



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Tempus Resources Limited 02R  
[2024] ATP 2**

**Catchwords:**

*Review – decline to conduct proceedings – rights issue – board spill – effect on control – need for funds – underwriting – sub-underwriting – frustrating action – shortfall shares – continuous disclosure*

*Corporations Act 2001 (Cth), sections 203D, 249D, 657A, 657EA*

*Eastern Field Developments Limited v Takeovers Panel [2019] FCA 311*

*Guidance Note 1: Unacceptable Circumstances, Guidance Note 17: Rights issues*

*Tempus Resources Limited [2024] ATP 1, Nex Metals Explorations Ltd 04R [2021] ATP 18, CFOAM Limited [2020] ATP 22, Moreton Resources Limited (Administrators Appointed) 02 (Consent to Review) [2020] ATP 1, Tribune Resources Limited [2018] ATP 18, Auris Minerals Limited [2018] ATP 7, Argosy Minerals Limited [2014] ATP 7, Rey Resources Ltd [2009] ATP 14, Mount Gibson Iron Limited [2008] ATP 4*

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

**INTRODUCTION**

1. The review Panel, Alex Cartel (sitting President), Teresa Dyson and Diana Nicholson declined to conduct proceedings on an application by Mr Matthew Bull to review the decision of the initial Panel to decline to conduct proceedings in *Tempus Resources Limited*.<sup>1</sup> The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

|                                    |  |
|------------------------------------|--|
| <b>AGM</b>                         | Tempus’s annual general meeting held on 29 November 2023 |
| <b>Applicant</b>                   | Mr Matthew Bull  |
| <b>Prospectus</b>                  | has the meaning given in paragraph 5(d)                  |
| <b>Requisition Notice</b>          | has the meaning given in paragraph 5(e)                  |
| <b>Requisitioning Shareholders</b> | has the meaning given in paragraph 5(e)                  |
| <b>Rights Issue</b>                | has the meaning given in paragraph 5(b)                  |
| <b>Section 249D Meeting</b>        | has the meaning given in paragraph 11                    |
| <b>Tempus</b>                      | Tempus Resources Limited                                 |
| <b>Tempus 01</b>                   | <i>Tempus Resources Limited [2024] ATP 1</i>             |

<sup>1</sup> [2024] ATP 1

## FACTS

3. Tempus is an ASX listed company (ASX code: TMR) in the mining industry with a focus on the exploration of gold.
4. The Applicant is a shareholder in Tempus.
5. The facts are set out in more detail in *Tempus 01*. The following is a summary:
  - (a) On 27 November 2023, Tempus announced that three directors of Tempus would retire at Tempus's AGM.
  - (b) On 29 November 2023, Tempus announced the appointment of two new directors effective immediately. Tempus also announced its intention to undertake a non-renounceable 1 for 1 entitlement offer at an issue price of \$0.005 per share (**Rights Issue**) to raise approximately \$1.714 million, with the Rights Issue to be fully underwritten by RM Capital Pty Ltd.
  - (c) On 1 December 2023, Tempus announced that on 29 November 2023 it had received a notice under sections 203D and 249D from shareholders holding less than 5% of Tempus, seeking the removal of each of the three directors of Tempus and the appointment of the Applicant and two others as directors. The announcement stated that the notice did not comply with section 249D.<sup>2</sup>
  - (d) On 13 December 2023, Tempus announced an 'Entitlement Issue Prospectus' in relation to the Rights Issue (**Prospectus**). The Prospectus stated that the Rights Issue would not extend to shareholders with a registered address outside Australia or New Zealand. The Prospectus also stated that the underwriter would allocate any shortfall to its sub-underwriters and/or clients and other people who assisted with the Rights Issue such that neither the underwriter, the sub-underwriters nor any clients, individually, would have voting power in Tempus in excess of 19.9%.
  - (e) On 18 December 2023, Tempus announced that it had received a further notice under section 203D on 13 December 2023 and a notice under section 249D on 15 December 2023 from shareholders holding at least 5% of Tempus (together, the **Requisition Notice**). The Requisition Notice proposed resolutions for the removal of each of the three directors of Tempus 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.<sup>3</sup> The announcement stated that the Requisition Notice was valid.
  - (f) On 19 December 2023, the Rights Issue opened, with a closing date of 2 January 2024.
6. On 29 December 2023, the Applicant made an application to the Panel in relation to the affairs of Tempus seeking a declaration of unacceptable circumstances on the

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<sup>2</sup> On 8 December 2023, Tempus announced that on 6 December 2023 it had received a further defective notice under sections 203D and 249D which contained the same proposed resolutions as the previous defective notice

<sup>3</sup> Representing approximately 6.35% of Tempus based on 345,145,024 shares on issue at that time

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basis that the Rights Issue would lead to a change of control. The Applicant submitted that (among other things):

- (a) shareholders with registered addresses in the UK, Singapore and Canada, including the Requisitioning Shareholders, and shareholders with shares held through BNP Paribas (despite it having a registered address in Sydney) were excluded from participating in the Rights Issue
  - (b) the Rights Issue excluded shareholders from applying for shortfall shares unless specifically asked by the underwriter and
  - (c) the shortfall shares would be concentrated in the hands of the underwriter and potentially the newly appointed board who would then control the outcome of the shareholder vote.
7. The Applicant sought in effect interim and final orders that the Rights Issue be cancelled, or alternatively:
- (a) the Rights Issue be suspended until after the general meeting proposed in the Requisition Notice or
  - (b) the terms of the Rights Issue be amended to allow for the excluded shareholders to participate in the Rights Issue.
8. On 2 January 2024, the Rights Issue closed.
9. Also on 2 January 2024, the President declined to make interim orders having regard to (among other things), the material provided and the ability of the initial Panel to make final orders in due course.
10. On 4 January 2024, Tempus announced the results of the Rights Issue with a take up of 15.9% by eligible shareholders, and a shortfall of 84.1%.
11. 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 resolutions the subject of the Requisition Notice and stated that the directors of Tempus unanimously recommend shareholders vote against all resolutions.
12. On 9 January 2024, Tempus issued the shares under the Rights Issue, other than the shortfall shares.
13. Also on 9 January 2024, the initial Panel declined to conduct proceedings on the basis that (among other things) there was no material to suggest that the circumstances of the Rights Issue were likely to have an effect on the control of Tempus, and that the material supported the conclusion that Tempus had a genuine need for funds.

## APPLICATION

14. On 11 January 2024, the Applicant made a review application seeking a review of the decision of the initial Panel to decline to conduct proceedings in *Tempus 01*, and sought the President's consent for leave pursuant to section 657EA.
15. In the review application, the Applicant submitted (among other things) that:
  - (a) *“[t]he company states its cash burn is approximately \$120,000 per month. The company had \$558,000 in cash on September 30 2023 and it raised a further \$740,000*

*on October 2 2023. The company has had minimal exploration activities during that period. Therefore the requirement for urgent capital raise is not justified and has been manufactured to force a dilutionary arise (sic) ahead of a shareholders meeting”*

- (b) the Rights Issue would exclude “approximately 30% of the register including many of the largest shareholders”
  - (c) people associated with the underwriting and sub-underwriting of the Rights Issue intended to obtain control of Tempus, as evidenced by (among other things) the discussion between individuals from the ‘10 Baggers Club’ group chat forum and
  - (d) Tempus had withheld a material mineral resource report and had failed to comply with its continuous disclosure obligations.
16. The President considered that granting consent to the review was warranted on the basis that new evidence had been provided by the Applicant.<sup>4</sup>

### Interim orders

17. The Applicant sought interim orders to the effect that the underwriting agreement and placement of shortfall shares be cancelled, or alternatively:
- (a) the shortfall issue be suspended until after the Section 249D Meeting or
  - (b) the terms of the shortfall issue be amended to allow existing shareholders a right to participate.
18. The Applicant noted that in Tempus’s announcement on 4 January 2024, Tempus had stated that the shares under the Rights Issue would be issued on 9 January 2024 with the shortfall shares “expected to be issued soon thereafter”. Accordingly, the Applicant sought the interim orders on an urgent basis prior to the issue of the shortfall shares.
19. To assist in considering the request for interim orders, the President queried when Tempus intended to issue the shortfall shares under the Rights Issue. In response to that query, Tempus submitted that it intended to issue the shortfall shares on 15 January 2024 but confirmed that it would be willing to delay the issue until 16 January 2024 to allow the review Panel time to consider the request for interim orders and the review application.
20. On that basis, and given the review Panel was due to meet on 15 January 2024 to consider the review application, the President deferred the decision on interim orders to the review Panel.

### DISCUSSION

21. The powers of a review Panel are set out in section 657EA. One of the powers a review Panel has is to decline to conduct proceedings and allow the initial Panel’s decision to stand.<sup>5</sup>

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<sup>4</sup> See *Moreton Resources Limited (Administrators Appointed) 02 (Consent to Review)* [2020] ATP 15

<sup>5</sup> See *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311 at [181] and *Nex Metals Explorations Ltd 04R* [2021] ATP 18

22. We have considered all the material, including the material before the initial Panel in *Tempus 01* and the initial Panel’s reasons for decision, but address specifically only that part of the material we consider necessary to explain our reasoning.

### Decision to conduct proceedings - jurisdiction

23. In deciding whether to conduct proceedings and, if so, make a declaration “*we need to have regard to, among other things, the purposes in section 602, the provisions of Chapter 6 and, more broadly, the role Parliament intended the Panel to perform*”.<sup>6</sup>
24. The Panel’s powers to declare unacceptable circumstances are wide and not restricted to cases where there is a live takeover bid. However, it remains the case that the Panel was established as the primary forum for resolving disputes in control transactions. The Panel is not a general corporations tribunal, and so an applicant must explain why the circumstances the subject of its application are unacceptable under section 657A.
25. Here we do not consider that the Applicant sufficiently explained why the terms of the Rights Issue were unacceptable for the purposes of section 657A, other than submitting that the underwriter and sub-underwriters would be supportive of Tempus’s existing board, suggesting association. We did not find this submission compelling<sup>7</sup> without more<sup>8</sup>, particularly given the underwriter for the Rights Issue is a professional firm.<sup>9</sup>

### Rights Issue

26. We received a preliminary submission from Tempus in relation to the review application. Tempus submitted that (among other things):
- (a) Tempus had an urgent need for funding, and that its cash position had further deteriorated since the date of the announcement of the Rights Issue, with a current cash balance of \$174,000 and cash burn of approximately \$120,000 per month
  - (b) the underwriter had engaged 13 sub-underwriters, and the underwriter had advised Tempus that the shortfall shares would be allocated to a total of 39 investors
  - (c) the Applicant and its associates could have contacted the underwriter to participate in the shortfall under the Rights Issue, but had not done so<sup>10</sup>
  - (d) “*the majority of the Company’s shareholder base (92.2% of shares held, 99.3% of shareholders) are in Australia and New Zealand and were able to participate in the offer, and shareholder participation was low*” and

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<sup>6</sup> *Auris Minerals Limited* [2018] ATP 7 at [23], also quoted in *Tribune Resources Limited* [2018] ATP 18 at [67]

<sup>7</sup> And falls far short of the ‘Mount Gibson’ hurdle, that it is for the applicant to demonstrate a sufficient body of evidence of association and to convince the Panel as to that association, albeit with proper inferences being drawn – *Mount Gibson Iron Limited* [2008] ATP 4 at [15]

<sup>8</sup> See *Argosy Minerals Limited* [2014] ATP 7 at [25] and [30] regarding evidence of a control effect in the context of a rights issue

<sup>9</sup> See *Guidance Note 17: Rights issues* at [24]

<sup>10</sup> Tempus submitted that it had received one enquiry from an existing shareholder to participate in the shortfall and Tempus referred that shareholder to the underwriter. Tempus submitted that the underwriter was not approached by that shareholder to apply for shortfall shares

- (e) in relation to the material mineral resource report, Tempus had complied at all times with its continuous disclosure obligations and the Panel was not an appropriate forum for continuous disclosure complaints where they had no control implications.
27. Tempus’s current \$174,000 cash balance suggests that since 30 September 2023<sup>11</sup>, Tempus has made cash payments in addition to its cash burn of approximately \$120,000 per month. However, we do not consider in the circumstances of this case, that we should question Tempus’s submission regarding its current cash balance and accordingly we accept that it has an urgent need for funds.
28. In relation to the Applicant’s submission regarding the exclusion of certain shareholders from participating in the Rights Issue, we agree with the initial Panel’s conclusion that it is not uncommon for listed companies to choose to not extend a rights issue to foreign shareholders, especially where foreign shareholders do not make up a large portion of the company’s register. Here, we consider this is further supported by Tempus’s submission that “*the majority of the Company’s shareholder base (92.2% of shares held, 99.3% of shareholders) are in Australia and New Zealand*”. In addition, for a company that is experiencing significant financial hardship, such as Tempus, it is reasonable to expect that foreign shareholders will be excluded on the basis that it is not practicable for the company to comply with the securities laws of foreign jurisdictions in order to extend the offer to foreign shareholders. We are also of the view that there is nothing in the material to suggest that BNP Paribas was unable to accept the Rights Issue, as evidenced by the acceptance forms sent to BNP Paribas in connection with the Rights Issue.
29. With regards to the shortfall, we note that while the Prospectus stated that shareholders should “*not apply for Shortfall Shares unless instructed to do so by the Underwriter*”, we agree with Tempus’s submission that the Applicant could have enquired about participating in the allocation of the shortfall but chose not to do so. We also note that participation in the Rights Issue more generally was very low, with a take up of only 15.9%. While the shortfall was substantial at 84.1%, we consider that there was an appropriate dispersion strategy employed by Tempus, given the shortfall shares would be ultimately allocated to 39 investors<sup>12</sup> (with no one investor to hold above 19.9% of Tempus).<sup>13</sup>
30. Accordingly, there is nothing before us to suggest that the Rights Issue would have a control effect that would be unacceptable. We agree with Tempus’s submission that the Applicant’s evidence of the ‘10 Baggers Club’ group chat forum appeared to be merely gossip and speculation, and there is no convincing evidence that any one individual or group formulated the Rights Issue for the purposes of obtaining control of Tempus.
31. We also agree with the initial Panel’s commentary regarding the Applicant’s submission that the Rights Issue was designed to frustrate the resolutions being

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<sup>11</sup> See the Applicant’s submission at [15(a)]

<sup>12</sup> The Panel in *Argosy Minerals Limited* [2014] ATP 7 at [25] noted that while dilution may have an effect on the control of an entity, “*if the effect is purely that control is dispersed, the effect is unlikely to be unacceptable*”

<sup>13</sup> See *Guidance Note 17: Rights issues* at [7] to [10], *CFOAM Limited* [2020] ATP 22 at [20] and *Rey Resources Ltd* [2009] ATP 14

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considered at the Section 249D Meeting.<sup>14</sup> In particular, we consider that the timing of Tempus resolving to undertake the Rights Issue<sup>15</sup> ahead of its receipt of the notices from the Requisitioning Shareholders suggests that the Rights Issue was not formulated to frustrate the Section 249D Meeting.

32. We note that the Applicant made an out of process submission in response to Tempus's preliminary submission regarding the shortfall shares, Tempus's need for funds, Tempus's compliance with its continuous disclosure obligations and other matters. We decided to receive the out of process submission but did not consider that the submission altered our views in this matter.
33. We consider Tempus's compliance with its continuous disclosure obligations in connection with the release of a material mineral resources report is not a matter for us to consider in connection with these proceedings.

## DECISION

34. 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).

## Orders

35. 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.

**Alex Cartel**

**President of the sitting Panel**

**Decision dated 15 January 2024**

**Reasons given to parties 6 February 2024**

**Reasons published 8 February 2024**

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<sup>14</sup> See *Tempus Resources Limited* [2024] ATP 1 at [24] to [30]

<sup>15</sup> And the announcement of the Rights Issue on the same day that Tempus received notices from the Requisitioning Shareholders

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### Advisers

| Party     | Advisers            |
|-----------|---------------------|
| Tempus    | Steinepreis Paganin |
| Applicant | -                   |