



Australian Government

Takeovers Panel

**Reasons for Decision
Nimrod Resources Limited
[2019] ATP 3**

Catchwords:

Decline to conduct proceedings – public unlisted company with fewer than 50 members – registration of share transfers

Corporations Act 2001 (Cth), sections 606, 1071F

Corporate Law Economic Reform Program Bill 1999, Explanatory Memorandum

Careers Australia Group Limited [2012] ATP 5

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

INTRODUCTION

1. The Panel, Bill Koeck, Rebecca Maslen-Stannage and Tony Osmond (sitting President) declined to conduct proceedings on an application by JPC International Pty Ltd and Romell Pty Ltd (as trustee for Romell Trust) in relation to the affairs of Nimrod Resources Limited. The application concerned Nimrod issuing shares to a company that may have resulted in a contravention s606¹ if Nimrod had over 50 members. Nimrod had not registered a transfer from JPC to 11 new shareholders that would have resulted in Nimrod having over 50 members. The Panel considered that s606 did not apply and it did not have jurisdiction. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

Applicants	JPC and Romell Pty Ltd as trustee for the Romell trust
Goldtower	Goldtower Construction Pty Ltd as trustee for GTC Trust
JPC	JPC International Pty Ltd
Nimrod	Nimrod Resources Limited

FACTS

3. Nimrod is an unlisted public company with 40 members. Mr James Macaulay is its managing director.
4. On 18 May 2018, Nimrod shareholders approved the issue of shares to Goldtower in two tranches of 20,000,000 shares at 12.5 cents per share and 18,334,206 shares at

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

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19.09 cents per share and passed a resolution appointing Mr Bruce McIver as a director.

5. In November 2018, another company offered to subscribe for 38,159,586 Nimrod shares at 15.65 cents per share (**November offer**).
6. On or about 7 December 2018, the Applicants became aware that the board of Nimrod had agreed to issue (instead of the second tranche) 28,000,000 shares to Goldtower at 12.5 cents per share (the **Additional Shares**) and had decided not to accept the November offer.
7. On 10 December 2018, JPC gave transfers and share certificates to Nimrod, involving the transfer of 500 Nimrod shares to 11 new shareholders. If registered, these transfers would result in Nimrod having over 50 members. Nimrod has not as yet registered those transfers.

APPLICATION

8. By application dated 1 February 2019, the Applicants sought a declaration of unacceptable circumstances. The Applicants submitted that (among other things):
 - (a) One or more of the secretary and directors of Nimrod *“willfully and deliberately delayed the registration of the 11 Transfers in circumstances which in themselves amounts to unacceptable circumstances.”*
 - (b) *“In the circumstances, the Panel ought to regard the 11 Transfers as registered and accordingly Nimrod having more than 50 members at all relevant times for the purposes of this Application”*. The issue of the additional shares contravened s606 and amounted to unacceptable circumstances.
 - (c) The failure to consider the November offer provided a benefit to Goldtower in securing control or potential control of Nimrod and caused a detriment to Nimrod and all other Nimrod shareholders as a consequence of further dilution of share capital and less funds being raised.
 - (d) Goldtower, two of Nimrod’s directors and companies related to those directors were associates and have a relevant interest in each other’s shares.

Interim orders sought

9. The Applicants sought interim orders to the effect that (among other things) Goldtower not vote or dispose of any of the Additional Shares which give Goldtower more than of 20% voting power in Nimrod.

Final orders sought

10. The Applicants sought final orders to the effect that (among other things) the Additional Shares which give Goldtower more than of 20% voting power in Nimrod be vested in ASIC for sale.

DISCUSSION

11. Nimrod made a preliminary submission. Nimrod submitted that JPC provided the 11 transfers on 10 December 2018 by email. The next day the Additional Shares were issued to Goldtower. On 17 December 2019, JPC delivered to Nimrod’s registered

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office 11 share transfers and “*what appeared to be*” copies of JPC’s share certificates. On 23 January 2019, Nimrod informed JPC that its transfers were not accompanied by the original share certificates and that it would register the transfers upon receipt of the original share certificates.

12. At the time Goldtower was issued the Additional Shares, and at all other relevant times, Nimrod had fewer than 50 members. Section 606 only applies to unlisted companies that have more than 50 members. The rationale given for this limitation is that it was considered difficult “*to justify the imposition of takeover regulation to closely held companies in the light of the costs involved*”.²
13. In *Careers Australia Group Limited* [2012] ATP 5, the Panel considered whether an offeror making offers to small shareholders, which may reduce the number of shareholders in an unlisted company to 50 or under (and as a result taking the company outside the scope of Chapter 6) could be unacceptable. The Panel said (at [21]):
We accept there will be circumstances in which removal of a company from the ambit of Chapter 6 will clearly not be unacceptable, for instance, if a company ends up with 50 or fewer shareholders by coincidence; that is, as an ancillary result of some other act. Where there is a plan or proposal designed to cause a company to be taken outside the ambit of Chapter 6, unacceptable circumstances may, in our view, arise.
14. The facts here are different. Nimrod does not attract the requirements of Chapter 6 and the Additional Shares were issued to Goldtower before any valid share transfers were received from JPC. Therefore we did not need to consider whether Nimrod was entitled not to register JPC’s share transfers.³

DECISION

15. 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). Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

Tony Osmond

President of the sitting Panel

Decision dated 8 February 2019

Reasons given to parties 25 February 2019

Reasons published 27 February 2019

² *Corporate Law Economic Reform Program Bill 1999*, Explanatory Memorandum, at [7.17]

³ Noting the powers of the Court under s1071F. Given this, we decided not to accept an undertaking from Nimrod that it would register JPC’s share transfers if JPC provided either original share certificates or “*a statutory declaration that one or both of JPC’s original share certificates has been lost or destroyed and containing the information required by section 1070D(5)*”

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Advisers

Party	Advisers
Applicants	HCG Consulting Pty Ltd (Business Consultants)
Goldtower	Jones Day
Nimrod	Talbot Sayer Lawyers
Mr James Macaulay	NA