. The timing of, and the quantum of new shares issued under, the placement and the institutional entitlement offer will have the effect of disenfranchising part of the share register of MMA.

## CONCLUSION

6. It appears to the Panel that the circumstances are unacceptable circumstances:
  - (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
    - (i) the control, or potential control, of MMA or
    - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in MMA or
  - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602 of the *Corporations Act 2001* (Cth) (Act).
7. 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).

## DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of MMA.

**Allan Bulman**  
**Director**  
**with authority of James Dickson**  
**President of the sitting Panel**  
**Dated 26 November 2017**

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<sup>12</sup> Halom chose not to participate in the institutional entitlement offer and has been offered the opportunity to subscribe under the retail entitlement offer



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**Annexure B**

**AUSTRALIAN SECURITIES AND INVESTMENTS  
COMMISSION ACT 2001 (CTH) SECTION 201A  
UNDERTAKING**

**MMA OFFSHORE LIMITED (MMA)**

Pursuant to section 201A of the ASIC Act, MMA undertakes that it will:

1. announce to ASX, before market open on Monday, 27 November 2017:
  - (a) that the AGM (currently scheduled to be held at 10.30am (Perth time) on 30 November 2017) will be postponed to the Applicable Date, subject only to the approval of the Extension Application by ASIC;
  - (b) the Proxy Cut-Off Time for the Postponed AGM; and
  - (c) the Voting Entitlements Determination Time for the Postponed AGM;
2. conduct a poll on all resolutions to be considered at the Postponed AGM; and
3. otherwise do all that is reasonably necessary to postpone the AGM until the Applicable Date and give effect to these undertakings.

In these undertakings the following terms have the corresponding meaning:

**Applicable Date** means 10.30am (Perth time) on 19 December 2017.

**AGM** means the annual general meeting of shareholders of MMA in respect of the financial year ended 30 June 2017.

**ASIC** means the Australian Securities & Investments Commission.

**ASIC Act** means the *Australian Securities & Investments Commission Act 2001* (Cth).

**ASX** means ASX Limited or the financial market conducted by it, as the context requires.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Extension Application** means the application made by MMA to ASIC on 22 November 2017 under 250P of the Corporations Act, pursuant to which MMA seeks to extend the period within which section 250N of the Corporations Act requires that MMA hold its Annual General Meeting to a date no earlier than 14 December 2017 and no later than 21 December 2017.

**MMA** means MMA Offshore Limited ACN 083 185 693.

**Proxy Cut-Off Time** means the date and time by which an appointment of a proxy for the AGM must be received by the Company to be effective. In the case of the postponed AGM, that is 10.30am (Perth time) on 17 December 2017.

**Voting Entitlements Determination Time** means the date and time for determining the entitlements of MMA shareholders to vote at the AGM. In the case of the postponed AGM, this is 7.00pm (Sydney time) on 17 December 2017.

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**Signed by Jeffrey Weber, Managing Director of MMA Offshore Limited  
with the authority, and on behalf, of  
MMA Offshore Limited  
Dated 26 November 2017**