



Australian Government

Takeovers Panel

**Reasons for President's Decision
Careers Australia Group Limited 03R
[2015] ATP 2**

Catchwords:

Consent to review - decline to consent - initial application alleged misleading statements and omissions - bid closed - 18 months passed - Court preferable forum

Corporations Act 2001 (Cth) sections 657B, 657C, 657EA(2)

Australian Securities and Investments Commission Regulations, reg 22

Procedural Rule 3.3.2

Guidance Note 2: Reviewing decisions

Careers Australia Group Limited 03 [2015] ATP 1, The Presidents Club Limited [2012] ATP 10, Austral Coal Limited 03R [2005] ATP 15

INTRODUCTION

1. The President of the Panel, Vickki McFadden, declined to consent to a review application being made in response to the initial Panel declining to conduct proceedings in *Careers Australia Group Limited 03 [2015] ATP 1*.
2. In these reasons, the following definitions apply.

Applicants	Jiggi Investments Pty Ltd ATF Company Executive Superannuation Fund, Wayburn Holdings Pty Ltd, Vernon and Jillaine Wills ATF the Wills Family Super Fund, Vernon Wills and Jillaine Wills, D & E Somerville ATF The Somerfam Super Fund, Devine Superannuation Pty Ltd ATF Devine Executive Super Fund, Orbit Capital Pty Ltd, Pinbrook Pty Ltd, Jim and Lisa Elder ATF Elder Superannuation Fund and Ganbros Pty Ltd
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Careers Australia or CAG	Careers Australia Group Limited
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Cirrus	Cirrus Business Investments Limited, an entity owned by White Cloud Capital Fund and its investors
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FACTS

3. On 23 December 2014, the Applicants made an application concerning statements made in bidder's statements and target's statements in relation to the bid by Cirrus for Careers Australia, which closed on 23 July 2013. See *Careers Australia 03*.¹

¹ *Careers Australia Group Limited 03 [2015] ATP 1*

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4. The sitting Panel declined to conduct proceedings. The executive advised the parties of the Panel's decision by email on 6 January 2015, together with a statement of matters that the Panel considered important to its decision (although they were stated not to be exhaustive and not to be listed in any order of importance).
5. The facts are sufficiently set out in the reasons of the sitting Panel, a draft of which was circulated to the parties at approximately the time the request for consent was received.

REQUEST FOR CONSENT

6. By letter dated 8 January 2015, the Applicants sought consent to review the decision of the sitting Panel.
7. The Applicants submitted that the sitting Panel had erred in its consideration of the issues raised by the Applicants. They submitted that the consequence of the sitting Panel's decision was that Cirrus had acquired control of Careers Australia and profited to the detriment of former shareholders in circumstances that were unacceptable because they:
 - (a) constituted a breach of s636(1)(m),² s670A(1) and s670A(2) and
 - (b) were contrary to the Eggleston principles set out in s602(a)³ and s602(b)(iii).⁴

DISCUSSION

The initial decision

8. As set out in the request for consent, the sitting Panel's decision was made because:
 - (a) there was no reasonable prospect of it making a declaration of unacceptable circumstances due to the following matters, which among others, it considered important:
 - The time that has elapsed since Cirrus' bid closed
 - The circumstances surrounding the application, including the intervening circumstances since the bid closed, are likely to require information gathering and forensic analysis that the Panel is not best equipped to undertake
 - The subject matter of the application can be addressed in another forum, and it appears that the court is a more appropriate forum and
 - (b) the application was out of time and the Panel would not in all the circumstances extend time.
9. This has been amplified in the sitting Panel's draft reasons.

The principles for granting consent

10. Section 657EA(2) provides:

² references are to the *Corporations Act 2001* (Cth) unless otherwise indicated

³ the acquisition of control over voting shares takes place in an efficient, competitive and informed market

⁴ the holders of shares and directors are given enough information to enable them to assess the merits of the proposal

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If the decision is not:

- (a) a decision to make a declaration under section 657A; or
- (b) a decision to make an order under section 657D or 657E;

the person may apply for review only with the consent of the President of the Panel.

11. This section was considered by the acting President in *Austral Coal 03R*.⁵ That was a case of refusal to grant consent. The acting President based his consideration on essentially three tests:
- (a) the policy underpinning s657EA(2). He said this indicated the legislature did not intend that parties would have an automatic right to a review if the decision did not involve a declaration or orders
 - (b) whether there was any potential error in the sitting Panel's decision and
 - (c) whether there was any other basis for granting consent. Under this heading he considered whether there was new evidence, the importance of the dispute and whether there would be material prejudice to any party if the consent was granted or not granted.
12. In *Austral Coal 03R*, the acting President also considered whether a review Panel would be likely to decide to conduct proceedings if consent were given (in other words, a consideration of the merits of the application), although this was not strictly necessary to his conclusion.

The policy

13. Section 657EA(2) was introduced in 1999.⁶ The Explanatory Memorandum to the Bill did not address the policy underpinning s657EA(2), but articulated what the provision does. The Explanatory Memorandum said:
- ... Where the decision is not a decision to make a declaration or order (such as a decision not to make a declaration or order) a person may only apply with the consent of the President of the Panel.*⁷
14. 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.
15. I do not think this aspect of the policy underpinning the requirement for consent has much application in this matter because the bid closed in July 2013. What is involved here is a retrospective review.

⁵ *Austral Coal Limited 03R* [2005] ATP 15

⁶ *Corporate Law Economic Reform Program Act 1999*, Act no 156 of 1999

⁷ Supplementary Explanatory Memorandum to the *Corporate Law Economic Reform Program Bill 1998*, para 3.22

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Potential error

16. In *Austral Coal 03* the acting President said:⁸

If an application for review under section 657EA presented no potential error in the first instance decision and no new evidence relevant to the matter, the President did not consider he had a reasonable basis for exercising the discretion to consent under section 657EA(2) for the review to proceed.

17. I have read:

- the request for consent to review (which includes the decision of the sitting Panel)
- the original application to the Panel and
- the draft reasons of the sitting Panel.

18. The Applicants submitted that the Panel's rules clearly contemplate that the Panel may undertake information gathering and the fact that information gathering is not commonly undertaken is no reason not to do so. The Applicants submitted that they should not be prevented from having a Panel deal with alleged unacceptable circumstances because a level of information gathering and forensic analysis is required. I do not think this is what the sitting Panel decided.

19. Sitting Panels regularly gather information, usually through the brief process,⁹ and analyse the information received. In my view, the sitting Panel simply said that a Court was in a better position than the Panel to undertake the type of information gathering and analysis required in this case. I agree with that conclusion.

20. The Applicants also submitted that the debt refinancing of Careers Australia in January 2014 supported their claims. They put the argument this way:

We note that the debt financing facility was entered into (in January 2014) only some 6 months after the Takeover had closed (in July 2013). Logically, to justify the Westpac facility ... CAG's financial performance during the previous 6 months (and projected financial performance) must have been very strong and significantly stronger than it was in (sic) during the takeover. This in fact supports the Applicant's claim that if CAG's financial performance dramatically improved immediately after Takeover, CAG and Cirrus undoubtedly had in their possession material financial information which was not disclosed during the Takeover (resulting in contraventions)

21. I do not accept that argument. There may be a number of reasons why the debt was able to be refinanced. It is not an "*inescapable conclusion*" that there was information available during the takeover that was not disclosed.

22. The Applicants also submitted that the sitting Panel was incorrect in deciding that the court was a more appropriate forum because:

- (a) requiring them to pursue the matter in Court would deny them swift access to justice and

⁸ *Austral Coal Limited 03R* [2005] ATP 15 at [10]

⁹ *Australian Securities and Investments Commission Regulations*, reg 22

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- (b) they had been without recourse for approximately 17 months already as the unacceptable circumstances only came to light in October 2014.
23. The sitting Panel exercised discretion not to conduct proceedings on the basis (among others) that there is a more appropriate forum to consider the allegations. I do not see any error in this approach, and moreover would take the same view. They are not denied access to justice by going to Court, and given the takeover was completed almost 18 months ago, the argument for swift action by the Panel does not, in my view, influence this approach.
24. Accordingly, I am not satisfied that there is any potential error in the sitting Panel's decision.

Another basis for consent?

25. No new evidence was mentioned in the application requesting consent.
26. While the outcome of a Court hearing may have implications for disclosure in future cases, Cirrus' takeover was completed almost 18 months ago. Although the matter is obviously important to the Applicants, it is not imperative that the issues be decided immediately as in an ongoing takeover.
27. Lastly, I am not satisfied that there would be material prejudice to the Applicants by refusing consent. They have another forum in which to pursue their allegations and I agree with the initial Panel that the Court appears to be the more appropriate forum. Further, because of that view, I am inclined to think that granting consent may materially prejudice the other parties because they would be denied (in a matter like this) the process, procedures and potential defences available in a Court.

Merits of the Panel's decision

28. In *Austral Coal 03R* the acting President said:¹⁰
- 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.*
29. 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.¹¹ 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.
30. For the following reasons I think it is unlikely that a review Panel would conduct proceedings on the application (assuming it took the view that the application was within time or that it would extend time):
- (a) the entering into the financing facility and the payment of the dividend do not necessarily indicate previous strength in Careers Australia's financial position,

¹⁰ *Austral Coal Limited 03R* [2005] ATP 15 at [17]

¹¹ *Guidance Note 2: Reviewing decisions* at para [28]

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so this does not indicate that there was or was likely to be an information deficiency in the course of the takeover

- (b) the bid closed at a price within the fair range given by the independent expert, so it is not apparent, without more, that the acquisition of voting shares took place, or may have taken place, in a market that was not efficient, competitive and informed and
- (c) the application depends on reliance being placed on various statements, but it is not at all clear what effect those statements had. To take one example, the Cirrus nominee directors' statements refer to cash flow, whereas the application appears to be based on an absence of profitability and revenue forecast information.

Time

31. I agree with the sitting Panel that the original application was out of time.¹² I also agree that time should not be extended.

DECISION

32. On the basis of the above, I decline to grant consent under s657EA(2) to a review of the decision in *Careers Australia 03*.

Vicki McFadden

President of the Panel

Decision dated 8 January 2015

Reasons published 14 January 2015

Advisers

Party	Advisers
Applicants	HopgoodGanim

¹² I note the submission, in reliance on *The Presidents Club Limited* [2012] ATP 10, that the circumstances are ongoing