



Australian Government

Takeovers Panel

**Reasons for Decision
Tempus Resources Limited
[2024] ATP 1**

Catchwords:

Decline to conduct proceedings - rights issue - board spill - effect on control - need for funds - underwriting - sub-underwriting - frustrating action

Corporations Act 2001 (Cth), sections 203D, 249D

Guidance Note 17: Rights issues, Guidance Note 12: Frustrating action

Accelerate Resources Limited 01 & 02 [2020] ATP 7, Factor Therapeutics Limited [2019] ATP 5, MMA Offshore Limited [2017] ATP 21, Resource Generation Limited [2015] ATP 12

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

INTRODUCTION

1. The Panel, Alberto Colla, Sarah Rennie and Sharon Warburton (sitting President), declined to conduct proceedings on an application by Mr Matthew Bull in relation to the affairs of Tempus Resources Limited. The application concerned a rights issue announced by Tempus on 29 November 2023, being around the time that the applicant and others gave ss 203D¹ and 249D notices to the company. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

AGM	has the meaning given in paragraph 5
Applicant	Mr Matthew Bull
Prospectus	has the meaning given in paragraph 8
Requisition Notice	has the meaning given in paragraph 12
Requisitioning Shareholders	has the meaning given in paragraph 12
Rights Issue	has the meaning given in paragraph 6
Section 249D Meeting	has the meaning given in paragraph 23
Tempus	Tempus Resources Limited

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)

Takeovers Panel

Reasons – Tempus Resources Limited [2024] ATP 1

FACTS

3. Tempus Resources Limited is an ASX listed company (ASX code: TMR) in the mining industry with a focus on the exploration of gold. As at 11 January 2024, its market capitalisation is approximately \$2 million.²
4. The Applicant is a shareholder in Tempus.
5. On 27 November 2023, Tempus announced that three directors of Tempus had decided not to stand for re-election and retire at Tempus's annual general meeting (AGM) to be held on 29 November 2023.³ On 29 November 2023, Tempus announced the appointment of two new directors effective immediately.
6. Also on 29 November 2023, Tempus announced its intention to undertake an underwritten non-renounceable 1 for 1 entitlement offer (**Rights Issue**) at an issue price of \$0.005 per share to raise up to approximately \$1.714 million and that the Rights Issue would be fully underwritten by RM Capital Pty Ltd. Tempus stated that funds raised from the Rights Issue would be allocated towards origination/evaluation of potential new acquisitions, a process to realise value from the Blackdome-Elizabeth assets, as well as Tempus' working capital and expenses of the Rights Issue.
7. On 1 December 2023, Tempus announced that on 29 November 2023 it received a notice under s203D and s249D from shareholders who hold less than 5% of Tempus, seeking the removal of each of the 3 directors of Tempus (and any other director appointed after 29 November 2023) and the appointment of the Applicant and two others as directors. The announcement stated that Tempus' lawyers had advised that the notice did not comply with s249D and that Tempus did not intend to take any action in response to the notice at that stage.⁴
8. On 13 December 2023, Tempus announced an 'Entitlement Issue Prospectus' in relation to the Rights Issue (**Prospectus**). The Prospectus stated that the offer would open on 19 December 2023 and close at 5pm on 2 January 2024 (unless extended).
9. The Prospectus stated as follows on pages 13-14 under the heading Overseas Shareholders:

"This Offer does not, and is not intended to, constitute an offer in any place or jurisdiction in which, or to any person to whom, it would not be lawful to make such an offer or to issue this Prospectus.

It is not practicable for the Company to comply with the securities laws of overseas jurisdictions having regard to the number of overseas Shareholders, the number and value of Securities these Shareholders would be offered and the cost of complying with

² Source: Morningstar DatAnalysis

³ On 28 November 2023, Tempus announced that its CEO had been appointed as managing director until the conclusion of the AGM and the appointment of new directors, when he would resign

⁴ On 8 December 2023, Tempus announced that on 6 December 2023, it had received a second notice under ss203D and 249D which contained the same proposed resolutions as the previous defective notice. The announcement stated that Tempus' lawyers had advised that the second notice did not comply with ss203D and 249D and that Tempus did not intend to take any action in response to the notice at that stage

Takeovers Panel

Reasons – Tempus Resources Limited [2024] ATP 1

regulatory requirements in each relevant jurisdiction. Accordingly, the Entitlement Offer is not being extended and Shares will not be issued to Shareholders with a registered address which is outside Australia or New Zealand.”

10. The Prospectus stated (among other things) as follows on pages 7-8 under the heading Effect on Control:
 - (a) *“The Underwriter is presently not a Shareholder and is not a related party of the Company for the purposes of the Corporations Act.”*
 - (b) *“In accordance with the terms of the Underwriting Agreement, the Underwriter will allocate the Shortfall to its sub-underwriters and/or clients and people who have otherwise agreed to assist with the completion of the Entitlement Offer such that neither the Underwriter, the sub-underwriters nor any of the Underwriter’s clients, individually, will have a voting power in the Company in excess of 19.9% after the issue of the Shortfall.”*
 - (c) *“In the Board’s opinion, in the current commercial environment and having explored all options, the underwriting by the Underwriter of a non-renounceable entitlement issue was the most commercially feasible option available to the Company in the context of the Company’s current requirement for capital.”*
 - (d) *“The Company has a clear need for funds which has not been contrived (noting paragraph 9 of GN 17), and having regard to all available options, the Company has considered that entering into the Underwriting Agreement with the Underwriter provides the Company with the highest degree of certainty in the time available that the Entitlement Offer will be successful.”*
11. The Prospectus stated on page 6 that two directors of Tempus held a joint shareholding of 540,000 Tempus shares⁵ and that the other director of Tempus held nil Tempus shares.
12. On 18 December 2023, Tempus announced that it had received a notice under s203D on 13 December 2023 and a notice under s249D on 15 December 2023 from shareholders who hold at least 5% of Tempus (together, the **Requisition Notice**). The Requisition Notice (attached to the announcement) proposed resolutions for the removal of each of the 3 directors of Tempus (and any other person who is appointed as a director of Tempus after the date of the Requisition Notice) and for the appointment of the Applicant and two others as directors. The Requisition Notice was signed by the Applicant and three other shareholders (**Requisitioning Shareholders**) and stated their shareholdings which were (in aggregate) 21,930,290 Tempus shares.⁶ The announcement stated that Tempus had taken legal advice in relation to the validity of the Requisition Notice and had confirmed that it is valid.

⁵ Representing approximately 0.16% of Tempus based on 345,145,024 shares on issue

⁶ Representing approximately 6.35% of Tempus based on 345,145,024 shares on issue

Takeovers Panel

Reasons – Tempus Resources Limited [2024] ATP 1

APPLICATION

13. By application dated 29 December 2023, the Applicant sought a declaration of unacceptable circumstances. The Applicant submitted (among other things) that:
 - (a) Shareholders with registered addresses in the UK, Singapore and Canada, which includes all the Requisitioning Shareholders, and shareholders with shares held through BNP Paribas (despite it having a registered address in Sydney), have been excluded from participating in the Rights Issue.
 - (b) The Rights Issue excludes shareholders from applying for shortfall unless specifically asked by the underwriter.
 - (c) The shortfall shares will be concentrated in the hands of the underwriter and potentially the newly appointed board who will then control the outcome of the shareholder vote.
14. The Applicant submitted that the circumstances were unacceptable because *“they will lead to a change in control, in terms of the controlling shareholding group, of Tempus Resources without that possibility (or probability) being disclosed to the market.”*
15. The Applicant in effect sought interim and final orders, including that the Rights Issue be cancelled or the following alternatives:
 - (a) The Rights Issue be suspended until after the general meeting proposed in the Requisition Notice.
 - (b) The terms of the Rights Issue be amended to allow for the excluded shareholders to participate in the Rights Issue.

DISCUSSION

16. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.
17. Tempus made a preliminary submission dated 2 January 2024, submitting (among other things):
 - (a) At the time of resolving to proceed with the Rights Issue:
 - (i) *“the Company had no knowledge that the Requisition Shareholders intended to serve section 203D and section 249D notices on the Company”*
 - (ii) Tempus was in *“dire need of a funding solution”*
 - (iii) Tempus had considered other forms of raising equity capital, but was very limited in the approach it could take because it does not have any placement capacity available under ASX Listing Rules 7.1 or 7.1A and
 - (iv) the Rights Issue (including the underwriting) was the only form of funding available to Tempus.
 - (b) The underwriter has engaged 13 sub-underwriters to take up shortfall under the Rights Issue, who:
 - (i) are not associated parties of Tempus (to Tempus’ knowledge) and

Takeovers Panel

Reasons – Tempus Resources Limited [2024] ATP 1

- (ii) in no circumstances will any sub-underwriter end up with more than 20% of Tempus' shares.
 - (c) A number of the sub-underwriters are individual stockbrokers and Tempus understands that they intend to disperse any shortfall shares amongst their client base.
 - (d) The Rights Issue is open to all of Tempus' shareholders located within Australia and New Zealand, which contrary to the application includes shares held by BNP Paribas, which has a registered address in Sydney.⁷
 - (e) All of Tempus' previous entitlement offers have not been made to shareholders outside of Australia and New Zealand as it has determined that it is unreasonable to do so given the:
 - (i) number of holders
 - (ii) number and value of securities and
 - (iii) cost of complying with the legal requirements in each jurisdiction outside Australia and New Zealand.
 - (f) Should the Panel commence proceedings in response to the application, Tempus is concerned that this could result in the underwriter having an opportunity to terminate the underwriting agreement and, again, this would place Tempus in a dire financial position.
 - (g) Tempus has real concerns that, if the Rights Issue is frustrated or delayed in any way, it will not be able to meet its ongoing financial commitments or continue operating as a going concern.
18. Given the Rights Issue was scheduled to close on 2 January 2024, the President considered interim orders requested by the Applicant on an urgent basis and invited submissions on the request.
19. The Applicant made various submissions in response to this request (which did not appear to address the question of interim orders specifically), including that:
- (a) he is aware shareholders who will take shortfall shares in the Rights Issue sold down ahead of the record date in anticipation of getting in at a lower price
 - (b) the level of fees to RM Capital is excessive and
 - (c) the previous Tempus board was voted out by the shareholders at the AGM and *"a cursory glance at the largest holders now indicates that the loss for the updated board would be more resounding now"*.
20. In response, Tempus submitted (among other things) that:
- (a) the underwriting agreement with RM Capital Pty Ltd was negotiated and is on arm's length terms

⁷ Tempus supplied with its preliminary submissions entitlement and acceptance forms that were sent to BNP Paribas

Takeovers Panel

Reasons – Tempus Resources Limited [2024] ATP 1

- (b) the additional submissions of the Applicant remain highly speculative and baseless
 - (c) there is no evidence to support the statement that any shareholders who “will take shortfall shares” have sold down ahead of the announcement of the Rights Issue and
 - (d) a “ cursory glance” at the largest shareholders in Tempus cannot be a basis for drawing any conclusions around voting intentions of Tempus’ shareholders.
21. The President decided to decline to make any interim orders. The President considered that it was not appropriate to make any interim orders in the circumstances having regard to (among other things) the strength of the material provided by the Applicant, Tempus’ submissions including in relation to Tempus’ need for funds and in relation to the underwriting arrangements, and the ability of the sitting Panel, once appointed, to potentially make final orders addressing any unacceptable circumstances in due course (such as divesting shares acquired under the Rights Issue or freezing voting power of shares acquired under the Rights Issue).
22. On 4 January 2024, Tempus announced the results of the Rights Issue; 15.9% of shares were applied for by eligible shareholders, resulting in a shortfall of 84.1%. The announcement also stated as follows:
- “In accordance with section 1.7 of the Prospectus and the terms of the Underwriting Agreement, the Underwriter will allocate the Shortfall to its sub-underwriters and/or clients and people who have otherwise agreed to assist with the completion of the Entitlement Offer such that neither the Underwriter, the sub-underwriters nor any of the Underwriter’s clients, individually, will have a voting power in the Company in excess of 19.9% after the issue of the Shortfall.”*
23. On 5 January 2024, Tempus announced that a general meeting (**Section 249D Meeting**) had been convened for 14 February 2024 and released a notice of general meeting which included the 7 resolutions the subject of the Requisition Notice and stated that the directors of Tempus unanimously recommend shareholders vote against all resolutions set out in the notice of meeting.
24. The Applicant’s complaint is essentially that the Rights Issue was designed to “frustrate” the resolutions to be considered at the upcoming Section 249D Meeting.
25. *Guidance Note 12: Frustrating action* (GN 12) sets out the Panel’s approach to frustrating action. As observed in *Accelerate Resources Limited 01 & 02*⁸, GN 12 relates to actions that could frustrate a bid or potential bid. There is no reference to board control situations in GN 12.
26. However, the Panel has previously noted that “[i]f, in the context of issues regarding the composition of a company’s board, there is an accumulation or exercise of voting power possibly in contravention of s606, without proper disclosure under Chapter 6C or in

⁸ [2020] ATP 7 at [38]

Takeovers Panel

Reasons – Tempus Resources Limited [2024] ATP 1

otherwise unacceptable circumstances, those issues may be treated as control issues for the purposes of s657A.”⁹

27. In *MMA Offshore Limited*,¹⁰ the Panel considered an equity raising consisting of a 1 for 1 accelerated non-renounceable entitlement offer and institutional placement to existing and new investors which was announced in the lead up to MMA Offshore Limited’s annual general meeting. The timetable for the equity raising was such that shares issued under the placement and institutional entitlement offer would be able to be voted at the meeting while shares issued under the retail entitlement offer would not be able to be voted at the meeting. The Panel considered that the size¹¹ and timing of the accelerated component of the equity raising raised control issues within the purview of the Panel, noting that this was particularly so where some institutions would obtain or increase substantial holdings as a result of the placement and institutional entitlement offer.¹² The Panel found that the timing of the equity raising had the potential to distort voting at the meeting and that this was unacceptable.¹³
28. In *Factor Therapeutics Limited*,¹⁴ the Panel considered a placement made by Factor Therapeutics shortly after the applicant and another shareholder gave a s249D notice to the company. The Panel noted that while a placement made prior to a s249D meeting may have an effect on control and impact on voting at the meeting in an unacceptable way, Factor appeared to have a genuine need for funds, the applicant had not provided sufficient material to suggest that the placement had not been in contemplation prior to the lodgement of the s249D request, and also had not provided sufficient material to suggest that any of the placees would become substantial holders as a result of the placement and no material to suggest any association between them.¹⁵ The Panel declined to conduct proceedings.
29. We considered that Tempus had on first view legitimate reasons for not extending the Rights Issue to shareholders with registered addresses outside of Australia and New Zealand, and in our experience, it is not uncommon for ASX listed companies comparable to Tempus to do so.
30. Additionally, as noted above, Tempus submitted that when it resolved to proceed with the Rights Issue it had no knowledge that the Requisitioning Shareholders intended to submit a notice to spill the board.¹⁶ This was not rebutted.

⁹ *Resource Generation Limited* [2015] ATP 12 at [48]

¹⁰ [2017] ATP 21

¹¹ In total the accelerated component of the equity raising would have been approximately 27.1% of the total number of shares that could be voted at the meeting

¹² [2017] ATP 21 at [13]

¹³ [2017] ATP 21 at [14]

¹⁴ [2019] ATP 5

¹⁵ [2019] ATP 5 at [12]-[13]

¹⁶ Noting that based on Tempus’ ASX announcement of 1 December 2023 (see paragraph 7 above), the initial defective notice under ss203D and 249D was received on 29 November 2023, being the same day that Tempus announced that it intended to undertake the Rights Issue (see paragraph 6 above)

Takeovers Panel

Reasons – Tempus Resources Limited [2024] ATP 1

31. As set out above, Tempus made submissions to the effect that it had an urgent need for funds. We queried whether Tempus' prior public disclosure in relation to the intended use of the funds raised, which stated that (in addition to working capital) part of the proceeds would be used for the origination or evaluation of potential new acquisitions, adequately conveyed this funding imperative. However, in our view the material supported the conclusion that Tempus had a genuine need for funds. While we acknowledge that the need for funds is not a safe harbour,¹⁷ the Tempus' board's decision to proceed with the Rights Issue appeared to us to be reasonable and supported by rational reasons.
32. As noted above, following the lodgement of the application the results of the Rights Issue were announced. The shortfall arising from the Rights Issue is in our view very large and gave us some pause. The way in which that shortfall is ultimately distributed could potentially have an impact on voting at the Section 249D Meeting. However, at the time of our meeting on 8 January 2024, the shortfall was yet to be allocated¹⁸ and the Section 249D Meeting was yet to occur. Tempus had disclosed the underwriter's proposed method of allocating the shortfall (see paragraph 22 above), which includes dispersion to sub-underwriters and/or their clients. We consider this approach to be reasonable in the circumstances. On the materials provided, there was in our view nothing to suggest that the circumstances relating to the Rights Issue would be likely to impact voting at the Section 249D Meeting in an unacceptable way or otherwise have a control effect. We say this noting that aside from the Requisitioning Shareholders, there do not appear to be any other substantial shareholders in Tempus.¹⁹ We were not persuaded that conducting a deeper inquiry into the circumstances relating to the Rights Issue was warranted in the circumstances.
33. We note that we were not assisted by the Applicant waiting until 29 December 2023, being 1 business day before the closure of the Rights Issue, to bring the application, noting the Prospectus was released on 13 December 2023.
34. We also note that the Applicant made an out of process submission which included extracts from a group chat forum called '10 Baggers Club' relating to the Rights Issue and referring to an individual which the Applicant submitted had "*bought in to sub underwrite initially [sic] \$250k then \$200k*" and "*bought in new managemet [sic] and plans to use the company to vend in more projects as soon as early in the current year*". Tempus provided a response submitting (among other things) that it considers the extracts from the 10 Baggers Club discussion to be "*gossip and speculation with absolutely no basis*" and that Tempus has made enquiries of the individual referred to who refutes statements made in the extracts as being inaccurate, false and misleading. We decided to receive the out of process submission (and response). This material did

¹⁷ See *Guidance Note 17: Rights issues* at [12]

¹⁸ Based on Tempus' ASX announcement of 4 January 2024

¹⁹ Based on Tempus' most recent Annual Report announced on 29 September 2023 (see page 66) and ASX announcements between that date and 9 January 2024

Takeovers Panel

Reasons – Tempus Resources Limited [2024] ATP 1

not alter our views set out above and we did not consider it appropriate to make further enquiries into this aspect.

DECISION

35. 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).

Sharon Warburton

President of the sitting Panel

Decision dated 9 January 2024

Reasons given to parties 15 January 2024

Reasons published 18 January 2024

Takeovers Panel

Reasons – Tempus Resources Limited
[2024] ATP 1

Advisers

Party	Advisers
Tempus	Steinepreis Paganin
Applicant	-