



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Lincoln Minerals Limited 04R  
[2023] ATP 1**

**Catchwords:**

*Decline to make a declaration - rights issue - effect on control - underwriting - sub-underwriting - frustrating action - association - shareholder intention statement - related party - tracing notice*

*Corporations Act 2001 (Cth), sections 228, item 9 of 611, 657EA and 672A*

*Australian Securities and Investments Commission Act 2001 (Cth), sections 127 and 192*

*ASX Listing Rules, rules 7.9, 12.1 and chapter 10*

*Guidance Note 12: Frustrating Action, Guidance Note 17: Rights issues*

*Lincoln Minerals Limited 02 & 03 [2022] ATP 25, Benjamin Hornigold Limited 08R, 10R & 11R [2019] ATP 22, Dragon Mining Limited [2014] ATP 5, Perilya Limited 02 [2009] ATP 1, BigAir Group Limited [2008] ATP 12, Mount Gibson Iron Limited [2008] ATP 4, Resource Pacific Holdings Limited [2007] ATP 26 and Dromana Estate Limited 01R [2006] ATP 8*

*Ross (Liquidator) in the matter of Print Mail Logistics (International) Pty Ltd (In Liq) v Elias [2021] FCAFC 203, Ross, in the matter of Print Mail Logistics (International) Pty Ltd (in liq) v Elias [2021] FCA 419, Eastern Field Developments Limited v Takeovers Panel [2019] FCA 311 and Elders IXL Ltd v National Companies & Securities Commission [1987] VR 1, Jones v Dunkel [1959] HCA 8*

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

**INTRODUCTION**

- The review Panel, Paula Dwyer (sitting President), John O’Sullivan and Neil Pathak, affirmed the initial Panel’s decision not to make a declaration of unacceptable circumstances in relation to the affairs of Lincoln Minerals Limited<sup>1</sup>. The review Panel agreed with the initial Panel’s conclusions, for substantially the same reasons.
- In these reasons, the following definitions apply.

<b>2021 AGM</b>	the Annual General Meeting of Lincoln for the financial year ended 30 June 2021, held on 31 October 2022
<b>APH Holding</b>	APH Holding Pty Ltd, a related entity of APMI owned by Mr Zhang
<b>APMI</b>	Australia Poly Minerals Investments Pty Ltd, a related entity of Poly Mineral owned by Mr Zhang
<b>ASIC Act</b>	<i>Australian Securities and Investments Commission Act 2001 (Cth)</i>

<sup>1</sup> *Lincoln Minerals Limited 02 & 03 [2022] ATP 25*. All references to the initial Panel are to the Panel in that proceeding

## Takeovers Panel

### Reasons – Lincoln Minerals Limited 04R [2023] ATP 1

<b>Evolution</b>	Evolution Capital Pty Ltd, the underwriter of the Rights Issue
<b>First Supplementary Target's Statement</b>	the first supplementary target's statement dated 31 October 2022 given by Lincoln in relation to the Quantum Bid
<b>Good Make</b>	Good Make Inc.
<b>Jigsaw</b>	Jigsaw Consult Pty Ltd, a sub-underwriter of the Rights Issue
<b>KST Partners</b>	the accounting and audit service provider known as KST Partners. KST Partners is the local agent for Good Make and Regal Fortress
<b>Mr Saw</b>	Mr Kee Guan Saw, the founding director of KST Partners
<b>Mr Zhang</b>	Mr James Zhang, a former director of Lincoln and the sole director and shareholder of APMI
<b>Ms Zhang</b>	Ms Ruiyu (Yoyo) Zhang, the Executive Chair and Chief Financial Officer of Lincoln
<b>Notice of Meeting</b>	has the meaning given in paragraph 8
<b>Olary</b>	Olary Holdings Limited
<b>Poan</b>	Poan Group Holdings Pty Ltd
<b>Poly Mineral</b>	Poly Mineral Investment Limited, Lincoln's largest shareholder, a related entity of APMI owned by Mr Zhang
<b>Quantum</b>	Quantum Graphite Limited (ASX code: QGL)
<b>Quantum Bid</b>	Quantum's off-market takeover bid for all the ordinary shares in Lincoln, offering 1 Quantum share for every 40 Lincoln shares
<b>Regal Fortress</b>	Regal Fortress Inc.
<b>Rejecting Shareholders</b>	Poly Mineral, Good Make, Regal Fortress and Poan, holding in aggregate 52.28% of Lincoln's issued share capital
<b>Rejection Statement</b>	has the meaning given in paragraph 10
<b>Rights Issue</b>	Lincoln's fully underwritten non-renounceable pro-rata rights issue of 67 new Lincoln shares for every 50 Lincoln shares held at an issue price of \$0.006 per new Lincoln share to raise approximately \$4.6 million

## Takeovers Panel

### Reasons – Lincoln Minerals Limited 04R [2023] ATP 1

<b>Second Supplementary Target’s Statement</b>	the second supplementary target’s statement dated 28 November 2022 given by Lincoln in relation to the Quantum Bid
<b>Shareholder Approval</b>	the approval by Lincoln’s minority shareholders at the 2021 AGM of the resolutions in respect of the Rights Issue and associated underwriting and sub-underwriting arrangements as set out in paragraphs 8(a) and (b)
<b>Target’s Statement</b>	the target’s statement dated 5 October 2022 given by Lincoln in relation to the Quantum Bid (as supplemented)

## FACTS

3. The facts are set out in detail in the initial Panel’s reasons for decision in *Lincoln Minerals Limited 02 & 03*<sup>2</sup>. Below is a summary.
4. Lincoln is an ASX listed mining exploration company (ASX code: LML). It has been suspended from trading since 21 September 2020.<sup>3</sup>
5. 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.
6. On 27 September 2022, in an announcement titled “*Recapitalisation to fund exploration and reinstatement to ASX*”, Lincoln announced its intention to undertake the Rights Issue, subject to obtaining shareholder approval.
7. On 5 October 2022, Lincoln lodged its Target’s Statement, in which the Lincoln directors recommended that Lincoln shareholders reject the Quantum Bid.
8. 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.”

---

<sup>2</sup> [2022] ATP 25

<sup>3</sup> 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. As at the date of these reasons, Lincoln’s shares are trading again on the ASX, having been reinstated to quotation on 20 January 2023

## Takeovers Panel

### Reasons – Lincoln Minerals Limited 04R [2023] ATP 1

- (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”*.
9. 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 [Rights Issue] for up to approximately \$900,000, which would take its holding in the Company from 19.91% to approximately 29% - assuming the full sub-underwriting commitment was called upon”*.
10. On 24 October 2022, Lincoln released an announcement noting that the 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**).
11. By application dated 27 October 2022, Olary sought a declaration of unacceptable circumstances. Olary submitted that the following circumstances (among others) were unacceptable:
- (a) the control effect of the Rights Issue and the proposed issue of shortfall shares to the underwriter and sub underwriters and
  - (b) the inadequate disclosure in the Notice of Meeting in relation to the proposed underwriting and the sub underwriting arrangements.
12. 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 [Quantum] 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 [Quantum] Bid price) without paying a control premium”*
  - (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

## Takeovers Panel

### Reasons – Lincoln Minerals Limited 04R [2023] ATP 1

- (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.
13. During the initial proceedings, Lincoln provided further disclosure by way of the Second Supplementary Target's Statement which the initial Panel considered sufficiently addressed their concerns in relation to certain undervalue statements and shareholder intention statements. The initial Panel declined to make a declaration in relation to other concerns raised by the applications in light of all the circumstances.

## APPLICATION

14. On 30 November 2022, Quantum requested the substantive President's consent to apply for a review of the decision by the initial Panel in *Lincoln Minerals Limited 02 & 03*<sup>4</sup> pursuant to section 657EA<sup>5</sup>. On 1 December 2022, the substantive President granted his consent to the review of the decision noting the initial Panel's concerns regarding the Rejection Statement and certain undervalue statements and the possibility of new material becoming available following Quantum's application to ASIC requesting the issue of beneficial tracing notices (see paragraph 16 below).
15. With the substantive President's consent, Quantum made its review application on 1 December 2022 submitting that (among other things) the initial Panel erred in:
- (a) determining not to make further enquiries about potential undisclosed shareholder associations during an active takeover bid, including as between the Rejecting Shareholders and Lincoln and
  - (b) accepting Lincoln's Second Supplementary Target's Statement purportedly addressing certain undervalue and misleading statements because that disclosure was not clear or effective, in both content and form,
- and if the decision was not reviewed, it would materially prejudice the interests of Lincoln shareholders and the Quantum Bid as Lincoln shareholders were being compelled to make decisions in an uninformed market.
16. Quantum also submitted that new information may soon be available to substantiate its allegations of association as a result of Quantum's application to ASIC requesting the issue of beneficial tracing notices under section 672A to selected shareholders of Lincoln, including the Rejecting Shareholders.
17. Quantum sought final orders that:
- (a) the decision of the initial Panel be set aside
  - (b) a declaration of unacceptable circumstances be made
  - (c) the Shareholder Approval be set aside
  - (d) Lincoln convene a further general meeting of its shareholders to approve the Rights Issue (including as a frustrating action)

---

<sup>4</sup> [2022] ATP 25

<sup>5</sup> 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)

## Takeovers Panel

### Reasons – Lincoln Minerals Limited 04R [2023] ATP 1

- (e) APMI be prohibited from sub-underwriting the Rights Issue until Quantum is given an opportunity to sub-underwrite the Rights Issue on the same terms and until APMI's participation has been approved for the purposes of the related party provisions in Chapter 2E and
- (f) the Rejecting Shareholders be excluded from voting on any resolutions put to Lincoln shareholders in connection with the Rights Issue.

## DISCUSSION

### Conducting proceedings

- 18. The powers of a review Panel are set out in section 657EA. Subsection (4) provides that a review Panel has the same powers to make a declaration or orders as the initial Panel and may vary or set aside the decision reviewed or substitute a new decision. It may also affirm the decision reviewed after conducting proceedings or decline to conduct proceedings and allow the initial Panel's decision to stand.
- 19. The role of a review Panel is to conduct a de novo review.<sup>6</sup>
- 20. Having considered all the materials which the initial Panel had when it decided not to make a declaration of unacceptable circumstances, the initial Panel's reasons for making its decision, the review application and the preliminary submissions of the parties, we decided to conduct proceedings and communicated this to the parties on 14 December 2022.

### Interim orders sought

- 21. In its review application, Quantum sought interim orders to the effect that:
  - (a) Lincoln be required to issue a replacement target's statement which:
    - (i) consolidates all of the corrective disclosures made in its First Supplementary Target's Statement and Second Supplementary Target's Statement and
    - (ii) explains the reasons why the Lincoln board formed the view the Quantum Bid is inadequate, or otherwise, removes statements to that effect from the Target's Statement and
  - (b) Lincoln does not proceed with the Rights Issue until the later of:
    - (i) ASIC concluding their investigations in connection with the beneficial ownership tracing notices issued by it under section 672A or
    - (ii) the conclusion of any review proceedings.
- 22. Lincoln submitted that making the interim orders would not preserve the status quo in any sensible way but would, in effect, be determinative of the review proceedings and effectively make the review application otiose. Additionally, Lincoln submitted that delaying the Rights Issue for an indeterminate period would likely have the effect of derailing the Rights Issue and the reinstatement to quotation of Lincoln's

---

<sup>6</sup> *Benjamin Hornigold Limited 08R, 10R & 11R* [2019] ATP 22 at [11] and *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311 at [187]

## Takeovers Panel

### Reasons – Lincoln Minerals Limited 04R [2023] ATP 1

shares on ASX in accordance with the timetable approved by ASX. Lincoln also submitted that the interim orders bore no relationship to the final orders being sought by Quantum.

23. We accepted the submissions of Lincoln and decided not to make any interim orders.

#### Materials considered

24. In determining this matter, we have been provided with, and have considered, the following materials:
- (a) all the material before the initial Panel
  - (b) the initial Panel's reasons for decision
  - (c) the review application and
  - (d) the preliminary submissions and submissions and rebuttals of the parties in these review proceedings.
25. We have considered all the materials, but address specifically only those we consider necessary to explain our reasoning.

#### Initial Panel's conclusions and reasons

26. We agree with the conclusions of the initial Panel, and the reasons given for those conclusions, and adopt the initial Panel's reasons, subject to our comments below.

#### Association issues

27. Quantum submitted (among other things) that:
- (a) Lincoln and each of Ms Zhang, Mr Zhang and the Rejecting Shareholders
  - (b) Ms Zhang, APMI and Poly Mineral and
  - (c) the Rejecting Shareholders,
- are associates with respect to Lincoln, including due to the conduct of those parties with respect to the making of the Rejection Statement.
28. Quantum submitted (among other things) that these alleged associate relationships may constitute unacceptable circumstances because substantial holder notices had not been lodged disclosing the nature and extent of those relationships, thereby inhibiting:
- (a) the acquisition of Lincoln shares taking place in an efficient, competitive and informed market and
  - (b) shareholders and directors of Lincoln being given enough information to assess the merits of the Quantum Bid.
29. In paragraphs 57 to 63 of its reasons, the initial Panel discussed the difficulties an applicant faces in proving a relationship of association, noting despite concerns with the circumstances surrounding the making of the Rejection Statement 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*

## Takeovers Panel

### Reasons – Lincoln Minerals Limited 04R [2023] ATP 1

*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.”*

30. Quantum submitted (among other things) that it was in the public interest to make enquiries in relation to a potential association between shareholders collectively holding 52.28% of a listed entity’s issued share capital and that the initial enquiries the Panel made were insufficient *“resulting in a lost opportunity to elicit information which would have been central to a determination of the question of association. For instance, Quantum notes that no follow-up enquiries appear to have been made by the Panel in respect of APMI’s failure to respond to the Panel’s initial brief. Other than being a potential associate of other major shareholders of Lincoln, APMI is vicariously a 19.91% Lincoln shareholder, a sub-underwriter of the Entitlement Offer, a major lender/creditor of Lincoln, an entity controlled by a former Lincoln director of whom the current Lincoln chairman is a niece, and based on Quantum’s assessment, a related party of Lincoln.”*
31. We were concerned about the lack of response from APMI to the initial Panel’s brief and decided to seek further information from:
  - (a) ASIC - in relation to the status of its beneficial tracing notices investigations
  - (b) Ms Zhang – in relation to her relationships with APMI, Poly Mineral, Mr Zhang, the Rejecting Shareholders and Mr Saw
  - (c) Mr Saw – in relation to his relationships with Lincoln, Poan, Good Make and Regal Fortress, including through KST Partners
  - (d) Poan – in relation to its relationship with Lincoln, the Rejecting Shareholders and Mr Saw and
  - (e) Mr Zhang – in relation to his relationship with Lincoln, the Rejecting Shareholders and Ms Zhang.
32. The responses (to the extent they were provided) are discussed below.
33. ASIC submitted that its consideration of the beneficial tracing notice application and correspondence with the recipients was confidential under section 127 of the ASIC Act and therefore it was unable to provide us with any material information in relation to those investigations, noting that it expected to be able to provide us with further information *“in due course”*.
34. Lincoln responded to the questions addressed to Ms Zhang on her behalf, disclosing (among other things) certain familial and professional links between Ms Zhang, Mr Zhang and his related entities that were consistent with Lincoln’s previous disclosures.
35. As Lincoln made submissions on behalf of Ms Zhang, we considered it was appropriate<sup>7</sup> to request that Lincoln describe:
  - (a) the enquiries it made of Ms Zhang and explain why those enquiries were appropriate and

---

<sup>7</sup> in order to ensure compliance with Rule 22(2) of the *Takeovers Panel Procedural Rules 2020*



## Takeovers Panel

### Reasons – Lincoln Minerals Limited 04R [2023] ATP 1

- (b) how Lincoln satisfied itself that the submissions by Ms Zhang were true and correct.
36. In response, Lincoln provided a statement signed by Ms Zhang which highlighted a number of additional structural links between Ms Zhang and Mr Zhang's related entities that had not previously been disclosed to the initial Panel or us. In light of this, we decided to allow all parties the opportunity to make submissions on what inferences (if any) we should draw from the additional structural links, and whether the inferences supported a conclusion that unacceptable circumstances exist in relation to the affairs of Lincoln.
37. The additional structural links disclosed between Ms Zhang and Mr Zhang's related entities, when taken together with the earlier disclosed familial and professional links between Ms Zhang, Mr Zhang and his related entities<sup>8</sup>, suggest that there may be a relationship of association between them.
38. Quantum submitted that this, when taken together with other factors, also supported an inference that Lincoln and each of Ms Zhang, Mr Zhang and the Rejecting Shareholders are associates.
39. Ms Zhang is one of three Lincoln directors. The other two directors of Lincoln, Jason Foley (independent director) and Sam Barden (director and CEO) appear to have no connection with Ms Zhang, Mr Zhang or his related entities that would call into question their independence, or the independence of the Lincoln board as a whole, so as to infer a relationship of association between Lincoln and any of Ms Zhang, Mr Zhang or his related entities. Accordingly, in the absence of probative material, we did not accept Quantum's submission that Lincoln and each of Ms Zhang, Mr Zhang and the Rejecting Shareholders are associates.
40. In light of this, and noting that Ms Zhang holds no shareholding in Lincoln, we were satisfied that any relationship of association between Ms Zhang, Mr Zhang and his related entities did not impact in any way on either the Quantum Bid or the Rights Issue to such an extent that would amount to unacceptable circumstances in relation to Lincoln. Accordingly, we consider that we do not need to decide whether Ms Zhang and Mr Zhang are associates.
41. Noting the delayed disclosure of Ms Zhang's additional structural links to Mr Zhang's related entities, we sought clarification from Lincoln as to why this information had not previously been disclosed to the Panel. In essence, Lincoln submitted that it did not consider the additional structural links to be material in the context of the issues before the Panel. We were less than satisfied with this response, and it raised concerns as to what other information (if any) Lincoln had failed to disclose to the Panel on the grounds of selective materiality.
42. The delayed disclosure of the additional structural links between Ms Zhang and Mr Zhang's related entities required a further round of submissions and had a material impact on the timely resolution of these proceedings, and caused us to defer making our decision from mid-December 2022 to 4 January 2023. Accordingly, had we made

---

<sup>8</sup> see *Lincoln Minerals Limited 02 & 03* [2022] ATP 25 at [59]

## Takeovers Panel

### Reasons – Lincoln Minerals Limited 04R [2023] ATP 1

a declaration of unacceptable circumstances, we may have considered whether to make a costs order against Lincoln.

43. Unhelpfully, we received no response to the questions in the brief directed to Mr Zhang, Mr Saw or Poan and asked the parties what inferences (if any) we should draw from this.
44. Quantum submitted that we should infer that the non-responding parties are associates on the basis that:
  - (a) it would be unfavourable for them to disclose the requested information
  - (b) failure to respond constituted probative evidence that they were attempting to conceal undisclosed associations and
  - (c) they are acting in concert, or pursuant to a relevant agreement, in an attempt to conceal the undisclosed associations.
45. Lincoln submitted that:

*“As the Panel in Lincoln 02 & 03 correctly pointed out, there is insufficient material to draw any inferences. To date Quantum has not been able to provide probative evidence of association, neither has it convinced the Panel as to any association – what Quantum has submitted to date is pure speculation. In the absence of probative material suggesting actual association...it is not possible for the Panel to infer any such relationship exists. If anything, the absence of material suggesting any kind of association...is more likely to suggest the parties have had little real world connection or relationship with one another until these proceedings, which would contradict any inference of association. Lincoln submits that the parties were merely of a like mind concerning the [sic] Quantum’s bid and separately acted in the same manner, being to reject Quantum’s bid.”*
46. In support of its contention, Lincoln cited a number of earlier Panel decisions<sup>9</sup>. While Quantum sought to distinguish these authorities from the present matter, we agree with Lincoln’s submission that there was insufficient probative material before us to infer any relationship of association.
47. In particular, there was insufficient material for us to be able to draw any inferences from the failure of Mr Zhang, Mr Saw and Poan to respond to the brief.<sup>10</sup> We had serious concerns in respect of their failure to respond. We considered directing those parties to attend a conference<sup>11</sup> and issuing a summons to compel those parties to appear before us to give evidence (and potentially produce documents) under section 192 of the ASIC Act. However, given the lack of probative evidence submitted by the applicant to support the alleged associate relationships and the

---

<sup>9</sup> *BigAir Group Limited* [2008] ATP 12, *Mount Gibson Iron Limited* [2008] ATP 4, *Dragon Mining Limited* [2014] ATP 5, *Elders IXL Ltd v National Companies & Securities Commission* [1987] VR 1 and *Dromana Estate Limited* 01R [2006] ATP 8

<sup>10</sup> See *Jones v Dunkel* [1959] HCA 8, *Ross, in the matter of Print Mail Logistics (International) Pty Ltd (in liq) v Elias* [2021] FCA 419 at [56] to [63] and *Ross (Liquidator) in the matter of Print Mail Logistics (International) Pty Ltd (In Liq) v Elias* [2021] FCAFC 203 at [23]

<sup>11</sup> The Panel is empowered to hold a conference under Rule 23 of the *Takeovers Panel Procedural Rules 2020*

## Takeovers Panel

### Reasons - Lincoln Minerals Limited 04R [2023] ATP 1

commercial and legal imperative for Lincoln to undertake its Rights Issue, we did not consider that the circumstances warranted taking those further steps.

48. While we were also interested in the outcome of ASIC's investigations in connection with the beneficial ownership tracing notices issued by it under section 672A, in light of:
- (a) the commercial and legal imperative for Lincoln to undertake and finalise the Rights Issue
  - (b) the lack of probative evidence supporting the alleged associate relationships and
  - (c) uncertainty regarding the timing of the conclusion of ASIC's investigations and the disclosure of the findings to us,

we considered that it was not in the public interest to defer our decision, noting that if ASIC's investigations revealed probative evidence supporting Quantum's allegations, it would be open to Quantum or ASIC to make a further application to the Panel in due course.

#### Related party issues

49. Quantum submitted that APMI and Lincoln are related parties for the purposes of section 228 and Chapter 10 of the ASX Listing Rules due to APMI's relationship with Lincoln's Chair, Ms Zhang. Specifically, Quantum submitted that APMI is a related party of Lincoln by virtue of the fact that APMI is acting in concert with Ms Zhang on the understanding that she will receive a financial benefit if Lincoln gives APMI a financial benefit.
50. Quantum submitted that this may be inferred from a number of factors, including:
- (a) the extensive involvement of Mr Zhang and his relatives in the governance of Lincoln, including the regular coinciding of the appointment and resignation of his relatives from the board of Lincoln with a view to maintaining Lincoln board control and influence
  - (b) the close working relationship between Mr Zhang and Ms Zhang at APH Holding<sup>12</sup>, including Lincoln's board meetings being held at the offices of APH Holding
  - (c) Lincoln's chair having a casting vote<sup>13</sup>
  - (d) Ms Zhang not fulfilling her role as the chair and CFO of Lincoln, having purportedly not chaired a meeting and outsourced the CFO duties [REDACTED] since 4 October 2022 and
  - (e) the proposed underwriting of the Rights Issue by APMI, designed to further entrench Mr Zhang's control of Lincoln.

---

<sup>12</sup> Ms Zhang is the CFO of APH Holding

<sup>13</sup> Lincoln's chair is currently occupied by Ms Zhang, but has previously been occupied by Mr Zhang and other relatives of Mr Zhang

## Takeovers Panel

### Reasons – Lincoln Minerals Limited 04R [2023] ATP 1

51. We were not persuaded that these factors (some of which were not substantiated) demonstrated that APMI was acting in concert with Ms Zhang on the understanding that she would receive a financial benefit if Lincoln gave APMI a financial benefit so as to give rise to the alleged related party relationship.
52. In any event, given the Rights Issue was underwritten by Evolution and sub-underwritten by Jigsaw, both independent professional underwriters, we consider that APMI's participation in the sub-underwriting arrangements would be a commercial call for the underwriter to make, at its discretion, and therefore unlikely to substantiate Quantum's allegation that APMI was acting in concert with Ms Zhang.

#### Shareholder approval of frustrating action

53. The initial Panel considered that while *"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 action"*<sup>14</sup>. On that basis, we consider that approval by shareholders also mitigated against the Rights Issue being an unacceptable frustrating action."<sup>15</sup>
54. Quantum submitted (among other things) that the Shareholder Approval is invalid and should have no bearing on our conclusions on the grounds that it was given on an uninformed and misleading basis, including because at the time of voting Lincoln shareholders had been provided with inadequate disclosure of:
  - (a) the pathway to reinstatement of quotation of Lincoln's shares on ASX
  - (b) the status and conditions attached to Lincoln's exploration and mineral licences
  - (c) the alleged associate relationships and alleged related party relationships
  - (d) the control effects of the Rights Issue and
  - (e) the relative merits of the Quantum Bid as against the Rights Issue.
55. In support of its submissions, Quantum submitted that the initial Panel erred in its reliance on *Resource Pacific Holdings Limited* [2007] ATP 26 for the proposition that Lincoln shareholders had an opportunity to decide whether to proceed with the Rights Issue in the knowledge that it would amount to a triggering action. Specifically, Quantum submitted that in that decision, shareholders had the benefit of corrective disclosures a week before the shareholder vote whereas Lincoln shareholders did not have all relevant information at the time of the Shareholder Approval and would have been unduly influenced by:
  - (a) undervalue statements in the Target's Statement by the Lincoln board and
  - (b) the purported unqualified intention of the Rejecting Shareholders to reject the Quantum Bid in the Rejection Statement,

---

<sup>14</sup> *Resource Pacific Holdings Limited* [2007] ATP 26 at [23]

<sup>15</sup> *Lincoln Minerals Limited 02 & 03* [2022] ATP 25 at [48]

## Takeovers Panel

### Reasons – Lincoln Minerals Limited 04R [2023] ATP 1

each of which were not corrected until 29 November 2022 in the Second Supplementary Target's Statement.

56. Quantum submitted that with the benefit of the corrective disclosures, Lincoln shareholders may have formed a different view on the relative merits of the Quantum Bid as against the Rights Issue resulting in a different outcome.
57. Lincoln rejected Quantum's suggestion that its shareholders had inadequate disclosure, submitting that:
  - (a) the Notice of Meeting explicitly acknowledged that approval of the Rights Issue resolutions would constitute a prescribed occurrence under the Quantum Bid. This, coupled with the information set out in Quantum's bidder's statement (as supplemented), the Target's Statement and other operational updates issued by Lincoln prior to the 2021 AGM, reasonably enabled Lincoln shareholders to make an informed decision in relation to the Rights Issue with the knowledge it would trigger a defeating condition under the Quantum Bid and
  - (b) the corrective disclosures would not have had a material influence on Lincoln shareholders and the Shareholder Approval.
58. Further, Lincoln submitted that even if Lincoln shareholders had been given inadequate disclosure, this was irrelevant as the Rights Issue was not an unacceptable frustrating action that required shareholder approval on the grounds that:
  - (a) Quantum was aware of Lincoln's pressing need to raise funds at the time it launched the Quantum Bid
  - (b) Lincoln had a commercial and legal imperative to raise funds under the Rights Issue, that being, to achieve a reinstatement of trading in Lincoln's securities on ASX and to maintain the support of the South Australian Department for Energy and Mining in relation to one of Lincoln's material assets and
  - (c) the Quantum Bid did not give Lincoln shareholders a genuine opportunity to dispose of their shares on the basis that the 50.1% minimum acceptance condition could not be satisfied having regard to the Rejection Statement.
59. Additionally, Lincoln submitted that it is a mischaracterisation for Quantum to assert that Lincoln shareholders were being asked to decide between the Quantum Bid and the Rights Issue. Instead, the choice for Lincoln shareholders was to either:
  - (a) vote in favour of the Rights Issue to cement a pathway to reinstatement of Lincoln shares to quotation on ASX, at the risk that Quantum may abandon the Quantum Bid or
  - (b) vote against the Rights Issue, face permanent delisting of Lincoln's shares on the ASX and be left with a highly conditional bid in circumstances where Quantum had not informed the market whether or not it would waive the 50.1% minimum acceptance condition.
60. As noted by the initial Panel, paragraph 21 of the Panel's *Guidance Note 12: Frustrating Action*, states that "a frustrating action is unlikely to give rise to unacceptable circumstances where...the frustrating action is required to avoid a materially adverse

## Takeovers Panel

### Reasons – Lincoln Minerals Limited 04R [2023] ATP 1

*financial consequence, such as insolvency*". In *Perilya*<sup>16</sup>, 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.<sup>8</sup> 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<sup>9</sup>."

61. At the time of announcing the Rights Issue, Lincoln's securities had been suspended from quotation on ASX for more than two years. Unless it raised further capital, Lincoln was likely to be permanently delisted from ASX and would fail to satisfy the conditions of the South Australian Department for Energy and Mining which may result in cancellation of a material exploration licence.
62. Given this perilous position it found itself in, the Lincoln board effectively had two choices, either:
  - (a) proceed with the Rights Issue and trigger a defeating condition under the Quantum Bid to facilitate reinstatement to quotation of Lincoln's shares on ASX and satisfy a key requirement for the ongoing support of the South Australian Department for Energy and Mining in relation to key exploration licences or
  - (b) abandon the Rights Issue and face permanent delisting of Lincoln's shares on ASX and the loss of support of the South Australian Department for Energy and Mining and likely cancellation of key exploration licences to avoid triggering a defeating condition in the Quantum Bid.
63. Considering these options, the Lincoln board decided to proceed with the Rights Issue to avoid the near certain materially adverse financial consequence of doing otherwise. In these circumstances, we are reluctant to interfere with the commercial judgment of the Lincoln directors.

#### **APMI's participation in sub-underwriting arrangements**

64. The initial Panel was concerned with the potential control impact of APMI sub-underwriting the Rights Issue but considered this was not unacceptable (among other things) on the basis that the discretion of Evolution and Jigsaw to make commercial calls in relation to sub-underwriting arrangements was important to the success of Lincoln's shortfall dispersion strategy.
65. Quantum submitted (among other things) that the initial Panel erred in finding Evolution and Jigsaw's discretion to make *commercial calls* in relation to sub-underwriting arrangements supported an effective shortfall dispersion strategy because:
  - (a) APMI's sub-underwriting commitment and allocation was effectively pre-determined before Evolution and Jigsaw agreed to act as underwriter and sub-underwriter and

---

<sup>16</sup> *Perilya Limited 02* [2009] ATP 1 at [30]

## Takeovers Panel

### Reasons – Lincoln Minerals Limited 04R

[2023] ATP 1

- (b) Jigsaw's submission that "[i]n the event that APMI did not want to nor was able to sub-sub underwrite any of the [Rights Issue] shortfall, Jigsaw Consult was intending on working with the other sub-sub underwriters to place the shortfall elsewhere", suggests that APMI would be given the opportunity to take up its full sub-underwriting commitment and that only after this would Jigsaw consider dispersing the balance of shortfall shares to other sub-underwriters.

66. Lincoln submitted (among other things) that:

- (a) Quantum's submissions were speculative and inconsistent with the arm's length terms of Evolution's underwriting agreement with Lincoln under which Evolution may allocate shortfall shares as it saw fit and was not contractually bound to allocate any shortfall shares to APMI
- (b) Quantum's suggestion of ulterior and undisclosed arrangements between Lincoln, APMI, Evolution and Jigsaw was a malicious attempt to detract from the genuine efforts of Lincoln to mitigate the control effect of the Rights Issue by engaging independent professional underwriters and was at odds with the standards of behaviour that would be expected of Evolution and Jigsaw as independent professional underwriters
- (c) APMI's relevant interest in Lincoln may increase to a maximum of 27.6%, assuming its full-underwriting commitment was called upon, which was only a few percentage points higher than the relevant interest it would be entitled to creep to under item 9 of section 611 from its starting point at 19.91% and therefore did not have a significant impact on control and
- (d) like any underwriter (and particularly in the case of a small cap listed entity), Evolution had sought the support of the major shareholders in an effort to mitigate its underwriting risk.

67. We disagree with Lincoln's suggestion that an increase in a major shareholder's relevant interest from 19.91% to 27.6% is insignificant and does not have a sufficient impact on control to warrant a declaration of unacceptable circumstances being made, and consider that there may well be circumstances where an increase of this proportion would be unacceptable.

68. However, in the circumstances of this matter, we consider Lincoln took sufficient steps to mitigate the potential control effect of the Rights Issue such that the potential increase in APMI's relevant interest is not unacceptable.

69. In particular, we consider that Lincoln's:

- (a) establishment of a genuine shortfall facility whereby eligible shareholders could subscribe for and be allocated shares not taken up by other rights holders before being allocated to the underwriters and
- (b) appointment of Evolution as an independent professional underwriter, and Jigsaw as an independent professional sub-underwriter, each with the discretion to further sub-underwrite the Rights Issue,

to be key factors mitigating against a finding of unacceptable circumstances, consistent with the position adopted by the Panel in *Guidance Note 17: Rights issues*.

## Takeovers Panel

Reasons – Lincoln Minerals Limited 04R  
[2023] ATP 1

70. We consider it relevant that:
- (a) Evolution and Jigsaw did not appear to be contractually bound to allocate shortfall shares to APMI or otherwise to have fettered their discretion as underwriters of the Rights Issue in a way that would benefit APMI to the detriment of other Lincoln shareholders and
  - (b) it is entirely reasonable for Evolution and Jigsaw, as independent professional underwriters committed to fully underwriting the shortfall under the Rights Issue, to exercise their independent discretion to seek sub-underwriting commitments from third parties (including APMI) to mitigate their underwriting risk.
71. We consider Lincoln’s appointment of Evolution and Jigsaw as underwriter and sub-underwriter to the Rights Issue was a genuine step taken to mitigate the potential control effect of the Rights Issue and was not to facilitate any ulterior purpose to increase APMI’s control of Lincoln. This conclusion is consistent with our conclusions with respect to the independence of the Lincoln board set out in paragraph 39 above.
72. We also consider that the Shareholder Approval (which in effect also approved the sub-underwriting arrangements) mitigated against the sub-underwriting arrangements being unacceptable, despite the disclosure deficiencies identified by the initial Panel. Consistent with the views of the initial Panel, 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 Shareholder Approval resolutions.
73. In light of the foregoing, we consider that it is not in the public interest to interfere with the underwriting and sub-underwriting arrangements in this instance.

### DECISION

74. For the reasons above, we agree with the initial Panel’s decision and affirm that decision.
75. We make no orders, including as to costs.

**Paula Dwyer**  
**President of the sitting Panel**  
**Decision dated 4 January 2023**  
**Reasons given to parties 13 February 2023**  
**Reasons published 15 February 2023**



## Takeovers Panel

Reasons - Lincoln Minerals Limited 04R  
[2023] ATP 1

### Advisers

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