



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Yancoal Australia Limited 02 & 03  
[2017] ATP 15**

**Catchwords:**

*Rights issues – decline to conduct proceedings – association – association hurdle – state owned entities – control effect – dilution – interim order undertaking*

*Corporations Act 2001 (Cth), section 12; Australian Securities and Investments Commission Regulations 2001 (Cth), Regulation 16*

*MEC Resources Limited [2017] ATP 6, Yancoal Australia Limited 01 [2014] ATP 24, Multiplex Prime Property Fund 03 [2009] ATP 22*

<b>Interim order</b>	<b>IO undertaking</b>	<b>Conduct</b>	<b>Declaration</b>	<b>Final order</b>	<b>Undertaking</b>
<b>NO</b>	<b>YES</b>	<b>NO</b>	<b>NO</b>	<b>NO</b>	<b>NO</b>

**INTRODUCTION**

1. The Panel, James Dickson, Paula Dwyer (sitting President) and Karen Phin declined to conduct proceedings on an application by Senrigan Capital Management Ltd and Mr Nicholas R. Taylor and an application by Mt Vincent Holdings Pty Ltd and Osendo Pty Ltd, both in relation to the affairs of Yancoal Australia Limited. The application concerned Yancoal’s 23.6 for 1 renounceable entitlement offer announced on 1 August 2017. The Panel considered (among other things) that there was no material to indicate that the entitlement offer would lead to a change of control in Yancoal or increase the voting power of its majority shareholder. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.
  - Cinda** entities associated with China Cinda Asset Management Co., Ltd
  - Coal & Allied** Coal & Allied Industries Limited
  - General Nice** Evercharm International Investments Ltd, an entity associated with General Nice Development Ltd
  - Glencore** Glencore Coal Pty Ltd (a wholly owned subsidiary of Glencore plc)
  - Lucion** Shandong Lucion Investment Holdings Group Co., Ltd
  - Noble** Mt Vincent Holdings Pty Ltd and Osendo Pty Ltd (indirect wholly-owned subsidiaries of Noble Group Limited) –

## Takeovers Panel

### Reasons – Yancoal Australia Limited 02 & 03 [2017] ATP 15

	applicants in Yancoal 03
<b>SCNs</b>	Subordinated Capital Notes issued by Yancoal
<b>Senrigan</b>	Senrigan Capital Management Ltd and Mr Nicholas R. Taylor – applicants in Yancoal 02
<b>Taizhong</b>	Shandong Taizhong Energy Co., Ltd
<b>Yancoal</b>	Yancoal Australia Limited
<b>Yanzhou</b>	Yanzhou Coal Mining Company Limited

## FACTS

3. Yancoal is an ASX listed company (ASX code: YAL). Yancoal produces thermal and metallurgical coal from mines in Queensland and New South Wales.
4. Yanzhou has a relevant interest of approximately 78% in Yancoal and also holds SCNs convertible into Yancoal shares. In *Yancoal Australia Limited 01*,<sup>1</sup> the Panel made an order restricting Yanzhou’s ability to convert SCNs without minority shareholder approval if its voting power would increase above 78%.
5. On 24 January 2017, Yancoal entered into an agreement to acquire 100% of the shares in Coal & Allied from wholly-owned subsidiaries of Rio Tinto Limited.<sup>2</sup> As part of this acquisition, Yancoal made an irrevocable tag-along offer to Mitsubishi Development Pty Ltd (which was accepted) to acquire a 32.4% interest<sup>3</sup> in the Hunter Valley Operations, which are coal mines located in the Hunter Valley region of New South Wales.<sup>4</sup>
6. On 28 July 2017, Yancoal announced that it had entered into a conditional binding agreement with Glencore to establish a Yancoal (51%)/Glencore (49%) unincorporated joint venture in relation to the Hunter Valley Operations.
7. On 1 August 2017, Yancoal announced a 23.6 for 1 renounceable entitlement offer at US\$0.10 per share to raise up to approximately US\$2.35 billion to fund the Coal & Allied acquisition, in conjunction with a placement to Taizhong and General Nice at the same price to raise approximately US\$150 million. The entitlement offer has the following features (among others):

---

<sup>1</sup> [2014] ATP 24

<sup>2</sup> Under the agreement (as amended) the consideration comprises a US\$2.45 billion cash payment at completion of the acquisition and US\$240 million of ‘non-contingent’ royalty payments payable over a five-year period

<sup>3</sup> Held by HVO Resources Pty Ltd, a wholly-owned subsidiary of Mitsubishi Development Pty Ltd

<sup>4</sup> Yancoal separately acquired an option to purchase Mitsubishi Development Pty Ltd’s 28.9% interest in the Warkworth joint venture, exercisable at any time between completion of the acquisition and 31 December 2018

## Takeovers Panel

### Reasons – Yancoal Australia Limited 02 & 03 [2017] ATP 15

- (a) the offer price is at a 67.9% discount to the closing price of Yancoal shares on 31 July 2017 (\$0.390 per share) and a 4.6% discount to the theoretical ex rights price (\$0.131 per share)
  - (b) Yanzhou has committed to take up US\$1 billion of its entitlements<sup>5</sup> and the balance is underwritten, severally to the value of US\$1.3 billion, by Glencore (US\$300 million), Cinda (US\$750 million) and Lucion (US\$250 million)
  - (c) entitlements that are not taken up or sold will be offered for sale through a bookbuild process by the joint lead managers<sup>6</sup> with any proceeds remitted back to shareholders. The underwriters can participate in the bookbuild and
  - (d) shareholders who take up their entitlement in full may also apply for additional shares and are guaranteed an allocation of additional shares to enable a shareholder to maintain the same proportionate shareholding the shareholder held at the entitlement offer record date (noting that they would otherwise be diluted as a consequence of Yanzhou’s conversion of SCNs – see below). If the bookbuild does not clear above the offer price, shareholders who apply for additional shares may receive an allocation greater than their guaranteed allocation.
8. Yanzhou has committed to take up US\$1 billion of its entitlement in the entitlement offer and to convert as many SCNs as it is able to. The effect of the entitlement offer and SCN conversion is likely to be to decrease Yanzhou’s percentage holding in Yancoal to approximately 65%. However the entitlement offer booklet discloses that Lucion “*may be regarded as an associate of Yanzhou*” and, if that is the case, Yanzhou’s voting power may be as high as 72%.<sup>7</sup> If no shareholders or their assignees<sup>8</sup> (other than Yanzhou) exercise their rights under the entitlement offer, the underwriters and placees will collectively hold 33% of Yancoal’s ordinary shares.

## APPLICATION

### Declarations sought

9. By application dated 8 August 2017 (received on 9 August 2017), Senrigan sought a declaration of unacceptable circumstances, submitting that (among other things):
- (a) the entitlement offer has been priced and structured in a manner that (i) is unnecessarily highly dilutive and “*value shifting*” (ii) does not allow existing minority shareholders a reasonable and equal opportunity to participate (iii) is prejudicial to the ongoing ownership interests of existing minority shareholders and (iv) ensures Yanzhou is able to convert all of its SCNs and

---

<sup>5</sup> Yanzhou has agreed to make its approximately US\$830 million of unexercised entitlements available to satisfy demand for additional new shares applied for by Yancoal shareholders up to the guaranteed allocation (see below)

<sup>6</sup> Morgan Stanley Australia Securities Limited, J.P. Morgan Australia Limited and China International Capital Corporation Hong Kong Securities Limited

<sup>7</sup> If Lucion is required to take up its full underwriting commitment

<sup>8</sup> Either by shareholders selling their rights on market or having their rights sold under the bookbuild

## Takeovers Panel

### Reasons – Yancoal Australia Limited 02 & 03 [2017] ATP 15

- (b) Cinda and Lucion are associates of Yanzhou, therefore the voting power of Yanzhou and its associates could go from 78% to 89.15% as a result of the entitlement offer.
10. By application dated 9 August 2017, Noble sought a declaration of unacceptable circumstances, submitting that (among other things):
- (a) the entitlement offer is unacceptably dilutive and disproportionately affects the interest of existing minority shareholders and is highly unattractive to new investors
  - (b) dispersion strategies put in place by Yancoal are of no practical value to existing minority shareholders
  - (c) certain pre-existing relationships exist between Yancoal, Yanzhou, the underwriters and the placement investors that give rise to a relationship of association, and therefore the voting power of Yanzhou and its associates will increase as a result of the entitlement offer and placement
  - (d) the practical effect of the entitlement offer is that Yanzhou will retain control over Yancoal, *“with the key change being a “rotation” of the existing minority shareholders to a new key group of minority investors”* and
  - (e) if the entitlement offer is permitted to proceed as proposed it *“sets a dangerous precedent for other companies looking to undertake a significant transaction, as a means of eliminating minority shareholders without paying them a control premium or providing proper value for their shares”*.

#### Interim orders sought

11. Senrigan sought an interim order to the effect that offers under the entitlement offer not be made and entitlement trading be deferred until a decision is made by the Panel in relation to the application.
12. Noble sought an interim order to the effect that Yancoal be restrained from taking any action to pursue or undertake the entitlement offer, placement, underwriting and conversion of SCNs until termination of the proceedings.
13. The substantive President of the Panel accepted undertakings from Yancoal that it would not process any applications received in relation to the entitlement offer until the earliest of 5pm (Melbourne time) on 18 August 2017, an order of the Panel otherwise preventing processing and the determination of the proceedings (see Annexure A).

#### Final orders sought

14. Senrigan sought final orders including that the entitlement offer be prevented from proceeding in its current form without shareholder approval and a variation of the Panel’s orders in *Yancoal Australia Limited 01* to restrict Yanzhou, together with its associates (including Cinda and Lucion), from having voting power of more than 78% in Yancoal.

## Takeovers Panel

### Reasons – Yancoal Australia Limited 02 & 03 [2017] ATP 15

15. Noble sought final orders including orders preventing the entitlement offer, placement, underwriting and conversion of SCNs proceeding on the terms announced or substantially similar terms.

## DISCUSSION

16. We decided to hear both applications together pursuant to Regulation 16(1)(a) of the *Australian Securities and Investments Commission Regulations 2001* (Cth). We received preliminary submissions from Yancoal, Yancoal's independent board committee, Senrigan and Noble. We decided to receive further preliminary submissions from Yancoal, Senrigan and Noble. We have considered all the material, but address specifically only those issues we consider necessary to explain our reasoning.
17. The Panel has previously expressed concerns about highly dilutive rights issues where there is a control effect.<sup>9</sup> We accept that Yancoal's entitlement offer is highly dilutive to shareholders who do not participate. However if it is the case that Yanzhou is not an associate of any of the underwriters (leaving aside Lucion's position) or placees, we consider the entitlement offer would not lead to a change in control in Yancoal or result in an increase in Yanzhou's voting power in Yancoal. Yanzhou will continue to be the majority shareholder in Yancoal after completion of the entitlement offer. The dilution of the applicants' interest in Yancoal, if they choose not to participate in the entitlement offer, may have an effect on control but we consider that this, of itself,<sup>10</sup> is unlikely to be unacceptable.<sup>11</sup>
18. Senrigan submitted that Lucion is owned and supervised by the Shandong SASAC,<sup>12</sup> the same entity that supervises Yanzhou's parent,<sup>13</sup> and the China Ministry of Finance holds 64.45% of, and controls, Cinda. Therefore, in Senrigan's submission, Cinda, Yanzhou's parent and Lucion are controlled by the Chinese state and therefore are associates. Senrigan submitted that if both Lucion and Cinda are associates of Yanzhou, the voting power of Yanzhou and its associates would increase to 89.15% as a result of the entitlement offer.
19. Noble submitted that there were common state ownership, past business dealings and joint investments between Yanzhou and its parent and each of Lucion, Cinda, Taizhong and General Nice that indicate that there is "*a sufficient body of material, from which the Panel can draw inferences from the pattern of behaviour, commercial logic and other evidence, to support a finding of association*". Noble also submitted that the commercial relationship between Glencore and Yanzhou (and its parent) also indicates that they are associates. Noble submitted that under the entitlement offer Yanzhou and its parent's voting power may increase to as high as 99.5% if all the underwriters and placees are associates.

---

<sup>9</sup> See *Multiplex Prime Property Fund 03* [2009] ATP 22 at [47] and *Yancoal Australia Limited 01* [2014] ATP 24 at [77]-[96]

<sup>10</sup> If, at some time in the future, the underwriters or the placees were to facilitate an increase in control of Yancoal, that can of course be the subject of another application

<sup>11</sup> See *MEC Resources Limited* [2017] ATP 6 at [12]

<sup>12</sup> State-owned Assets Supervision and Administrative Commission of the State Council

<sup>13</sup> Yankuang Group Co Ltd

## Takeovers Panel

### Reasons – Yancoal Australia Limited 02 & 03 [2017] ATP 15

20. Yancoal submitted that:

*All that the evidence submitted suggests, at a stretch, is that there is a pre-existing working relationship between some of the relevant entities (evidenced by two prior business dealings in relation to other matters). This is not unlike private equity, pension funds and other financial investors (including SOEs) which in the course of their business may invest together on occasions. This does not of itself evidence any arrangement or understanding or show the parties to be acting in concert in relation to the affairs of Yancoal.*

21. Yancoal also submitted that the fact that persons have some affiliation in common does not support an inference that they are acting in concert “*in the absence of additional evidence of agreement or dependency, or actual influence implying commonality of action, relationships are not enough to establish that parties are acting in concert*”. We agree.<sup>14</sup> We note that Yancoal has acknowledged that Lucion may be regarded as an associate of Yanzhou. In relation to the other underwriters and placees, we consider that there was an insufficient body of probative material provided to justify making enquiries as to whether some or all of them are associated with Yanzhou.<sup>15</sup>

22. Even if the entitlement offer has a control effect, we consider that there is an adequate dispersion strategy. The entitlement offer is renounceable and includes a bookbuild and a shortfall facility. As a result, minority shareholders have the opportunity to maintain their existing percentage interest in Yancoal and, in the event the bookbuild does not clear above the offer price, the opportunity to receive additional new shares in preference to the underwriters.

23. While Yanzhou has some back up funding in place, the entitlement offer is required to fund the Coal & Allied acquisition. The decisions by Yancoal’s directors to enter into and fund that transaction are governed by directors’ duties and the ASX Listing Rules. To the extent it is alleged that Yancoal has not complied with those requirements that can be raised with the ASX, ASIC or the courts.

24. We were not convinced in all the circumstances, including the assessment of the entitlement offer by the independent board committee of Yancoal, that the entitlement offer was inappropriately structured or priced and as a consequence unattractive to minority shareholders. Therefore, we do not consider that the applicants’ economic capacity or desire to participate in the entitlement offer is a matter for us.

## DECISION

25. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under

---

<sup>14</sup> Noting for completeness that probative material that is not strictly “*evidence*” may suffice

<sup>15</sup> We consider that we did not need to decide whether any of the underwriters or placees who were state owned entities or partly owned by state owned entities were associated with Yanzhou or its parent under s12(2)(a). If a ‘technical’ application of that paragraph is the only basis on which association could be found, we do not consider it alone would likely give rise to unacceptable circumstances

## **Takeovers Panel**

**Reasons – Yancoal Australia Limited 02 & 03  
[2017] ATP 15**

regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

26. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

**Paula Dwyer**

**President of the sitting Panel**

**Decision dated 14 August 2017**

**Reasons given to parties 17 August 2017**

**Reasons published 24 August 2017**

## Takeovers Panel

Reasons – Yancoal Australia Limited 02 & 03  
[2017] ATP 15

### Advisers

Party	Advisers
Independent Board Committee of Yancoal	Gilbert + Tobin
Noble	Clayton Utz
Senrigan	Johnson Winter & Slattery
Yancoal	Herbert Smith Freehills
Yanzhou	King & Wood Mallesons





**Australian Government**

**Takeovers Panel**

**Annexure A**

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

**YANCOAL AUSTRALIA LIMITED 02**

Yancoal Australia Limited undertakes to the Panel that, without the Panel's consent, it will not process any applications received in relation to the entitlement offer announced by it on 1 August 2017 until the earliest of:

- (a) 5pm (Melbourne time) on 18 August 2017
- (b) an order of the Panel otherwise preventing processing and
- (c) the determination of the proceedings.

---

**Signed by Reinhold Schmidt of Level 26, 363 George Street, Sydney  
with the authority, and on behalf, of Yancoal Australia Limited**

**Dated 10 August 2017**

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

**YANCOAL AUSTRALIA LIMITED 03**

Yancoal Australia Limited undertakes to the Panel that, without the Panel's consent, it will not process any applications received in relation to the entitlement offer announced by it on 1 August 2017 until the earliest of:

- (a) 5pm (Melbourne time) on 18 August 2017
- (b) an order of the Panel otherwise preventing processing and
- (c) the determination of the proceedings.

---

**Signed by Reinhold Schmidt of Level 26, 363 George Street, Sydney  
with the authority, and on behalf, of Yancoal Australia Limited**

**Dated 10 August 2017**