



Australian Government

Takeovers Panel

**Reasons for Decision
Lincoln Minerals Limited 02 & 03
[2022] ATP 25**

Catchwords:

Decline to make a declaration – frustrating action – need for funds – rights issue – undervalue statements – target’s statement – supplementary target’s statement – shareholder intention statement – directors’ recommendation

Corporations Act 2001 (Cth), sections 606, 611(7), 611(10), 611(13), 657C(2)

Australian Securities and Investments Commission Regulations 2001, Regulation 16

Guidance Note 12 – Frustrating action, Guidance Note 17 – Rights issue, Guidance Note 22 – Recommendation and Undervalue Statements

Lincoln Minerals Limited [2022] ATP 6, Dragon Mining Limited [2014] ATP 5, Perilya Limited 02 [2009] ATP 1, Resource Pacific Holdings Limited [2007] ATP 26

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

INTRODUCTION

1. The Panel, Kristen Jung, Bill Koeck and Tony Osmond (sitting President), declined to make a declaration of unacceptable circumstances in relation to the affairs of Lincoln Minerals Limited. The applications (heard together) concerned a pro-rata rights issue by Lincoln to eligible shareholders and a takeover bid for Lincoln by Quantum, one of the applicants. During the proceedings, Lincoln provided further disclosure in the form of a supplementary target’s statement which the Panel considered sufficiently addressed certain concerns raised in relation to undervalue statements and shareholder intention statements. The Panel declined to make a declaration in relation to other concerns raised by the applications in light of all the circumstances.

2. In these reasons, the following definitions apply.

2021 AGM	has the meaning given in paragraph 4
APMI	Australia Poly Minerals Investments Pty Ltd
Convertible Notes	has the meaning given in paragraph 4
Evolution	has the meaning given in paragraph 38
Jigsaw	Jigsaw Consult Pty Ltd
Notice of Meeting	has the meaning given in paragraph 10
Olary	Olary Holdings Limited
Qualification	has the meaning given in paragraph 12
Quantum	Quantum Graphite Limited (ASX code: QGL)

Takeovers Panel

Reasons – Lincoln Minerals Limited 02 & 03 [2022] ATP 25

Quantum Bid	Quantum’s off-market takeover bid for all the ordinary shares in Lincoln, offering 1 Quantum share for every 40 Lincoln shares
Rejecting Shareholders	has the meaning given in paragraph 12
Rejection Statement	has the meaning given in paragraph 12
Remaining Undervalue Statements	has the meaning given in paragraph 67
Rights Issue	fully underwritten non-renounceable pro-rata rights issue of 1.34 new shares for every 1 share held at an issue price of \$0.006 per new share to raise approximately \$4.6 million
Statement A	has the meaning given in paragraph 64(a)
Statement B	has the meaning given in paragraph 64(b)
Supplementary Notice	has the meaning given in paragraph 5
Undertaking	has the meaning given in paragraph 5
Variation to the Undertaking	has the meaning given in paragraph 9

FACTS

- Lincoln is an ASX listed mining exploration company (ASX code: LML). It has been suspended from trading since 21 September 2020.¹
- On 21 January 2022, Lincoln issued a notice of meeting for its 2021 annual general meeting (**2021 AGM**) seeking approval for the issue of convertible notes (**Convertible Notes**) to APML.
- On 9 February 2022, Olary made a Panel application in relation to the approval of the Convertible Notes², which led to an undertaking by Lincoln to (among other things) prepare a supplementary notice of AGM (**Supplementary Notice**) to address the disclosure concerns of the Panel and comply with any applicable regulatory requirements and not formally issue the Supplementary Notice or re-schedule the 2021 AGM until ASIC and the Panel had confirmed they did not object to the form of the Supplementary Notice (**Undertaking**).
- On 9 August 2022, Quantum issued and served its bidder’s statement in relation to the Quantum Bid. Quantum subsequently lodged a replacement bidder’s statement on 6 September 2022, setting out the terms of the Quantum Bid.

¹ This followed a determination by ASX that Lincoln’s operations are not adequate to warrant the continued quotation of its securities and therefore it is in breach of ASX Listing Rule 12.1

² *Lincoln Minerals Limited* [2022] ATP 6

Takeovers Panel

Reasons – Lincoln Minerals Limited 02 & 03 [2022] ATP 25

7. On 27 September 2022, in an announcement titled “Recapitalisation to fund exploration and reinstatement to ASX”, Lincoln announced its intention to conduct the Rights Issue and that it had obtained a waiver from ASX to do so at a ratio greater than 1 new share for every share held, subject to shareholder approval. The announcement noted that funds raised through the Rights Issue would be used to repay “*the working capital load [sic] advanced by Australian [sic] Poly Minerals Investments Pty Ltd (APMI)*” and that “*LML no longer intends to issue the convertible notes to APMI.*”
8. On 5 October 2022, Lincoln lodged its target’s statement, in which directors recommended that shareholders reject the Quantum Bid.
9. On 10 October 2022, we issued a media release³ in relation to *Lincoln Minerals Limited*⁴ that “*following a request from Lincoln and on the basis it does not issue the Notes to APMI or seek shareholder approval for it, the Panel has consented to a variation of the Undertaking which will (in effect) allow Lincoln to re-schedule and hold its postponed 2021 AGM without having to issue the Supplementary Notice in respect of the Notes*” (**Variation to the Undertaking**).
10. On 12 October 2022, Lincoln lodged a supplementary notice of meeting for its 2021 AGM (**Notice of Meeting**), to be held on Monday 31 October 2022. The Notice of Meeting sought shareholder approval of the following resolutions:
 - (a) **Resolution 12A:** “*That, for the purposes of the Entitlement Offer Waiver and for all other purposes, approval is given for the Company to conduct the Entitlement Offer at an issue price of \$0.006 per shares [sic] and on the basis of 1.34 new shares for every 1 share held on the record date and otherwise on the terms and conditions set out in the Explanatory Memorandum*”. A voting exclusion applied to Resolution 12A so that “*[t]he Company will disregard any votes cast on this Resolution by or on behalf of any substantial shareholders, any proposed underwriter or sub-underwriter of the Entitlement Offer, any brokers or managers of the Entitlement Offer, or any of their respective associates.*”
 - (b) **Resolution 12B:** “*That, for the purposes of ASX Listing Rule 7.9 and for all other purposes, approval is given for the Company to issue shares from the shortfall of the Entitlement Offer to Jigsaw Investments Pty Ltd [ACN 090 409 911] (and/or their nominee(s) or sub-underwriters) on the terms and conditions set out in the Explanatory Memorandum*”. A voting exclusion applied to Resolution 12B so that “*[t]he Company will disregard any votes cast in favour of this Resolution by or on behalf of a person who is expected to participate in the proposed issue (being Jigsaw Investments Pty Ltd [ACN 090 409 911] (and/or their nominee(s) or sub-underwriters including Australia Poly Minerals Investments Pty Ltd)) or an associate of that person or those persons*”.
11. The Notice of Meeting also stated that “*[s]hareholders should be aware that, if the Company proceeds with the Rights Issue, Quantum Graphite Limited will be permitted to withdraw its takeover bid*” and that “*APMI would sub-underwriter [sic] the Entitlement Offer for up to approximately \$900,000, which would take its holding in the Company from*

³ TP22/53

⁴ [2022] ATP 6

Takeovers Panel

Reasons – Lincoln Minerals Limited 02 & 03 [2022] ATP 25

19.91% to approximately 29% - assuming the full sub-underwriting commitment was called upon”.

12. On 24 October 2022, Lincoln released an announcement noting that four substantial shareholders of Lincoln holding in aggregate 52.28% of Lincoln’s shares on issue (**Rejecting Shareholders**) “have indicated that they reject the takeover offer made by Quantum Graphite Limited (ASX: QGL) at the current price of 1 QGL share for every 40 LML shares, and remain committed to their investments in LML” (**Rejection Statement**). The Rejection Statement also noted that “[t]hese statements are not intended to be forward looking, or statements as to the likely future actions of any individual rejecting shareholder” (**Qualification**).

LINCOLN MINERALS LIMITED 02

Declaration sought

13. By application dated 27 October 2022, Olary sought a declaration of unacceptable circumstances. Olary submitted that the following circumstances (among others) were unacceptable:
 - (a) Lincoln not seeking shareholder approval for the termination of the Convertible Notes and the conversion of the outstanding debt into a shareholder loan
 - (b) the control effect of the Rights Issue and the proposed issue of shortfall shares to the underwriter and sub underwriters and
 - (c) the inadequate disclosure in the Notice of Meeting of (among other things) information required under the Undertaking, details regarding the shareholder loan and the underwriting and the sub underwriting arrangements.

Interim orders sought

14. Olary sought interim orders to the effect that the date of the 2021 AGM be delayed until the date that was the later of 7 December 2022 and the end of the Panel proceedings.
15. The President of the Panel considered, on an urgent basis, Olary’s request for an interim order and sought submissions from the parties.
16. Lincoln submitted that adjourning the 2021 AGM would prevent Lincoln from meeting the extension timetable approved by ASX for its re-listing and that, as a result, “the underwriting arrangement will likely be withdrawn, the rights issue will not proceed, the directors may find that the Company is insolvent, and ASX may delist LML”.
17. The President considered the prejudice to Lincoln, particularly the potential impact on the underwriting arrangements, and declined to make the interim orders.
18. The President noted that the sitting Panel, once appointed, may make further interim orders or final orders in respect of the Rights Issue.

Final orders sought

19. Olary sought final orders that the Rights Issue not proceed “on its current terms without further fulsome information to shareholders”.

Takeovers Panel

Reasons – Lincoln Minerals Limited 02 & 03 [2022] ATP 25

LINCOLN MINERALS LIMITED 03

Declaration sought

20. By application dated 31 October 2022, Quantum sought a declaration of unacceptable circumstances. Quantum submitted (among other things) that:
- (a) *“the Rights Issue is a deliberate attempt to frustrate the Takeover Bid by its terms”* and that it *“is being conducted in a manner which is designed to enable the largest (substantial) shareholder to gain control of Lincoln at a significant discount to Lincoln’s last traded share price (and the Takeover Bid price)”*
 - (b) Lincoln’s recommendations in the target’s statement *“lack substantive basis, contain inaccuracies and are misleading”*
 - (c) Quantum had *“serious concerns regarding the reliability of the Lincoln share register”* and the recent resignations of three directors within 2 months of their appointment
 - (d) the Rejection Statement *“is expressed in terms that are unclear in meaning and the Qualification in [the] Rejection Statement is ambiguous”* and that an inference could be drawn of an association between the Rejecting Shareholders and Lincoln and
 - (e) there was inaccurate and inadequate disclosure in the target’s statement, including with respect to the Rights Issue, the relative merits of the Quantum Bid and details of the proposed re-listing of Lincoln.

Interim orders sought

21. Quantum sought interim orders that Lincoln (in effect and among other things):
- (a) disclose further information about the Rejecting Shareholders and how the Rejection Statement was obtained and clarify ambiguities with respect to the Rejection Statement
 - (b) rectify all deficiencies and inaccuracies in its share register
 - (c) issue a supplementary target’s statement to address the alleged disclosure deficiencies identified by the applicant
 - (d) be prohibited from putting resolutions to its shareholders until the later of the conclusion of these proceedings, 5 business days after Lincoln lodged a prospectus in respect of the Rights Issue or all alleged disclosure deficiencies being *“sufficiently rectified”*⁵ and
 - (e) disclose details of its compliance with the *Foreign Acquisitions and Takeovers Act 1975* (Cth) for the purposes of the Rights Issue.

⁵ Following the 2021 AGM results, Quantum revised this order request to be (in effect) that Lincoln be prohibited from changing its capital structure until the later of the conclusion of these proceedings, 5 business days after Lincoln lodged a prospectus in respect of the Rights Issues or all alleged disclosure deficiencies being *“sufficiently rectified”*

Takeovers Panel

Reasons – Lincoln Minerals Limited 02 & 03 [2022] ATP 25

Final orders sought

22. Quantum sought final orders to the effect that Lincoln not proceed with the Rights Issue unless the following conditions were met:
 - (a) the Rights Issue having a “*more effective dispersion strategy*”
 - (b) Lincoln obtaining an independent valuation
 - (c) APMI being prohibited from sub-underwriting the Rights Issue until shareholder approval is obtained for the purposes of section 611⁶ and Chapter 2E and Quantum being given an opportunity to sub-underwrite on the same terms and
 - (d) the Rejecting Shareholders being excluded from voting on any shareholder resolution in connection with the Rights Issue.
23. Following the 2021 AGM results, Quantum sought additional final orders that Resolution 12A and Resolution 12B be “*set aside, as if they did not occur*” and that “[n]o new shareholder vote occurs in respect of the Rights Issue” until the conditions listed in Quantum’s initial final orders were satisfied.

DISCUSSION

24. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.

Decision to conduct proceedings

25. Quantum made the *Lincoln Minerals Limited 03* application two business days after the *Lincoln Minerals Limited 02* application was made and given there was some overlap in the subject matter, we made a direction that the applications be heard together⁷.
26. On 31 October 2022, Lincoln shareholders voted in favour of Resolution 12A and Resolution 12B at the 2021 AGM.
27. While we considered that shareholder approval of the Rights Issue (albeit for ASX purposes) with appropriate voting exclusions could potentially go towards mitigating some of the issues raised in the applications relating to the Rights Issue, the following matters warranted further consideration:
 - (a) Lincoln’s need for funds and the process undertaken by Lincoln leading to the Rights Issue, its structure and the selection of the underwriter and sub-underwriter
 - (b) whether the disclosure made to shareholders for the purpose of their approval had been adequate, including with regards to the potential control effect of the Rights Issue, Lincoln’s strategy with regards to seeking reinstatement of trading in its securities and the relative merits of the Rights Issue as an alternative to the Quantum Bid and

⁶ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth) and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

⁷ Under regulation 16 of the *Australian Securities and Investments Commission Regulations 2001* (Cth)

Takeovers Panel

Reasons – Lincoln Minerals Limited 02 & 03 [2022] ATP 25

- (c) the context in which the Rejection Statement was made, the intended meaning of the Qualification and the relationship between the Rejecting Shareholders and Lincoln.

28. Accordingly, we decided to conduct proceedings.

Lincoln's reinstatement on ASX

29. As noted in paragraph 3 above, trading in Lincoln's securities has been suspended since 21 September 2020. Lincoln referred to ASX's policy of removing an entity from the official list where that entity has been suspended from quotation for a continuous period of 2 years and submitted that:

- (a) it had *"worked closely with the ASX to extend the deadline for delisting and formulate a pathway to reinstatement"* and that, had the directors not *"taken steps to extend the deadline for delisting, Lincoln shareholders would have faced loss of their investment in a listed entity by the third quarter of 2022"*
- (b) raising funds under the Rights Issue was a pre-requisite to ASX's agreement to extend the date (scheduled to be 21 September 2022) by which Lincoln would have otherwise been de-listed and
- (c) ASX had indicated that if the prospectus for the Rights Issue was not lodged by 25 November 2022, ASX intended to remove Lincoln from the official list from the commencement of trading on 28 November 2022. We sought non-party submissions from ASX which confirmed this submission.

30. Lincoln also submitted that raising funds and the reinstatement of trading in Lincoln's securities were conditions to the support of the South Australian Department for Energy and Mining in relation to one of Lincoln's material assets.

31. We consider that, while several issues raised in the submissions and rebuttals may concern ASIC (some of which are discussed below), we are generally not minded to second guess the Lincoln board's view that it is in the best interests of Lincoln shareholders for Lincoln to be re-listed on the ASX.

Rights Issue

Need for funds

32. Paragraph 11 of Guidance Note 17 provides that the Panel is likely to accept the directors' decision with regards to the company's need for funds if the decision appears to be reasonable and supported by rational reasons.

33. It appeared to us that there was a commercial imperative for Lincoln to conduct the Rights Issue because:

- (a) as an exploration entity, Lincoln has no sources of operating earnings and therefore needs the funds to continue its ordinary activities
- (b) Lincoln has committed to expenditure arrangements to avoid the cancellation of key exploration licenses
- (c) financial information provided by Lincoln, including a 2-year budget, was consistent with a need for funds and

Takeovers Panel

Reasons – Lincoln Minerals Limited 02 & 03 [2022] ATP 25

- (d) as referred to in paragraphs 29 and 30 above, the Rights Issue was considered necessary to achieve a reinstatement of trading in Lincoln's securities and to maintain the support of the South Australian Department for Energy and Mining in relation to one of Lincoln's material assets.

Control impact

34. Quantum submitted in its application that, although Lincoln had not proceeded with the Convertible Notes, *"Lincoln's engagement of APMI as sub-underwriter of the Rights Issue is merely the adoption of a different capital raising framework to achieve a similar outcome – being the transfer of control of Lincoln to APMI at a significant discount."*
35. Olary raised concerns in its submission that *"the sub-underwriting arrangement allows APMI [sic] to effectively by pass the 3% creeping provisions of the Corporations Act, as on a full sub-underwriting commitment, APMI [sic] would increase its holding in LML from 19.91% to 29% immediately"* and that Lincoln had not disclosed why APMI had been selected as *"a sub-underwriter and the only sub-underwriter"* and whether APMI was related to Jigsaw Investments Pty Ltd.
36. We were concerned with the potential control effect of APMI's sub-underwriting arrangement, particularly following the issues previously identified in *Lincoln Minerals Limited*⁸ in relation to the Convertible Notes.
37. We sought submissions from Jigsaw as a non-party to provide further information on the underwriting and sub-underwriting arrangements in relation to the Rights Issue.
38. Jigsaw submitted that it was involved in *"pursu[ing] an active investment strategy"* and had *"independently approached Lincoln"* to discuss Lincoln's capital needs and that these discussions *"evolved into the concept of an underwritten [e]ntitlement [o]ffer, which it was agreed was the fairest and most transparent way to structure any investment."* Jigsaw submitted it had entered into a term sheet with Lincoln in relation to a proposed underwriting of the Rights Issue by *"entities associated with Jigsaw Investments"* but that given Jigsaw was not an AFSL holder, Lincoln and Jigsaw had approached an AFSL third party holder, Evolution Capital Pty Ltd (**Evolution**) to act as underwriter with Jigsaw acting as sub-underwriter.
39. Jigsaw submitted that its intention was to have its sub-underwriting *"cover a maximum investment in Lincoln of \$1.5m"* and that it had had active discussions with three parties each considering participating in any shortfall allocation for circa \$1 million. These included brokers who may also invite their clients to participate *"further widening the sub-sub underwriting pool."* Jigsaw submitted that Lincoln had indicated that APMI also wished to participate in the shortfall although *"nor [sic] formal documentation has been seen by Jigsaw Consult as to APMI's intentions"*. Jigsaw added that *"[i]n the event that APMI did not want to nor was able to sub-sub underwrite any of the Entitlement Offer shortfall, Jigsaw Consult was intending on working with the other sub-sub underwriters to place the shortfall elsewhere."*
40. Lincoln submitted it had consulted financial and legal advisers in relation to its recapitalisation strategy which led to the Rights Issue and that it had taken steps to

⁸ [2022] ATP 6

Takeovers Panel

Reasons – Lincoln Minerals Limited 02 & 03 [2022] ATP 25

mitigate the control effect of the Rights Issue by engaging an unrelated underwriter, seeking shareholder approval, offering a shortfall facility and pricing the Rights Issue at a discount. In relation to the shortfall facility, Lincoln provided that “[t]he allocation of shortfall is to be at the discretion of the Lincoln board, based on factors which include the size of a shareholder’s existing holdings and the desire of Lincoln to maintain a spread of shareholders, but the policy will be applied on a consistent basis across all shareholders a [sic] who apply for shortfall”.

41. We consider that the following factors are likely to mitigate any potential control effects of the Rights Issue:
 - (a) Lincoln receiving advice from financial advisers⁹
 - (b) the proposed shortfall facility¹⁰ and
 - (c) the Rights Issue being underwritten by Evolution, an independent professional underwriter, and sub-underwritten by Jigsaw, an independent professional sub-underwriter, with the ability to obtain further sub-underwriting at their discretion¹¹.
42. We consider the underwriter’s discretion to make commercial calls in relation to the sub-underwriting important to the success of the dispersion strategy. Accordingly, we were reluctant to prohibit APMI’s participation in the sub underwriting arrangements.
43. We also consider that while approval by shareholders of the Rights Issue (and in effect the sub-underwriting) at Lincoln’s 2021 AGM was for ASX purposes and the disclosure in the Notice of Meeting was less than adequate for the purposes of an approval under item 7 of section 611, the approval did mitigate against the Rights Issue being unacceptable. It was relevant to our assessment that the underwriter, APMI, any sub-underwriter, any substantial shareholder and their respective associates were excluded from voting on the resolutions relating to the Rights Issue.

Frustrating action

44. Quantum submitted that “*the Rights Issue will result in a significant issue of Lincoln Shares*” as a result of which, assuming full participation, “*Quantum’s maximum possible control following the Takeover Bid will be 43% (which is below its 50.1% minimum acceptance condition)*” and that if Quantum sought to extend the Quantum Bid to shares issued under the Rights Issue, it would be required to offer a significant number of new consideration shares. Quantum submitted that the timing of Lincoln announcing the Rights Issue “*during the bid period constitutes a clear attempt to intentionally frustrate the Takeover Bid*”.
45. As noted above, Lincoln submitted that the Rights Issue was necessary to achieve a reinstatement of trading in Lincoln’s securities and to maintain the support of the South Australian Department for Energy and Mining in relation to one of Lincoln’s material assets.

⁹ Guidance Note 17 – Rights issue at [6(a)]

¹⁰ Guidance Note 17 – Rights issue at [6(b)]

¹¹ Guidance Note 17 – Rights issue at [6(b)]

Takeovers Panel

Reasons – Lincoln Minerals Limited 02 & 03 [2022] ATP 25

46. Paragraph 21 of Guidance Note 12¹² refers to a frustrating action that is unlikely to give rise to unacceptable circumstances where it is required to avoid materially adverse financial consequence, such as insolvency. In *Perilya Limited 02*¹³, the Panel considered that (footnote omitted) “*[i]n circumstances where the board has made a decision which appears reasonable to avoid what is potentially a materially adverse financial effect on the company, that decision would meet the requirements of Guidance Note 12 so as not to make the frustrating action an unacceptable circumstance. This is particularly the case where the decision is made to support the ordinary course of business or is one involving an asset which is not the "crown jewels" of the company*”.
47. In this case, Lincoln’s board considered that the Rights Issue was necessary to avoid a materially adverse financial consequence, which we consider mitigated against the Rights Issue being unacceptable on the grounds that it was a frustrating action.
48. We noted that the Notice of Meeting stated that “*[s]hareholders should be aware that, if the Company proceeds with the Rights Issue, Quantum Graphite Limited will be permitted to withdraw its takeover bid*”. While we consider that the disclosure in the Notice of Meeting was less than adequate for the purposes of an approval for a frustrating action, Lincoln shareholders were nonetheless afforded the opportunity to decide whether to proceed with the Rights Issue with the knowledge that it would amount to a triggering action¹⁴. On that basis, we consider that approval by shareholders also mitigated against the Rights Issue being an unacceptable frustrating action.

Disclosure

49. Quantum submitted that Lincoln had failed to provide adequate disclosure in relation to:
- (a) the Rights Issue, noting that Lincoln was proposing to make the prospectus available to shareholders after the 2021 AGM whereas “*Lincoln shareholders should have been given the level of disclosure to which they are entitled under Part 6D.2 of the Corporations Act, before being asked to make a fundamental decision on the Entitlement Offer, and the control of Lincoln*” and
 - (b) material details, including the timetable, in relation to the steps taken by Lincoln to address ASX’s requirements for re-listing.
50. Olary submitted that “*a prospectus should have been issued for the Entitlement Offer prior to seeking shareholder approval*” and “*[t]he prospectus would have set out all the information which an investor would require to make an informed decision*”.
51. Lincoln submitted that it was “*appropriate (and consistent with Lincoln’s understanding of market practice) to seek shareholder approval at the 2021 AGM prior to issuing the prospectus*” given (among other things):
- (a) ASX’s waiver to proceed with the Rights Issue¹⁵ was conditional on shareholder approval and

¹² Guidance Note 12 – Frustrating action

¹³ [2009] ATP 1 at [30]

¹⁴ See *Resource Pacific Holdings Limited* [2007] ATP 26 at [23]

¹⁵ on a ratio greater than 1 new share for every share held

Takeovers Panel

Reasons – Lincoln Minerals Limited 02 & 03 [2022] ATP 25

- (b) *“[t]he underwriter required certainty that its underwriting proposal was approved by the shareholders before the prospectus was lodged.”*
52. Lincoln also referred to ASX’s intention to remove Lincoln from the official quotation from the commencement of trading on 28 November 2022 if the prospectus was not lodged by 25 November 2022.
53. As noted above, while we do not necessarily agree a prospectus should have been issued prior to shareholder approval being sought, we would have preferred more fulsome disclosure in the Notice of Meeting for shareholders to decide between the Rights Issue and the Quantum Bid albeit the control impact of the Rights Issue (including the maximum increase in APMI’s voting power) and the fact that the Rights Issue would trigger a defeating condition in Quantum’s Bid were disclosed. In light of the Lincoln board’s priority to reinstate trading in Lincoln securities and the prospect of being delisted if ASX’s timetable was not met as well as the information otherwise available to Lincoln shareholders, we consider that it is not appropriate to delay the Rights Issue by seeking further shareholder approval.
54. We consider that the prospectus for the Rights Issue (of which we reviewed a draft) would provide better disclosure for Lincoln shareholders, including in relation to Lincoln’s strategy for reinstatement on ASX, proposed use of funds and corrective disclosure in relation to the identity of the underwriter once it is issued. In light of the Lincoln board having formed the view that it was in the best interests of shareholders for trading in Lincoln securities to be reinstated, we did not want to curtail the ability of Lincoln’s board to comply with the 25 November 2022 deadline provided by the ASX.
55. Lincoln submitted that *“[t]here was no concern raised by ASIC, ASX and the Takeover [sic] Panel in relation to seeking shareholder approval prior to the issue of the prospectus, during their review of the 2021 AGM Notice”*.
56. We did not review the Notice of Meeting and consider Lincoln’s submission to be incorrect. We note that the Panel only provides ‘no objection’ confirmations to the documents it has specifically requested to receive for the purposes of addressing any disclosure concerns it may have in the context of Panel proceedings. In light of the Variation to the Undertaking, we did not (and did not need to) review any document in relation to the 2021 AGM or otherwise.

Rejection Statement

57. Quantum submitted that the Rejection Statement *“does or may constitute unacceptable circumstances”* on the basis that the Rejecting Shareholders were associated with each other and Lincoln, while such association had not been disclosed, and that the Rejection Statement and the Qualification were unclear which as a result *“undermines and frustrates Quantum’s bid by misleading the market to think that Quantum’s bid is, and will continue to be, overwhelmingly unsupported”*.
58. We agreed with Quantum that the Qualification was unclear and noted that the Qualification was not included in the signed shareholder intention statements provided by the Rejecting Shareholders to Lincoln. However, on 29 November 2022 Lincoln released a second supplementary target’s statement deleting the Qualification, which addressed our concerns.

Takeovers Panel

Reasons – Lincoln Minerals Limited 02 & 03 [2022] ATP 25

59. Lincoln submitted it was aware that:
- (a) its Executive Chair and CFO, Ms Ruiyu (Yoyo) Zhang is the niece of Mr James Zhang
 - (b) Mr Zhang is a former director of Lincoln (appointment ceased 29 July 2021) and is the sole director and shareholder of APMI, which is a related party of Poly Mineral Investment Limited (Lincoln's largest shareholder) and
 - (c) Ms Zhang is also the CFO of APH Holdings, a related company to APMI which is owned by Mr Zhang.
60. Lincoln submitted that it was not aware of any business, familial or other relationships between members of its board and any of the Rejecting Shareholders (other than Poly Mineral Investment Limited), while noting that their dealings with each of them (other than Poly Mineral Investment Limited) has been through the same contact.
61. We were provided with an email dated 14 October 2022 with the subject line "Letter from Major Shareholders (URGENT URGENT URGENT)", in which Lincoln's CEO sought Ms Ruiyu (Yoyo) Zhang's (Lincoln's Chair) help in obtaining the shareholder intention statements underlying the Rejection Statement, noting that "[w]e need a letter from the top 5 shareholders ASAP, stating that they will not be participating in the QGL takeover. This would effectively kill the takeover, and help us with the AGM 2021 Rights Issue vote."
62. In *Dragon Mining Limited*¹⁶, the Panel discussed the difficulty an applicant faces in an association case:
- "Dromana Estate Limited 01R acknowledges the difficulties that an applicant faces in gathering evidence in association matters. In deciding whether to conduct proceedings on an association case, this must be kept in mind. However, the Panel has limited investigatory powers which means, before we decide to conduct proceedings, an applicant must do more than make allegations of association and rely on us to substantiate them. An applicant must persuade us by the evidence it adduces that we should conduct proceedings."*
63. We were concerned with the circumstances surrounding the making of the shareholder intention statements underlying the Rejection Statement, including the way in which the directors of Lincoln arranged for these statements to be obtained. However, we consider that, in the circumstances of this matter as a whole, there is insufficient material to justify us making any further enquiries in relation to the alleged association between the Rejecting Shareholders, and the Rejecting Shareholders and Lincoln, noting that ASIC could make further enquiries in relation to these matters and either Quantum or ASIC could apply to the Panel if further information came to light.

¹⁶ *Dragon Mining Limited* [2014] ATP 5 at [60]

Takeovers Panel

Reasons – Lincoln Minerals Limited 02 & 03 [2022] ATP 25

Undervalue statements

64. Quantum submitted that Lincoln's target's statement contained undervalue statements as defined in Guidance Note 22¹⁷, including the following:
- (a) *"The Offer is opportunistic: Lincoln shares are not currently trading, having been suspended from trading on the ASX on 21 September 2020 due to a lack of activity on Lincoln's assets. Lincoln is currently working towards Lincoln Shares no longer being suspended from trading on the ASX, where the market will determine the fair price for Lincoln shares" (Statement A) and*
 - (b) *"The Offer does not reflect a premium for control: Typically, an acquirer would pay a premium to the trading value of a company when seeking to obtain control. The Directors believe that Quantum is seeking to achieve control of Lincoln without paying Lincoln shareholders an appropriate control premium to the fair value of the assets" (Statement B).*
65. Lincoln submitted that Statement A was "a statement of fact" which referred to Lincoln's shares being suspended from the ASX since September 2020 "making it difficult to assess the fair value of Lincoln's shares". Lincoln also submitted that ASIC had previously raised concerns about Statement B and that "Lincoln took steps to remedy the inadequate disclosure for the second statement after working with ASIC to address this", resulting in Lincoln releasing on 1 November 2022 a supplementary target's statement deleting the statement that the Quantum Bid "does not reflect a premium for control".¹⁸
66. We recognise that in light of Lincoln's suspension from trading since 21 September 2020, assessing the value of Lincoln's shares and, accordingly, any premium, in a meaningful way was challenging. We were also satisfied that Lincoln's target's statement had been the object of ASIC's scrutiny and that a supplementary target's statement had already been lodged addressing ASIC's concerns in relation to undervalue statements.
67. However, we were concerned that, in its supplementary target's statement, Lincoln had not dealt with the undervalue statements in section 2.1 of the target's statement to the effect that the offer "represents a significant discount on the underlying value of LML's Shares" and "[b]ased on the valuations undertaken by our management and advisors, we have reached the conclusion that LML Shareholders should REJECT the Offer" (**Remaining Undervalue Statements**). The Remaining Undervalue Statements implied that there had been a quantitative assessment of Lincoln's value by the board, the basis of which we considered should be disclosed to shareholders to allow them to make an informed assessment of the statement, particularly in circumstances where Lincoln's shares have been suspended from trading since 21 September 2020. In the absence of such clarification, we considered that the directors' recommendation should be limited to their qualitative assessment of the Quantum Bid which were set out in the target's statement.

¹⁷ Guidance Note 22 – Recommendation and Undervalue Statements at [6]

¹⁸ The supplementary target's statement also deleted statements in the target's statement that "the Offer is not fair to LML shareholders"

Takeovers Panel

Reasons – Lincoln Minerals Limited 02 & 03 [2022] ATP 25

68. On 29 November 2022, Lincoln released a second supplementary target's statement deleting the Remaining Undervalue Statements, which alleviated our concerns with respect to this issue.

Other matters

69. Lincoln submitted that Olary held no securities in Lincoln and that it had "*no economic or other interest in the outcome of the Lincoln 02 Application*".
70. Under section 657C(2), an application to the Panel may be made by the bidder, the target, ASIC or any other person whose interests are affected by the relevant circumstances.
71. Given we decided to hear the *Lincoln Minerals Limited 02* and *Lincoln Minerals Limited 03* applications together and the matters which were relevant to our decision were covered by the later application, we did not need to reach a conclusion on this issue and so did not consider this matter further.
72. We also note that APMI did not respond to our brief or any of the Panel's communication during these proceedings. While unhelpful, we have not made any inferences with regard to this.

DECISION

73. For the reasons above, we declined to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration and we had regard to the matters in s657A(3).

Orders

74. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Tony Osmond

President of the sitting Panel

Decision dated 29 November 2022

Reasons given to parties 13 December 2022

Reasons published 15 December 2022

Takeovers Panel

Reasons – Lincoln Minerals Limited 02 & 03
[2022] ATP 25

Advisers

Party	Advisers
Lincoln Minerals Limited	Norton Rose Fulbright
Olary Holdings Limited	
Quantum Graphite Limited	Holding Redlich