

## MEMORANDUM

**From:** Rockwall Analytics

**Subject:** Mining Co Rights Issue and Board Spill

**Date:** August 2, 2020

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### Capital Markets, Corporate and M&A

In advance of our meeting, we have been asked to consider whether Activist Limited (Activist) may have any avenues to either:

1. Prevent Mining Co Limited (Mining Co) from undertaking its proposed capital raising (Rights Issue), or
2. To otherwise delay the Rights Issue until after Mining Co's AGM (at which Activist is seeking to spill the board)

The circumstances giving rise to our instructions are set out in *Mining Co's* ASX announcements, as well as in correspondence between *Activist* and *Rockwall Analytics*

### Executive summary

#### APPLICATION TO THE TAKEOVERS PANEL

*Rockwall Analytics* recommend that *Activist* apply to the Takeovers Panel (Panel) seeking a declaration of **unacceptable circumstances** in relation to the affairs of *Mining Co* for the following reasons:

1. An application to the Panel is advantageous because it is less costly, complicated and time intensive compared to court proceedings and has a lower burden of proof than the evidentiary requirements of a Court
2. The Panel has a wide range of powers and remedies available at their discretion in order to protect rights or interests affected by cases of **unacceptable circumstances** in relation to the affairs of a company, and
3. The Panel has the ability to declare **unacceptable circumstances** whether or not the circumstances constitute a contravention of the Corporations Act

Our view is that there are reasonable grounds on which an application to the Panel can be made (though, there are also a number of mitigating circumstances which favour Mining Co). A summary of the grounds on which an application to the Panel can be made is set out below:

#### COMMENCEMENT OF PROCEEDINGS IN COURT

There may also be grounds on which to commence proceedings in a Court against *Mining Co* on the basis that the **Rights Issue** may be in breach of directors' fiduciary duties and/or constitute minority oppression

Whilst there may be tactical advantages in commencing proceedings in a Court, we do not recommend litigation given its extensive procedural processes and the time-sensitive nature of this matter. We have not undertaken a detailed legal analysis on this potential avenue, but we look forward to discussing this further with you in our meeting, if this avenue is of interest

#### ON WHAT BASIS COULD ACTIVIST MAKE AN APPLICATION TO THE PANEL?

The Panel can make a declaration of **unacceptable circumstances** in relation to the affairs of a company having regard to a number of principles, such as whether the circumstances have an unacceptable effect on the control of the company. We are of the view that the Panel is likely to hear the application given the potential control implications that the Rights Issue may have on the board spill at the AGM

The central basis of an application to the Panel would be that the structure and timing of the Rights Issue will distort the voting power of shareholders at the AGM and therefore have the potential to change the outcome of the board spill resolutions. The Panel states that if there is potential for a rights issue to affect control, directors should carefully consider all reasonably available options to mitigate that effect

A list of the key factors that the Panel will likely consider and the submissions we would propose to make in relation to each point are set out below:

Factors considered by the Panel	Proposed Submission
Effect of the Right Issue	The Panel has jurisdiction to consider the application. The fact that an application involves a proposal to reconstitute a board of directors does not take it outside the purview of the Panel
Financial situation and solvency of Mining Co	The financial situation of Mining Co does not warrant the Rights Issue being undertaken before an AGM. The purpose of the Rights Issue is stated by Mining Co. as “general balance sheet tailoring”, i.e. to repay some of its debt and improve its financial position rather than to address any imminent solvency issues which are time critical. Improving Mining Co’s financial position (in circumstances where solvency is not a concern) does not outweigh the control effect that it may have on the board spill
Timing of the Rights Issue	The interrelationship of the timing of the Rights Issue and the AGM amounts to unacceptable circumstances. The timing of the Rights Issue would distort voting (particularly if shareholders proposing to vote in favour of the board spill do not want to invest further capital in Mining Co unless they know there is a change in the board)
Structure of the Rights Issue	<p>The Rights Issue structure discourages take up by existing shareholders opposed to the current Mining Co board and management team and, in so doing, potentially enables the incumbent board to use the Rights Issue to evade a potential board spill, thus creating unacceptable circumstances. We will discuss how the structure of the Rights Issue will likely be viewed by the Panel. Relevant factors include:</p> <ul style="list-style-type: none"> <li>• size, price, discount to market, timing, underwriting and renounceability;</li> <li>• whether the Rights Issue is underwritten by professional underwriters or sub-underwriters or a related party or major shareholder; and</li> <li>• whether there is a dispersion strategy</li> </ul>

WHAT ARE THE GROUNDS ON WHICH MINING CO MAY OBJECT TO THE PANEL APPLICATION?

*Mining Co* will likely submit that there are a number of ‘mitigating factors’ which justify there not being any unacceptable circumstances. These are briefly set out below:

Factors considered by the Panel	Proposed Submission
Effect of the Rights Issue	A delay in the timetable will put at risk Mining Co's ability to undertake the Rights Issue. The benefits of the Rights Issue outweigh any control effect
Financial situation and solvency of Mining Co	The Rights Issue has been structured and timed to deliver financial certainty to Mining Co.
Timing of the Rights Issue	When balancing the overall effect on voting at the AGM arising from timing of the Rights Issue and the benefits of completing the Rights Issue, it would be in the best interests of all Mining Co shareholders that the Rights Issue is undertaken on the proposed timetable
Structure of the Rights Issue	All existing shareholders are given an equal opportunity to retain their voting power by participating. The Rights Issue has been designed and structured, and will ultimately be implemented, in accordance with all applicable laws and other regulatory requirements

WHAT ORDERS SHOULD ACTIVIST SEEK FROM THE PANEL?

*Rockwall Analytics* recommend that *Activist* seek a declaration of unacceptable circumstances and the following orders:

1. Interim orders that any new shares to be issued under the Rights Issue be postponed until the final orders are made, and
2. Final orders to the effect that any new shares to be issued under the Rights Issue be postponed until after the record time for determining voting entitlements at the AGM, or otherwise prohibit the casting of any votes attaching to those new shares at the AGM

Kind regards

**Rockwall Analytics**