



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Flinders Mines Limited  
[2012] ATP 9**

**Catchwords:**

*Decline to conduct proceedings, scheme implementation agreement, triggered condition, foreign court injunction*

*Corporations Act 2001 (Cth), sections 411, 602, 657A(3)*

*BC Iron Limited [2011] ATP 6, Mount Gibson Iron Limited [2008] ATP 4, Qantas 02R [2007] ATP 7, Qantas Airways Limited 02 [2007] ATP 6, AMP Shopping Centre Trust 02 [2003] ATP 24*

**INTRODUCTION**

1. The Panel, Garry Besson (sitting President), Catherine Brenner and Justin Gleeson SC, declined to conduct proceedings on an application by Ms Geraldine Carter in relation to the affairs of Flinders Mines Limited. The application concerned the effect that an injunction granted by a foreign court against Magnitogorsk Iron and Steel Works OJSC had on preventing the Flinders Mine Ltd scheme of arrangement from proceeding to court approval after the shareholders had approved it. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

Applicant	Ms Geraldine Carter
Chelyabinsk court	Arbitration Court of Chelyabinsk Region, Russian Federation
Flinders	Flinders Mines Limited
MMK	Magnitogorsk Iron and Steel Works OJSC
Quit Date	Defined in the SIA to mean 30 June 2012 or such later date as MMK and Flinders may agree in writing
SIA	Scheme implementation agreement dated 25 November 2011, under which Flinders agreed to propose a scheme of arrangement for MMK, or a member of the MMK Group, to acquire Flinders shares

**FACTS**

3. Flinders is an ASX listed company (ASX code: FMS). MMK is a Russian steel production company listed in Russia on the Moscow Interbank Currency Exchange (MICEX: MAGN). MMK's global depository receipts are traded on the London Stock Exchange (LSE: MMK).
4. On 25 November 2011, Flinders and MMK entered into the SIA, under which MMK or its nominee would acquire all of the issued ordinary shares of Flinders not already held by MMK for A\$0.30 per share by way of scheme of arrangement.

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5. On 15 February 2012, the Federal Court ordered that the scheme meeting be convened.
6. One of the conditions of the scheme and the SIA was:

*No temporary restraining order, preliminary or permanent injunction or other order issued by any court of competent jurisdiction or other legal restraint or prohibition being in effect at 8.00 am on the Second Court Date which prevents the consummation of any aspect of the Scheme.*
7. Clause 2.12 of the SIA provided that, if any condition had not been satisfied or waived by the Quit Date, *“either party may give notice to the other terminating”* the SIA.
8. Clause 1.7 of the scheme of arrangement provided (among other things) that the scheme would lapse, and be of no further force or effect, *“if the Effective Date has not occurred on or before the Quit Date”*.
9. On 29 March 2012, Ms Elena Nikolayevna Egorova, a shareholder in MMK, brought an action in the Chelyabinsk court challenging the legitimacy of the MMK board’s resolutions relating to MMK’s proposed acquisition of Flinders.
10. On 30 March 2012, the scheme was approved by Flinders shareholders. Also on 30 March 2012, the Chelyabinsk court issued an injunction restraining MMK from implementing the MMK board’s resolutions relating to its proposed acquisition of Flinders. On that day the closing price of Flinders shares was the same as the price offered under the scheme, A\$0.30.
11. On 3 April 2012, Flinders announced that the injunction had been obtained and that it had made an application to the Federal Court to adjourn the second court hearing to approve the scheme under s411(4).<sup>1</sup>
12. On 6 April 2012, MMK lodged a motion with the Chelyabinsk court seeking a discharge of the injunction.
13. On 16 April 2012, Flinders announced that:
  - (a) MMK’s request to discharge the injunction had been denied
  - (b) MMK had filed an appeal against the injunction
  - (c) Flinders had retained Russian legal counsel and commenced its own appeal against the injunction and
  - (d) *“There has been much speculation as to the reasons behind the injunction, Flinders has been informed by senior MMK executives that they have been unable to confirm any cause other than that stated in the injunction. MMK has advised Flinders that they have no evidence to the contrary.”*

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<sup>1</sup> References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

14. On 18 April 2012, Flinders announced that:

*Further to the announcement by Flinders Mines Limited (Flinders) dated 16 April 2012, Magnitogorsk Iron and Steel Works OJSC (MMK) and Flinders advise that by mutual agreement the parties are treating the Quit Date under the Scheme Implementation Agreement (SIA) between Flinders and MMK as 30 June 2012. This agreement was made on the basis of MMK's expectation that Flinders' and MMK's appeals against the injunctive relief obtained by a minority shareholder of MMK, restraining implementation of the SIA, will be heard and a judgement delivered before that date.*

15. The appeals by MMK and Flinders against the injunction were heard before an appeal court on 30 May 2012 and 6 June 2012.

16. On 8 June 2012, Flinders announced that both appeals had been dismissed. The announcement also stated that:

*Flinders notes that the next court hearing regarding the legal action commenced by Ms Egorova will be 2 July 2012, after the SIA Quit Date of 30 June 2012.*

*Flinders continues to examine all avenues to enable a transaction with MMK to be implemented before the Quit Date of 30 June 2012. In addition, in accordance with the SIA, Flinders has suggested a number of alternative proposals and variations to the SIA for MMK's consideration and will inform the market of any outcomes.*

17. On 8 June the closing price for Flinders shares was A\$0.125.

## APPLICATION

18. By application dated 15 June 2012, the Applicant sought a declaration of unacceptable circumstances. The Applicant submitted (among other things) that:

- (a) Ms Elena Egorova, the applicant for the injunction at the Chelyabinsk court, did not exist or it was very likely that she did not exist. Therefore it has not been established that the injunction has a proper legal basis
- (b) Even if Ms Egorova is a real person, it was not in the public interest or conducive to takeover efficiency that a small shareholder with poor information could block a mutually agreed and highly beneficial transaction between two parties.

19. The Applicant submitted that the effect of the circumstances was to prevent the completion of the scheme by MMK and Flinders.

20. On 20 June 2012, the Applicant amended her application to elaborate on her submissions referred to in paragraph 18(b). She submitted, among other things, that there was a public interest in the implementation of the scheme of arrangement free from international interference, particularly where no public evidence had been provided of the appropriateness of the injunction.

**Interim order sought**

21. The Applicant sought an interim order to extend the Quit Date to 14 July 2012 or such other time as the Panel deemed appropriate.

**Final orders sought**

22. On the assumption that Ms Egorova did not exist or was not a living person, the Applicant sought final orders to the effect that:
- (a) the injunction be declared legally void or be set aside and neither Flinders nor MMK be permitted to rely on the injunction to terminate the SIA
  - (b) Flinders and MMK be required as soon as practicable to obtain a second Court hearing and complete the acquisition of Flinders by MMK
  - (c) the second Court hearing occur in advance of the Quit Date or the Quit Date be extended until after the hearing and
  - (d) if any other injunction was issued by a foreign Court, the Quit Date be extended to 31 July 2012.
23. On the assumption that Ms Egorova was a real and living person, the Applicant sought a final order that the Quit Date be extended to 14 July 2012.

**DISCUSSION**

**Ms Egorova**

24. The Applicant provided some press and blog reports in relation to the Chelyabinsk court proceedings and submitted, among other things, that:
- (a) Ms Egorova has not been seen or heard from in public since commencing her legal action
  - (b) Ms Egorova's address, place or residence, place of employment, next of kin and other family members all remain unknown and
  - (c) MMK has had no direct contact or conversations with Ms Egorova despite repeated requests to do so.
25. Flinders made a preliminary submission that its lawyers had sent communications to Ms Egorova with a view of resolving her claim and it had no evidence to suggest the response from Ms Egorova was not genuine.
26. MMK made a preliminary submission and provided two documents evidencing Ms Egorova's existence which MMK obtained from the court documents filed by Ms Egorova. The documents were:
- (a) an "extract from the depo account held by the depository whereby Ms Egorova is identified" as a shareholder in MMK and
  - (b) a "power of attorney issued by Ms Egorova in favour of her attorney".

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27. In relation to the power of attorney, MMK submitted that it was “*attested by a Russian notary public and that under Russian law, a notary public could not have attested the document unless Ms Egorova appeared in person before the notary public*”.
28. We do not have any probative material which rebuts the evidence provided by Flinders and MMK. Therefore there is no prima facie basis for us to consider that Ms Egorova does not exist.
29. Some of the press and blog articles attached to the application speculated that there was some collusion between Ms Egorova and MMK. Flinders in a preliminary submission stated that it “*does not presently have evidence to support the speculation regarding collusion between MMK and [Ms Egorova]*”. MMK submitted that it “*continues to believe that the action brought by Ms Egorova is illegitimate and unjustified and intends to continue to oppose it, regardless of whether the scheme proceeds or not.*” MMK also sought to have the injunction lifted. Therefore there is no prima facie basis for us to consider that MMK and Ms Egorova are colluding.
30. We have considered whether there is “*a sufficient body of evidence of association*” between Ms Egorova and MMK<sup>2</sup> or evidence of any relationship between them which would suggest collusion. Other than press and blog speculation, there is no evidence of that nature.

#### **Public interest in the implementation of the scheme of arrangement**

31. In considering whether to make an interim order and in considering the Applicant’s submission in relation to the undesirability of a small shareholder in the ‘bidder’ blocking the scheme of arrangement (see paragraph 18(b)), we wanted to get a better understanding of why Flinders and MMK had not agreed to extend the Quit Date - given that the final hearing of the Chelyabinsk court proceeding was scheduled for 2 July 2012 and the Quit Date was 30 June 2012.
32. We noted that Flinders, in its preliminary submission, had submitted that it was continuing to explore alternatives for implementation of the scheme. It stated that it did not support an order by the Panel to extend the Quit Date under the SIA because it wished to preserve its rights under the SIA.
33. We also noted that MMK in its preliminary submission had submitted that it had obtained written legal advice in relation to the impact of the injunction by the Chelyabinsk court on the scheme. MMK submitted that it considered that the injunction “*is binding against MMK and its executive bodies and prohibits MMK from taking steps to perform*” the SIA.
34. Before deciding whether to conduct proceedings, we asked MMK and Flinders for information on the following issues:

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<sup>2</sup> *Mount Gibson Iron Limited* [2008] ATP 4, [15]

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- (a) whether they would be prepared to extend the Quit Date, or undertake not to exercise their right to terminate the SIA, to a time after the hearing of the merits of the application before the Chelyabinsk court
  - (b) what prejudice would be suffered to Flinders if the Panel made an interim order extending the Quit Date
  - (c) what alternatives Flinders was exploring for implementation of the scheme and
  - (d) further details of the Chelyabinsk court proceedings.
35. Clause 10 of the SIA contained a number of exclusivity provisions, including a no current discussions/no solicitation restriction, a no due diligence restriction, a no talk restriction and a requirement to notify any approaches. Flinders submitted that an interim order extending the Quit Date would *“be prejudicial to Flinders’ interests as a whole, because it will prevent Flinders seeking out and implementing a third party proposal in place of the current scheme”*.
36. MMK submitted that it and Flinders had contracted on the basis that either party could withdraw from the transaction if the scheme had not become effective by the Quit Date. MMK submitted that this was a substantive contractual right.
37. MMK also submitted that *“the grant of an injunction by a foreign court on the application of a third party preventing one party to a transaction from proceeding with the transaction (which itself is expressed to be a condition of the transaction) cannot on any view constitute unacceptable circumstances”*.
38. We are reluctant to interfere with contractual rights that have been agreed at arm’s length, disclosed and considered by the Federal Court as part of the scheme process. The Panel is generally reluctant to change the terms of a contract disclosed to the market.<sup>3</sup> While the Panel has done so, it has generally been in circumstances where the contractual rights had not been disclosed to the market or security holders.<sup>4</sup>
39. In this case the Quit Date and its effect had been disclosed to the market.
40. In any event, there is no certainty that extending the Quit Date will be effective. The proceedings may not be completed on 2 July 2012.

#### **Has Flinders done enough to ensure that the scheme proceeds?**

41. We considered whether there could be unacceptable circumstances because Flinders had not done enough to ensure that the scheme proceeds.<sup>5</sup>
42. Flinders submitted that it had invited MMK to propose another transaction with the same commercial effect as the scheme but that to date MMK had declined that invitation. Flinders also submitted that it had suggested to MMK an interpretation of the Chelyabinsk court’s injunction that would permit implementation of the scheme (which MMK rejected).

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<sup>3</sup> By analogy, an example may be *Qantas Airways Limited 02* [2007] ATP 6, affirmed on review in *Qantas 02R* [2007] ATP 7

<sup>4</sup> *AMP Shopping Centre Trust 02* [2003] ATP 24, *BC Iron Limited* [2011] ATP 6

<sup>5</sup> See last paragraph of s657A(3)

43. We consider that there is no prima facie evidence that Flinders had not done enough to ensure that the scheme proceeds.

**DECISION**

44. 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).
45. The circumstances of this matter raise an issue for market efficiency. That issue is whether it is appropriate for a single small shareholder to be able to block a large takeover transaction by taking some form of collateral action. In this case, the action was taken in a foreign jurisdiction. We have no information about whether Ms Egorova is properly pursuing rights under Russian law, or otherwise as to her motives. This could simply be an example of an unfortunate outcome.
46. However, we note that the condition of the scheme referred to in paragraph 6 is drafted broadly, and catches injunctions in foreign jurisdictions that may be made on grounds that would not be recognised as appropriate in this jurisdiction. With the benefit of this experience, it may be wise for target directors in future to consider very carefully the drafting of these conditions.

**Orders**

47. 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, including as to costs.

**Garry Besson  
President of the sitting Panel  
Decision dated 29 June 2012  
Reasons published 3 July 2012**

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### Advisers

Party	Advisers
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