



Australian Government

Takeovers Panel

**Reasons for Decision
Lincoln Minerals Limited
[2022] ATP 6**

Catchwords:

Decline to conduct proceedings – convertible notes – notice of meeting – disclosure – creep exception – related party approval – independent expert’s report – corrective disclosure – undertaking – supplementary disclosure – no objection

Corporations Act 2001 (Cth), sections 208, 210, 606, 611 (items 7 and 9), 657A(2)

ASX Listing Rule 10.11

Australian Securities and Investments Commission Act 2001 (Cth), section 201A

Guidance Note 1 – Unacceptable Circumstances

ASIC Regulatory Guide 76: Related party transactions

Merlin Diamonds Limited [2016] ATP 18

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

INTRODUCTION

1. The Panel, Kristen Jung, Bill Koeck and Tony Osmond (sitting President), declined to conduct proceedings on an application by Olary Holdings Limited in relation to the affairs of Lincoln Minerals Limited. The application concerned (among other things) the proposed issue of convertible notes by Lincoln, subject to necessary approvals, to APMI (a company associated with Lincoln’s 19.91% shareholder) which, upon their conversion into shares, could increase APMI’s voting power to a maximum of 48.55%.¹ The Panel decided not to conduct proceedings after accepting an undertaking from Lincoln. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

- AGM** Has the meaning given in paragraph 7
- Applicant** Olary Holdings Limited
- APMI** Australia Poly Minerals Investments Pty Ltd
- Corporations Act** *Corporations Act 2001 (Cth)*
- Lincoln** Lincoln Minerals Limited
- Maturity Date** Has the meaning given in paragraph 6(a)
- Note Agreement** Has the meaning given in paragraph 5

¹ Assuming a conversion price of \$0.005 and no interest accrued under the Notes is converted into shares

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Notes	Has the meaning given in paragraph 5
Notes Resolution	Has the meaning given in paragraph 8
Notice of AGM	Has the meaning given in paragraph 7
Poly Mineral	Poly Mineral Investment Ltd, a company incorporated in Hong Kong
Quarterly Report	Has the meaning given in paragraph 41
Subsequent Capital Raising	Has the meaning given in paragraph 6(e)
Supplementary Notice	Has the meaning given in paragraph 63(a)

FACTS

3. Lincoln is an ASX listed company (ASX code: LML). It has been suspended from trading since 21 September 2020.²
4. The Applicant submitted that it had previously put investment and merger proposals to the Lincoln Board.
5. On 20 December 2021, Lincoln entered into a convertible note agreement with APMI (**Note Agreement**) to raise up to \$1.6 million through the issue of 1.6 million convertible notes to APMI (**Notes**). The Notes converted into fully paid ordinary shares in Lincoln.
6. On 23 December 2021, Lincoln announced³ that its “major shareholder has agreed to subscribe for unsecured Convertible Notes in the Company to the value of \$1.6M to fund the Company’s ongoing exploration program and meeting working capital requirements”. The announcement set out the key terms of the Notes, including that:
 - (a) the maturity date of the Notes is 31 December 2022 (**Maturity Date**)
 - (b) conversion of some or all the Notes can occur at any time prior to the Maturity Date
 - (c) the Notes are subject to “all necessary shareholder and regulatory approvals”
 - (d) interest is payable at a rate of 8% per annum in cash or shares at the noteholder’s election
 - (e) the conversion price is “the lower of: \$0.005; and a 15% discount to the issue price of shares and/or the exercise price of any options offered under any capital raising(s) completed by the Company of greater than \$500,000 prior to the Maturity Date (**Subsequent Capital Raising**)”.

² This followed a determination by ASX that Lincoln’s operations are not adequate to warrant the continued quotation of its securities and therefore it is in breach of ASX Listing Rule 12.1

³ The date on the announcement was 22 December 2021 but the announcement was released onto the ASX announcements platform on 23 December 2021

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7. On 21 January 2022, Lincoln issued⁴ its notice of annual general meeting (**Notice of AGM**) in respect of its annual general meeting to be held on 25 February 2022 (**AGM**).
8. Among other things, the AGM sought approval for the issue of Notes to APMI, “*the Company’s largest shareholder*” which “*holds a voting power of 19.91%*”. Specifically, the resolution proposed:

“That, for the purposes of Listing Rule 7.1 and for all other purposes, approval is given for the Company to issue up to 1,600,000 Convertible Notes, each with a face value of \$1.00, to raise up to \$1,600,000 to Australian [sic] Poly Minerals Investments Pty Ltd (ACN 622 067 556) on the terms and conditions set out in the Explanatory Memorandum” (Notes Resolution).
9. It was clarified during the course of proceedings that APMI was in fact a company associated with Poly Mineral and that it was Poly Mineral which held, and had lodged a substantial holder notice in respect of, a direct 19.91% interest in Lincoln.⁵
10. APMI and Poly Mineral are both owned by Mr James Zhang, who was a director of Lincoln from 17 February 2016 to 29 July 2021. Mr Zhang’s niece, Ms Ruiyu (Yoyo) Zhang, is one of Lincoln’s current directors, and all of Lincoln’s current directors are employees of another entity owned by Mr Zhang.
11. On 21 February 2022, following receipt of the Panel application (on 9 February 2022), Lincoln announced⁶ that its AGM (scheduled for 25 February 2022) had been postponed to 16 March 2022 “*due to amendments made to [the Notes Resolution] of the Notice of Meeting (Original Notice) that result [sic] in a Supplementary Notice of Meeting (Supplementary Notice) being issued by the Company...*”.
12. On 24 February 2022, Lincoln announced that the AGM would be further postponed due to the Panel application “*and ASIC subsequently seeking additional information to be prepared by the Company that will enable shareholders to make an informed decision on [the Notes Resolution]...*” and that Lincoln would advise a new date for the AGM “*as well as provide a supplementary notice of meeting once all new information has been prepared for release*”.

APPLICATION

13. By application dated 9 February 2022, the Applicant sought a declaration of unacceptable circumstances.
14. The Applicant submitted that Lincoln’s announcement from 23 December 2021 regarding the issue of Notes with “*unjust conversion price and conditions [is] unacceptable*”. In respect of the Notes, it submitted (among other things) that:

⁴ The Notice of AGM is dated 18 January 2022 but was released onto the ASX announcements platform on 21 January 2022

⁵ This clarification was provided by APMI following the Panel’s enquiries as to why APMI had not lodged a substantial holder notice

⁶ The date on the announcement was 18 February 2022 but the announcement was released onto the ASX announcements platform on 21 February 2022

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- (a) the proposal was, in effect, a takeover of Lincoln by Mr Zhang
 - (b) the conversion price of \$0.005 was “*extremely low*” and, in effect, at a deep discount to a proposal that the Applicant had made to the Lincoln Board
 - (c) “[n]o satisfactory information is provided about how \$0.005 is an acceptable issue price” and
 - (d) “[a]t the conclusion of the acquisition of [the] convertible note[s], [APMI] will be able to convert another 320,000,000 shares to give [APMI]... 48.55% control, further diluting the current shareholders who have no information or effective say in these matters”.
15. The Applicant further submitted (among other things) that:
- (a) the Lincoln Board is not independent as all members “*are employees or relatives of Mr Zhang*” and that the sale of an Australian Financial Services Licence to a party controlled by Mr Zhang was not at arm’s length
 - (b) Mr Zhang has “*publicly expressed his intention to ship all LML graphite to China*” and that the “*takeover*” through APMI will “*cause Australia to lose the public interest in Australia’s strategic mineral resource*” and
 - (c) Lincoln was trading while insolvent.
16. The Applicant sought an interim order to suspend the issue of the Notes, and a final order that the Notes be “*disallowed or cancelled*”.

DISCUSSION

Preliminary submissions

17. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.
18. We received preliminary submissions from Lincoln and jointly from APMI and Mr Zhang to the effect that we should decline to conduct proceedings.
19. Lincoln submitted (among other things) that:
- (a) The upcoming AGM seeks shareholder approval to issue the Notes and the Notes will not be converted into shares (and APMI’s and Mr Zhang’s voting power will not increase beyond 19.91%) unless Lincoln shareholders approve the conversion at a general meeting in accordance with section 611.⁷
 - (b) Lincoln had been in suspension for over 12 months and therefore it “*had limited to [sic] access to funding via the equity capital markets. The Company urgently required funding in December 2021 to fund working capital costs and meet expenses... The convertible note entered into with [APMI] provided the Company with immediate funding for its working capital purposes.*”

⁷ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth) and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

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- (c) The Note Agreement *“is on arms’ length terms having regard to the circumstances of the Company and terms of the investment. The conversion price appeared to be broadly in the range of past trading in the Company’s shares or otherwise at a 15% discount to future raisings. The interest of 8% per annum for an unsecured facility is also considered in line with or better than market terms.”*
- (d) The Applicant’s proposal was not a standalone funding offer and *“came with a range of terms and conditions that LML did not agree to or consider to be in the best interests of its shareholders at the time.”*
20. Lincoln also advised us of its intention to postpone the upcoming AGM for approximately 14 days⁸ so that it could prepare a supplementary notice of meeting for shareholders with further disclosure in relation to the Notes Resolution, including disclosure for the purposes of ASX Listing Rule 10.11.⁹
21. APMI and Mr Zhang submitted (among other things) that:
- (a) *“Approximately \$260,000 in loan funding has been provided under [the Notes] to date. No conversion has occurred. If it were to occur, APMI will comply with Chapter 6 of the Corporations Act which would likely require a resolution under s611(7) of the Corporations Act to be passed by unassociated shareholders of LML (i.e APMI and associates could not vote)... There has been no breach or potential breach of Chapter 6-6C of the Corporations Act or infringement of the principles set out in s602...”*.
- (b) Between January 2020 and the date of Lincoln’s suspension from trading (on 21 September 2020), Lincoln’s share price trading range was approximately \$0.003 to \$0.009. *“Given this and the difficulties LML is currently facing APMI believes the conversion price [of \$0.005] is reasonable”* and in any event, will need to be approved by unassociated shareholders.
- (c) *“As APMI understands it the APMI proposal was accepted given the immediate availability of funds of which LML was in need - the Alternative Transaction [proposed by the Applicant] would have taken months to complete.”*
- (d) If the Notes are cancelled, Lincoln *“will need to consider whether it needs to be put into some form of insolvency administration unless urgent alternative funding can be arranged.”*
22. In addition to the Notes, the application raised a number of other issues in respect of Lincoln including on directors’ duties and conflicts of interest, oppressive conduct, related party transactions and insolvent trading. Lincoln and APMI/Mr Zhang denied these various allegations. Both preliminary submissions submitted (in effect) that, in any event, these matters were more appropriately dealt with by the Courts

⁸ Lincoln subsequently announced postponement of its AGM on 21 February 2022 – see paragraph 11

⁹ In summary, ASX Listing Rule 10.11 requires an entity to obtain shareholder approval before it issues (or agrees to issue) any equity securities to a related party, a substantial (30%+) holder in the 6 months prior, a substantial (10%+) holder with board representation in the 6 months prior, an associate of such persons, or a person whose relationship to the entity or such persons is such that, in ASX’s opinion, the issue should be approved by shareholder. ASX Listing Rule 10.12 sets out certain exceptions to ASX Listing Rule 10.11

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and were irrelevant to the Panel’s consideration of whether unacceptable circumstances arise from the issuance of the Notes.

23. Having regard to our jurisdiction under section 657A(2), we are only concerned with those issues raised by the Applicant that go to the control (or potential control) of Lincoln or the acquisition (or proposed acquisition) of a substantial interest in Lincoln having regard to the purposes of Chapter 6 as set out in section 602.¹⁰

Disclosure

24. The Applicant submitted, in effect, that Lincoln shareholders had “*no information or effective say*” on the decision to enter into the Note Agreement and the terms of the Notes, and the potential for APMI to obtain 48.55% control of Lincoln upon conversion of the Notes.
25. We considered the information provided to Lincoln shareholders to date in respect of the Notes and Note Agreement and had significant concerns. In particular, we were concerned that the information accompanying the Notes Resolution in the Notice of AGM did not disclose, or did not sufficiently disclose, the following matters:
- (a) The terms of the Notes and the Note Agreement.
 - (b) The consequences of Lincoln entering into the Note Agreement, in particular:
 - (i) the potential control effects on Lincoln
 - (ii) the dilutionary impact on Lincoln shareholders if Lincoln elected to convert the Notes and
 - (iii) the ability of Lincoln to repay the Notes at maturity if it elected to do so (if the Notes Resolution was approved and Notes were issued) or the amounts already drawn down on the Notes (if the Notes Resolution was not approved or the Notes Resolution was approved but Notes were not issued) given its current financial situation.
 - (c) That shareholder approval was being sought on the basis that APMI is a related party to a former Lincoln director.
 - (d) The basis upon which the conversion price for the Notes was determined.
 - (e) An explanation of Lincoln’s financial situation and specific funding needs which required the Note Agreement to be entered into.
 - (f) Other proposals and options that had been made or considered by the Lincoln Board before deciding to proceed with the Notes proposal, and any proposals since received.
26. We discuss these matters in further detail.

Terms of the Notes and Note Agreement

27. The summaries of the Note Agreement and the key terms and conditions of the Notes attached as schedules to the Notice of AGM were brief – each was of no more

¹⁰ See generally, the Panel’s Guidance Note 1 – Unacceptable Circumstances

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than half a page. We did not consider that these summaries provided sufficient detail of the material terms of the Notes and Note Agreement to allow shareholders to make an informed decision regarding the Notes Resolution.

28. There was also erroneous disclosure regarding the conversion price of the Notes. Lincoln's ASX announcement of 23 December 2021 and Notice of AGM had both disclosed the conversion price to be "*the **lower** of: \$0.005; and a 15% discount to the issue price of shares and/or the exercise price of any options offered under any [Subsequent Capital Raising]*" (emphasis added). The Lincoln Board's resolution of directors approving entry into the Note Agreement also summarised the key terms of the Notes and referred to \$0.005 as the upper limit on the conversion price for the Notes.
29. However, Lincoln's submissions, as well as the Note Agreement, referred to \$0.005 as the floor for the conversion price of the Notes. Lincoln subsequently confirmed that the reference to "*lower of*" in its ASX announcement and Notice of AGM was an "*inadvertent error*" and that the correct terms of the conversion price is "*the **higher** of: 0.5 cents or a 15% discount to the issue price of shares, and/or exercise price of any options, offered under any [Subsequent Capital Raising]*" (emphasis added).
30. We considered this to be a material error in the disclosure of the terms of the Notes which required immediate market correction.¹¹

Control and the ability to creep

31. The Panel has previously considered the level of disclosure required to shareholders regarding the control implications of convertible notes, including the capacity of the noteholder to convert their notes in reliance on the creep exception and increase their voting power above 20%.
32. In *Merlin Diamonds Limited*,¹² the explanatory memorandum for the issue of certain convertible notes and options stated, in effect, that the conversion of the notes could not result in a noteholder holding more than 19.9% of Merlin at the time of conversion, unless shareholder approval is obtained (the "19.9% Conversion Requirement"). However, the secured note deeds did not include any such restriction. The notes and options would have given the noteholders the ability to require the issue of shares over time (relying on the 3% creep exception) giving them collectively more than 50% of Merlin shares (assuming no other shares were issued).
33. The Panel considered that Merlin's explanatory memorandum was misleading. The Panel stated that:

"...Shareholders were not informed that the holders of the notes and options would have the capacity to convert their convertible notes and exercise their options to increase their voting power in Merlin above 20% in reliance on the 3% creep exception.

[The explanatory memorandum] did not draw shareholders attention to the very significant control implications of the notes and options. Rather, it wrongly indicated that the secured note deeds would be subject to the 19.9% Conversion Requirement. If

¹¹ See further at paragraph 64

¹² [2016] ATP 18

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that requirement had applied it may have prevented reliance on the 3% creep exception and prevented a holder of the notes and options from obtaining control by means of their conversion or exercise. We consider that Merlin shareholders were misled and given false comfort on material potential control implications of the notes and options.”¹³

34. In this case, the Notice of AGM disclosed the following:

“Section 611 of the Corporations Act provides that certain acquisitions of relevant interests in a company’s voting shares are exempt from the prohibition in Section 606(1), including acquisitions by a person, which as a result of the acquisition, that person would have voting power in the company more than 3 percentage points (3%) higher than they had 6 months before the acquisition (this exemption is known as the “3% creep” exemption and is found in of [sic] item 9 of section 611 of the Corporations Act).

The Company notes that,

- (a) APMI (the Investor) is the Company’s largest shareholder, currently holds a voting power of 19.91%;*
- (b) as the Convertible Notes do not contain voting rights, the issue of the Convertible Notes themselves will have no impact on the voting power of the Investor; and*
- (c) assuming a conversion price of \$0.005, the voting power of APMI will increase as per the below table upon conversion of the Convertible Notes...*

(The table set out that APMI’s current voting power was 19.91% and that upon the conversion of the Notes into shares, its maximum voting power would be 48.55%, on the assumption that no additional Lincoln shares are acquired by or issued to APMI and all interest payable on the Notes is satisfied by the payment of cash.)

... At the time of any proposed conversion of the Convertible Notes, and/or the conversion of any accrued interest as may be payable to the Investors [sic] the Company will consider the application of section 606... and whether any further Shareholder approval are [sic] required prior to the issue of such Shares.”

35. Drawing on the Panel’s comments in *Merlin Diamonds Limited*, we did not consider that the disclosure properly informed Lincoln shareholders, if the Notes are issued, of APMI’s ability to rely on the 3% creep exception which will ultimately give it more than 19.91% of Lincoln shares without the need for shareholder approval under item 7 of section 611 (assuming no further shares are issued). We understand from the terms of the Notes that APMI would have the capacity to exercise its right to creep on up to two occasions to the Maturity Date.¹⁴ We did not consider that the disclosure sufficiently drew to the attention of shareholders this potential control implication.

¹³ Ibid at [120]-[121]

¹⁴ The Note Agreement was entered into on 20 December 2021. Therefore, upon issue of the Notes, APMI would be able to rely on the 3% creep exception on up to two occasions to 31 December 2022 (given the creep exception can only be relied upon every 6 months)

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36. While the Notice of AGM set out the relevant provisions (i.e. the 20% prohibition in section 606 and the 3% creep exception in section 611), more needed to be done to explain to shareholders how those provisions applied in the circumstances to APMI and the potential control effect on Lincoln.

Dilutionary impact

37. The Notice of AGM disclosed that if all Notes were issued and subsequently converted, and assuming no other shares are issued, existing Lincoln shareholders would be diluted by 35.75%. However, the Notice of AGM stated that the calculations in the Notice of AGM “do not contemplate conversion of any accrued interest as may be payable to the Investor. The issue of Shares on the conversion of any accrued interest will have a further dilutionary effect on Shareholders.”
38. ASIC submitted that it considered that the Notice of AGM “should disclose the full dilutionary effect of the convertible notes in the case that additional shares are issued as consideration for interest accruing under the convertible note agreement.” We agree with ASIC’s submission.
39. We also note that the disclosure of the dilutionary effect of the Notes in the Notice of AGM was clearly incorrect in light of Lincoln’s clarification that \$0.005 was the floor (rather than the upper limit) for the conversion price of the Notes. The Notice of AGM states (erroneously) that “technically there is no floor price upon which the notes could convert...” and sets out in a table the dilutionary impact of the Notes where the conversion price is assumed to be \$0.005 and below. While it did not involve an understatement of the dilutionary impact which is potentially more problematic than an overstatement (as was the case here), the disclosures in this regard were clearly inaccurate and incomplete and must be rectified.

Lincoln’s financial situation and ability to repay the Notes

40. The Applicant contended that Lincoln has been in a “state of insolvency” since mid-2021. It submitted (in effect) that if Lincoln shareholders did not approve the Notes, Lincoln would not be able to repay the amounts that had already been drawn down on the Notes. Further, if the Notes were approved and issued, “LML is producing no income and therefore would not be in a position to repay the convertible note under the short term time proposed”.
41. Lincoln’s quarterly cash flow report for the quarter ended 31 December 2021 (**Quarterly Report**) disclosed that it had a cash balance of \$32,000 and that it had drawn down \$60,000 on the Notes.
42. The Notice of AGM disclosed that the first subscription amount of \$200,000 in respect of the Notes was advanced by APMI to Lincoln as an unsecured loan (with no conversion rights) on 24 December 2021. We note that this seemed to conflict with the disclosure in the Quarterly Report that \$60,000 had been drawn down by 31 December 2021.
43. Subsequently, Lincoln’s 2021 Annual Report dated 28 January 2022 disclosed that \$260,000 had been drawn down on the Notes to fund Lincoln’s operations.

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44. On the information available to us, it was unclear how Lincoln intended to repay the Notes given its cash position and that, as Lincoln had put in its preliminary submission, it was a *“mining exploration company that does not generate revenues, and its shares have been suspended from trading for over 12 months...”*.
45. In light of our concerns, we did not consider that Lincoln shareholders were sufficiently informed of:
- (a) Lincoln’s financial situation and of its specific funding needs which required the Note Agreement to be entered into at that time
 - (b) if the Notes Resolution is passed, how Lincoln expects to repay the Notes if they are not converted by their Maturity Date and
 - (c) if the Notes Resolution is not passed, how Lincoln expects to repay the \$260,000 that has already been drawn down on the Notes.
46. We note that Lincoln also confirmed that the amounts advanced by APMI were subject to a *“conditional conversion right”*, those conditions being (in effect):
- (a) Lincoln obtaining the necessary shareholder approvals under the ASX Listing Rules and the Corporations Act and
 - (b) Lincoln exercising its *“exclusive right”* to elect to convert the Notes into shares, rather than the noteholder (APMI).
47. We note that shareholders were not informed of Lincoln’s exclusive right to initiate the conversion process. We would expect this to be disclosed to shareholders as, in the absence of disclosure, one may expect conversion to be at the option of the noteholder.¹⁵

Related party approval and the conversion price

48. Lincoln’s 2021 Annual Report disclosed that APMI is a related party of Mr Zhang, *“a shareholder of the Company”*, and that as a related party, the issue of the Notes *“is subject to shareholder approval at the next shareholder meeting.”*
49. Lincoln’s ASX announcement from 21 February 2022 also stipulated that APMI *“...is associated with a former director of Lincoln Minerals Limited, Mr James Tenghui Zhang, who is deemed to be a related party of the Company having been a director of the Company until his resignation on 30 July 2021 and who controls [APMI].”*
50. It was unclear based on this disclosure whether Lincoln was seeking shareholder approval for a related party transaction for the purposes of ASX Listing Rule 10.11 or Chapter 2E of the Corporations Act or both.
51. However, it appeared from Lincoln’s submissions that it was seeking related party approval for the purposes of ASX Listing Rule 10.11 rather than Chapter 2E, noting that:

¹⁵ This term was subsequently disclosed in Lincoln’s announcement on 2 March 2022 – see footnote 20 for further details

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- (a) Lincoln had submitted that it considers the Note Agreement *“is on arms’ length terms having regard to the circumstances of the Company and the terms of the investment. The conversion price appeared to be broadly in the range of past trading in the Company’s shares or otherwise at a 15% discount to future raisings. The interest of 8% per annum for an unsecured facility is also considered in line with or better than market terms.”* Accordingly, in apparent reliance on the arm’s length exception in section 210, Lincoln contended that *“shareholder approval is not required to be obtained under Chapter 2E...”*.
- (b) Lincoln had advised us that it intended to postpone its AGM¹⁶ to prepare supplementary disclosure for the purposes of ASX Listing Rule 10.11 (and did not mention Chapter 2E).
52. In any event, the Notice of AGM made no mention of the related party relationship. It did not stipulate that shareholder approval was being sought on the basis that APMI is a related party of Mr Zhang and that such approval was (apparently) for the purposes of ASX Listing Rule 10.11.
53. Accordingly, we considered that Lincoln should inform its shareholders of the reasons that shareholder approval for the Notes Resolution was required, and clarify:
- (a) whether shareholder approval was being sought for the purposes of Chapter 2E and/or ASX Listing Rule 10.11 and
- (b) if shareholder approval is not being sought under Chapter 2E, the basis upon which Lincoln determined that such approval is not required. If Lincoln sought to rely on the arm’s length exception in section 210, it should explain in some detail why it (the arm’s length exception) applies.
54. If shareholder approval was being sought for the purpose of Chapter 2E, ASIC Regulatory Guide 76: Related party transactions is relevant. RG 76 notes that while there is no express requirement in Chapter 2E for an independent expert report to accompany a notice of meeting, there are circumstances in which ASIC encourages such a report to be obtained and sent to members.¹⁷ We sought submissions from the Parties on whether a valuation from an independent expert should be required in the circumstances.
55. In response, Lincoln submitted (among other things) that:
- (a) there was no binding legal requirement to obtain an independent expert’s report in the circumstances
- (b) the Notes are on arm’s length terms and therefore Chapter 2E approval is not required
- (c) the Notes *“are a standard funding arrangement for micro-cap companies and is not a disposal of, or acquisition of, a substantial asset from a related party”* and

¹⁶ Which it did on 21 February 2022 – see paragraph 11

¹⁷ See RG 76.105 to RG 76.113

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- (d) “[i]t is not considered a significant transaction for the purposes of ASIC RG para 76.113, and any material dilution impacts from conversion of the Convertible Note into shares would, in any event, be subject to a shareholder approval under s. 611 of the Corporations Act and the notice for such meeting would be accompanied by an Independent Expert Report.”

56. ASIC submitted that:

“... to the extent Lincoln considers the Transaction to be a related party transaction for which member approval is required, then ASIC considers that the company will need to procure an independent expert’s report (IER) and the notice of meeting should comply with the disclosure requirements set out in s219 of the Act and ASIC Regulatory Guide 76: Related party transactions (RG 76).

RG 76.105 provides that a valuation from an independent expert should be provided with a notice of meeting for member approval under Ch 2E where, amongst other things, the transaction is significant from the point of view of the entity. We consider that this threshold has been met given the size of the amount of funds being raised relative to Lincoln’s current financial position, importance of the receipt of funds for the company’s future and the potential substantial dilution of existing members that could occur if the convertible notes are converted to shares (see RG 76.113)... Accordingly, ASIC considers that Lincoln should engage an independent expert to provide a valuation on the benefit proposed to be given to APMI...”

57. On the basis of the information available to us, and without seeking to influence ASIC’s and ASX’s consideration of this issue, in our preliminary view, we did not consider it necessary for an independent expert’s report to be prepared by Lincoln for the issue of the Notes if Chapter 2E approval is not required because the arm’s length (or other) exception applies and sufficient information is provided to shareholders explaining the basis upon which such approval is not required, including why the arm’s length exception applies.
58. We considered that this disclosure should include an explanation of how Lincoln determined that \$0.005 is an appropriate floor for the conversion price for the Notes having regard in particular to the other proposals (see below). This is of importance given that Lincoln shareholders do not have any meaningful way to assess the value of their shares in light of Lincoln’s suspension from trading since 21 September 2020.
59. We note that while it is our preliminary assessment that we did not consider an independent expert’s report necessary, it may be the case that it is required for another purpose (for example, if ASIC or ASX required it).¹⁸

Other proposals

60. The Applicant submitted that it had previously put several proposals to the Lincoln Board, the terms of which may have been more favourable to shareholders than the Notes proposal.

¹⁸ See also paragraph 69

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61. We considered that the details of these proposals should also be disclosed to shareholders, together with sufficiently detailed reasons why Lincoln chose to proceed with the Notes proposal and not with the Applicant's proposals.
62. Shareholders should also be informed of any other funding offers or proposals received by Lincoln since entering the Note Agreement (including a proposal from the Applicant), including their impact (if any) on the Board's recommendation in relation to the Notes Resolution.

Consideration of an undertaking

63. In light of our views on disclosure expressed above and Lincoln's intention to issue a supplementary notice of meeting (which it announced on 21 February 2022¹⁹), we asked Lincoln if it was willing to provide an undertaking under section 201A of the ASIC Act to the Panel that it will:
 - (a) prepare a supplementary notice of meeting (**Supplementary Notice**) which addresses our disclosure concerns and complies with applicable regulatory requirements
 - (b) not formally issue the Supplementary Notice or re-schedule its AGM until ASIC, and then the Panel, provide written confirmation that they do not object to the form of the Supplementary Notice and
 - (c) not hold its re-scheduled AGM until not less than 14 days after the Supplementary Notice has been sent to its shareholders – we considered that in these circumstances this would provide shareholders with sufficient time to properly consider the additional disclosure.
64. In addition, given the error in the disclosure of the conversion price of the Notes which, in our view, required immediate market correction, we asked Lincoln whether it would be willing to undertake to immediately advise the market that the conversion price for the Notes was incorrectly described in the Notice of AGM and that it will be issuing supplementary disclosure.²⁰
65. In response, Lincoln offered to give the attached undertaking (**Annexure A**). We are satisfied that the undertaking sufficiently deals with those issues raised by the Applicant which, in our view, go to control (or potential control) of Lincoln or the acquisition (or proposed acquisition) of a substantial interest in Lincoln.
66. The undertaking provides, among other things, that the Supplementary Notice will not be dispatched until ASIC has provided written confirmation that it does not

¹⁹ See paragraph 11

²⁰ Prior to the Panel's formal acceptance of Lincoln's undertaking, on 2 March 2022, Lincoln made an announcement on ASX advising (among other things) that there was an error reported in its announcement of 23 December 2021 titled 'Convertible Note funding' and in the Notice of AGM in relation to the conversion price for the Notes. Lincoln's announcement disclosed that the correct conversion price for the Notes is the higher of \$0.005 and a 15% discount to the issue price of shares and/or the exercise price of any options offered under any Subsequent Capital Raising. Lincoln also disclosed that it was preparing a supplementary notice of AGM. We were satisfied that Lincoln's announcement was sufficient to satisfy its obligations under paragraph 1 of its undertaking and that a further announcement was not required

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object to the form of the Supplementary Notice, to be followed by the Panel's confirmation that it does not object to the same.

67. We note that the provision of a 'no objection' confirmation by the Panel (assuming that one is ultimately given) should not be taken to be a sign of the Panel's endorsement of the content and disclosure in the Supplementary Notice. Rather, we only intend to confirm that the Supplementary Notice sufficiently deals with our disclosure concerns – being those issues set out in paragraph 2 of Lincoln's undertaking – such that we have no objection to its dispatch.
68. In forming a view that we may have 'no objection' to the Supplementary Notice being dispatched, we will rely on the assistance of ASIC to first review the contents of the Supplementary Notice. As the corporate regulator, ASIC is better placed and better equipped to scrutinise the disclosure and to consider the application of Chapter 2E (and liaise with ASX in relation to the application of the ASX Listing Rules) to the issue of the Notes (see further paragraph 70).
69. In coming to our decision to accept Lincoln's undertaking and accordingly, decline to conduct proceedings, we do not seek to comment on or limit any actions powers or discretions of ASIC, ASX or any other regulator in relation to the issue of the Notes or the shareholder approval being sought by Lincoln.²¹
70. On this point, we note ASIC's submission that it *"has not come to a view about whether the proposed issuance of \$1.6 million of convertible notes to Australia Poly Minerals Investments Pty Ltd by Lincoln (Transaction) requires shareholder approval and the basis of the company's reliance on the arm's length exception. ASIC may have further comments and queries regarding this upon receipt and review of the additional information Lincoln will provide in the draft supplementary notice of annual general meeting."*

DECISION

71. Given the information provided to the Panel, the undertaking offered by Lincoln and 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 regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).
72. 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.

Tony Osmond
President of the sitting Panel
Decision dated 3 March 2022
Reasons given to parties 7 April 2022
Reasons published 12 April 2022

²¹ See also paragraph 59

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Advisers

Party	Advisers
Olary Holdings Limited	Banki Haddock Fiora
Lincoln Minerals Limited	Moray & Agnew Lawyers
Mr Johnson Zhang	Moray & Agnew Lawyers
Ms Ruiyu (Yoyo) Zhang	Moray & Agnew Lawyers
Ms Ting Ting Gao	Moray & Agnew Lawyers
Australia Poly Minerals Investments Pty Ltd	Dentons Australia
Mr James Zhang	Dentons Australia



Australian Government

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Annexure A

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

LINCOLN MINERALS LIMITED

Lincoln Minerals Limited ACN 050 117 023 (**LML**) undertakes to the Takeover Panel (**Panel**) under section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth) as follows:

1. LML must immediately advise the market that the conversion price in the Convertible Note Agreement dated 20 December 2021 (**Agreement**) pursuant to which LML proposes to issue up to 1,600,000 convertible notes (**Notes**) to Australia Poly Minerals Investments Pty Ltd ACN 622 067 556 (**APMI**) is erroneously described in its original Notice of AGM dated 18 January 2022 and that it will be issuing a supplementary notice of AGM to its shareholders.
2. Subject to paragraph 3 below, LML will issue a supplementary notice of AGM to its shareholders (**Supplementary Notice**) and disclose in the Supplementary Notice details and/or additional details in respect of the following:
 - (a) the terms of the Agreement;
 - (b) the consequences of LML entering into the Agreement and issuing the Notes to APMI, expressly including:
 - (i) the potential control effects upon issue and conversion of such Notes;
 - (ii) APMI's ability to increase its shareholding in LML to greater than 19.91% over time (relying on item 9 of section 611 of the Corporations Act) without the need for shareholder approval pursuant to item 7 of section 611 of the Corporations Act;
 - (iii) if issue of the Notes is approved by LML's shareholders, LML's plan for repaying the Notes if they are not subsequently converted by the relevant maturity date;
 - (iv) if issue of the Notes is not approved by LML's shareholders, LML's plan for repaying \$260,000 that has already been drawn down; and
 - (v) the full dilutionary effect of the Notes in the event APMI elects to receive interest accruing under the Agreement in shares;

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- (c) the basis upon which it was determined that 0.5 cents is an appropriate floor for the conversion price for the Notes
 - (d) that LML shareholder approval is being sought on the basis that APMI is a related party to Mr James Tenghui Zhang and which clarifies:
 - (i) whether shareholder approval is being sought for the purposes of Chapter 2E of the Corporations Act and/or ASX Listing Rule 10.11; and
 - (ii) if shareholder approval is not being sought under Chapter 2E of the Corporations Act, the basis upon which LML has determined that such approval is not required. If LML relies on the arm's length exception in section 210 of the Corporations Act, it should explain why it applies;
 - (e) the financial position of LML and funding needs for LML entering into the Agreement at the time; and
 - (f) other options that the board of LML has considered prior to deciding to enter into the Agreement and a description of each other funding offer or proposal received by LML since entering into the Agreement and their impact (if any) on the LML board's recommendation in relation to the resolution for the issue of the Notes.
3. LML will not formerly issue the Supplementary Notice or re-schedule the AGM until:
- (a) a draft of the Supplementary Notice has been provided to ASIC and the Panel; and
 - (b) ASIC has provided written confirmation that it does not object to the form of the Supplementary Notice, to be followed by written confirmation from the Panel that it does not object to the same.
4. LML will not hold its re-scheduled AGM until 14 days after the Supplementary Notice has been sent to its shareholders.
5. In preparing the Supplementary Notice, LML will comply with any applicable regulatory requirements.

In this undertaking, the following terms have the corresponding meaning:

AGM

LML's Annual General Meeting of shareholders which was originally scheduled for 25 February 2022, postponed to 16 March 2022 and has been further postponed to a date not yet set by LML (as announced by LML in its ASX announcement from 24 February 2022).

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Corporations Act *Corporations Act 2001 (Cth)*

**Signed by Ruiyu Zhang, Managing Director
with the authority, and on behalf, of
Lincoln Minerals Limited
Dated 1 March 2022**