

# ***CR 2012/123 - Income tax: Yancoal Australia Limited -contingent value right shares***

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## Class Ruling

### Income tax: Yancoal Australia Limited — contingent value right shares

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#### **ⓘ This publication provides you with the following level of protection:**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## What this Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

#### Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:
- section 44 of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - Division 1A of former Part IIIA of the ITAA 1936;
  - section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
  - section 104-25 of the ITAA 1997;
  - Subdivision 115-A of the ITAA 1997;
  - section 116-20 of the ITAA 1997;
  - Subdivision 130-C of the ITAA 1997;
  - section 202-40 of the ITAA 1997;
  - Division 207 of the ITAA 1997; and

- section 974-75 of the ITAA 1997.

## **Class of entities**

3. For the purposes of this Ruling, a 'former Gloucester shareholder' is defined as an entity that was a shareholder of Gloucester Coal Ltd (Gloucester) and who:

- disposed of all of their Gloucester shares pursuant to a scheme of arrangement under Part 5.1 of the *Corporations Act 2001* and received one Yancoal Australia Limited (Yancoal) ordinary share and one Yancoal contingent value right (CVR) share as consideration for each Gloucester ordinary share (see Class Ruling CR 2012/54); and
- is not an 'Excluded Shareholder' as defined in Appendix 3 to the *Explanatory Booklet: For a scheme of arrangement in relation to the proposed merger of Gloucester Coal Ltd and Yancoal Australia Limited* (the Explanatory Booklet) dated 27 April 2012 to the scheme of arrangement.

4. The class of entities to which this Ruling applies (hereinafter referred to in this Ruling as 'relevant Yancoal shareholders') are former Gloucester shareholders who:

- acquired their Gloucester ordinary shares on or after 20 September 1985;
- held their Gloucester ordinary shares on capital account;
- continually held their Yancoal ordinary shares and CVR shares from the Implementation Date of the scheme of arrangement (being 6 July 2012), until the date that they dispose of their CVR shares;
- disposed of their CVR shares as a result of the issue of a Lapse Notice, Deemed Lapse Notice, or Early Lapse Notice;
- are 'Australian residents' (as that term is defined in subsection 995-1(1) of the ITAA 1997); and
- are not a 'temporary resident' of Australia (as that term is defined in subsection 995-1(1) of the ITAA 1997).

5. This Ruling does not apply to relevant Yancoal shareholders that held their Yancoal shares or CVR shares on revenue account or as trading stock at any time from the Implementation Date of the scheme of arrangement until the date that they dispose of their CVR shares.

6. This Ruling does not apply to relevant Yancoal shareholders who are subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997.

(Note - Division 230 of the ITAA 1997 will not generally apply to the financial arrangements of individuals, unless they have made an election for those rules to apply to them.)

### **Qualifications**

7. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 11 to 26 of this Ruling.

8. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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### **Date of effect**

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10. This Ruling applies from 6 July 2012 to 30 June 2014. The Ruling continues to apply after 30 June 2014 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## Scheme

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11. The following description of the scheme is based on information provided by PricewaterhouseCoopers (the Applicant). The following documents, or relevant parts of them, form part of and are to be read with the description:

- application for class ruling dated 24 August 2012 lodged by the Applicant on behalf of Yancoal;
- the Explanatory Booklet dated 27 April 2012 that was registered by the Australian Securities and Investments Commission on 30 April 2012; and
- correspondence from the Applicant providing further particulars.

**Note:** certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

12. In this Ruling, unless otherwise indicated, capitalised terms take on the same meanings as in the documents listed in the previous paragraph.

### Scheme of arrangement

13. Yancoal is an Australian resident company that operates coal mines. Prior to 6 July 2012, Yancoal was a wholly-owned subsidiary of Yanzhou Coal Mining Company Ltd, a company in the People's Republic of China.

14. On 6 July 2012, Yancoal acquired all of the ordinary shares in Gloucester pursuant to a scheme of arrangement between Gloucester and its shareholders under Part 5.1 of the *Corporations Act 2001*.

15. In consideration for the transfer of their Gloucester shares to Yancoal, relevant Yancoal shareholders (who were not 'Foreign Scheme Shareholders' or 'Electing Small Shareholders' each as defined in the Explanatory Booklet dated 27 April 2012), received either of the following for each Gloucester share they held on the Scheme Record Date of 4 July 2012:

- one Yancoal ordinary share and one fully paid CVR share in the capital of Yancoal issued under the CVR Terms of Issue (the Terms); or
- one Yancoal ordinary share if an 'All Bidder Shares Election' was made.

16. Yancoal ordinary shares and CVR shares are separately quoted on the Australian Securities Exchange.

**CVR shares terms of issue*****Rights attached to CVR shares***

17. A CVR share confers rights under clause 1.2 of the Terms on CVR shareholders to receive notice of and to attend any general meeting of Yancoal and to also receive a copy of any reports or accounts to be considered by the meeting.

18. A CVR share does not confer rights on CVR shareholders to:

- receive dividends;
- subscribe for, or participate in any bonus issue of, new shares in the capital of Yancoal; or
- vote at any meeting of Yancoal (except on a proposal specified in clause 1.2(c) of the Terms).

***Return of capital***

19. In the event of a winding up of Yancoal and there being a return of capital, CVR shareholders will rank equally with Yancoal ordinary shareholders, but will only be entitled to receive the amounts specified in clause 1.3 of the Terms out of the assets of Yancoal available for distribution to holders of shares in the company.

***Repurchase of CVR shares***

20. The CVR shares will have an End Date of 18 months from the Issue Date of the CVR shares being 6 January 2014 unless an Early Lapse Notice is taken to be issued or Yancoal issues a Lapse Notice at its discretion before the End Date.

21. Yancoal will Repurchase the CVR shares at the End Date, or at any time before the End Date that Yancoal chooses (the Repurchase Date). In return for giving up the CVR shares under the Repurchase, the holders of CVR shares will receive the Repurchase Price.

22. The Repurchase of the CVR shares will occur under one of three circumstances:

- a Lapse Notice is issued by Yancoal;
- a Lapse Notice is deemed to have been issued by Yancoal (Deemed Lapse Notice); and
- Yancoal is deemed to have issued an Early Lapse Notice.

23. If a Lapse Notice or Deemed Lapse Notice is issued, the Repurchase Price will be calculated according to the formula set out in clause 4.1 of the Terms. If an Early Lapse Notice is deemed to have been issued, the Repurchase Price will be \$0.00000001 per CVR share, payable in cash.

24. In the event that a Lapse Notice or Deemed Lapse Notice is issued, the Repurchase Price may be satisfied by either:

- causing the payment in cash; or
- causing the delivery (by way of transfer) of existing Yancoal ordinary shares equal in value to the Repurchase Price subject to the conditions in clause 4.2(b) of the Terms.

### ***Future dividends payable by Yancoal***

25. During the period that the CVR shares are on issue, Yancoal may pay a dividend on its ordinary shares.

### **Other Matters**

26. For the purposes of former section 160APHM of the ITAA 1936, the Applicant has advised the Commissioner that on the Implementation Date of the scheme of arrangement, the 'net position' in relation to a relevant Yancoal shareholder's Yancoal ordinary shares was greater than 30% where:

- the relevant Yancoal shareholder received Yancoal ordinary shares and CVR shares as consideration under the scheme of arrangement; and
- the relevant Yancoal shareholder did not enter into another 'position' in relation to the Yancoal ordinary shares.

## **Ruling**

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### **Yancoal ordinary shares and CVR shares: capital or revenue account**

27. Where a relevant Yancoal shareholder held their Gloucester shares on capital account and disposed of their Gloucester shares pursuant to the scheme of arrangement, that disposal does not, of itself, affect whether the Yancoal ordinary shares and CVR shares received as consideration are held on capital account by the relevant Yancoal shareholder.

### **Dividend included in assessable income**

28. If Yancoal pays a dividend (as defined in subsection 6(1) of the ITAA 1936) in respect of its ordinary shares, it must be included in the assessable income of a relevant Yancoal shareholder holding those ordinary shares on the dividend record date (paragraph 44(1)(a) of the ITAA 1936).

**Gross-up and tax offset**

29. During the period in which the CVR shares are on issue, Yancoal may pay a dividend that is a frankable distribution under section 202-40 of the ITAA 1997 in respect of its ordinary shares. Yancoal may frank that dividend. A relevant Yancoal shareholder who receives a franked dividend directly, satisfies the residency requirement in section 207-75 of the ITAA 1997, and is a 'qualified person' in relation to the franked distribution:

- must include in their assessable income the amount of the franking credit attached to the dividend (subsection 207-20(1) of the ITAA 1997); and
- will be entitled to a tax offset equal to the franking credit received on the dividend (subsection 207-20(2) of the ITAA 1997).

30. If, during the period in which the CVR shares are on issue, Yancoal pays a dividend in respect of its ordinary shares, and a relevant Yancoal shareholder:

- receives the dividend as a partnership or the trustee of a trust;
- is not a corporate tax entity;
- if the entity is the trustee of a trust — the trust is not a complying superannuation entity or FHSA trust when the dividend is paid; and
- is a 'qualified person' in relation to the franked distribution,

the shareholder must include in the assessable income of the partnership or trust the amount of the franking credit attached to the dividend.

31. Division 207 of the ITAA 1997 contains detailed rules for calculating the share of the franking credit received on the dividend that the partners of the partnership, or the beneficiaries of the trust, will be entitled to as a tax offset.

## Qualified person

32. A relevant Yancoal shareholder will be a 'qualified person' in relation to a franked dividend paid in respect of Yancoal ordinary shares for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 if, pursuant to former section 160APHO of the ITAA 1936:

- the shareholder held their Yancoal ordinary shares 'at risk' for a period of at least 45 days (excluding the day of acquisition of the shares, the day (if any) on which the shares were disposed of, and any days on which the shareholder has materially diminished risks of loss or opportunities for gain in respect of the shares within the meaning of former sections 160APHM and 160APHJ of the ITAA 1936) during the primary qualification period; and
- neither the relevant Yancoal shareholder, nor an associate of the relevant Yancoal shareholder, have made, is under an obligation to make, or are likely to make, a related payment (within the meaning of former section 160APHN of the ITAA 1936) in respect of the dividend.

33. A shareholder has materially diminished risks of loss or opportunities for gain on a particular day in respect of shares if the shareholder's net position on that day in relation to the shares has less than 30% of those risks and opportunities (former subsection 160APHM(2) of the ITAA 1936).

34. The CVR shares will have an effect on whether a Yancoal ordinary share is held 'at risk' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936.

35. A share is held 'at risk' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 if a shareholder has a net position (within the meaning of former section 160APHJ of the ITAA 1936) of at least 30% of the risks of loss and opportunities for gain in relation to the share.

36. For the purpose of calculating whether a relevant Yancoal shareholder holds a Yancoal ordinary share 'at risk' under former section 160APHM of the ITAA 1936, the Commissioner accepts from the facts and circumstances of the scheme (including the Terms and information provided by the Applicant), that a shareholder to whom this Ruling applies will have a net position of at least 30% in relation to each Yancoal ordinary share on each day during which the shareholder holds a corresponding number of CVR shares, pursuant to former subsection 160APHJ(10) of the ITAA 1936. However, this conclusion will only apply if the shareholder does not hold any other position (within the meaning of former section 160APHJ of the ITAA 1936) in relation to their Yancoal ordinary shares.

37. This Ruling does not consider whether a relevant Yancoal shareholder holds a Yancoal ordinary share 'at risk' if they hold any position in relation to their Yancoal ordinary shares other than CVR shares acquired as consideration under the scheme of arrangement.

### **CGT consequences – Repurchase of CVR shares for ordinary shares**

38. CGT event C2 under section 104-25 of the ITAA 1997 will happen to relevant Yancoal shareholders when Yancoal effects the Repurchase of the CVR shares in return for the transfer of existing Yancoal ordinary shares from an existing Yancoal shareholder to the holders of CVR shares. The CVR shares are a convertible interest (item 4 of the table in subsection 974-75(1) of the ITAA 1997), and the Repurchase of the CVR shares in return for Yancoal ordinary shares will result in the CVR shares being converted (paragraph 104-25(1)(f) of the ITAA 1997).

39. The time of CGT event C2 will be the date of the Repurchase of the CVR shares (paragraph 104-25(2)(b) of the ITAA 1997). This is the date on which the Yancoal ordinary shares are transferred to the holders of CVR shares, being relevant Yancoal shareholders.

40. If the Repurchase of CVR shares is effected in return for the transfer of existing Yancoal ordinary shares, it will amount to converting a convertible interest under Subdivision 130-C of the ITAA 1997 (item 2 of the table in subsection 130-60(1) of the ITAA 1997).

41. The first element of the cost base and reduced cost base of the Yancoal ordinary shares transferred under the Repurchase to a holder of CVR shares, being a relevant Yancoal shareholder, will include the cost base of the CVR shares at the time of conversion (item 2 of the table in subsection 130-60(1) of the ITAA 1997).

42. A capital gain or capital loss that a holder of CVR shares, being a relevant Yancoal shareholder, makes from CGT event C2 happening as a result of the Repurchase being effected by the transfer of Yancoal ordinary shares (converting a convertible interest) is disregarded (subsection 130-60(3) of the ITAA 1997).

43. A holder of CVR shares, being a relevant Yancoal shareholder, who receives Yancoal ordinary shares under the Repurchase will be taken to have acquired the Yancoal ordinary shares at the date of the Repurchase, being the time when the conversion of the convertible interest happened (subsection 130-60(2) of the ITAA 1997). This is the date on which the Yancoal ordinary shares are transferred to the holders of CVR shares.

## **CGT consequences – Repurchase of CVR shares for cash**

44. CGT event A1 under section 104-10 of the ITAA 1997 will happen to a relevant Yancoal shareholder when Yancoal effects the Repurchase of the CVR shares for cash.

45. The time of CGT event A1 will be the date of the Repurchase of the CVR shares (paragraph 104-10(3)(b) of the ITAA 1997).

46. The capital proceeds from CGT event A1 happening on the Repurchase of the CVR shares for cash will be the money a CVR shareholder, being a relevant Yancoal shareholder, receives (subsection 116-20(1) of the ITAA 1997).

47. If the CVR shares were acquired by a resident CVR shareholder, being a relevant Yancoal shareholder, at least 12 months before the Repurchase, a capital gain from CGT event A1 happening may qualify as a discount capital gain under subsection 115-25(1) of the ITAA 1997, provided the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied.

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**Commissioner of Taxation**

19 December 2012

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## **Appendix 1 – Explanation**

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**❶** *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

48. The tax consequences and relevant legislative provisions that arise concerning the scheme that is the subject of this Ruling are outlined in the Ruling part of this document.

49. The two main issues that arise under the scheme are:

- the effect of the CVR shares on the franking credits received in respect of dividends paid on Yancoal ordinary shares; and
- the CGT consequences on the Repurchase of CVR shares.

50. The Ruling section provides a detailed explanation of the Commissioner's decision. Therefore, no further explanation is warranted.

## **Appendix 3 – Detailed contents list**

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51. The following is a detailed contents list for this Ruling:

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## References

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- Previous draft:*
- ITAA 1936 160APHM(2)
  - ITAA 1936 160APHN
- Not previously issued as a draft
- ITAA 1936 160APHO
- Related Rulings/Determinations:*
- CR 2012/54; TR 2006/10
- ITAA 1997 104-10
  - ITAA 1997 104-10(3)(b)
  - ITAA 1997 104-25
  - ITAA 1997 104-25(1)(f)
  - ITAA 1997 104-25(2)(b)
- Subject references:*
- capital gains
  - capital gains tax
  - convertible interest
  - CGT capital proceeds
  - CGT discount
  - CGT event A1 – disposal of a CGT asset
  - CGT events C1-C3 – end of a CGT asset
  - disposal of assets
  - disposal of shares
  - qualified person
- ITAA 1997 Subdiv 115-A
  - ITAA 1997 115-25(1)
  - ITAA 1997 116-20(1)
  - ITAA 1997 Subdiv 130-C
  - ITAA 1997 130-60(1)
  - ITAA 1997 130-60(2)
  - ITAA 1997 130-60(3)
  - ITAA 1997 202-40
  - ITAA 1997 Div 207
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  - ITAA 1997 975-75(1)
  - TAA 1953
  - Copyright Act 1968
  - Corporations Act 2001
- Legislative references:*
- ITAA 1936 6(1)
  - ITAA 1936 44(1)(a)
  - ITAA 1936 Div 1A of Pt IIIAA
  - ITAA 1936 160APHJ
  - ITAA 1936 160APHJ(10)
  - ITAA 1936 160APHM
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### ATO references

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