



Australian Government

Takeovers Panel

Reasons for Decision

Tissue Repair Ltd

[2024] ATP 20

Catchwords:

Decline to conduct proceedings – board spill – requisition notice – collective action – association – relevant agreement – undertaking

Corporations Act 2001 (Cth), sections 203D, 249D, 249P, 671B

Australian Securities and Investments Commission Act 2001 (Cth), section 201A

ASIC Regulatory Guide 128: Collective action by investors, UK Takeover Panel Practice Statement No 26, Shareholder activism

Perpetual Custodians Ltd (as custodian for Tamoran Pty Ltd (as trustee for Crivelli)) and Others v IOOF Investment Management Ltd (2013) 304 ALR 436

Agua Resources Limited [2019] ATP 13, Caravel Minerals Limited 02R [2018] ATP 10, Caravel Minerals Limited [2018] ATP 8, Auris Minerals Limited [2018] ATP 7, Indiana Resources Limited [2017] ATP 8, Resource Generation Limited [2015] ATP 12, Dragon Mining Limited [2014] ATP 5, Mount Gibson Iron Limited [2008] ATP 4, Orion Telecommunications Limited [2006] ATP 23

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

INTRODUCTION

1. The Panel, Bruce Cowley, Kierin Deeming and Chelsey Drake (sitting President), declined to conduct proceedings on an application by Tissue Repair Ltd in relation to its affairs. The application concerned an alleged undisclosed association between certain shareholders of the company in favour of requisitioning a meeting for a restructure of the company’s board. The Panel declined to conduct proceedings after accepting an undertaking from a leading requisitioner not to give the requisition notices to Tissue Repair Ltd, and to inform each co-requisitioner that they are free to exercise their voting rights in their absolute discretion on any resolution put to Tissue Repair Ltd shareholders. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

Co-requisitioners has the meaning given in paragraph 13

Explanatory Statement has the meaning given in paragraph 14

Notices has the meaning given in paragraph 12

TRP Tissue Repair Ltd

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TRP NEDs

Mr Jack Lowenstein, Mr Bryan Gray and Mr Michael Silberberg, being the non-executive directors of TRP as at the date of TRP's application

FACTS

3. TRP is an ASX listed company (ASX code: TRP) which is developing unconventional wound healing products targeting applications in the chronic wound and aesthetic procedure aftercare markets.
4. Mr Tony Charara is the co-founder and executive director of TRP. As at the date of TRP's application, Mr Charara, through both a personal holding and his wholly owned company, Spark Capital Pty Limited, held voting power of approximately 8.1% of TRP.
5. On 4 June 2024, Mr Charara provided to the TRP board a draft memorandum outlining the strategic challenges faced by TRP in executing its strategy as an ASX listed company. The memorandum proposed voluntary delisting to rectify the company's challenges and stated (among other things) that this strategy had been advised by a number of the company's major shareholders.
6. On 12 June 2024, the TRP NEDs provided their response to Mr Charara's draft memorandum, which did not support delisting the company. Following this, Mr Charara expressed his disagreement via email, stating that the decision should be put to shareholders at the next AGM.
7. On 26 June 2024, Mr Jack Lowenstein emailed Mr Charara expressing concerns regarding possible discussions between Mr Charara and various TRP shareholders about delisting the company.
8. On 1 July 2024, Mr Charara responded, asserting (among other things) that his engagement with TRP shareholders adhered to industry best practices and insider trading laws, that the shareholders involved were experienced market participants aware of their obligations, and that no decision to delist the company had been made, as any such proposal was still in its early, undefined stages.
9. On 16 July 2024, Mr Lowenstein emailed to Mr Charara (1) a termination letter for his role as executive director and (2) a proposed ASX announcement for an interim CEO appointment to be released at close of trading that day. Approximately 40 minutes later, Mr Lowenstein and Mr Charara held a telephone conversation whereby Mr Charara sought discussion with the TRP NEDs regarding withdrawal of the termination letter. The TRP NEDs agreed to withdraw the termination letter and the proposed ASX announcement on the basis that there would be cooperation regarding overall strategy that did not, for the immediate future and until other efforts were made, include delisting.
10. In early August 2024, Mr Charara and TRP's co-founder, Mr Peter Scutt, held various conversations with separate TRP shareholders. As at the date of TRP's application, Mr Scutt, through his wholly owned company, Creight Investments Pty Ltd, held voting power of approximately 6.65% of TRP.

11. On 26 August 2024, Mr Lowenstein received an email from Prandium Legal informing him that a group of shareholders holding over 50% of TRP's shares wanted to remove him and Mr Peter Gray as directors and appoint Mr Scutt in their place. The email suggested that, given the majority support, formally calling a meeting would be futile and costly, and proposed discussing a way for the directors to resign without a formal meeting, with an agreed announcement about the board changes.
12. On 27 August 2024, the TRP NEDs received another email from Prandium Legal attaching proposed notices under sections 249D and 203D¹ dated 15 August 2024 (the **Notices**) to requisition a general meeting to move resolutions for (1) the removal of Mr Lowenstein, Mr Gray and any other person appointed as a director of TRP between 15 August 2024 and the date of the general meeting and (2) the appointment of Mr Scutt as a director of TRP. Prandium Legal asserted that the Notices would be served on TRP if TRP failed to provide a satisfactory proposal to give effect to the board changes being sought by the Co-requisitioners.
13. The Notices were purportedly signed via Docusign by 22 individual shareholders collectively holding approximately 50.88% of TRP's voting shares (the **Co-requisitioners**), including Mr Charara, Spark Capital Pty Limited and Creight Investments Pty Ltd.
14. The explanatory statement under section 249P which accompanied the proposed section 249D notice (**Explanatory Statement**) relevantly stated as follows:

"This explanatory statement outlines the reasons that the Requisitioning Shareholders urge all shareholders of TRP to vote in favour of the resolutions set out in the 249D notice issued by the Requisitioning Shareholders.

The resolutions are put with a view to restoring TRP to a founder-led vision, with a focus on the financial position, strategy and vision of the company led by its founders.

More particularly.

1. TRP was founded in 2012 by technology co founders Tony Charara and Peter Scutt with a clear vision to acquire and develop wound care drug technology and undertake clinical trial programs to confirm the early efficacy and Mode of Action of the underlying technology. Since founding TRP in 2012, the founder group has been unwavering in driving towards its goal of commercialising the technology and remains committed to its original vision.

2. There has been a breakdown in the relationship of trust and confidence between the founders and Messrs Lowenstein and Gray. The Requisitioning Shareholders believe that the lack of trust and confidence between those directors and the founders is likely to harm TRP's pursuit of its commercial goals, and distract TRP's executive and clinical team from pursuing the company's clinical and commercial objectives.

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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3. *The Requisitioning Shareholders therefore seek to remove Messrs Lowenstein and Gray from the board of TRP, and to appoint Mr Peter Scutt, one of TRP's founders, as a nonexecutive director of TRP.*

4. *Mr Scutt, with the other founders, was responsible for TRP being formed and has contributed heavily to its successful pursuits of its historical clinical and drug development objectives via Creight Investments Pty Ltd, Mr Scutt holds 4,022,260 shares and 2,500,000 options in TRP.*

5. *The Requisitioning Shareholders encourage all shareholders to vote in favour of all the resolutions proposed by them."*

15. On 2 September 2024 (after making its application to the Panel), TRP released an ASX announcement stating *"Further to the Takeovers Panel media release dated 29 August, Tissue Repair Limited (ASX:TRP) announces that it received a copy of a notice with an indication that, absent directors resigning and a new director being appointed, the actual meeting requisition would be formally served. To date, the actual requisition has not been received."*

APPLICATION

Declaration sought

16. By application dated 28 August 2024, TRP sought a declaration of unacceptable circumstances. It submitted (among other things) that:
- (a) there were inconsistencies relating to the execution of the Notices, which were signed via DocuSign
 - (b) the Co-requisitioners had a relevant agreement to seek to restructure TRP's board and failed to disclose any combined voting power, relevant interests or association and
 - (c) the agreement, arrangement or understanding between the Co-requisitioners may have extended beyond the reconstitution of TRP's board to a broader plan to delist the company.
17. TRP submitted that the effect of the circumstances was that the acquisition of control over TRP was not taking place in an efficient, competitive and informed market because:
- (a) there had been a series of breaches of section 606 by the Co-requisitioners by acquiring relevant interests in each other's shares
 - (b) the agreement, arrangement or understanding and association between the Co-requisitioners was not disclosed in contravention of section 671B and
 - (c) the Explanatory Statement included no disclosure regarding a proposed delisting of TRP (which would typically be required in any compliant control proposal), despite at least one of the Co-requisitioners seeking that TRP pursue this strategy.

Interim orders sought

18. TRP sought interim orders that:
- (a) the Co-requisitioners be precluded from serving the Notices on TRP until further order of the Panel
 - (b) alternatively, the Co-requisitioners deliver all the Docusign ID envelope Certificates of Completion related to the execution of the Notices and
 - (c) the Co-requisitioners be prevented from acquiring any additional interests in TRP shares until further order of the Panel.

Final orders sought

19. TRP sought final orders that:
- (a) the relevant agreement among the Co-requisitioners be cancelled
 - (b) the Co-requisitioners lodge substantial shareholder notice(s) required under section 671B, in a form acceptable to the Panel and
 - (c) all shares acquired by any Co-requisitioner on or after the earlier of 15 August 2024 and the date on which the association was formed or the relevant agreement was entered into be vested in ASIC for resale.

DISCUSSION

20. We have considered all the material presented to us in coming to our decision, but only specifically address those things that we consider necessary to explain our reasoning.

Preliminary submission

21. Based on TRP's application, we had some concerns with the nature and content of Mr Charara's engagement with the Co-requisitioners. We invited Mr Charara to make a preliminary submission.
22. Mr Charara and Spark Capital Pty Limited subsequently made a preliminary submission submitting (among other things):
- (a) there was no evidence of association between Co-requisitioners beyond jointly signing the Notices, which in itself does not demonstrate association
 - (b) beyond joining together to requisition a meeting, there was no agreement, arrangement or understanding between the Co-requisitioners, or relevant voting interest in each other's shares and each was unconstrained as to how to vote and
 - (c) although Mr Charara did previously consider and raise with the board whether delisting was desirable, in discussing the Notices with the Co-requisitioners, there was no mention of any delisting proposal and no consideration of such proposal existed among the Co-requisitioners. After initially raising the delisting strategy with the board, Mr Charara subsequently made clear to the board that he was no longer considering that proposal. Rather, the purpose of the Notices was as set out in the Explanatory Statement (i.e. to consider the

reconstitution of TRP's board) and the conversations held between Mr Charara and the Co-requisitioners were limited to this subject matter. Mr Charara therefore offered to state publicly that *"he is not considering, proposing or currently giving any consideration to any proposal to delist TRP and that he has no intention to do so in future"*.

Potential association

23. The Panel's starting point for an association matter is 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 (see *Mount Gibson Iron Limited*).²
24. This test was discussed in *Dragon Mining Limited*:³
- "We are conscious of the risk that some people may read this decision as signalling a raising of the 'association hurdle'. This is not our intention. Our decision in this matter was based purely on the evidence that was submitted to us.*
- Dromana Estate Limited 01R acknowledges the difficulties that an applicant faces in gathering evidence in association matters. In deciding whether to conduct proceedings on an association case, this must be kept in mind. However, the Panel has limited investigatory powers which means, before we decide to conduct proceedings, an applicant must do more than make allegations of association and rely on us to substantiate them. An applicant must persuade us by the evidence it adduces that we should conduct proceedings."*
25. ASIC Regulatory Guide 128 at Table 2 states that jointly signing a section 249D notice to requisition a general meeting of a company for the purposes of putting forward a resolution relating to the composition of the board or the company's affairs is *"likely to be considered entering into a relevant agreement and for these investors to be considered associates. If this is accompanied by an understanding about the exercise of voting rights, it will also result in the acquisition of a relevant interest. We expect that this would be the case in most instances."*
26. In *Caravel Minerals Limited*,⁴ the Panel declined to make a declaration of unacceptable circumstances in relation to allegations of association between shareholders of Caravel Minerals Limited who had requisitioned a general meeting pursuant to section 249D. In relation to whether requisitioning shareholders were associates, the Panel considered the guidance in ASIC Regulatory Guide 128 but stated that *"It was not clear to us, in the circumstances of this case, that the signing of the s249D Notice alone was sufficient to establish a relevant agreement between the Requisitioning Shareholders. While there was a shared frustration among the Requisitioning Shareholders with the actions of the Caravel board, we are not satisfied that there was necessarily a 'meeting of minds' of all who signed the requisition or that it was established that the purpose of all who signed went beyond causing the resolutions to be put to a meeting."*⁵ On the material provided in that

² [2008] ATP 4 at [15]

³ [2014] ATP 5 at [59]-[60], footnotes omitted

⁴ [2018] ATP 8

⁵ Ibid at [44], footnote omitted

case, the Panel considered it would need to make further enquiries to determine whether there was an association between the requisitioning shareholders or groups of them, but decided not to for public interest and other reasons.⁶

27. In *Caravel Minerals Limited 02R*,⁷ the review Panel affirmed the initial Panel's decision and stated that:

*"To the extent that matters relevant to our jurisdiction are concerned, we agree with ASIC that jointly signing a s249D notice is "likely to be considered entering into a relevant agreement" giving rise to association, although we were of the view this will not necessarily be the case in all situations. We did not find it necessary to decide whether the requisition in this case, of itself, was enough to establish association. We were satisfied in this case that, had we found such an association, the initial Panel's other reasons for declining to make a declaration of unacceptable circumstances would lead us to the same conclusion as the initial Panel. We consider that there is no reasonable prospect that we would come to a different conclusion if we conducted proceedings."*⁸

28. Mr Charara (through both his personal holding and Spark Capital Pty Limited) clearly had sufficient voting power in TRP to request a general meeting under section 249D without involving any other shareholders. However, in the hope of avoiding "the publicity and expense to TRP associated with a general meeting by demonstrating to TRP's board that other shareholders were frustrated with the actions of the board and were prepared to join him in requesting a meeting" (as submitted by Mr Charara), the materials presented indicate that Mr Charara sought to show the support of other TRP shareholders by having them sign the Notices.
29. In the present case, it is unclear to us based on the materials presented whether the mere signing of the Notices is enough to constitute a relevant agreement among the Co-requisitioners. Apart from the Notices, there was limited material to support a 'meeting of minds'⁹ among all the Co-requisitioners, nor that their purpose extended beyond simply bringing the resolutions to a meeting.

Undertaking

30. Notwithstanding the above, we consider that arranging for shareholders who collectively hold over 20% to sign a requisition notice puts them at risk of being found to be associates and in breach of section 606.
31. We therefore asked Mr Charara and Spark Capital Pty Limited if they would be willing to provide a joint and several undertaking under section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth) to the Panel to:
- (a) not give the Notices to TRP and

⁶ Ibid at [48]-[55]

⁷ [2018] ATP 10

⁸ Ibid at [12]

⁹ See *Perpetual Custodians Ltd (as custodian for Tamoran Pty Ltd (as trustee for Crivelli)) and Others v IOOF Investment Management Ltd* (2013) 304 ALR 436, [70]-[75]

- (b) inform each of the Co-requisitioners that they are free to exercise their voting rights in their absolute discretion on any resolution put to TRP shareholders.
32. Mr Charara and Spark Capital Pty Limited agreed to provide this undertaking (**Annexure A**).
33. We consider that the undertaking adequately deals with any potential unacceptable circumstances that may have arisen, having regard to the following (in no particular order):
- (a) The Notices were not formally given to TRP.
 - (b) As stated by the Panel in *Aguia Resources Limited*¹⁰ (footnotes omitted):

“In considering whether to conduct proceedings on the question of whether shareholders are associated in the context of a board spill, the Panel will apply its well-established principle that the applicant must demonstrate a sufficient body of evidence of association to convince the Panel as to that association, albeit with proper inferences being drawn. As a practical matter, it may be more difficult for an applicant to demonstrate a sufficient body of probative material where it is alleged that a large number of parties have recently commenced acting in concert.”¹¹

We consider that the number of individual shareholders who signed the Notices (being 22) made it challenging for TRP to provide material to demonstrate, and for us to find, an association between all (or even some) of them.

- (c) The Panel has previously considered that there may be more reason to be concerned if there is material to suggest that any of the alleged associates had joint plans for the management of the company after the requisition meeting.¹² Mr Charara submitted that:
 - (i) in discussing the Notices with the Co-requisitioners, there was no mention of any delisting proposal and no consideration of such proposal existed among the Co-requisitioners
 - (ii) after initially raising the delisting strategy with the board, Mr Charara subsequently made clear to the board that this proposal was no longer being considered by himself and
 - (iii) the purpose of the Notices was as set out in the Explanatory Statement (i.e. to consider the reconstitution of TRP’s board) and the conversations held between Mr Charara and the Co-requisitioners were limited to this subject matter.

Based on the submissions and materials provided, we consider that the Co-requisitioners’ actions appear consistent with a desire to consider changing the

¹⁰ [2019] ATP 13

¹¹ Ibid at [24(b)], citing *Mount Gibson Iron Limited* [2008] ATP 4 at [15] and *Auris Minerals Limited* [2018] ATP 7 at [20]

¹² *Aguia Resources Limited* [2019] ATP 13 at [24(f)], citing *Resource Generation Limited* [2015] ATP 12 at [93]

composition of the TRP board for corporate governance or other proper purposes. We did not consider it necessary to inquire into this further following the acceptance of the undertaking and noted Mr Charara's submission that "he is not considering, proposing or currently giving any consideration to any proposal to delist TRP and that he has no intention to do so in future".

- (d) Even if the aggregate voting power of the alleged associates is more than 20%, there is no contravention of section 606 unless a person has acquired a relevant interest in shares through a transaction in relation to securities entered into by or on behalf of that person. In the context of a board spill, in the absence of any acquisitions of shares by alleged associates, we would need to find that the alleged associates have acquired a relevant interest in each other's shares by entering into a relevant agreement to each vote their shares in favour of the resolutions at the requisitioned meeting.¹³ While the email from Prandium Legal to Mr Lowenstein on 26 August 2024 put forward the position that the Co-requisitioners could pass the resolutions, Mr Charara denied that he had any agreement with his Co-requisitioners regarding voting and the undertaking effectively withdrew the potential resolutions.
- (e) A contravention of the substantial holding provisions alone can give rise to unacceptable circumstances. However, it may be less likely to be in the public interest to intervene in a board dispute and make a declaration of unacceptable circumstances on a contravention of the substantial holding provisions alone if it is not material or where the market is not misinformed.¹⁴ We consider that ASIC can follow up any historical contraventions of the substantial holder provisions in the present case.
- (f) The Panel has previously considered that there may be more reason to be concerned if any alleged associates have acquired shares around the time of a s249D requisition.¹⁵ Although TRP sought final orders vesting shares acquired by the Co-requisitioners after the alleged association was formed, no material was presented to us that would suggest that any acquisitions had occurred.

Alleged inconsistencies relating to execution of the Notices

- 34. TRP submitted that there were inconsistencies relating to the execution of the Notices, which were signed via DocuSign.
- 35. Having already decided that there was no reasonable prospect that we would declare the circumstances unacceptable in light of the undertakings from Mr Charara and Spark Capital Pty Limited to not give the Notices to TRP, we did not consider that it was necessary to consider this issue or whether it was a matter for the Panel.

¹³ Ibid at [24(d)], citing *Resource Generation Limited* [2015] ATP 12 at [99]-[108]

¹⁴ Ibid at [24(g)], citing *Caravel Minerals Limited* [2018] ATP 8 at [50] and *Auris Minerals Limited* [2018] ATP 7 at [23]-[24].

¹⁵ Ibid at [24(c)], citing *Indiana Resources Limited* [2017] ATP 8 at [20], *Orion Telecommunications Limited* [2006] ATP 23 at [103]-[108] and UK Takeover Panel Practice Statement No 26, *Shareholder activism*, at [1.7]

DECISION

36. Given the information provided to the Panel and the undertakings given by Mr Charara and Spark Capital Pty Limited, 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).
37. 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.

Chelsey Drake

President of the sitting Panel

Decision dated 19 September 2024

Reasons given to parties 22 October 2024

Reasons published 28 October 2024

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Advisers

Party	Advisers
TRP	Mills Oakley
Mr Tony Charara and Spark Capital Pty Limited	Prandium Legal



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

TISSUE REPAIR LTD

Mr Tony Charara and Spark Capital Pty Limited each jointly and severally undertakes to the Panel to:

1. not give the Notices to TRP and
2. inform each of the Co-requisitioners that they are free to exercise their voting rights in their absolute discretion on any resolution put to TRP shareholders.

Mr Tony Charara and Spark Capital Pty Limited each jointly and severally undertakes to the Panel that they will confirm in writing to the Panel when they have satisfied their obligations under this undertaking.

In this undertaking the following terms have the corresponding meaning:

Co-requisitioners means each of the signatories to the Notices.

Notices means the notices dated 15 August 2024 and provided to TRP's non-executive directors on 27 August 2024 to requisition a general meeting to move resolutions for the removal of two TRP directors and the appointment of a new director under sections 249D and 203D of the *Corporations Act 2001* (Cth).

TRP means Tissue Repair Ltd.

**Signed by Mr Tony Charara
Dated 18/09/2024**

**Signed by Mr Tony Charara of Spark Capital Pty Limited
with the authority, and on behalf, of Spark Capital Pty Limited
Dated 18/09/2024**