



Australian Government

Takeovers Panel

**Reasons for Decision
Yancoal Australia Limited
[2014] ATP 24**

Conference - rights issue - subordinated capital notes - control effect - creep - compulsory acquisition - declaration - orders - FIRB - interim order undertaking - dilution - standing - need for funds

Corporations Act 2001 (Cth) Part 6A.2, Chapter 2E, s260A, items 9 and 10 of s611, s657A, s657D, s657E, ASIC Regulations, Reg 35, 38, ASIC Act s194

Guidance Note 4: Remedies - general, Guidance Note 17: Rights issues, Guidance Note 19: Insider Participation in Control Transactions, ASIC RG 25 Takeovers: False and misleading statements

Celamin Holdings NL [2014] ATP 22, Wollongong Coal Limited [2014] ATP 21, Aspen Parks Property Fund 01 and 02 [2014] ATP 19, MacarthurCook Property Securities Fund 01 & 02 [2012] ATP 7, Real Estate Capital Partners USA Property Trust [2012] ATP 6, Gladstone Pacific Nickel Limited 02 [2011] ATP 16, Multiplex Prime Property Fund 03 [2009] ATP 22

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

INTRODUCTION

1. The Panel, Richard Hunt (sitting President), Jane Sheridan and Alison Watkins, made a declaration of unacceptable circumstances in relation to the affairs of Yancoal Australia Limited. The application concerned a pro-rata, renounceable rights offer of Subordinated Capital Notes. The Panel considered that the rights offer was (among other things) highly dilutive, enabled compulsory acquisition to occur more cheaply than would otherwise be the case and the steps taken to minimise the control effect were not sufficient. The Panel made orders restricting the ability of Yancoal’s major shareholder to convert the notes into ordinary shares without minority shareholder approval.

2. In these reasons, the following definitions apply.

- Applicants** Mr Nicholas Taylor and Senrigan
- Bank of China facilities** Yancoal’s US\$2.6 billion syndicated facility agreement with the Bank of China Limited, China Construction Bank Corporation and China Development Bank Corporation and Yancoal’s US\$140 million bilateral facility agreement with the Bank of China Limited
- FIRB** Foreign Investment Review Board
- IBC** the independent board committee of Yancoal, comprising Messrs Gregory Fletcher, Vincent O’Rourke AM, Geoff Raby and Huaqiao (Joe) Zhang

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Noble	Noble Group Limited
Portfolio	Portfolio Services Pty Ltd
SCNs	Subordinated Perpetual Convertible Unsecured Capital Notes offered by Yancoal SCN Ltd, a wholly owned subsidiary of Yancoal, under a prospectus dated 24 November 2014
Senrigan	Senrigan Capital Management Limited
Water Island	Water Island Capital LLC
Yancoal	Yancoal Australia Limited
Yanzhou	Yanzhou Coal Mining Company Limited

FACTS

3. Yancoal is an ASX listed company (ASX code: YAL). The company was formed by a series of acquisitions, including a merger in 2012 with Gloucester Coal Limited. Yancoal produces thermal and metallurgical coal from mines in Queensland and New South Wales.
4. Yanzhou, a Chinese incorporated company listed on the Hong Kong and Shanghai Stock Exchanges, has voting power in approximately 78% of Yancoal's shares. Yanzhou is 56.52% owned by Yankuang Group Corporation Limited, a Chinese state-owned corporation. Yanzhou obtained FIRB approval to hold its interest.
5. Noble has voting power in approximately 13.20% of Yancoal's shares. The remaining 8.80% of Yancoal's voting shares are held by minority shareholders.
6. Senrigan, one of the Applicants, has an economic interest in Yancoal shares through cash-settled equity swaps. The other applicant, Mr Taylor, is Senrigan's founder and chief investment officer. He holds Yancoal shares through a nominee. Since March 2013, the Applicants have been in discussions with Yancoal in relation to having Yanzhou buy out minority shareholders through some form of privatisation.
7. On 9 July 2013, Yancoal announced that it had received an indicative non-binding privatisation proposal from Yanzhou, under which Yanzhou would acquire by scheme of arrangement all the shares in Yancoal it did not own by offering 0.91 Yanzhou CDIs¹ for every Yancoal share, which represented an average offer price of A\$0.91 per share.
8. On 11 December 2013, Yancoal released an ASX announcement that the Commonwealth Treasurer had announced that he had removed "*certain foreign investment conditions placed on Yanzhou*", including a requirement for Yanzhou to reduce its ownership of Yancoal to less than 70%. The Treasurer's announcement

¹ CHESS Depository Interests

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stated that Yanzhou had made commitments to the Treasurer/FIRB, including that:

So long as Yanzhou continues to own at least 51 per cent of the shares of Yancoal, Yanzhou will ensure Yancoal continues to operate so that it remains solvent. In addition, Yanzhou will extend its existing loans to Yancoal if required...²

9. On 24 March 2014, Yancoal announced that Yanzhou had withdrawn its privatisation proposal.
10. At 30 June 2014, Yancoal had debt facilities in place including:
 - (a) approximately US\$2.6 billion under the Bank of China facilities
 - (b) approximately US\$140 million bilateral facility agreement with Bank of China (as part of the Bank of China facilities) and
 - (c) approximately US\$1.916 billion owing to Yanzhou,³ ranking *pari passu* with the Bank of China facilities.
11. The Bank of China facilities are subject to the covenants set out in paragraph 57.
12. Since about 29 May 2014, the Applicants have been aware that Yancoal's advisers were working on refinancing Yancoal. Several discussions and some correspondence followed and, on 21 October 2014, the Applicants wrote expressing concern to the independent directors of Yancoal about a proposal by Yancoal to refinance by undertaking a 10:1 rights issue. This letter was then sent to the full board on 23 October 2014.
13. On 27 October 2014, the solicitors for the independent directors informed the Applicants that the independent directors had been requested by the board of Yancoal to "*consider ways (within Yancoal's control) of improving Yancoal's debt to equity ratio*" and that no decision on any transaction had been made.
14. On 10 November 2014, Yancoal announced balance sheet strengthening and funding initiatives, including a pro-rata, renounceable rights offer of 2.32112 SCNs for every 100 Yancoal shares to raise up to approximately US\$2.3 billion. The SCNs are to be treated as equity for accounting purposes. Yancoal intends to apply US\$1.8 billion of the rights offer proceeds to repay existing senior debt owing to Yanzhou and use any remaining proceeds to part fund Yancoal's existing coal operations and future growth.
15. The rights offer is made by Yancoal SCN Limited, a wholly owned subsidiary of Yancoal. The rights offer is not underwritten.
16. Features of the SCNs include:

² we were provided with the FIRB undertaking which stated (among other things) that "*In the interest of further strengthening the capital structure of Yancoal and so as to ensure that Yancoal is on a financially more robust footing going forward, upon maturity of each of the Yanzhou Shareholder Loans (listed in the letter dated 15 November 2013), if Yancoal so requires, Yanzhou will offer to continue the same financing facility in favour of Yancoal on commercial terms.*"

³ including its subsidiaries

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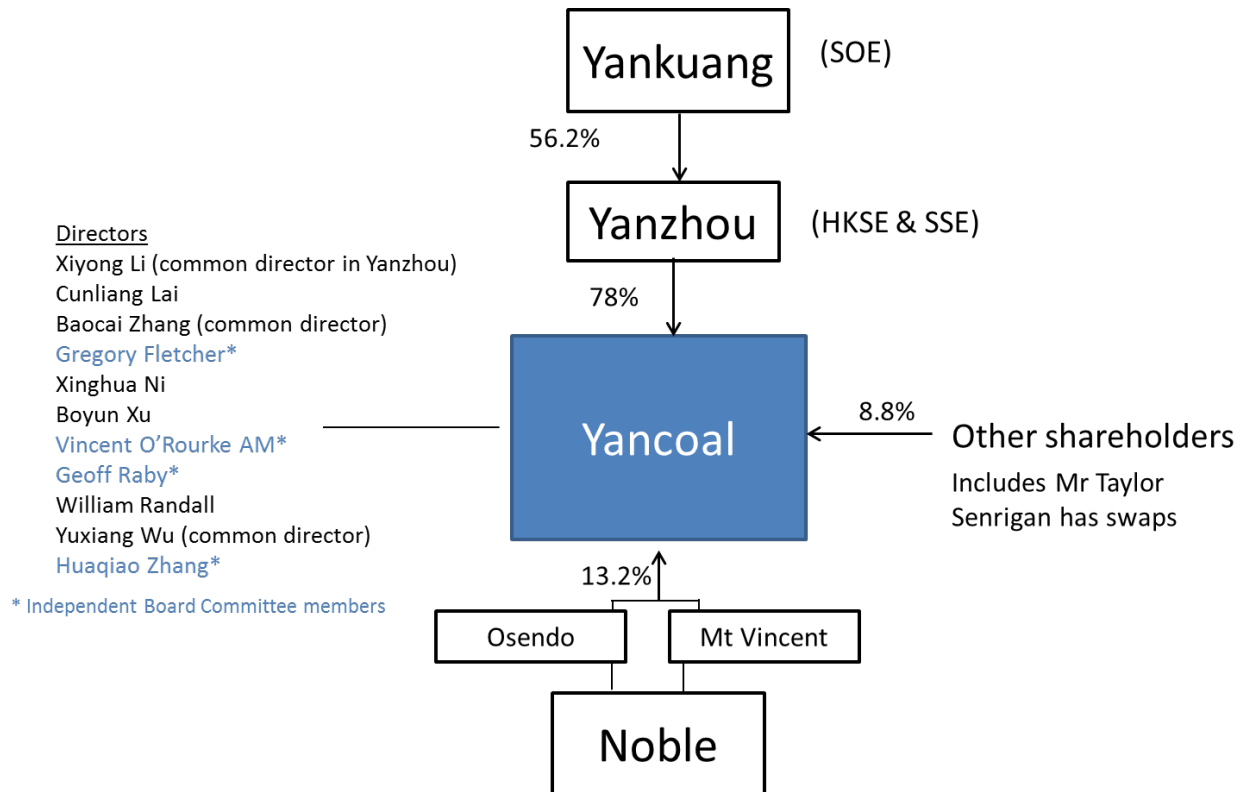
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- (a) The issue price is US\$100 per note.
 - (b) The SCNs are convertible into Yancoal shares at a conversion price of US\$0.10 per share, so each SCN is initially convertible into 1,000 Yancoal shares.
 - (c) The SCNs are perpetual. They do not have any fixed maturity date and do not have to be redeemed except on winding up of Yancoal or Yancoal SCN Limited.
 - (d) Distributions on the SCNs (initially 7% per annum) are perpetually deferrable, non-compounding and within the control of Yancoal's board.
 - (e) The SCNs have priority over Yancoal's ordinary shares, the intercompany loan between Yancoal SCN Limited and Yancoal (involving the lending of the proceeds of the rights offer to Yancoal) and an additional loan from Yanzhou (see paragraph 18(a) below). Otherwise the SCNs are subordinated.
 - (f) The SCNs are unsecured.
17. Yanzhou has committed to subscribe for its full entitlement of approximately US\$1.8 billion of SCNs. This commitment is dependent (among other things) on Yancoal committing to repay Yanzhou and its subsidiaries US\$1.8 billion in shareholder loans from the proceeds of the offering. The Chairman's letter in the rights offer prospectus states that:
- The issue of [SCNs], which will be treated as equity for balance sheet purposes, and repayment of US\$1.8 billion of the senior debt owing to Yanzhou, reduces Yancoal's gearing, addresses its financial covenant position with its senior lenders, including Bank of China, and establishes a more sustainable capital structure.*
18. As part of the arrangements established for the rights offer, Yanzhou has agreed to provide to Yancoal:
- (a) a subordinated committed funding facility of up to A\$1.4 billion, which ranks behind the SCNs and
 - (b) an additional committed funding facility of up to US\$807 million, which ranks equally with the SCNs for the purpose of paying distributions on the SCNs.
19. Also as part of the arrangements, subject to certain conditions, Bank of China and China Construction Bank agreed to extend the US\$2.6 billion syndicated facility for 3 years (where otherwise principal repayment requirements would have commenced in 2017), and to provide a waiver to extend the first test date for the interest cover ratio covenant to 30 June 2016 and to treat the SCNs as equity for the purpose of calculating each financial covenant.
20. On 12 November 2014, Yanzhou announced to Hong Kong Stock Exchange that the rights offer was "not an arrangement made for the purpose of the privatization of Yancoal...."

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21. If no other shareholders take up their rights, Yanzhou could acquire up to 98.8% of Yancoal by converting its SCNs into shares over time in reliance on item 9 of section 611 (the 3% creep rule).⁴
22. The relationship between the parties is shown in the following diagram.



APPLICATION

Declaration sought

23. By application dated 21 November 2014, the Applicants sought a declaration of unacceptable circumstances. They submitted (among other things) that:
- the rights offer was part of a strategy to avoid the need to obtain shareholder approval and enable Yanzhou to convert its SCNs into equity at depressed share prices “so as to permit the compulsory acquisition of minorities cheaply”
 - while the rights offer addressed some aspects of the Panel’s policy on rights issues (for example, the offer is renounceable and there is a shortfall facility which Yanzhou will not participate in), it did not mitigate the unacceptable control effect
 - the rights offer was not necessary given Yancoal’s debt was not yet due for repayment and the financial support Yanzhou had committed to provide by the undertakings to the Commonwealth Treasurer

⁴ All references are to the *Corporations Act 2001* (Cth)

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- (d) the Applicants (and possibly other minority shareholders) have been subject to coercion to sell out at prices not considered by the Applicants to represent fair value
 - (e) the proposed rights issue was a related party transaction that was not on “*arm’s length terms*” and
 - (f) there were questions as to whether the IBC had exercised its independent judgment in relation to the rights offer.
24. The Applicants submitted that the effect of the circumstances was that:
- (a) control of Yancoal, by acquisition of minority interests, will not take place in an efficient, competitive or informed market
 - (b) minority shareholders will not have a reasonable and equal opportunity to participate in any benefits accruing under the rights offer in that they need to make a significant cash investment whereas Yanzhou is refinancing existing debt and
 - (c) the rights offer was not an appropriate procedure to be followed as a preliminary step to compulsory acquisition.
25. They also submitted that the rights offer was generally contrary to the policy objectives of Chapter 6.

Interim order sought

26. The Applicants sought an interim order to the effect that no offers of the SCNs should be made until the conclusion of Panel proceedings.
27. The President declined to make an interim order because the rights offer was due to open on 2 December 2014, which gave us time to consider the application for interim orders as a sitting Panel.
28. On 28 November 2014, Yancoal undertook not to process applications under the rights offer until the earliest of 12 December 2014, an order from the Panel otherwise preventing processing and the determination of the proceedings (Annexure A). This was helpful.

Final orders sought

29. The Applicants sought final orders, including to the effect that:
- (a) the rights offer be made subject to shareholder approval (with Yanzhou excluded from voting)
 - (b) alternatively to (a), the rights offer be withdrawn and Yancoal be restrained from entering into any transaction or issuing convertible securities to a related party or its associates that might result in a person increasing their voting power from a starting point that is above 20% and below 90%, without prior shareholder approval (excluding related parties or associates).

DISCUSSION

Standing

30. Yancoal submitted in a preliminary submission that neither of the Applicants appeared to be Yancoal shareholders. Mr Taylor's name did not appear on Yancoal's register of members and Senrigan held cash-settled swaps. Therefore, it submitted, it was doubtful that either applicant had standing to make the application.
31. The Applicants submitted that Mr Taylor's shares were registered in the name of 'JP Morgan Nominees Australia' and held on trust for Mr Taylor.
32. Yancoal later submitted that *"Senrigan does not have standing to bring the application. Of course, this issue is now somewhat academic since holders of Yancoal shares have become parties"*.
33. We agree that the issue is academic in this case. We consider that at least Mr Taylor has standing to make the application. We note that the Panel recently acknowledged the width of the standing provisions.⁵

Decision to conduct proceedings

34. Yancoal, in its preliminary submission, submitted (among other things) that, absent the rights offer, Yancoal would breach its financial covenants under the Bank of China facilities and be in a position of default from 31 December 2014. In that instance, the Bank of China facilities could become immediately due and payable. Yancoal also submitted that the rights offer had *"been structured as a discounted pro rata renounceable rights issue, so as to give Yancoal shareholders a reasonable and equal opportunity to participate, and the SCN terms have been designed to be as attractive as possible to shareholders in the circumstances"*.
35. The IBC made a preliminary submission, which included a description of the process undertaken by the IBC to resolve Yancoal's financial difficulties which, they submitted, complied with Panel Guidance Note 19: Insider Participation in Control Transactions. It also submitted that the rights offer would *"improve Yancoal's financial position and prospects for further funding"*, that it must proceed or *"it is likely that Yancoal will breach two of [its financial covenants] on 31 December 2014"*, and that the timetable was extremely tight.
36. Portfolio,⁶ Water Island and Noble, all shareholders of Yancoal, became parties in these proceedings.
37. Portfolio made a preliminary submission to the effect that the Bank of China facilities were provided to Yancoal by Chinese state owned entities and should be considered as quasi equity.

⁵ *Celamin Holdings NL* [2014] ATP 22 at [27]. Cf *Aspen Parks Property Fund 01 and 02* [2014] ATP 19

⁶ as nominee for Third St Investments Pty Ltd, SES Rotges Investments Pty Ltd and Multi Consulting Pty Ltd

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38. Noble made a preliminary submission, submitting (among other things) that:
- (a) the SCNs will not be attractive to minority shareholders because “*distributions [under the SCNs] may be deferred in perpetuity at the sole discretion of the issuer...and will be non-compounding and not otherwise payable if deferred except as part of the redemption amount in a required redemption to the extent there are sufficient funds after making all other higher or equal ranking payments*” and
 - (b) the rights offer was inconsistent with the commitments given to FIRB, which have been repeated in Yancoal’s annual and half year reports.⁷ It submitted that the principles in ASIC’s Regulatory Guide 25 (regarding truth in takeovers) may apply to such statements.
39. We decided to conduct proceedings, recognising that timing was tight.

A conference

40. Given the complexity of the transaction, and time constraints, we decided to conduct a conference after issuing a brief and receiving submissions and rebuttals. The conference was held to clarify matters arising from the submissions and rebuttals and to otherwise inform ourselves on matters relating to the proceedings.⁸
41. We held the conference by telephone hook-up on 3 December 2014. We decided not to make a transcript.⁹ We decided to grant leave to the parties to be legally represented at the conference on the basis that only the lawyers named in the notice of appearance could attend and they would speak only if called upon.¹⁰ All the parties attended and/or were represented and everyone abided by the terms we set and cooperated in the inquiries we made. We appreciate their assistance.
42. We explored, primarily in questions directed to the chair of the IBC, issues around:
- (a) the context in which the SCNs were decided upon
 - (b) features of the SCNs that might give rise to unacceptable circumstances and
 - (c) the need for funding for Yancoal and this funding in particular.
43. This followed a brief in which we asked about:
- (a) what alternatives, and other forms of securities, were considered

⁷ Yancoal’s 2013 Annual Report stated that the directors of Yanzhou had “*provided a Letter of Financial Support to the Company effective from 31 December 2013*” undertaking (among other things) that “*unless revoked by giving not less than 12 months’ notice, it will provide ongoing financial support to the Company to enable it to pay its debts as and when they fall due*”. Yancoal’s Half-Year Financial Report for the half-year ended 30 June 2014 stated (among other things) that the directors of Yanzhou confirmed, as at 6 August 2014, the 31 December 2013 letter of financial support to Yancoal was still valid

⁸ see regulation 35 of the ASIC Regulations

⁹ ASIC Regulation 38(3)

¹⁰ ASIC Act s194

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- (b) whether there are any characteristics of the SCNs which made them more attractive to Yanzhou than other potential investors and
 - (c) the need for funds.
44. The conference assisted us to establish the facts and truncated the time it might otherwise have taken to come to a conclusion.

Potential control effect of the rights offer

45. Yancoal in its preliminary submission submitted that the rights offer will not have any effect on the control, or potential control, of Yancoal, in part because any future increases in Yanzhou's voting power would be limited by the 3% creep rule (rather than an immediate increase in voting power as would have been the case had ordinary shares been offered). Yancoal noted that Yanzhou already had control.
46. Water Island and the Applicants submitted that, if no other investors subscribed, Yanzhou could increase its voting power to 90% in approximately 19 months utilising 'creep' then proceed to compulsory acquisition. Both parties also submitted that the SCNs were not attractive to other investors, with Water Island noting that its mandate prevented it subscribing anyway.
47. Noble submitted that the ability of Yanzhou to reach 90% was "*an outcome it can achieve of its own volition using a 'bank' of convertible securities which are already held by it*". Noble also submitted that "*the price at which Yanzhou is able to increase its control is fixed at the conversion price of US\$0.10, regardless of any subsequent increase in the market price of Yancoal shares and is likely to be significantly less than the price Yanzhou would otherwise have to pay to increase its control, including by way of on-market purchases, which would be expected to push up the prevailing Yancoal share price.*"
48. Similar submissions were made by the Applicants and Portfolio. The Applicants also submitted that 'banking of creep' was not consistent with the principle underpinning the exception, namely limiting the speed with which controlling interests can be acquired.
49. The IBC submitted that the SCNs were not designed to discourage take-up by minority shareholders, were intended as the most advantageous option for Yancoal to address its funding problems and that the minority shareholders had the protection of Chapter 6A.
50. Yancoal submitted that:
- If a company undertook a rights issue merely with the intention of it being used to deliver a majority (or even just a substantial) shareholder into a position of being able to exercise compulsory acquisition rights (whether through the subsequent use of the 3% creep rule or otherwise), then it is reasonable to expect that the Panel would find that rights issue to be unacceptable. This is clearly not the situation here.*
51. Yanzhou submitted that the issue of the SCNs did not have any control effect or likely control effect. It submitted that such effect arose only if Yanzhou chose to convert the SCNs, which had not yet occurred. It also submitted that it "*does not have an intention to privatize Yancoal*".

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52. We do not think that intention is the test. It is effect. We take from Yanzhou's submission only that it does not intend at present to privatise Yancoal. We do not think Yanzhou intended to promise never to do so. In our view, the Panel's policy in Guidance Note 17 may apply to an offering that enables a shareholder to utilise creep in this way. This accords with ASIC and the minority shareholders' submissions and we agree that this is the approach we should take.
53. ASIC submitted that it is relevant for the Panel "*to consider the control outworkings of a potential transaction*" and not just focus on one feature or possible effect of a rights issue. Thus, it submitted it is appropriate for the Panel to look at how the creep provisions may be used in this situation. We agree.
54. We are satisfied that the SCNs have a control effect, or potential control effect, on Yancoal. ASIC, at the conference, said that the alternatives available and the steps taken to mitigate control are important. We agree with this as well.

Need for funds

55. Guidance Note 17 states that, in considering whether a rights issue gives rise to unacceptable circumstances, the Panel will "*look at the company's financial situation, the amount sought to be raised and the suitability of raising capital by the rights issue*".¹¹
56. Much was made of this aspect of the rights offer in the submissions and at the conference and we agree with the importance of it to Yancoal's situation.
57. Yancoal has, since its merger with Gloucester Coal in 2012, been a highly geared company. The rights offer prospectus disclosed the following financial covenants under the Bank of China facilities and the first date when those covenants are tested:
- (a) an interest cover ratio¹² of no less than 1.15 on 30 June 2015¹³
 - (b) a consolidated net worth of no less than \$A1.6 billion after adjusting for certain unrealised foreign exchange impacts, on 31 December 2014 and
 - (c) a gearing ratio¹⁴ of no more than 0.80 on 31 December 2014.
58. Yancoal submitted that, absent the rights offer, it would fail the consolidated net worth and gearing ratio covenants on 31 December 2014. It submitted that a total of A\$4.9 billion of senior debt fell due before 2020 and its operations were not expected to generate sufficient cash to repay this debt within that timeframe. Yancoal also submitted that its modelling indicated that, even if the rights offer raised the maximum subscription of \$2.3077 billion, "*significant further funding will*

¹¹ Guidance Note 17: Rights issues at [7]

¹² calculated as EBITDA for the 12 month period divided by interest expense for the 12 month period

¹³ this covenant also applied for the 12 month periods ending 30 June 2014 and 31 December 2014 but was waived for both periods by the Bank of China Limited in May 2014

¹⁴ calculated as the consolidated net indebtedness of Yancoal and its subsidiaries, after adjusting for certain unrealised foreign exchange impacts, divided by the consolidated net worth of Yancoal and its subsidiaries

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be required to fund its operations and capital expenditure over the period to end 2018, which Yanzhou has agreed to provide”.

59. In October 2014, Yancoal obtained waivers from Bank of China in relation to the consolidated net worth and gearing ratio covenants conditional on the rights offer proceeding.¹⁵
60. At the conference the chair of the IBC stated that, in May 2014, Yancoal’s projected cash flow shortfall for 2014-2018 was A\$600 million. As a result of the decline in the price of coal, by August 2014 this projected shortfall had increased to A\$1.8 billion.¹⁶ In his view this added urgency to the task of addressing the capital structure of Yancoal. He stated that he recognized that there may not be support from all the minorities for the transaction but there was a cash hole to fill.
61. The minority shareholders made a number of submissions questioning the urgency of the need for funds. The Applicants submitted that it was extremely unlikely that Bank of China would call an event of default as a result of a covenant breach, because Yanzhou was effectively a Chinese state owned entity. Yanzhou and Yancoal submitted in response that this was not the case; Yanzhou was a listed entity partly owned by a Chinese state owned entity. We approached the relationship between Yancoal, Yanzhou and the Bank of China on the basis that it was an arm’s length banking relationship.
62. The Applicants further submitted that, even if Bank of China did call an event of default, Yancoal was covered by Yanzhou providing a guarantee for the Bank of China facilities and by statements of support Yanzhou had provided to FIRB and Yancoal. We consider that Yanzhou’s guarantee for the Bank of China facilities only provides limited comfort. The existence of a guarantee may be a factor a lender takes into account in calling an event of default, but does not ensure that the event of default will not be called. At the conference the chair of the IBC stated that he felt it was responsible to formalise the position and not gamble the company every six months on Bank of China’s forbearance.
63. Noble submitted that there were other ways in which Yanzhou could have provided financial support to Yancoal and further submitted *“It is not an appropriate response to the suggested issues regarding financial covenants to propose a transaction the central feature of which contains characteristics which are unacceptable to all interested parties other than Yanzhou.”* It submitted that Yancoal had been designed to be highly geared from the outset. At the conference it stated that when Yancoal was established with a low capital base that was seen as helping the company grow, and the debt would be continued.

¹⁵ And an extension of the first test date for the interest cover ratio covenant, and a 3 year extension of the US\$2.6 billion syndicated facility, as outlined in paragraph 19

¹⁶ a Goldman Sachs paper provided by Yancoal repeated a question from the IBC, which suggested that the figure by October 2014 was A\$2.1 billion

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64. The chair of the IBC stated at the conference that he derived little comfort from the undertakings to FIRB, because the Treasurer could agree to release Yanzhou from those undertakings at any time. We accept his position on this. However, Yanzhou has provided comfort directly to Yancoal:
- (a) On 14 February 2014, it provided Yancoal with an executed funding support letter undertaking that it would provide A\$300 million for the 2014 calendar year and ongoing financial support to Yancoal to enable it to pay its debts as and when they fall due unless revoked by giving not less than 12 months' notice.
 - (b) On 30 September 2014 and 21 October 2014, it provided Yancoal further letters of support. These were conditional on the rights offer proceeding. The 21 October 2014 support letter states (among other things) that for as long as Yanzhou owns at least 51% of Yancoal, Yanzhou will ensure that Yancoal continues to operate so that it remains solvent unless the letter is revoked by giving not less than 24 months' notice.
65. At the conference, the chair of the IBC stated that the 21 October letter of support provided him with additional comfort in relation to the solvency of Yancoal, given that the notice period was longer and it referred to "solvency" which struck him as a better guarantee than "paying debts as and when they fall due", especially in the context of a potential event of default and Yancoal's ongoing capex requirements. It is not clear to us what the difference is, at least as a matter of law.
66. What is clear is that the February 2014 support letter would be replaced by the later support letters once the conditions relating to the rights offer were met, and that this was considered desirable. In any event, the February 2014 support letter requires Yanzhou to give 12 months' notice. While 24 months' notice provides more comfort than 12, notice has not been given and we think there would be sufficient time if it were given to make arrangements like further fundraising.
67. Yancoal submitted that reliance on the February 2014 support letter "*is unsustainable, in light of that letter being an interim measure, given in the context where Yancoal was working to address its capital structure from the end of 2013, to allow time for that to occur. It is a 'bootstraps' argument to treat that letter as a long-term solution to Yancoal's financial difficulties*".
68. The IBC submitted that it:
- ...has never been of the view that the February 2014 letter of support permitted it to simply do nothing. That letter of support is not a solvency guarantee, and it can be withdrawn on 12 months notice. The IBC does not consider that letter of support, of itself, enables it or Yancoal to commit to capex and other initiatives over the medium term. Such commitments and initiatives require balance sheet rectification.*
69. We accept that Yancoal needs further capital. However need for funds is not a safe harbour.¹⁷ The urgency of the need for funds here is less clear than in other rights

¹⁷ Guidance Note 17: Rights issues at [8], *Real Estate Capital Partners USA Property Trust* [2012] ATP 6 at [30]

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issues when the Panel has allowed a highly dilutive rights issue with a control effect to proceed.¹⁸ The February 2014 support letter continues to operate. In addition, it is not clear to us that the Bank of China has ruled out a waiver of covenant breaches in the event that the rights offer does not proceed. In Yancoal's October 2014 waiver request to the Bank of China, it stated that:

As discussed with you, there can be no guarantee that the Offer will occur and the Hybrid Bonds will be issued. If the Hybrid Bonds are not issued, we expect that additional waivers will be required next year under the SFA in connection with the gearing, ICR and net worth covenants.

It is our preference to obtain a waiver from the Agent (acting on the instructions of the Majority Lenders) at the same time as the waivers to this letter, to cover the situation where the Hybrid Bonds do not get issued.

However we understand from our meeting with you on 5 August 2014 that Bank of China Limited does not wish to consider such a request at this stage. Accordingly, if the Hybrid Bonds are not issued, we note for completeness that we may need to contact you again to seek additional waivers.

Consideration of alternatives

70. At the conference, the chair of the IBC stated that in May 2014 Yancoal's board considered, on advice from Goldman Sachs, four possible initiatives to deal with Yancoal's need for further capital:
 - (a) a rights issue of ordinary shares
 - (b) asset divestments
 - (c) commodity linked solutions (involving pre-selling a portion of future coal production) and
 - (d) the SCNs.
71. He also stated that the option recommended by Goldman Sachs was SCNs. At that stage, the IBC had not been formed.
72. In July 2014 it was decided to form the IBC and Minter Ellison and Deloitte were appointed to advise it. By August 2014, it was clear that Yancoal's projected cash flow for 2014-2018 had deteriorated. At the conference the chair of the IBC stated that the IBC was tasked to look at other alternatives and had considered 11 in all. The IBC provided us with a Deloitte presentation dated 28 October 2014 addressing these alternatives.
73. The SCN option was considered by the IBC to be the best option available to meet Yancoal's objectives.
74. At the conference the chair of the IBC also stated that it was evident to the IBC that Yanzhou did not want to privatise Yancoal.

¹⁸ For example in *Multiplex Prime Property Fund 03* [2009] ATP 22, there was a clear statement from the financiers that covenant breaches would not be waived (at [5]) and minority unitholders had "the risk of an accelerated call hanging over their heads" (at [47]). The Panel in that matter stated that in other circumstances "a massively dilutive rights issue such as this may not be acceptable"

75. We were provided with a number of the presentations that Goldman Sachs and Deloitte had made to Yancoal and the IBC. In the analysis of some of the alternatives, including an equity placement, the issue of participatory notes (which would offer an equity upside but no control effect) and privatisation, it was noted that Yanzhou approval was not likely to be forthcoming. We also received from the IBC an 'IBC Chairman's script', which appears to be a presentation from the chair of the IBC to the Yancoal board. The presentation states:

For completeness, I should note Yanzhou has informed the IBC that it would not have participated in any other deal.

76. Perhaps Yanzhou did not want to privatise Yanzhou, at least for the time being.¹⁹ But we are satisfied that Yanzhou was not genuinely open to other possible ways to remedy the funding needs of Yancoal. We infer from the above that the alternatives available to Yancoal were limited by what would be accepted by Yanzhou in such a way as to limit the ability of Yancoal to address its need for funds otherwise than by the rights offer of SCNs.

Structure of the rights offer

77. Guidance Note 17 provides that:

Structural matters (such as price, number of shares offered, renounceability, underwriting) cannot be considered in isolation from each other and the market conditions at the time of the rights issue. The Panel will look at the structure of the rights issue as a whole, and the market, in deciding whether the rights issue gives rise to unacceptable circumstances.

78. There are some aspects of the rights offer that are designed to mitigate any potential control effect. The rights offer is renounceable. Shareholders (other than Yanzhou) can apply for shortfall.²⁰ Any remaining shortfall will also be offered to external investors. Deutsche Bank was appointed as an arranger to find external investors. However, there are other aspects of the rights offer which limit the ability of the control effect of the rights offer to be mitigated satisfactorily.
79. Taking into account the issue price and conversion price of the SCNs, the rights offer is similar in effect to a 23 for 1 rights issue of ordinary shares and is highly dilutive. The rights offer was originally designed to be less dilutive (approximately 11 to 1), but the ratio was altered to 23 to 1 at the request of Deutsche Bank to enhance marketability.
80. The Applicants submitted that a minority shareholder would have to pay over 19.3 times the current value of its investment in Yancoal to take up its full pro-rata entitlement under the rights offer to avoid dilution. Noble, Water Island and Portfolio made similar submissions. The dilutive effect of a rights issue is one of the factors the Panel takes into account in determining whether a rights issue is unacceptable. On its face, the rights offer is more dilutive than the unacceptable

¹⁹ Yancoal submitted that Yanzhou's earlier privatisation proposal in July 2013 had been "pursued with a view to satisfying (although at the holding company Yanzhou level) FIRB's then sell down requirements in relation to Yancoal, by issuing shares in Yanzhou to Yancoal shareholders in consideration for their shares and listing CDI's over those Yanzhou shares on ASX, with Yanzhou then being less than 70% owned by an SOE entity"

²⁰ and if necessary be allocated shortfall on a pro rata basis

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rights issue in *Gladstone Pacific Nickel Limited 02*,²¹ which was a 1 for 11 rights issue and minority investors needed to invest an amount almost 4 times the last available market price of the shares.

81. ASIC also submitted that shareholders other than Yanzhou would be unlikely to take up their rights because they would be required to pay around 19.3 times the current value of their investment (based on submissions by the Applicants). In contrast, it submitted, Yanzhou would not be required to invest any new funds as a result of its participation in the offer.
82. Yancoal submitted that the reference to '19.3 times' was misleading because a substantial amount of cash was returned to shareholders in the form of capital returns and special dividends as part of the Yancoal/Gloucester Coal merger in 2012 and, because the shares are thinly traded, Yancoal's current share price was not "*necessarily a reliable indicator of the 'value' of its shares*".
83. We do not accept Yancoal's argument. In deciding whether to invest in a rights issue, the current market price of the issuer is more relevant than capital returns and special dividends that occurred two years ago. In respect of the value of Yancoal's shares, we agree with Noble's and the Applicants' submission that the dilutive nature of the rights offer was reflected in the decrease in the Yancoal share price "*following the announcement of the SCN Offer on Monday 10 November 2014*". However we do accept that any rights issue to raise US\$2.3 billion would have been highly dilutive, given Yancoal's market capitalisation of A\$220 million.
84. There are features of the securities themselves that limit the ability of the control effect of the rights offer to be mitigated satisfactorily.
85. The Applicants and Noble submitted that the SCNs were unattractive to minority shareholders because the distributions were perpetually deferrable, non-compounding and within the control of Yancoal's board which has a majority of Yanzhou appointed nominees.
86. ASIC submitted that the coupon rate for the SCNs was low for a company in Yancoal's financial position and there was uncertainty of distributions, the SCNs were likely to be illiquid, and there was a relatively high risk of compulsory acquisition. This was reflected in the advice received by the IBC from Deloitte and Goldman Sachs.
87. Yancoal submitted that the SCNs were a more attractive investment than ordinary shares for the following reasons, among others:
 - (a) while the coupon is deferrable,²² SCN holders could receive their 7% payment²³ as opposed to holders of ordinary shares who could not receive dividends when Yancoal was making losses. It acknowledged that the rate was low but submitted that it was all that Yancoal could afford. In addition,

²¹ [2011] ATP 16, at [20]

²² this is a requirement for the SCNs to constitute accounting equity

²³ in addition there is a 2.5% distribution rate step-up if the SCNs remain on issue at year 10 (and a further 5% step-up after a change of control)

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any redemption or resale must be at an amount which includes any SCN distributions that are in arrears

- (b) Yanzhou has provided up to US\$807 million of financial support to enable payment of distributions on the SCNs over the first 5 years
 - (c) subject to exceptions, there are provisions that restrict Yancoal's ability to pay dividends on ordinary shares if the SCN distributions have been deferred and that operate to prevent interest payments on Yanzhou's subordinated debt if SCN distributions have not been paid (described as distribution 'pusher' and 'stopper' clauses)
 - (d) it is a term of the SCNs that any future lending by, or support by, Yanzhou must be junior to the SCNs, subject to certain limited exceptions and
 - (e) Yanzhou was committed not to exercise its compulsory acquisition powers, should it have such powers, during the first 5 years in a way which would result in holders receiving less than the higher of the notional redemption amount for their SCNs and a 'make whole' amount.
88. Yanzhou also submitted that the SCN offer was more attractive to minority shareholders than a rights issue of ordinary shares.
89. ASIC submitted that Yancoal's reasons tended "*to advance form over substance*". It submitted that "*the fact that the SCNs rank senior to Yanzhou's financial support is likely to be 'cold comfort' to investors given the extent of other debt ranking senior to the SCNs*". It also submitted that "*the fact that there are distribution 'pusher' and 'stopper' clauses is not effective unless other investors expect Yancoal to pay dividends*".
90. In response to a question in the brief about whether the SCNs were attractive securities, each of the minority shareholder parties to the application and the Applicants submitted that the SCNs were not attractive securities. However, at the conference they were more equivocal in answer to a question about whether the SCNs were more attractive than ordinary shares. Only one said they would 'look at' any rights offer of ordinary shares. Clearly they are concerned about dilution, but dilution might be an unavoidable consequence of the financial position the company finds itself in. Here, though, we are not concerned about a rights issue of ordinary shares. We must consider the SCNs. We also do not accept that the only choices before Yancoal were a rights issue of ordinary shares and the rights offer of SCNs.
91. In providing advice in relation to the SCNs, both Yancoal's and the IBC's advisers expressed concerns about the attractiveness to minority shareholders of the SCNs as designed by Goldman Sachs. While Goldman Sachs provided advice to Yancoal in relation to the SCNs, it declined an invitation to underwrite or act as lead manager or agent. One of the reasons it gave was that "*the Notes offering may not be viewed by some shareholders of [Yancoal] as a beneficial investment for them*". The chair of the IBC stated in the conference that UBS had declined an approach to act as the arranger for the rights offer. The IBC's financial adviser, Deloitte, had told the IBC that factors "*such as a relatively low distribution rate, expected illiquidity and uncertainty as to the underlying value of [Yancoal] may lead to limited demand for the SCNs*".

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92. Deutsche Bank agreed to undertake the role as arranger of the rights offer after suggesting some changes to the terms of the SCNs. One of those changes was to change the conversion strike price of the SCNs from a 10% premium to a 50% discount to the current Yancoal share price (from approximately A\$0.24 to US\$0.10 or about A\$0.12). The chair of the IBC stated at the conference that, as arranger, Deutsche Bank would be paid a success fee for raising US\$500 million more than would be raised simply by Yanzhou taking up its entitlement. He regarded this as very important and, based on the advice by Deutsche Bank, felt confident that it would be raised (compared to the SCN terms as designed by Goldman Sachs).
93. This would help mitigate any control effect of the rights offer.
94. We asked a representative of Deutsche Bank how confident he was that Yancoal could raise the additional US\$500 million. He stated at the conference that Deutsche Bank was more confident to raise the money with SCNs than with ordinary shares in a distressed company. This was because the instrument was better than shares in that (a) while there was no guarantee, there was a higher prospect of distributions, (b) Yanzhou's A\$1.4 billion in further funding ranked behind the SCNs and (c) while there was no guarantee of liquidity, there was a prospect of resale. He suggested that the protections made the SCNs more investable, but he could not guarantee that they would be attractive; and noted that if none of the minorities invested it would be hard to sell them.
95. We consider that the SCNs are a complex security requiring a significant capital contribution, which makes them unattractive to Yancoal shareholders other than Yanzhou. In theory, the SCNs may be more attractive than ordinary shares. This was the view of Goldman Sachs, Deutsche Bank and Deloitte. However, in practice we accept ASIC's submission that the SCNs are unattractive for the reasons it gives. In addition, one shareholder specifically stated it was excluded from participation in the rights offer because its mandate did not allow it to invest in securities like the SCNs.
96. We also consider that the steps taken to minimise the control effect of the rights offer were not sufficient.²⁴ The discounted conversion price was not likely to assist in making the SCNs more marketable (which we were told it was intended to do – Deutsche Bank required the change in the conversion price as a condition to its appointment as arranger of the issue). Indeed, the discounted conversion price exacerbates the control effect because Yanzhou is able to reach the compulsory acquisition threshold by relying on the creep exception at a greater discount to the price of the shares before the rights offer was announced.

²⁴ if no other shareholders take up their rights, Yanzhou could acquire up to 98.8% of Yancoal by converting its SCNs into shares over time in reliance on item 9 of section 611 based on a US\$0.10 conversion price. It would have been 96.9% based on a conversion price of US\$0.30 (representing a premium to the then share price). The conversion price would have to exceed US\$1.50 to ensure that Yanzhou would remain below 90% on conversion of the SCNs

Equality of benefits

97. The Applicants and Noble submitted that Yancoal and Yanzhou had agreed that Yanzhou would subscribe to the SCNs by setting off their loans, a benefit not given to other investors.
98. Yancoal submitted that *“it is disingenuous to suggest that Yanzhou, unlike other shareholders, is in some way not being asked to contribute because the Offer’s proceeds are being used to retire its debt – its immediate net cashflows are only different because it (unlike other shareholders) has already provided the relevant cash”*.
99. Yancoal also submitted that *“Yanzhou will effectively exchange its senior debt (ranking equally with bank debt) for subordinated SCNs and will, in addition, extend a further up to A\$2.349 billion in subordinated funding to support the Offer, for the benefit of Yancoal (including the Minorities).”*
100. The Panel has considered rights issues in the past where a majority shareholder subscribed through a set off of their loans to the issuer, the most recent of which was *Wollongong Coal Limited*.²⁵ In isolation, we would not be concerned about this aspect of the rights offer. There may be features of debt to equity conversion that makes a particular proposal unacceptable, but as a general proposition we accept Yancoal’s submission that Yanzhou is providing further funds to Yancoal. However, this cannot be looked at in isolation.
101. ASIC, the Applicants and Portfolio each submitted that the rights offer also provides Yanzhou with the ability to use the creep exception to obtain over 90% of the voting shares in Yancoal and compulsorily acquire minority shareholders under Part 6A.2.
102. The Applicants submitted in the application that the rights offer *“has been designed so as to enable Yanzhou to, over time, obtain more than 90% ownership of Yancoal and proceed to compulsorily acquire [the minority] at depressed prices.”* The IBC submitted that was not the intention.
103. Portfolio submitted that Yanzhou *“will be entitled to acquire an interest in more than 90% of the shares of Yancoal (on conversion of the SCNs) and at a significant discount to the price immediately before the announcement of the offer for the SCNs was made”*. Noble made a similar point in submissions. We agree and consider that the holders of the ordinary shares in Yancoal to whom the SCNs are being offered, other than Yanzhou, do not have a reasonable and equal opportunity to participate in any benefits accruing to Yanzhou as a person who would acquire a substantial interest in Yancoal.

Other matters

104. The Applicants submitted that the rights offer was a related party transaction that required shareholder approval under Chapter 2E and was a control transaction which was in breach of s260A (which limits the ability of companies to assist financially persons acquiring their shares). ASIC submitted that the Panel is an appropriate forum to consider a benefit to a related party which includes

²⁵ [2014] ATP 21 at [26]

significant control related aspects, whether or not the benefit is a breach of Chapter 2E.

105. The Panel has previously suggested that it might be prepared to consider Chapter 2E issues in more detail in the context of a rights issue.²⁶ However, given the conclusions we have reached on the rights offer, we do not consider we need to deal with Chapter 2E or s260A issues here.
106. Noble submitted that the principles discussed in ASIC's Regulatory Guide 25 (relating to 'truth in takeovers') may apply to Yanzhou's commitments to the Treasurer/FIRB and Yancoal. The Applicants' and other minority shareholders supported this submission. ASIC submitted that the assurances given by Yanzhou were not directly made in relation to a control transaction and that it "*would be a significant extension for RG 25 to have application to statements made by bidders (or scheme proponents) that are about their economic commitment to the target*". We consider that we do not need to consider this issue further.

DECISION

Declaration

107. It appears to us that the circumstances are unacceptable having regard to:
- (a) the effect the circumstances are having, will have or are likely to have on the control, or potential control, of Yancoal and
 - (b) the purposes of Chapter 6 set out in section 602 of the Act.
108. Accordingly, we made the declaration set out in Annexure B and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

Orders

109. Following the declaration, we made the final orders set out in Annexure C. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'²⁷ if 4 tests are met:
- (a) It has made a declaration under s657A. This was done on 12 December 2014.
 - (b) It must not make an order if it is satisfied that the order would unfairly prejudice any person. For the reasons below, we are satisfied that our orders do not unfairly prejudice any person.
 - (c) It gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 9 December 2014. We suggested two alternative potential orders: (i) that any issue of the SCNs under the rights offer may only proceed with the approval of Yancoal shareholders, excluding Yanzhou and its associates or (ii) that any

²⁶ *MacarthurCook Property Securities Fund 01 & 02* [2012] ATP 7 at fn 26

²⁷ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

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conversion of SCNs by Yanzhou and its associates which would result in an increase in Yanzhou's voting power in Yancoal may only proceed with the approval of Yancoal shareholders, excluding Yanzhou and its associates.

The Applicants and the minority shareholders other than Water Island submitted that the first order was more appropriate. Water Island submitted that the second order was more appropriate given Yancoal's need for funds. ASIC submitted that either order would remedy the unacceptable circumstances. Yancoal, IBC and Yanzhou submitted that neither order was appropriate but suggested an alternative order that Yanzhou not be able to convert its SCNs for two years in the absence of minority shareholder approval.

We have made an order that any conversion of the SCNs by Yanzhou and its associates may only proceed with the approval of Yancoal shareholders, excluding Yanzhou and its associates. Yanzhou may convert its SCNs to maintain its existing 78% voting power without shareholder approval. To the extent that circumstances change (for example Yanzhou acquires Yancoal shares on market), it could apply for a variation of the order, which would be assessed in light of all the circumstances prevailing at the time.

This order remedies the unacceptable circumstances sufficiently in our view, although it does not address all the features complained of. In making it, we have taken into account the company's need for funds and the fact that an offering of ordinary shares would also be dilutive. We note the timing imperative for Yancoal, although equally note that something may have been done earlier. We also note that Yanzhou's February 2014 letter of support could only be revoked on 12 months' notice which gives Yancoal some time to make refinancing arrangements.

We considered whether the approval should be by way of ordinary resolution or some higher approval figure; given Noble holds the majority of the shares when Yanzhou's shares are excluded. However we consider on balance that 50% approval is appropriate in the circumstances. We note that this might result in Noble controlling the vote, because it holds more than 50% of the reduced electorate. We regard this merely as an incident of the existing shareholding structure.

- (d) It considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. The orders do this by ensuring that the ability of Yanzhou to convert its SCNs and be in a position to compulsorily acquire minority shareholders at a discount is subject to shareholder approval.

110. The Applicants submitted that Yancoal should pay their costs, because they had attempted to engage with Yancoal on the rights offer since 29 May 2014. Guidance Note 4 states that *"a party is entitled to make, or resist, an application once without*

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exposure to a costs order, provided it presents a case of reasonable merit in a businesslike way".²⁸ We decided not to make a costs order.

Richard Hunt
President of the sitting Panel
Decision dated 12 December 2014
Reasons published 7 January 2015

Advisers

Party	Advisers
IBC	Minter Ellison Deloitte Corporate Finance
Applicants	Clifford Chance
Noble	Clayton Utz
Portfolio Services Pty Ltd	Jones Day
Water Island Capital LLC	Corrs Chambers Westgarth
Yancoal	Herbert Smith Freehills Deutsche Bank
Yanzhou	Ashurst

²⁸ at [27]



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Annexure A

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

YANCOAL AUSTRALIA LIMITED

Yancoal Australia Limited undertakes to the Panel that it will not process any applications received in relation to the rights offer announced by it on 10 November 2014 until the earliest of:

- (a) 5pm on 12 December 2014
- (b) an order of the Panel otherwise preventing processing and
- (c) the determination of the proceedings.

**Signed by Baocai ZHANG of Yancoal Australia Limited, L26, 363 George Street,
Sydney, NSW 2000
with the authority, and on behalf, of Yancoal Australia Limited**

Dated 28th, November, 2014



Australian Government

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Annexure B

CORPORATIONS ACT

SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

YANCOAL AUSTRALIA LIMITED

CIRCUMSTANCES

1. Yancoal Australia Limited (**Yancoal**) is an ASX listed entity. Yanzhou Coal Mining Company Limited (**Yanzhou**) has voting power in approximately 78% of Yancoal's shares.
2. On 10 November 2014, Yancoal announced a pro-rata, renounceable rights offer of 2.32112 Subordinated Capital Notes (**SCNs**) for every 100 Yancoal shares to raise up to approximately US\$2.3 billion. Features of the SCNs include:
 - (a) The issue price is US\$100 per note.
 - (b) The SCNs are convertible into Yancoal shares at a conversion price of US\$0.10 per share, so each SCN is initially convertible into 1,000 Yancoal shares.
 - (c) The SCNs are perpetual.
 - (d) The SCNs have priority over Yancoal's ordinary shares and some loans and financial support. Otherwise the SCNs are subordinated.
 - (e) The SCNs are unsecured.
 - (f) Distributions on the SCNs are perpetually deferrable, non-compounding and within the control of Yancoal's board.
3. The rights offer is not underwritten.
4. Yanzhou has committed to subscribe for its full entitlement of approximately US\$1.8 billion of SCNs. Its commitment is dependent (among other things) on Yancoal committing to repay it and its subsidiaries US\$1.8 billion in shareholder loans from the proceeds of the offering.
5. If no other shareholders take up their rights, Yanzhou could acquire up to 98.8% of Yancoal by converting its SCNs into shares over time in reliance on item 9 of section 611 of the *Corporations Act 2001* (Cth) (**Act**).
6. The Panel considers, having regard to the terms of the SCNs, that:
 - (a) the rights offer is highly dilutive
 - (b) some shareholders are excluded from participation by reason of their investment mandates

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- (c) the SCNs are a complex security which require a significant capital contribution and are unattractive to Yancoal shareholders other than Yanzhou
 - (d) the steps taken to minimise the control effect of the rights offer are not sufficient, including the discount conversion price which exacerbates the potential control effect and
 - (e) compulsory acquisition may occur at a cheaper price than would be the case through ordinary acquisitions of shares.
7. The alternatives available to Yancoal, on the evidence provided, were limited by what would be accepted by Yanzhou in such a way as to limit the ability of Yancoal to address its need for funds otherwise than by the SCNs.
8. As far as practicable, the holders of the ordinary shares in Yancoal to whom the SCNs are being offered, other than Yanzhou, do not have a reasonable and equal opportunity to participate in any benefits accruing to Yanzhou as a person who would acquire a substantial interest in Yancoal.
9. It appears to the Panel that the circumstances are unacceptable having regard to:
- (a) the effect that the Panel is satisfied the circumstances are having, will have or are likely to have on the control, or potential control, of Yancoal and
 - (b) the purposes of Chapter 6 set out in section 602 of the Act.
10. 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 Yancoal.

Alan Shaw
Counsel
with authority of Richard Hunt
President of the sitting Panel
Dated 12 December 2014



Australian Government

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Annexure C

**CORPORATIONS ACT
SECTION 657D
ORDERS**

YANCOAL AUSTRALIA LIMITED (“Yancoal”)

The Panel made a declaration of unacceptable circumstances on 12 December 2014.

THE PANEL ORDERS

1. Subject to order 2, the conversion by Yanzhou Coal Mining Company Limited (“**Yanzhou**”) and its associates of Subordinated Capital Notes may only proceed with the approval of Yancoal shareholders excluding Yanzhou and its associates.
2. Yanzhou may from time to time, without shareholder approval, convert such number of Subordinated Capital Notes as would allow it to maintain (but not increase) the level of its voting power in Yancoal as at the date of these orders.
3. In this order:

Approval of Yancoal shareholders means approval by at least 50% of the votes cast by members entitled to vote on the resolution.

Subordinated Capital Notes means the Subordinated Capital Notes issued pursuant to a rights offer by Yancoal SCN Limited made under the prospectus dated 24 November 2014.

Alan Shaw
Counsel
with authority of Richard Hunt
President of the sitting Panel
Dated 12 December 2014