



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Tissue Repair Ltd (Consent to Review)  
[2024] ATP 21**

**Catchwords:**

*Consent to review – decline to consent – board spill - undertaking*

*Corporations Act 2001 (Cth), section 657EA(2)*

*Guidance Note 2: Reviewing Decisions*

*Moreton Resources Limited (Administrators Appointed) 02 (Consent to Review) [2020] ATP 15, Accelerate Resources Limited 02 (Consent to Review of Interim Orders) [2020] ATP 5, Careers Australia Group Limited 03R [2015] ATP 2, Austral Coal Limited 03R [2005] ATP 15*

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

**INTRODUCTION**

1. The substantive President of the Panel, Alex Cartel, declined to grant consent to an application for review of a decision of the sitting Panel to decline to conduct proceedings in *Tissue Repair Ltd*.
2. In these reasons, the following definitions apply.

**Notices** has the meaning given in paragraph 6

**Spark Capital** Spark Capital Pty Limited

**TRP** Tissue Repair Ltd

**Undertaking** has the meaning given in paragraph 8

**FACTS**

3. TRP is an ASX listed company (ASX code: TRP).
4. Mr Tony Charara is the co-founder and executive director of TRP.
5. On 4 June 2024, Mr Charara proposed to his fellow directors that TRP delist from the ASX. That proposal was not supported by the non-executive directors.
6. On 27 August 2024, TRP’s non-executive directors received notices under s249D<sup>1</sup> and s203D dated 15 August 2024 to requisition a general meeting to move resolutions for the removal of two TRP directors and the appointment of a new director (the **Notices**). The Notices appeared to be signed by shareholders, including Mr Charara and his wholly owned company Spark Capital, who together hold more than 50% of

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<sup>1</sup> 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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TRP's voting shares.<sup>2</sup> The Notices were provided to TRP's non-executive directors by a legal adviser who 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 relevant shareholders.

7. On 28 August 2024, TRP made its application to the Panel. TRP submitted (among other things) that the shareholders who had signed the Notices have a relevant agreement to seek to restructure TRP's board of directors and have failed to disclose any combined voting power, relevant interests or association.
8. On 18 September 2024, Mr Charara and Spark Capital gave an undertaking not to give the Notices to TRP and to inform each of the other shareholders who signed the Notices that they are free to exercise their voting rights in their absolute discretion on any resolution put to TRP shareholders (**Undertaking**). Mr Charara also submitted that he had not discussed any delisting proposal with the other requisitioning shareholders and 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.
9. Considering the Undertaking and Mr Charara's submission, the sitting Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances and declined to conduct proceedings.

### REQUEST FOR CONSENT

10. On 23 September 2024, TRP sought consent to review the sitting Panel's decision not to conduct proceedings.
11. TRP submitted (among other things) that:
  - (a) The sitting Panel, in declining to conduct proceedings, appeared to have considered that various aspects of the alleged relevant agreement and/or association, including the identity of each of the parties to it, its nature, purposes and extent, and the number of shares the subject of it, are all irrelevant.
  - (b) Even if the Undertaking deals with the relevant agreement, it presupposes that any association was limited to the mere signing of the Notices.
12. In light of the Undertaking, I decided to call for submissions on whether I should consent to the review.
13. Mr Charara and Spark Capital submitted that the sitting Panel's decision was plainly correct and that Spark Capital proposes to serve a fresh s249D notice which proposes resolutions to reconstitute the board of TRP but will not do so while a review proceeding is on foot, and hence any review proceeding would delay TRP shareholders from being able to consider resolutions to reconstitute the board.

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<sup>2</sup> As at that date, Mr Charara, through both a personal holding and Spark Capital, held voting power of approximately 8.1% of TRP

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## DISCUSSION

14. The sitting Panel's decision was a decision not to conduct proceedings and did not involve a declaration of unacceptable circumstances or orders. Accordingly, my consent is a necessary precondition to TRP applying for a review of that decision under s657EA(2).
15. *Guidance Note 2: Reviewing Decisions* (GN 2) states (at [29]) that the President's approach to consenting to a review is guided by the below considerations:
  - (a) that it is a policy underpinning s657EA(2) that there should be a prompt conclusion to Panel proceedings
  - (b) whether there was any potential error in the sitting Panel's decision and
  - (c) whether there is any other basis for granting consent, for example, if there is new evidence, the importance of the dispute, whether there would be material prejudice to any party by consenting or by withholding consent, and the merits of the sitting Panel's decision.
16. Firstly, I note that Mr Charara and Spark Capital have undertaken not to give the Notices to TRP. Therefore, a key aspect of the circumstances the subject of the initial application has been addressed and I consider this to be a significant factor weighing against the granting of consent here.
17. While a fresh s249D notice had been foreshadowed<sup>3</sup>, I consider that any issues arising from such a notice would constitute new circumstances and it would be open for TRP or another interested person to bring a new application (if appropriate).
18. On the materials before me and noting in particular the Undertaking, I was not persuaded that there was any potential error in the sitting Panel's decision, noting that I did not have the benefit of reviewing the sitting Panel's reasons for decision when I made my decision as the reasons had not been prepared at the time I considered TRP's request.
19. I also considered that there was no new relevant material presented in TRP's review application which would lead me to conclude that consent to a review application should be granted.
20. The initial application suggested that the impact of the association extended beyond the reconstitution of the Board to a broader plan to delist the company. Noting the submission by Mr Charara in the initial proceedings<sup>4</sup> and the lack of new evidence in the review application, if further evidence does come to light suggesting this is the case then again it may be open for TRP or another interested person to bring a new application.
21. I also did not consider there was any reasonable prospect that the final orders sought in the review application (being the same as those sought in the initial application) would be granted. I note for example that TRP sought an order that any TRP shares

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<sup>3</sup> See paragraph 13

<sup>4</sup> See paragraph 8

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acquired by the requisitioning shareholders while associated be vested in ASIC for sale (an order that is not made lightly). However, TRP did not refer to any such acquisitions.

22. I also note that TRP requested that the requisitioning shareholders file substantial holder notices under s671B in a form acceptable to the Panel. While the Panel does from time to time make orders relating to substantial holder notice disclosure, in the present case I consider this request to be more appropriately a matter for ASIC.
23. Lastly, I refer to *Austral Coal Limited 03R* [2005] ATP 15, where the then President, in declining to provide consent, noted (at [9]) that “...*the existence of the consent requirement was a firm indication that the legislature did not intend that parties would have an automatic right to review of a decision by a full Review Panel, where that decision did not involve a declaration of unacceptable circumstances or orders*”. In this instance, having regard to the GN 2 factors at [29], I do not consider that the provision of consent is warranted.<sup>5</sup>

## DECISION

24. On the basis of the above, I decline to grant consent under s657EA(2) to a review of the sitting Panel’s decision.

## POSTSCRIPT

25. On 25 September 2024, TRP announced that TRP’s three non-executive directors intend to resign as at the close of the TRP’s annual general meeting on 25 October 2024.

**Alex Cartel**

**President of the Panel**

**Decision dated 23 September 2024**

**Reasons given to parties 21 October 2024**

**Reasons published 24 October 2024**

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<sup>5</sup> Other examples of where the President declined to consent to a review include *Moreton Resources Limited (Administrators Appointed) 02 (Consent to Review)* [2020] ATP 15, *Accelerate Resources Limited 02 (Consent to Review of Interim Orders)* [2020] ATP 5 and *Careers Australia Group Limited 03R* [2015] ATP 2

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**Advisers**

<b>Party</b>	<b>Advisers</b>
TRP	Mills Oakley