Australian Government

Takeovers Panel

Reasons for Decision
Invest Blue Pty Ltd (Consent to Review)
[2025] ATP 6

Catchwords:

Consent to review – decline to consent – reducing company to less than 50 members – timely application – extend time for making application

Corporations Act 2001 (Cth), section 231, 606, 657C(3), 657D(1), 657EA(2)

Takeovers Panel Procedural Rules 2020, rules 11, 20

Takeovers Panel Procedural Guidelines 2020, 4.6(b)

Guidance Note 2: Reviewing Decisions

Moreton Resources Limited (Administrators Appointed) 02 (Consent to Review) [2020] ATP 15, 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 *Invest Blue Pty Ltd*.

2. In these reasons, the following definitions apply.

Applicant	Kanenaro Pty Ltd ATF Denaro Family Superannuation Fund
Austral Coal 03R	has the meaning given in paragraph 35
Careers 03R	has the meaning given in paragraph 36
Equity Plan Services	Equity Plan Services Pty Ltd
GN 2	has the meaning given in paragraph 22
Invest Blue	Invest Blue Pty Ltd
Invest Blue Support	Invest Blue Support Pty Ltd, a related body corporate of Invest Blue
Ironbark	Ironbark Investment Partners Pty Ltd
Issue 1	has the meaning given in paragraph 13(a)
Issue 2	has the meaning given in paragraph 13(b)

FACTS

3. Invest Blue is a proprietary company limited by shares which operates in the financial services sector.

4. Mr Anthony Denaro, a former employee of Invest Blue Support, is both a beneficiary of the Denaro Family Superannuation Fund and a director of the Applicant.

5. In March 2022, the Applicant acquired shares directly in Invest Blue, then a public company with more than 50 members.

6. In June 2022, Invest Blue requested that all employees transfer their shareholdings to a bare trust arrangement to (among other things) allow Invest Blue to transition to a proprietary company.

7. In August 2022, the Applicant appointed Equity Plan Services to hold its Invest Blue shares on trust pursuant to a bare trust deed.

8. On 19 April 2023, Invest Blue applied to convert from a public company to a proprietary company.

9. In August 2023, Ironbark, which already owned approximately 40% of the shares in Invest Blue through a related body corporate, offered to acquire all of the remaining shares in Invest Blue that it did not already own for scrip in Ironbark pursuant to a share purchase agreement.

10. A merger summary provided by Invest Blue to the Applicant stated "*Equity Plan Services Pty Ltd will act on behalf of shareholders in the bare trust to execute the Share Purchase Agreement. Equity Plan Services will contact shareholders separately to seek consent for them to agree to the SPA on your behalf*".

11. Completion under the share purchase agreement occurred on 15 December 2023 (as submitted by Invest Blue and Ironbark).

12. On 23 December 2024, Invest Blue Support commenced Federal Court proceedings against Mr Denaro alleging that he had breached certain post-termination employment obligations, including a three-year non-compete clause.

13. On 17 February 2025, the Applicant made an application to the Panel. The Applicant submitted that:

    (a) at the time of the merger, Invest Blue was an unlisted company with more than 50 members for the purposes of section 606[1] and that Invest Blue and Ironbark had failed to comply with the requirements of Chapter 6 (**Issue 1**), and

    (b) in the alternative, if Invest Blue was not a Chapter 6 company at the time of the merger, then certain steps taken by Invest Blue prior to the merger to extinguish the Chapter 6 rights of the Applicant and other employee shareholders constituted unacceptable circumstances (**Issue 2**).

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

14. The sitting Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances and declined to conduct proceedings. In its email to parties dated 25 February 2025, the sitting Panel stated that it considered the following circumstances important to its decision (not listed in any order of importance):

    (a) on the material provided, [Invest Blue] had fewer than 50 members on 15 December 2023, when the share purchase agreement was entered into

    (b) it was unlikely that, after making enquiries, the Panel would make a finding that there had been a deliberate strategy to reduce Invest Blue's number of shareholders with a view to taking the company outside the ambit of Chapter 6 of the Corporations Act 2001 (Cth) and depriving shareholders of the benefits and protections afforded under that Chapter

    (c) the orders sought by the applicant are apt to be unfairly prejudicial to various parties, including Invest Blue, Ironbark Investment Partners Pty Ltd, and former Invest Blue shareholders, particularly given the time that has passed since any relevant circumstances occurred and

    (d) the application was not timely.

15. The sitting Panel also noted that the application was out of time for the purposes of section 657C(3) and while the sitting Panel considered it was unlikely to extend time, it was not necessary to consider the request for an extension further given its decision not to conduct proceedings.

16. The sitting Panel's email states that the email communicates the decision of the Panel but it does not constitute the Panel's reasons for its decision which it will publish at a later date.

REQUEST FOR CONSENT

17. On 27 February 2025, the Applicant sought consent to review the sitting Panel's decision not to conduct proceedings.

18. For the purposes of seeking consent, the Applicant relied on matters raised in its review application and the original application in relation to Issue 1 only. The Applicant withdrew its request for any declaration of unacceptable circumstances in relation to Issue 2.

19. Ordinarily a review application under section 657EA is a *de novo* consideration of an initial Panel's decision.[2] Here, that decision was in relation to both Issue 1 and Issue 2. Separately, there is provision for an applicant to withdraw its application with the consent of the Panel or the President (if the request is made before a Panel is appointed).[3]

20. Although unusual, I see no reason to deny the withdrawal of Issue 2 noting that the sitting Panel's decision did not involve the making of a declaration of unacceptable

[2] Guidance Note 2: Reviewing Decisions at [31]
[3] Takeovers Panel Procedural Rules 2020, rule 11

circumstances or orders. Accordingly, I focus on Issue 1 for the purposes of considering whether to grant consent to review, as requested by the Applicant.

DISCUSSION

21. The sitting Panel's decision was a decision not to conduct proceedings and did not involve a declaration of unacceptable circumstances or orders. Accordingly, under section 657EA(2), my consent is a necessary precondition to the Applicant applying for a review of that decision.

22. *Guidance Note 2: Reviewing Decisions* (**GN 2**) states (at [29]) that the President's approach to consenting to a review is guided by the following considerations:

    (a) that it is a policy underpinning section 657EA(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.

23. In considering whether to grant consent, I have read:

    (a) the *Invest Blue Pty Ltd* application and its annexures

    (b) the email communicating the sitting Panel's decision and

    (c) the review application (which included the Applicant's request for consent) and its annexures (which included the preliminary submissions of Invest Blue and Ironbark in *Invest Blue Pty Ltd*).

Applicant's grounds for review

24. The Applicant raised a number of matters in support of Issue 1. I address specifically only those I consider necessary to explain my reasoning.

25. First, the Applicant disputes that the acquisition of Invest Blue by Ironbark completed on 15 December 2023 because ASIC records do not reflect changes in ownership consistent with the acquisition. I do not consider ASIC records to be definitive on this question and failure to report matters to ASIC is not a matter for the Panel.

26. I do not agree with the Applicant's submission that the state of the ASIC records and the failure of Invest Blue or Ironbark to refute the position disclosed by the ASIC records means that there was no evidence before the sitting Panel that the acquisition has completed.

27. Secondly, the Applicant referred to an annexure attached to the preliminary submissions of Invest Blue and an annexure attached to the preliminary submissions of Ironbark, both provided to the sitting Panel. The Applicant had not previously

had an opportunity to make any submissions in respect of these two documents.[4] The Applicant submitted that the Panel could draw inferences from these documents that Invest Blue had more than 50 members prior to the merger.

28. While this submission potentially raises new evidence because it represents the first opportunity that the Applicant has had to comment on the documents, I do not consider the submission of sufficient weight to lead a review Panel to reach a different decision.

29. The Applicant further submitted that the sitting Panel's concern regarding the potential prejudice to other parties (including former Invest Blue shareholders) in relation to the orders sought by the Applicant (see paragraph 14(c)) "*underplays the capacity of the Panel to fashion orders which would have ameliorated any possible prejudice*".

30. I have not had the benefit of reviewing the sitting Panel's reasons for decision which were not published at the time of my decision. While I agree that the Panel has scope to fashion its orders in a manner that mitigates prejudice, noting that it may not make any order if it is satisfied that the order would unfairly prejudice any person,[5] the Panel is entitled to consider the remedies available when deciding whether to conduct proceedings.[6] Based on its decision email, the sitting Panel appears to have had concerns with the orders requested by the Applicant. However, I only read this as being one of several considerations of the Panel and not definitive of the substantive issue (Issue 1).

31. The Applicant also submitted that the Shareholders Agreement of Invest Blue treats and defines the employee shareholders (including the Applicant) as shareholders to the exclusion of Equity Plan Services highlighting specific clauses of that agreement. This argument may support a claim that the Applicant can take to a Court but does not appear to me to be relevant to the question of the number of members of Invest Blue at the time of the merger.

32. Finally, the Applicant noted the three-year non-compete provisions in the Shareholder Agreements of both Invest Blue and Ironbark.[7] It submitted that the Panel should, when considering whether a company is a Chapter 6 company, oppose an interpretation of the share register that deprives employee shareholders of the protections of Chapter 6 and avoids the disclosure requirements of Chapter 6, including the consequences of entry into any shareholders agreement and "*the imposition of onerous non compete provisions affecting the future livelihood of the employee shareholder*". In this context, the Applicant noted Treasury's 'Worker non-compete clauses and other restraints' Issues Paper released last year and the possible future legislative reforms.

33. I make no comment on the government's policy reforms. Again, this concern does not change what is determinative of whether a company is a Chapter 6 company.

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[4] See rule 20
[5] Section 657D(1)
[6] Takeovers Panel Procedural Guidelines 2020 at 4.6(b)
[7] Employee shareholders were required to sign of deed of accession to the Shareholders Agreement of Ironbark in connection with the merger

Whether the Applicant was (and other employee shareholders were) fully informed about the establishment and consequences of the bare trust arrangements may be a relevant consideration in relation to Issue 2. However, that issue has been withdrawn by the Applicant and the sitting Panel noted it would be unlikely, after making enquiries, to make a finding on that issue. Again, I have not seen the sitting Panel's reasons in relation to this issue but I would expect that it would be a difficult evidentiary exercise for a Panel to draw a conclusion on this issue in a timely manner, noting (as the sitting Panel did) the time that has passed since the bare trust arrangements were put in place.

34. I understand that the enforcement proceedings by Invest Blue Support in the Federal Court are of personal concern to Mr Denaro. However, while the question of whether a company is a Chapter 6 company is relevant to the Panel's jurisdiction, I do not consider that withholding consent materially prejudices the Applicant given that it has another forum (being a Court) to make its claims.

Merits of the sitting Panel's decision

35. GN 2 (at [29(c)]) in posing the question as to whether there is any other basis for granting consent lists the merits of the sitting Panel's decision. In *Austral Coal Limited 03R* [2005] ATP 15 (***Austral Coal 03R***) the then acting President said (at [17]):

> *While it was not necessary for the President to reconsider the merits of the First Instance Decision, the President could find no reasonable basis to suspect that a Review Panel would decide to commence proceedings if he were to grant consent to such a review.*

36. In *Careers Australia Group Limited 03R* [2015] ATP 2 (***Careers 03R***) the then President, after quoting from *Austral Coal 03R*, stated (at [29], footnotes omitted):

> *Whether a review Panel would be likely to decide to conduct proceedings if consent were given is a relevant consideration in my view. There is some overlap between this and the error ground above, but it is not necessary for the initial Panel to be in error for a review Panel to come to a different conclusion. It is a de novo review. Were I to form the view that a review Panel would be likely to conduct proceedings, it may tip the balance against other factors that incline to the contrary. Of course all the factors must be weighed in each case.*

37. I agree with this statement and consider whether a review Panel would be likely to decide to conduct proceedings if consent were given to be a relevant consideration.[8] I consider the merits of the sitting Panel's decision here weigh against granting consent.

38. The submissions put forth by the Applicant ask the Panel to draw inferences from various documents or circumstances in relation to a question (Issue 1) that is unambiguous – namely, how many members did Invest Blue have at the time of the merger? This question turns on how many names were entered on the register of

[8] See also *Moreton Resources Limited (Administrators Appointed) 02 (Consent to Review)* [2020] ATP 15 at [25]-[26]

members of Invest Blue at that time.[9] The sitting Panel concluded that on the material provided Invest Blue had fewer than 50 members at that time.

39. I consider it unlikely that a review Panel would conduct proceedings on the basis of Issue 1 (or would take the view that the application was within time or that it would otherwise extend time). And, as noted above, I am not persuaded that there was any potential error in the sitting Panel's conclusion on Issue 1 nor any compelling new material which would change that conclusion.

Policy basis

40. GN 2 (at [29(a)]) also provides that I consider the policy underpinning section 657EA(2) when consenting to a review. This was enunciated in *Careers 03R* by the then President (at [14]) as follows:

> *One policy underpinning s657EA(2) in my view is that, while it is usual for Commonwealth administrative agencies to allow one merits review, if no declaration and orders have been made no new rights or obligations have been created. Section 657EA(2) gives effect to the principle that there should be a prompt conclusion to Panel proceedings because takeovers, and other control transactions, are often fast moving.*

41. In *Careers 03R* the President went on to say that this aspect of the policy did not have much application in that matter because the relevant bid closed almost 18 months prior to the date of the initial application and therefore, the matter involved a retrospective review.

42. Here, according to Invest Blue and Ironbark, the merger completed on 15 December 2023 and so like in *Careers 03R* there is no transaction pending on the Panel proceedings. I recognise that the facts are quite different between the two matters – *Careers 03R* involved a successful cash takeover bid and here the Applicant appears to be a beneficial shareholder in Ironbark following the merger and is allegedly subject to continuing contractual obligations. Bringing this matter to a prompt conclusion is not a significant factor from the perspective that the proceedings are holding up any transaction, but I do believe that prompt decision making is still important where I consider it unlikely that a review Panel will decide to conduct proceedings.

DECISION

43. On the basis of the above, I decline to grant consent under section 657EA(2) to a review of the sitting Panel's decision.

Alex Cartel
President of the Panel
Decision dated 27 February 2025
Reasons given to parties 13 March 2025
Reasons published 18 March 2025

[9] Section 231

Advisers

Party	Advisers
Kanenaro Pty Ltd ATF Denaro Family Superannuation Fund	Pointon Partners