Australian Government

Takeovers Panel

Reasons for Decision
Vmoto Limited
[2025] ATP 7

Catchwords:

Decline to conduct proceedings – association – de-listing – buy-back – board spill – rights issue – evidence – jurisdiction

Corporations Act 2001 (Cth), sections 12, 249D, 249P, 602, 657A, 657C, 657D(2), 671B

Takeovers Panel Procedural Rules 2020, rule 20

Takeovers Panel Procedural Guidelines 2020, 5.8

Guidance Note 17: Rights Issues

ASX Guidance Note 33: Removal of Entities from the ASX Official List

Flinders Mines Limited 02 and 03 [2019] ATP 2, Dragon Mining Limited [2014] ATP 5, Mount Gibson Iron Limited [2008] ATP 4

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

INTRODUCTION

1. The Panel, Sylvia Falzon, Neil Pathak (sitting President) and Richard Phillips, declined to conduct proceedings on an application by the Munro Family Super Fund in relation to the affairs of Vmoto Limited. The application concerned (among other things) transactions involving alleged transfers of Vmoto shares to entities selected by the Board in the context of a proposed de-listing and upcoming board spill meeting. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

Buy-back	has the meaning given in paragraph 12(c)
Consideration Share Issue	has the meaning given in paragraph 10
Employee Share Issue	has the meaning given in paragraph 14
Entitlement Offer	has the meaning given in paragraph 5
Proposed De-listing	has the meaning given in paragraph 12

Section 249D[1] Meeting	has the meaning given in paragraph 15
Small Holdings Sale Facility	has the meaning given in paragraph 9
Vmoto	Vmoto Limited

FACTS

3. Vmoto is an ASX listed company (ASX code: VMT) which develops and manufactures electric powered two-wheel vehicles.

4. The applicant (together with its related entities) is the 5th largest shareholder of Vmoto holding 5.83%. Vmoto's other substantial shareholders are its Managing Director who holds 12.03% and three other shareholders who hold 11.71%, 9.56% and 6.74% respectively.

5. On 13 October 2023, Vmoto announced a non-underwritten non-renounceable 1 for 4 entitlement offer at $0.15 per share to raise approximately $10.8 million (**Entitlement Offer**) to fund (among other things) the building of manufacturing facilities in China. The Prospectus in relation to the Entitlement Offer stated that *"[a]ny Entitlements not taken up under the Entitlement Offer (including the Top Up Facility) will form the Shortfall and the Directors reserve the right, subject to the requirements of the Listing Rules and the Corporations Act, to issue the Shortfall at their discretion… (**Shortfall Offer**)."*

6. On 20 November 2023, Vmoto announced that the Entitlement Offer had closed with a shortfall of approximately 35 million shares ($5.3 million) and that the shortfall would be offered to investors who are invited to participate in the Shortfall Offer.

7. On 6 December 2023, Vmoto announced that it had received strong support from new investors and existing shareholders for the Shortfall Offer which had closed significantly oversubscribed with applications for approximately 68 million shares ($10.2 million) and that to accommodate the excess demand Vmoto had decided to undertake a 'follow-on placement' of approximately 32 million shares ($4.9 million) on the same terms as the Entitlement Offer.

8. On 14 March 2024, Vmoto announced that it had entered into an agreement to acquire the remaining 50% interest in the issued capital of Vmoto Soco Italy srl and take Vmoto's interest to 100%.

9. On 27 May 2024, Vmoto announced that it had established an opt-out small holdings sale facility (**Small Holdings Sale Facility**) to provide holders of Vmoto shares with a market value of less than $500 the opportunity to have their shares sold without incurring any brokerage or handling costs.

10. Also on 27 May 2024, Vmoto announced that it had issued approximately 11 million shares as consideration (**Consideration Share Issue**) for the acquisition of the remaining 50% interest in Vmoto Soco Italy srl.

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

11. On 23 July 2024, Vmoto announced that it had completed the Small Holdings Sale Facility, which had resulted in approximately 0.46% of its issued capital being sold at the sale price of $0.1373, reducing the total number of shareholders by 1,169 shareholders.

12. On 16 December 2024, Vmoto announced an intention to de-list from the ASX (**Proposed De-listing**) subject to obtaining the required shareholder approval by way of a special resolution to be put forward at a general meeting proposed to be held on or around early March 2025. The announcement also stated (among other things):

    (a) that Vmoto had received formal advice from ASX that it will agree to the removal from the ASX on a date to be determined, subject to satisfaction of the relevant conditions

    (b) the reasons for seeking de-listing, which included that the public share price does not reflect its underlying value

    (c) that Vmoto intended to undertake an off-market equal access share buy-back (**Buy-back**) for up to 10% of the smallest number of Vmoto shares that Vmoto had on issue over the 12 months preceding the Buy-back

    (d) that all Vmoto directors have confirmed that they do not intend to participate in the Buy-back and

    (e) "*[d]epending on interest in the Buy-Back, the Company may, at its sole discretion, undertake a further exit mechanism for shareholders before the Delisting (if approved by shareholders) by way of a further buy-back (subject to shareholder approval) or a share sale facility.*"

13. The Buy-back was open from 2 January 2025 to 31 January 2025. The Supplementary Buy-Back Booklet dated 2 January 2025 stated that the price for the Buy-back had been set at $0.12 per share, which represented a premium of 8.6% to the 20-day volume weighted average price of the shares traded on the ASX up to the close of trading on 12 December 2024.

14. On 21 January 2025, Vmoto released an Appendix 2A stating that it had issued (**Employee Share Issue**) 8.4 million shares to employees "*in recognition of their efforts and contribution to the Company*" and approximately 1.3 million shares to consultants "*in lieu of cash payment for salaries*".

15. On 23 January 2025, the applicant and three related entities lodged a section 249D notice requisitioning a meeting (**Section 249D Meeting**) to consider resolutions to remove each of the incumbent Vmoto directors other than the Managing Director and resolutions to appoint two new Vmoto directors. In their members' statement under section 249P of the same date, the requisitioners stated that their "*primary issues*" related to (among other things) the Proposed De-listing and Buy-back, loss of market confidence and other matters relating to Board performance.

16. On 3 February 2025, Vmoto announced that it had received applications representing approximately 143% of the maximum number of shares that Vmoto could buy-back under the Buy-back terms and that due to this demand the Buy-back would be scaled back proportionately.

17. On 4 February 2025, Vmoto announced that the Section 249D Meeting had been scheduled for 6 March 2025 and released a notice of meeting and explanatory statement to shareholders. The notice of meeting stated that the Board recommends that shareholders vote against all resolutions. The notice of meeting also included a letter to shareholders which contained the following statement (and other similar statements):

    "*Whilst discontinuation of the proposed Delisting is the Requisitioning Shareholders' stated motive for the Resolutions, the Board believes the Requisitioning Shareholders are attempting to obtain effective control of the Board and therefore, the Company, without paying any control premium.*"

APPLICATION

18. By application lodged on 17 February 2025, the applicant sought a declaration of unacceptable circumstances. The applicant submitted (among other things) that:
    (a) The Proposed De-listing follows "*a number of transactions that have involved significant oppression of minority shareholders and the transfer of 22.6% of the company's shares to entities selected by the board to receive those shares in unacceptable circumstances*"[2] and the Vmoto Board is "*building support for their proposals*".
    (b) The Proposed Delisting "*will deliver the board members the benefits that come from removing the protections that the listing rules provide minorities*".
    (c) The Buy-back was "*at a fraction of the depreciated value of the company's tangible assets, 15 days…before the end of [its] financial year when shareholders were completely uninformed about the company's recent performance*" and was "*clearly not in all shareholders best interests*".
    (d) The Entitlement Offer was contrary to Guidance Note 17 including because the Board had no intention of, and made no attempt to, "*broadly place*" Shortfall Shares, and having regard to Vmoto's need for funds.
    (e) Certain substantial shareholders of Vmoto had not lodged substantial shareholder notices.
    (f) The notice of meeting in relation to the Section 249D Meeting contained misleading statements concerning the requisitioners' intentions and the accompanying voting form was causing confusion.
19. The applicant sought interim orders to:
    (a) postpone the Section 249D Meeting until the matters in the application are investigated and
    (b) require Vmoto to disclose details of the recipients of shares issued in connection with the Entitlement Offer and follow-on placement and other transactions and if there are any relationships between those recipients and any of the directors.

[2] The transactions included the Entitlement Offer and follow-on placement, the Small Holdings Sale Facility, the Consideration Share Issue and the Employee Share Issue

20. The applicant sought final orders to the following effect:
    (a) cancellation of the existing Section 249D Meeting and the convening of a fresh meeting that has the alleged false and misleading statements and voting paper manipulation removed to the Panel's satisfaction
    (b) imposing voting restrictions on Board members and the recipients of shares placed at the Board's discretion in relation to the Section 249D Meeting and resolution in relation to the Proposed De-listing
    (c) "*[a] remedial order forcing those parties who received shares in unacceptable circumstances to dispose of the shares in a manner acceptable to the Panel*" and
    (d) reversing the Employee Share Issue.

DISCUSSION

21. We have considered all the materials but address specifically only those we consider necessary to explain our reasoning. The materials included:
    (a) A preliminary submission from Vmoto submitting that we should decline to conduct proceedings.
    (b) An out of process rebuttal to Vmoto's preliminary submission from the applicant and further responses to that rebuttal from each of Vmoto and the applicant, each of which we decided to receive.[3]
    (c) Three submissions made by other Vmoto shareholders as non-parties which supported and substantially overlapped with submissions made by the applicant in the application, along with a rebuttal submission from Vmoto to those submissions and a further response from the applicant, each of which we decided to receive.[4]

Allegations concerning issues or transfers of Vmoto shares to supportive shareholders

22. Vmoto submitted that the application makes "*vague and unsupported assertions*" that the Vmoto Board has sought to issue shares to a group of supportive shareholders through various issues of shares dating back to October 2023, and that the applicant has failed to identify any shareholders of Vmoto who it considers to be associated or acting in concert and does not identify a block of voting power that is alleged to be the subject of an association. Vmoto also referred to the hurdle test for association matters[5] and submitted that the applicant had failed to demonstrate any patterns of behaviour or uncommercial dealings supporting an inference of association, and had merely made allegations, without evidence, in the hope that the Panel would exercise its powers to cure deficiencies in the application.

23. The applicant subsequently submitted that its application was not reliant on establishing associations. However, it appeared to us that the applicant was, at least

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[3] See *Takeovers Panel Procedural Rules 2020*, rule 20(1) and *Takeovers Panel Procedural Guidelines 2020* at [5.8]
[4] See *Takeovers Panel Procedural Rules 2020*, rule 20(3). These non-party submissions were provided to the parties
[5] *Mount Gibson Iron Limited* [2008] ATP 4 at [15]

in part, alleging there was some form of association or relationships between the directors of Vmoto and other shareholders that were unacceptable. For example, the applicant referred to the need to "*prevent people who were hand picked by the board to receive large numbers of shares, from voting their shares against the spill motion resolutions*". It also included references to a "*group of shareholders*" being chosen to "*to receive the benefit of favourable treatment*" and to shares being placed "*into friendly hands*". The applicant submitted that the Employee Share Issue placed shares "*in the hands of supporters so the directors could benefit from their support for their proposals*". However, the submissions lacked specificity and were not accompanied by any probative supporting evidence.

24. The applicant also made submissions which appeared to allege uncommercial dealings. For example, in relation to the Consideration Share Issue, the applicant submitted that the associated transaction was "*far from arms length*" and that "*the reasons offered to support bringing the transaction forward in the lead up to the proposed delisting do not make any commercial sense*". The applicant also made references in other submissions to shares having been issued "*very cheaply*" and "*on very favourable terms with invited parties*". Again, such assertions, unaccompanied by supporting evidence, did not take us very far.

25. As noted in *Dragon Mining Limited*[6], the Panel has limited investigatory powers, and as such, an applicant must do more than make allegations of association and rely on the Panel to substantiate them. We considered the applicant had provided mere fragments of an association claim which were difficult to thread together. It fell well short of providing a sufficient body of material to warrant us conducting further enquiries as to association or some other form of unacceptable relationship. This is particularly so having regard to the significant timeframe over which the applicant has asked us to investigate issues.

26. The applicant also made a number of submissions to the effect that the conduct of the Board in issuing shares to supportive parties had "*oppressed*" or "*suppressed*" minority shareholders. We do not consider this aspect of the allegations to be a matter for us. It is open to the applicant to consider bringing a shareholder oppression suit in the courts if it wishes.

Proposed De-listing and Buy-back

27. The applicant also made complaints in relation to the Proposed De-listing and the Buy-back. The Panel considered (and made a declaration of unacceptable circumstances) in relation to a proposed de-listing and associated buy-back in *Flinders Mines Limited 02 and 03*,[7] where it stated as follows (at [20]):

> "*The decision of a company's board to seek to de-list involves the exercise of business or commercial judgement, and may be subject to (among other things) requirements of the applicable listing rules, the discretions and policy of the relevant listing authority, director's duties and minority shareholders remedies. It is not the Panel's role, in the*

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[6] [2014] ATP 5 at [59]-[60]

[7] [2019] ATP 2

ordinary course, to opine on such judgements or enforce requirements for which other regulators or the courts have primary responsibility. However, the overlap of such requirements does not prevent the Panel exercising its jurisdiction in relation to matters that do fall within its jurisdiction and role. In our view, where de-listing has or is likely to have an effect on control or the acquisition of a substantial interest in a listed company, and appears inconsistent with the purposes in section 602, it is appropriate for us to consider whether it gives rise to unacceptable circumstances…."

28. Vmoto submitted that the Board had made a unanimous decision to pursue the Proposed De-listing after having obtained independent financial and legal advice, Vmoto had obtained in-principle approval from the ASX for the Proposed De-listing, and that there is no proper basis to conclude that it gives rise to concerns having regard to the purposes in section 602.

29. Vmoto also submitted that the Buy-back did not materially enhance or entrench any person's control of Vmoto and provided a table showing the increases in the relevant interests and voting power of Vmoto's existing substantial shareholders[8], which it submitted were materially below examples which the Panel has found to be acquisitions of a substantial interest for the purposes of section 657A[9].

30. Vmoto also made other submissions seeking to distinguish the circumstances from those in *Flinders Mines Limited 02 and 03*.[10]

31. The applicant submitted that the Buy-back was announced at a time when the market was waiting to be updated on annual profit forecast and was done "*under the auspices of giving shareholders who didn't want to own shares in an unlisted entity an opportunity to exit at a fraction of the net asset backing*". The three non-party shareholders also included as part of their submissions complaints regarding the price of the Buy-back.

32. The applicant further submitted that the timing of the Buy-back was unacceptable because it "*removed 10% of shareholders who weren't in favour of delisting before the delisting was put to the vote. Those shareholders were not allowed the opportunity of certainty in relation to the delisting before having to accept…*".

33. Vmoto submitted that the Buy-back was undertaken in an efficient, competitive and informed market in circumstances where Vmoto was in compliance with its continuous disclosure obligations at all times and had prepared fulsome disclosure through the preparation of a buy-back booklet.

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[8] The table noted that the Managing Director had moved from 10.92% to 12.03% and the other substantial shareholders (other than the applicant) had moved from 10.63% to 11.71%, 8.68% to 9.56% and 6.12% to 6.74% respectively

[9] Citing *Anaconda Nickel Limited 16 & 17* [2003] ATP 15 at [32] (acquisition of 5 or 6%), *Goldlink IncomePlus Limited 04* [2009] ATP 2 at [48] (acquisition of 9.9%) and *Wollongong Coal Limited* [2014] ATP 21 at [19] (acquisition of up to 10.6%); *Thorn Group Limited 01 & 02* [2020] ATP 29 (acquisition of up to 8.93%)

[10] For example, Vmoto submitted that the Buy-back was structured as an off-market buy-back with clear disclosure that any scale back would be undertaken proportionally, which afforded shareholders a reasonable time to consider the Buyback and the Proposed Delisting and did not "*coerce any shareholders into selling quickly or at all*"

34. Conducting a buy-back in close proximity to Vmoto's upcoming periodic financial disclosure did appear to us to be unusual. That said, participation in the Buy-back was optional and Vmoto had foreshadowed that it may offer other exit mechanisms for shareholders prior to de-listing.[11] We also note that the ASX in its guidance on de-listing encourages the implementation of a buy-back or other facility that allows shareholders to sell or redeem their shares for "*a nominated period up to, and/or following, the removal of the entity*",[12] and Vmoto obtained the ASX's in-principle approval for the Proposed Delisting.[13] We do not consider the complaints raised in relation to the Proposed De-listing or the Buy-back warrant us making further enquiries having regard to the materials provided.

Timeliness and extended time frame of allegations

35. Much of the material referred to in the application related to matters that occurred some time ago.

36. A Panel application must be made within 2 months after the circumstances have occurred or a longer period determined by the Panel.[14]

37. The applicant included in the application a request for an extension of time, submitting "*[w]e request favourable consideration of an extension of time because it is now apparent that the dominant Managing Director has been preparing the ground over a much longer period than 2 months to achieve his ambition to take control of the company by reducing the number of shares in minority hands and putting shares into friendly hands after he successfully restructured the board*". This submission, which we take to be an explanation for the applicant's delay, appeared to suggest that the alleged circumstances arose even earlier than the time of the Entitlement Offer.

38. Vmoto submitted, with reference to the factors set out in *Webcentral Group Limited 03*[15], that we should not exercise our discretion to extend time including because:

    (a) matters set out in the application such as the Entitlement Offer, the Consideration Share Issue and the Small Holdings Sale Facility are substantially out of time

    (b) the application fails to make any credible allegations of unacceptable circumstances

    (c) no essential matters supporting the application came to light within the two months preceding the application and

    (d) the applicant has provided no explanation for the delay in bringing the application.

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[11] See paragraph 12(e)

[12] ASX Guidance Note 33: Removal of entities from the ASX Official List, page 9

[13] Noting, as observed in *Flinders Mines Limited 02 and 03* [2019] ATP 2 at [19], that the fact that ASX has approved a proposed de-listing does not prevent us examining what is proposed if it involves circumstances that appear to be unacceptable

[14] See section 657C

[15] [2021] ATP 4 at [86]

39. We do not consider it is appropriate to undertake inquiries into matters stretching back almost 18 months ago having regard to the nature of the allegations, the lack of probative evidence supporting those allegations and the time and resources involved in undertaking such inquiries. In relation to the Entitlement Offer, the applicant's complaints concerning Vmoto's need for funds[16] invited an assessment of Vmoto's financial situation and "market factors" at or prior to October 2023, the amount sought to be raised and the availability of other alternatives to raising capital at that time. As noted in Guidance Note 17, the Panel is likely to accept the directors' decisions on issues relating to a company's need for funds where they appear to be reasonable unless the applicant can point to something that suggests a deeper inquiry may be warranted.[17] We consider there needs to be a very compelling reason for doing so here, and this is not apparent to us on the materials provided. We have similar reservations about conducting further inquiries into decisions of the Board in relation to allocating shares under the Shortfall Offer and follow-on placement at the end of 2023 and in relation to the Consideration Share Issue and the Small Holdings Sale Facility in 2024.

40. Having regard to our decision not to conduct proceedings, we do not consider it necessary to reach a view on whether to formally extend time under section 657C for the making of the application.

Other matters

Substantial shareholder notices

41. The applicant submitted that the second and third largest shareholders of Vmoto, holding 11.71% and 9.56% of Vmoto respectively, had failed to lodge any substantial shareholding notices in relation to their shareholdings since first acquiring 5% interests in connection with the Entitlement Offer.[18] Vmoto submitted that it had notified "*applicable existing substantial shareholders*" of the "*potential need*" to lodge an applicable substantial shareholding notice having regard to the apparent changes in voting power detailed in the table it provided in relation to the Buy-back.[19] This gave us some concerns; however, in its rebuttal the applicant noted that it had submitted a request to ASIC to investigate these matters. While the Panel does from time to time make orders relating to substantial holder notice disclosure in certain contexts[20], in this instance we do not consider there is a reasonable prospect of us making a declaration and orders solely in relation to this issue noting that the applicant has referred the issue to ASIC. We also note that disclosure of the number and percentage of these shareholders' holdings (albeit as at 8 March 2024) appeared in Vmoto's most recent annual report.

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[16] Which included submissions to the effect that Vmoto had sufficient cash balances to fund its expenditure and that the use of the proceeds was "*unnecessary discretionary spending*"
[17] Guidance Note 17: Rights Issues at [11]
[18] See section 671B
[19] See paragraph 29
[20] Noting the Panel's orders power in section 657D(2) excludes an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C

Complaints in relation to the notice of meeting

42. The applicant submitted that the letter from the Vmoto Board to shareholders in the notice of meeting in relation to the Section 249D Meeting "*makes assumptions in relation to the applicants intentions and draws the false and misleading conclusion that they are attempting to take over the company without making a take over bid and paying a premium*". It also submitted that the voting form supplied with the notice of meeting, which placed the Board's recommendation to vote "Against" in bold print next to each resolution, was causing confusion and "*designed to make voters think if they vote for the resolution they are voting for being against the resolution*".

43. Vmoto submitted that consistent with the proper exercise of their directors' duties, the Vmoto Board provided a recommendation to shareholders as to how to vote at the Section 249D Meeting in the notice of meeting and explained the rationale for this recommendation and that nothing in the notice of meeting or the proxy form can properly be considered to be misleading or confusing.

44. We query the basis for the Board's comments in the letter to shareholders that the requisitioning shareholders appeared to be seeking to take control of Vmoto without paying any control premium, noting the requisitioning shareholders' explanation for requesting the general meeting disclosed in the section 249P members' statement. However, we do not consider this sufficiently material to warrant us taking further action.

DECISION

45. 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).

Orders

46. 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.

Neil Pathak
President of the sitting Panel
Decision dated 28 February 2025
Reasons given to parties 12 March 2025
Reasons published 18 March 2025

Advisers

Party	Advisers
The Munro Family Super Fund	-
Vmoto Limited	Gilbert + Tobin