



Australian Government

Takeovers Panel

**Reasons for Decision
Flinders Mines Limited 02 & 03
[2019] ATP 2**

Catchwords:

de-listing – buy backs – on-market buy back – coercive effect – acquisition of a substantial interest – potential control impact – rights issue following – ASX Listing Rules – declaration – undertaking

Corporations Act 2001 (Cth), sections 257H(3), 602, 602A, 611, 657B, 657C(3), Australian Securities and Investments Commission Act 2001 (Cth), section 201A(2)

Australian Securities and Investments Commission Regulations 2001 (Cth), regulation 16(2)(c)

Amendment of GN 4 Remedies General - Public Consultation Response Statement, 30 January 2017

ASX Listing Rules 7.33, 17.11, ASX Guidance Note 33 (Removal of Entities from the ASX Official List)

Brisbane Markets Limited [2016] ATP 3; President’s Club Limited 02 [2016] ATP 1; Resource Generation Limited [2015] ATP 12; Austral Coal 03 [2005] ATP 14; Village Roadshow Limited 02 [2004] ATP 12

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

INTRODUCTION

1. The Panel, Alex Cartel (sitting President), Elizabeth Hallett and Diana Nicholson made a declaration of unacceptable circumstances in relation to the affairs of Flinders Mines Limited. The two applications (heard together) concerned Flinders Mines’ proposal to de-list after undertaking an on-market buy-back and an unmarketable parcels sale process. The buy-back was to be funded by a loan facility from a subsidiary of Flinders’ majority shareholder, TIO (NZ) Limited, to be repaid through a proposed non-renounceable pro-rata rights issue following the buy-back. The Panel declared the circumstances unacceptable because of the coercive effects of certain features of the proposed de-listing and associated transactions. The Panel decided not to make orders after accepting undertakings from Flinders and TIO (NZ) Limited.

2. In these reasons, the following definitions apply.

- Applicants** Mr Brendon Dunstan and OCJ
- Flinders or the Company** Flinders Mines Limited
- Loan Facility** loan agreement between Flinders and a subsidiary of TIO described in paragraph 7(d)
- Meeting** the general meeting of Flinders described in paragraph 10
- OCJ** OCJ Investment (Australia) Pty Ltd
- PIOP** the Pilbara Iron Ore Project

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proposed Buy-Back	proposed on-market buy-back described in paragraph 7(c)
proposed de-listing	proposed de-listing of Flinders described in paragraph 7 (including the proposed Buy-Back and proposed rights issue)
proposed rights issue	proposed rights issue described in paragraphs 7(d) and (e)
TIO	TIO (NZ) Limited, an indirect wholly-owned subsidiary of Todd
Todd	Todd Corporation Limited
VWAP	volume weighted average price for Flinders shares

FACTS

3. Flinders is an ASX listed company (ASX code: FMS). Its two largest shareholders are TIO with approximately 55.56% of Flinders' ordinary shares and OCJ with approximately 21.98%. There are no other substantial shareholders.
4. TIO acquired control of Flinders through a takeover bid in 2016. TIO's bidder's statement disclosed an intention, if Flinders became a part owned controlled entity, that:

TIO may, where the Listing Rules permit, seek to remove Flinders' listing on the ASX. If delisting is sought, TIO expects that a final decision as to Flinders' removal will be made by ASX in accordance with its published guidance. This states that it is generally acceptable for an entity to be delisted if, as a result of a takeover, the entity only has a small number of remaining security holders so that its continued listing can no longer be justified. ASX does not prescribe a minimum shareholding that the bidder must have, or a maximum number of remaining shareholders, before it will sanction a delisting, but its published guidance states that it will likely require shareholder approval be obtained unless (among other things) the bidder and its related bodies corporate own or control at least 75% of the entity's ordinary securities, and there are less than 150 minority holders of ordinary securities with holdings with a value of at least \$500.
5. On 2 August 2018, Flinders announced the close of a non-renounceable entitlement offer (not underwritten) that had raised \$8.275 million (approximately 88% of the offer) at \$0.07 per share. The offer booklet for the entitlement offer did not refer to any risk of de-listing under "Key Risks" or "Risks Specific to the Company", other than to include a cross-reference under "Other Risks" to the intentions of TIO disclosed in the bidder's statement referred to in paragraph 4 "including that it may seek to remove Flinders' listing on the ASX". The same disclosure had been made in two earlier entitlement offers following TIO's takeover bid.
6. In August 2018, Flinders commenced a strategic review with the assistance of independent financial advisers, Greenhill & Co, and legal advice from MinterEllison. Following this, the Flinders Board (comprising three independent directors and two directors who represent TIO) unanimously decided to pursue the proposed de-listing.

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7. On 13 December 2018, Flinders announced that it had applied for de-listing and received in-principle approval from the ASX subject to conditions that included shareholder approval by ordinary resolution. The announcement indicated (among other things) that:
 - (a) TIO had committed to the Flinders Board that it intended to vote in favour of the de-listing.
 - (b) Flinders would undertake an unmarketable parcels sale process at a price of not less than \$0.075 per share representing the 30 day VWAP prior to the announcement.
 - (c) Flinders would provide shareholders who do not wish to retain their shares with an opportunity to exit their investment in Flinders through an on-market buy-back of up to 10% of shares on issue:
 - (i) at a price equal to the lower of a 5% premium to the 5 day VWAP before the purchase¹ or \$0.075 per share and
 - (ii) to remain open until the earlier of one month after the date of the Meeting or the time taken to reach 10%.
 - (d) Flinders had entered into a loan agreement with a subsidiary of TIO for a total of up to \$27 million for the purpose of funding the proposed Buy-Back, which would be repaid by a rights issue to be undertaken following the proposed Buy-Back.
 - (e) TIO had advised Flinders that it did not intend to participate in the Buy-Back and had agreed to subscribe for shares under the rights issue equal to no less than any amount of the Loan Facility principal outstanding.
8. In combination, the proposed Buy-Back and proposed rights issue had the potential to increase TIO's voting power to a maximum of 65.3%.
9. The closing price for Flinders shares on the day of the announcement referred to in paragraph 7 was \$0.035, falling from \$0.070 the previous day.
10. On 21 December 2018, Flinders issued a notice convening a general meeting to consider approval of the proposed de-listing to be held on 22 January 2019. The notice of meeting gave an indicative date for de-listing of "early March 2019".

APPLICATIONS

Declaration sought

11. By application dated 10 January 2019, Mr Brendon Dunstan sought a declaration of unacceptable circumstances. Mr Dunstan submitted, among other things, that:
 - (a) Flinders' main asset PIOP was likely the only remaining significant source of iron ore that would use the Balla Balla Infrastructure Project, which is indirectly controlled by Todd.

¹ in accordance with ASX Listing Rule 7.33

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- (b) Todd was attempting to gain further control of Flinders and PIOP through the proposed de-listing without affording minority shareholders the protections of Chapter 6.
 - (c) The proposed de-listing had been structured to utilise exemptions under section 611² to create an artifice designed to increase TIO's control over Flinders (and PIOP) in circumstances where TIO should properly proceed by way of takeover offer or shareholder approval.
 - (d) Minority shareholders were being coerced into selling their shares and the proposed de-listing would allow TIO to acquire further control over Flinders (and PIOP) contrary to the purposes in section 602.
12. OCJ, in a separate application dated 11 January 2019, also sought a declaration of unacceptable circumstances and made submissions similar to those outlined in paragraphs 11(b) to (d) above.

Interim orders sought

13. Mr Dunstan and OCJ sought interim orders including orders to stay or prevent implementation of the proposed de-listing or adjourn the Meeting. We did not need to consider these requests as Flinders voluntarily postponed³ the Meeting and the close of the unmarketable parcels sale process, so that they would not occur before the conclusion of these proceedings.

Final orders sought

14. Mr Dunstan and OCJ sought final orders including orders requiring that:
- (a) Flinders not proceed with the proposed de-listing
 - (b) Flinders provide corrective disclosure in relation to the Meeting, including an independent expert's report and all material information in respect of the proposed de-listing and
 - (c) Todd and its associates not vote on resolutions in respect of the proposed de-listing.

Submissions from minority shareholders other than the applicants

15. We received submissions from a number of minority shareholders other than the applicants. After inviting and considering submissions from parties and ASIC in response, we considered some of these submissions but found that the issues they raised⁴ had already been adequately addressed in submissions by the applicants and ASIC. We declined to receive some other submissions that all parties agreed were not relevant to the matters before us (or already addressed by the applicants or ASIC).

² Unless otherwise indicated, all statutory references are to the Corporations Act 2001 (Cth), and all terms used in Chapters 6 to 6C have the meaning given in the relevant Chapter (as modified by ASIC)

³ See Flinders' ASX announcements on 17 January 2019 and 1 February 2019

⁴ to the extent that they were matters we could address

DISCUSSION

Preliminary submissions

16. ASIC submitted that we should conduct proceedings for reasons including:
- (a) The combination of the proposed Buy-Back and the proposed rights issue was artificial⁵ and designed to facilitate the acquisition of a substantial interest in Flinders by TIO.
 - (b) TIO should not be permitted to rely on items 10 or 19 of section 611, but rather should be required to seek shareholder approval under item 7 of section 611.
 - (c) The control effect of the proposed de-listing was likely to be exacerbated by its coercive effect on shareholders' decisions whether to participate in the proposed Buy-Back and not to participate in the proposed rights issue.
 - (d) The fact that ASX had approved the proposed de-listing (and may have imposed conditions in doing so) should not prevent the Panel conducting proceedings as ASX's role does not ordinarily require it to consider whether unacceptable circumstances may have arisen.
17. Flinders and TIO each made separate submissions that we should decline to conduct proceedings, submitting (among other things) that:
- (a) The proposed de-listing was Flinders' initiative, complied with the ASX's requirements⁶ and had been approved by ASX. Each of Flinders and TIO submitted that it was not its intention to achieve a control outcome.
 - (b) The proposed Buy-Back was intended to give minority shareholders an opportunity to exit prior to de-listing (consistent with ASX guidance) and the purpose of the Loan Facility and proposed rights issue was to fund that (with support from TIO).
18. Flinders and TIO indicated that they were willing to give certain undertakings to ameliorate any concerns we might have. These included extending the term of the Loan Facility to facilitate repayment without an immediate rights issue, and TIO agreeing not to exercise any increase in voting power due to the proposed Buy-Back beyond what would be permitted under the 3% creep exception in item 9 of section 611.

Decision to conduct proceedings

19. We agree with ASIC that the fact that ASX had approved a proposed de-listing does not prevent us examining what is proposed if it involves circumstances that appear to be unacceptable. We were not inclined to regard the proposed Buy-Back and proposed rights issue as merely an "artifice", as opposed to measures

⁵ ASIC requested clarification of its submission in this published version of our reasons, to the effect that, after corresponding with Flinders and considering Flinders' response, it remained concerned that the overall arrangements in the context of the proposed de-listing were an artifice (due to apparent avoidance of minority shareholder approval)

⁶ See ASX Guidance Note 33 (Removal of Entities from the ASX Official List)

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designed to satisfy ASX's requirements. However, we were concerned that several features of the proposed de-listing and associated transactions, in combination, would be likely to result in the acquisition of a substantial interest in Flinders in a manner that was not consistent with the purposes in section 602. We decided to conduct proceedings⁷ in order to confirm our preliminary concerns as the undertakings initially offered did not appear to address the features of the proposed de-listing that gave us most concern.⁸

De-listing and unacceptable circumstances

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 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. The Panel has not previously had reason to examine closely, or provide guidance on, de-listing. The manner and circumstances in which de-listing occurs may vary greatly. Our decision in this matter is based on the particular facts involved, including:
- (a) the Flinders Board had made a unanimous decision to pursue the proposed de-listing after taking independent financial and legal advice
 - (b) there had been very little trading liquidity in Flinders shares historically on the ASX, and this liquidity appeared to be declining further
 - (c) Flinders had obtained ASX's in principle approval for the proposed de-listing (after a period of consultation with the ASX) and the proposal appeared to comply with ASX Listing Rule 17.11 and ASX Guidance Note 33 and
 - (d) the associated transactions described above.

We do not consider it necessary or appropriate to discuss what, if any, relevance our decision on the facts of this matter may have for de-listing in other circumstances.

21. We expressed to parties and ASIC a preliminary view that, although it would not be appropriate for us to interfere with the proposed de-listing if it appeared consistent with the purposes in section 602, certain aspects of the proposal and the manner in which it was to be implemented appeared to create a risk that a substantial interest in Flinders would be acquired inconsistently with section 602.

⁷ We directed that both applications be considered together

⁸ See paragraphs 22 to 24

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Likely effect of proposed de-listing

22. Some of the submissions we received focussed on the purpose or intended effect of the proposed de-listing. Our concerns related more to the effect or likely effect of the proposal than its purpose. In particular, we were concerned about the likely effect of the following combination of factors:
- (a) The large proportion of shares (approximately 44%) held by persons other than TIO (“free float”), who may not wish to hold shares in an unlisted entity, and the limited liquidity in trading of Flinders shares.
 - (b) The fact that Flinders’ proposed exit opportunity involved an on-market buy-back capped at 10% of the shares on issue, for which there would (necessarily) be a maximum price of a 5% premium to the 5 day VWAP before purchase, but no floor price.
 - (c) The fact that the strategy of delisting (with TIO voting in favour, without having acquired 75% or made a further bid) had not been clearly contemplated or flagged in TIO’s bidder’s statement or any of the subsequent entitlement offer booklets.⁹
23. The on-market nature of the proposed Buy-Back meant it would operate on a “first in” basis with no scope for scaling back or pro-rating individual participation if the 10% cap was exceeded. The 5 day VWAP price cap, and lack of a floor price, increases the coercive pressure to sell quickly before excess sell orders drive down the price. The large “free float” makes it reasonable to expect that demand to sell might greatly exceed the 10% cap [REDACTED]. Timing may also have exacerbated these pressures, with the indicative timetable for the new de-listing strategy (announced less than two weeks before Christmas) proposing a buy-back potentially closing in early March 2019.
24. In our view, the combination of factors outlined above meant that the proposed de-listing was likely to:
- (a) result in the acquisition of a substantial interest in Flinders (under the proposed Buy-Back) by Flinders itself and, on cancellation of the shares bought back under section 257H(3), by TIO¹⁰
 - (b) have an effect on the control¹¹, or potential control, of Flinders due to the likely increase in TIO’s voting power, and
 - (c) be inconsistent with the purposes in section 602 in that this:
 - (i) would not take place in an efficient, competitive and informed market

⁹ This may well have been because such a strategy was not seriously contemplated by Flinders or TIO (and accordingly could not be flagged) prior to Flinders’ August 2018 strategy review noted in paragraph 6

¹⁰ due to TIO’s resulting power to vote a greater percentage of Flinders’ shares. See section 602A(1)(c)

¹¹ See: *Village Roadshow Limited 02 [2004] ATP 12, [30]-[40]*

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- (ii) would not afford shareholders (who may be coerced into selling quickly) a reasonable time to consider the proposed Buy-Back and proposed de-listing and
 - (iii) may not afford any shareholders that are coerced into selling a reasonable and equal opportunity to participate in benefits accruing to those who retain or acquire shares.
25. We do not think it necessary in this case to discuss what changes in the facts may have made a difference to our view that the proposed de-listing gave rise to unacceptable circumstances.
26. We note that, in light of Flinders and TIO agreeing to extend the Loan Facility and withdrawing the proposed rights issue, we did not need to consider the terms of the proposed rights issue. If a rights issue is proposed in the future, its terms could, if necessary, be addressed by a new application.
27. Flinders and TIO submitted that a declaration was unnecessary because they were prepared to provide undertakings that would address any unacceptable circumstances. We decided that a declaration of unacceptable circumstances was justified. While we acknowledge the preparedness of Flinders and TIO to provide undertakings, at the time of our decision to make a declaration, the undertakings offered still did not adequately address our concerns. We remained open to exploring undertakings that would address our concerns, but did not think it consistent with the Panel's usual practice,¹² or our obligation to act in a timely manner,¹³ to delay making a declaration once we were ready to do so in the hope that further undertakings would be offered.

Extension of time to make application

28. Section 657C(3) provides that an application for a declaration can be made only within two months after the circumstances occurred or a longer period determined by the Panel. The applications were made more than two months after events referred to in paragraphs 3 and 4 of our Declaration. Therefore, before making it, we requested submissions on whether we should extend time.
29. Flinders submitted that paragraphs 3 and 4 are not relevant, and should be deleted, as the decision to de-list was made by Flinders on or about 13 December 2018. TIO submitted that those paragraphs are not unacceptable circumstances, but did not oppose an extension if we considered it necessary. We are inclined to agree with TIO that paragraphs 3 and 4 of the Declaration do not describe unacceptable circumstances.¹⁴ Rather, we regard them as background required to explain why the manner of the proposed de-listing gave rise to unacceptable circumstances. However, for the avoidance of doubt, we decided to extend the

¹² See, for example: Amendment of GN 4 Remedies General - Public Consultation Response Statement, 30 January 2017, *Resource Generation Limited* [2015] ATP 12 at [136]-[137] and *Brisbane Markets Limited* [2016] ATP 3 at [108]-[111]

¹³ Australian Securities and Investments Commission Regulations 2001 (Cth), regulation 16(2)(c). See also section 657B

¹⁴ on the assumption that the reason in footnote 9 is correct

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time to make the applications to the dates they were made,¹⁵ and notified the parties of that on 8 February 2019.

DECISION

Declaration

30. It appears to us that the circumstances are unacceptable:
- (a) having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Flinders or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Flinders or
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602.
31. Accordingly, we made the declaration set out in Annexure A and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

Undertakings

32. We received submissions in relation to possible final orders and then accepted undertakings from Flinders and TIO (Annexure B) that (among other things) require:
- (a) that Flinders seek formal ASX approval for a revised process to delist involving an equal access scheme (off-market) buy-back of 10% of the shares at a fixed price of \$0.075 per share with a pro rata scale back
 - (b) extension of the Loan Facility term, in place of the proposed rights issue to repay the loan and
 - (c) that TIO will not vote shares representing any increase in its voting power as a result of the off-market buy-back for 18 months after its completion, and will seek to sell these shares either on market or otherwise.
33. We are satisfied that performance of these undertakings by Flinders and TIO in accordance with their terms will sufficiently address the unacceptable circumstances, making orders unnecessary.
34. In particular, an off market buy-back at a fixed price and with scale back of applications over the 10% cap further ameliorates some of the coercive elements of the proposed de-listing. Also, removal of the proposed rights issue combined with TIO's undertakings should help mitigate the potential control effect of the proposed de-listing.
35. During the proceedings, the applicants requested our consent¹⁶ to a variation of the confidentiality undertakings in parties' notices of appearance to allow information

¹⁵ having regard to the factors in *Austral Coal 03* [2005] ATP 14 at [18] to [21] and the public interest: *The President's Club Limited 02* [2016] ATP 1 at [106] to [160]

¹⁶ under section 201A(2) of the ASIC Act

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from the proceedings to be provided to ASX on a confidential basis. We were not satisfied that was necessary or appropriate given that the undertakings require that our published reasons be provided to ASX prior to Flinders seeking ASX formal approval of the revised de-listing. We note for completeness that any party may make further requests for consent to vary their confidentiality undertakings to the Panel, if necessary, if they interfere with their ability to address matters relevant to ASX's decision.

Alex Cartel

President of the sitting Panel

Decision dated 8 February 2019 (Declaration) 14 February 2019 (Undertakings)

Reasons given to parties 26 February 2019

Reasons published 4 March 2019

Advisers

Party	Advisers
Mr Brendon Dunstan	DLA Piper Australia
OCJ Investment (Australia) Pty Ltd	Gadens
Flinders Mines Limited	MinterEllison
TIO (NZ) Limited	Herbert Smith Freehills



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Annexure A

**CORPORATIONS ACT
SECTION 657A
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

FLINDERS MINES LIMITED 02 & 03

CIRCUMSTANCES

1. Flinders Mines Limited (**Flinders**) is an ASX listed company (ASX: FMS).
2. The two largest shareholders in Flinders are TIO (NZ) Limited (**TIO**) with approximately 55.6% of Flinders' ordinary shares and OCJ Investment (Australia) Pty Ltd with approximately 21.98%. There are no other substantial shareholders.
3. TIO acquired control of Flinders through a takeover bid in 2016. TIO's bidder's statement disclosed an intention, if Flinders became a part owned controlled entity, that:

TIO may, where the Listing Rules permit, seek to remove Flinders' listing on the ASX. If delisting is sought, TIO expects that a final decision as to Flinders' removal will be made by ASX in accordance with its published guidance. This states that it is generally acceptable for an entity to be delisted if, as a result of a takeover, the entity only has a small number of remaining security holders so that its continued listing can no longer be justified. ASX does not prescribe a minimum shareholding that the bidder must have, or a maximum number of remaining shareholders, before it will sanction a delisting, but its published guidance states that it will likely require shareholder approval be obtained unless (among other things) the bidder and its related bodies corporate own or control at least 75% of the entity's ordinary securities, and there are less than 150 minority holders of ordinary securities with holdings with a value of at least \$500.

4. On 2 August 2018 Flinders announced the close of a non-renounceable entitlement offer that had raised \$8.275 million (approximately 88% of the offer) at \$0.07 per share. The announcement quoted Flinders' Chairman as stating "we are extremely pleased with the support shown by all shareholders ...". The offer booklet for the entitlement offer did not refer to any risk of delisting under "Key Risks" or "Risks Specific to the Company", other than to include a cross-reference under "Other Risks" to the intentions of TIO disclosed in the bidder's statement referred to in paragraph 3 "including that it may seek to remove Flinders' listing on the ASX".¹

¹ Identical disclosure was included in the offer booklets of two earlier entitlement offers which closed after TIO's takeover bid

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5. On 13 December 2018 Flinders announced that it had applied for de-listing and received in-principle approval from the ASX subject to conditions that included shareholder approval by ordinary resolution (**Approval**). The announcement indicated (among other things) that:
 - (a) TIO had committed to the board of Flinders that it intended to vote in favour of the de-listing.
 - (b) Flinders would undertake an unmarketable parcels sale process at a price of not less than \$0.075 per share representing the 30 day volume weighted average price for the shares (**VWAP**) prior to the announcement.
 - (c) Flinders would provide shareholders who do not wish to retain their shares with an opportunity to exit their investment in Flinders through an on-market buy-back (**Buy-Back**) of up to 10% of shares on issue:
 - (i) at a price equal to the lower of a 5% premium to the 5 day VWAP before the purchase or \$0.075 per share and
 - (ii) to remain open until the earlier of one month after the date of the meeting to consider Approval or the time taken to reach 10%.
 - (d) Flinders had entered into a loan agreement with a subsidiary of TIO (**Loan Facility**) for a total of up to \$27 million for the purpose of funding the Buy-Back, which would be repaid by a rights issue to be undertaken following the Buy-Back.
 - (e) TIO had advised Flinders that it did not intend to participate in the Buy-Back and had agreed to subscribe for shares under the rights issue equal to no less than any amount of the Loan Facility principal outstanding.
6. The closing price for Flinders shares on the day of the announcement referred to in paragraph 5 was \$0.035, falling from \$0.070 the previous day.
7. On 21 December 2018 Flinders issued a notice convening a general meeting to consider the Approval on 22 January 2019.²

EFFECT

8. Given
 - (a) the previous disclosure of Flinders and statements of TIO, including those referred to in paragraphs 3 and 4
 - (b) the limited liquidity in the trading of Flinders shares and

² Currently extended to 26 February 2019

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- (c) the fact that shareholders other than TIO held approximately 44% of Flinders ordinary shares,

the Panel considers that the de-listing proposed in the announcement referred to in paragraph 5 was likely to result in many shareholders (other than TIO):

- (d) selling, or considering whether to sell, their shares
- (e) reasonably expecting that holders of significantly more than 10% of Flinders ordinary shares may sell their shares
- (f) concluding that they should sell their shares into the Buy-Back as soon as possible, before the 10% limit was reached and
- (g) potentially, accepting a price materially below what they would have otherwise accepted.

9. The Panel considers that the effects described in paragraph 8 are likely to result in Flinders, and indirectly TIO, acquiring a substantial interest in Flinders:

- (a) in a manner that is likely to coerce Flinders shareholders (other than TIO) to sell
- (b) in a market that would not be sufficiently efficient, competitive and informed
- (c) from shareholders who would not have reasonable time to consider the Buy-Back, and enough information to assess its merits and
- (d) in a manner that may deny shareholders who sell their shares a reasonable and equal opportunity to participate in benefits accruing to those who buy or retain Flinders shares.

CONCLUSION

10. It appears to the Panel that the circumstances are unacceptable circumstances:

- (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Flinders or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Flinders or
- (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602 of the *Corporations Act 2001* (Cth) (**Act**).

11. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3) of the Act.

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DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Flinders Mines Limited.

Allan Bulman
Director
with authority of Alex Cartel
President of the sitting Panel
Dated 8 February 2019



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Annexure B

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

UNDERTAKINGS IN RESPECT OF FLINDERS MINES LIMITED

Flinders Mines Limited (**Flinders**) undertakes to the Panel that as soon as practicable after the date of these undertakings:

1. Flinders agrees not to request ASX to remove Flinders from the official list of ASX except on the terms, or substantially on the terms, set out in these undertakings.
2. Flinders will seek ASX formal approval of the De-Listing but will only do so after a copy of these undertakings, the undertakings provided to the Panel by TIO (NZ) Limited (**TIO NZ**) on or about the date of these undertakings (**TIO NZ Undertakings**) and the Panel's published reasons for its decision are provided to ASX.
3. Subject to the shareholders of Flinders approving the removal of Flinders from the official list of ASX (**De-Listing**), Flinders will instead of its proposed on-market buy-back propose a limit based equal access scheme off-market buy-back of its shares of up to the 10/12 limit under the *Corporations Act 2001* (Cth) (**Corporations Act**) at a fixed price of \$0.075 per share (unfranked) (**Buy-Back Price**) with a pro rata scale back (**Buy-Back**).
4. Flinders will prepare and issue a new notice of meeting to its shareholders in relation to the De-Listing.
5. Flinders will:
 - (I) provide appropriate guidance to its shareholders on the tax consequences of the Buy-Back in the form of an opinion from its lawyers in the Buy-Back booklet; and
 - (II) state in the Buy-Back booklet that it is seeking (and will endeavour to promptly obtain) an ATO tax ruling and expects the tax ruling to reflect the tax consequences described in the opinion.
6. Flinders will extend the period of trading post shareholder approval and pre implementation of the De-Listing to the date which is approximately four weeks after the announcement to ASX of the results of the Buy-Back, including any scale back.
7. On request by TIO NZ, Flinders will provide reasonable assistance to place any Excess Shares (as defined in the TIO NZ Undertakings) required to be sold by TIO NZ at the Buy-Back Price pursuant the TIO NZ Undertakings.

8. In substitution for Flinders' previously proposed rights issue (**Rights Issue**), Flinders and TIO NZ (via its subsidiary, PIO Mines Pty Ltd) will agree to extend the term of their proposed loan (**Loan**) to 3 years on terms which are no more favourable to TIO NZ than arm's length terms (which will include capitalised interest at a rate to be agreed and specified in the new notice of meeting). The Loan amount will be increased such that it equals the amount required to fund the Buy-Back (up to A\$25.3 million) plus A\$3 million for Flinders' working capital and in the unlikely event of Flinders' incurring a franking deficit tax liability in connection with the unfranked dividend component of the Buy-Back, increased to the extent of that franking deficit tax liability, up to a further A\$4.6 million.
9. Flinders will use reasonable endeavours to seek alternative means by which retail Flinders' shareholders may trade their shares after the De-Listing, provided the cost and compliance burden of such trading platforms do not exceed the benefits.
10. Flinders agrees to amend the Loan and its previously agreed 'Commitment Agreement' with TIO NZ to reflect the above.
11. Flinders will make supplementary disclosures in the form of an ASX announcement regarding the changes to the De-Listing, Buy-Back, Loan, 'Commitment Agreement' and Rights Issue arising as a result of the above matters.

Flinders agrees to confirm in writing to the Panel when it considers that it has satisfied its obligations under this undertaking.

In this undertaking the following terms have the corresponding meaning:

- ASX** ASX Limited, or as the context requires, the financial market known as the 'Australian Securities Exchange' operated by it.
- ATO** Australian Taxation Office.

Signed by David McAdam, Executive Director of Flinders Mines Limited with the authority, and on behalf, of Flinders Mines Limited
Dated 13 February 2019



Australian Government

Takeovers Panel

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

FLINDERS MINES LIMITED 02 & 03

TIO (NZ) Limited (TIO NZ) undertakes to the Panel that it will, as soon as practicable:

1. If the Buy-Back (as defined in the Flinders Mines Limited (**Flinders**) undertaking) results in TIO NZ's voting power increasing above its present voting power of 55.56%, TIO NZ will seek to reduce its voting power from its level of voting power immediately following completion of the Buy-Back (**Post Buy-Back Voting Power**) to the level of TIO NZ's voting power prior to the commencement of the Buy-Back, being 55.56% (**Existing Voting Power**) by:

- (a) offering shares for sale on-market following completion of the Buy-Back at \$0.075 per share (**Buy-Back Price**) for a number of shares equal to the Post Buy-Back Voting Power minus the Existing Voting Power (**Excess Shares**) to the date the De-Listing (as defined in the Flinders undertaking) is implemented; and
- (b) to the extent that TIO NZ is unable to sell the Excess Shares under the process described above prior to the date that the De-Listing is implemented, TIO NZ will use reasonable commercial endeavours to sell the remaining Excess Shares at the Buy-Back Price for a period of 18 months after the completion of the Buy-Back including via any trading platform established by Flinders under paragraph 10 of the Flinders undertaking.

To avoid doubt:

- (c) the number of Excess Shares will be reduced by the number of Flinders shares sold by TIO NZ following completion of the Buy-Back; and
 - (d) to the extent TIO NZ is unable to sell the Excess Shares in accordance with the above process in the period ending 18 months after completion of the Buy-Back, TIO NZ will be under no further obligation to sell any Excess Shares.
2. To the extent TIO NZ holds Excess Shares, TIO NZ will not exercise any votes in relation to the Excess Shares until the earlier of 18 months after completion of the Buy-Back and completion of the sale of the Excess Shares under paragraph 1. To avoid doubt, this undertaking does not apply to any increase in TIO NZ's voting power above its Existing Voting Power which occurs independently of TIO NZ holding the Excess Shares, nor does it restrict TIO NZ exercising any votes in respect of its Existing Voting Power.
 3. In substitution for Flinders' previously proposed rights issue, TIO NZ (via its subsidiary, PIO Mines Pty Ltd) will agree to extend the term of its proposed loan (**Loan**) to 3 years on terms which are no more favourable to TIO NZ than arm's length terms (which will include capitalised interest at a rate to be agreed).
 4. The Loan amount will be increased such that it equals the amount required to fund the Buy-Back plus A\$3 million for Flinders' working capital and in the unlikely event of Flinders' incurring a franking deficit tax liability in connection with any unfranked dividend component of the Buy-Back, increased to the extent of that franking deficit tax liability, up to a further A\$4.6 million.
 5. TIO NZ's voting power for the purpose of determining its entitlement to rely on the 3% creep exception under the *Corporations Act 2001* (Cth) will disregard TIO NZ's voting power derived from

holding the Excess Shares until the earlier of 6 months following completion of the sale of the Excess Shares under paragraph 1 and 24 months from the completion of the Buy-Back.

6. TIO NZ agrees to procure that the Loan and the previously agreed 'Commitment Agreement' with Flinders be amended to reflect the above.

TIO NZ agrees to confirm in writing to the Panel when it considers that it has satisfied its obligations under this undertaking.

Signed by Christopher Brian Hall, Director of TIO (NZ) Limited with the authority, and on behalf, of TIO (NZ) Limited

Dated 13 February 2019