



Australian Government

Takeovers Panel

**Reasons for President's Decision
Accelerate Resources Limited 02 (Consent to Review of Interim Orders)
[2020] ATP 5**

Catchwords:

Consent to review – decline to consent – interim order – deferral of requisitioned meeting

Corporations Act 2001 (Cth), sections 249D, 657EA(2)

ASIC v NRMA Ltd [2002] NSWSC 1135, Guss v Veenhuizen [1976] HCA 25

Guidance Note 4: Remedies General

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 make interim orders in the *Accelerate Resources Limited 02 (Accelerate 02)* proceedings.
2. In these reasons, the following definitions apply.

Accelerate	Accelerate Resources Limited
Accelerate 01	has the meaning given in paragraph 9
Accelerate 02	has the meaning given in paragraph 1
Applicant	GTT Global Opportunities Pty Ltd
General Meeting	has the meaning given in paragraph 7
Kaolin Acquisition	has the meaning given in paragraph 4
Interim Orders 01	has the meaning given in paragraph 15
Interim Orders 02 Decision	has the meaning given in paragraph 16
Placement	has the meaning given in paragraph 6
Review Application	has the meaning given in paragraph 18
s249D General Meeting	has the meaning given in paragraph 8
s249D Notice	has the meaning given in paragraph 5
Voting Agreements	has the meaning given in paragraph 11

FACTS

3. Accelerate is an ASX listed company (ASX code: AX8).

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4. On 18 November 2019, Accelerate announced the acquisition of a kaolin project (**Kaolin Acquisition**) in consideration for Accelerate shares.
5. On 22 January 2020, Accelerate received a notice under section 249D¹ signed by the Applicant and other shareholders that collectively hold approximately 13% in Accelerate requiring Accelerate to convene a general meeting to consider resolutions to replace two of the four Accelerate directors (**s249D Notice**).
6. On 23 January 2020, Accelerate announced a placement of 4,905,000 shares at a price of \$0.02455 per share to sophisticated existing and new investors to raise \$120,418 (**Placement**).
7. On 7 February 2020, Accelerate called a general meeting to be held on 16 March 2020 (**General Meeting**) to, among other things, ratify prior issues of securities including the shares under the Placement and 7,000,000 shares issued under the Kaolin Acquisition.
8. On 12 February 2020, Accelerate called a separate general meeting to be held on 20 March 2020 (being 4 days after the General Meeting) to consider the resolutions the subject of the s249D Notice (**s249D General Meeting**).

Accelerate 01 application

9. By application dated 4 March 2020, the Applicant sought a declaration of unacceptable circumstances (**Accelerate 01**). The Applicant submitted, among other things, that:
 - (a) the Placement *“represents a clear frustrating action directly analogous to the actions the subject of Panel Guidance Note 12”*
 - (b) the Placement to undisclosed places had been conducted at a price lower than Accelerate’s shares had ever traded and *“in the absence of any disclosed or discernible requirement to raise capital through the placement”*
 - (c) if all resolutions the subject of the General Meeting passed, the board of Accelerate would have the capacity to issue a significant number of additional shares in Accelerate by way of further placements prior to the s249D General Meeting and
 - (d) existing shareholders of Accelerate who did not participate in the Placement suffered a dilution of their shareholdings without the opportunity to participate in the capital raising, which is likely to have a significant effect on the control of Accelerate and in particular the composition of its board after the s249D General Meeting.
10. In light of the Accelerate 01 application, Accelerate announced on 13 March 2020 that the General Meeting would *“be opened and then adjourned by the chairman until 11:00am (WST) on Friday, 20 March 2020”*.

¹ References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

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Accelerate 02 application

11. On 16 March 2020, Accelerate lodged a number of substantial holder notices disclosing, among other things, that it had a relevant interest of 12.82% in itself as a result of the shares issued under the Kaolin Acquisition being subject to a 9 month voluntary escrow and that certain vendors under the Kaolin Acquisition had agreed to enter into shareholder support deeds in relation to the shares issued to them (**Voting Agreements**). The Voting Agreements were entered into on 18 November 2019.
12. By application dated 17 March 2020, the Applicant sought a declaration of unacceptable circumstances. The Applicant submitted, among other things, that:
 - (a) Accelerate delayed in lodging a substantial holder notice in relation to its relevant interest as a result of the Voting Agreements in breach of the substantial holding provisions
 - (b) at the time Accelerate acquired a 12.82% relevant interest in itself as a result of the Voting Agreements, it had in place a similar voting agreement with the Applicant and other shareholders who signed the s249D Notice (which lapsed in December 2019) and as a result, had a relevant interest of at least 25.7% in breach of s606 and the substantial holding provisions and
 - (c) two or more of Accelerate’s directors are associates of Accelerate and the vendors under the Kaolin Acquisition, and another Accelerate substantial shareholder is an associate of Accelerate and Accelerate’s managing director, in breach of s606 and the substantial holding provisions.
13. The Applicant sought interim orders restraining until the determination of the *Accelerate 02* application:
 - (a) all parties to the Voting Agreements from voting any shares they control at any general meeting of Accelerate and
 - (b) Accelerate’s directors from voting any shares they control on the resolution at the General Meeting to ratify the issue of shares the subject of the Voting Agreements (being the 7,000,000 shares issued under the Kaolin Acquisition).

Request for interim orders

14. By email dated 18 March 2020,² the Applicant sought an interim order in respect of the *Accelerate 01* application that the s249D General Meeting (to be held at 1:00pm (Melbourne time) on 20 March 2020) be deferred by seven days until 27 March 2020.
15. Following submissions by the parties, the sitting Panel (being the same sitting Panel appointed to *Accelerate 02*) made interim orders on 19 March 2020 to the effect that:
 - (a) Accelerate must defer the date of its General Meeting (which had previously been adjourned to 20 March 2020) until the later of 27 March 2020 and the date

² Received by the Panel executive at approximately 4.14pm (Melbourne time)

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on which the Panel has made a determination in respect of both the *Accelerate 01* and *Accelerate 02* applications and

- (b) Accelerate keep for a period of 14 days, and provide to the Panel at its request, a record of any votes cast on the resolutions at the s249D General Meeting in respect of the ordinary shares in Accelerate held by certain shareholders, including the vendors to the Kaolin Acquisition and the Accelerate directors

(Interim Orders 01).

16. The sitting Panel advised parties to the *Accelerate 02* proceedings that it considered that the interim orders requested by the Applicant in *Accelerate 02*³ were sufficiently addressed by Interim Orders 01. Accordingly, the sitting Panel determined that it would not separately make the interim orders requested in *Accelerate 02* (**Interim Orders 02 Decision**).
17. The Panel executive advised the parties of the Interim Orders 02 Decision by email on 19 March 2020 at approximately 6.01pm (Melbourne time).

REQUEST FOR CONSENT

18. By email on 19 March 2020 (received by the Panel executive at approximately 11.11pm (Melbourne time)), the Applicant sought consent to review the Interim Orders 02 Decision (**Review Application**).⁴
19. The Applicant submitted that Interim Orders 01 did not sufficiently address the concerns raised in *Accelerate 02* in relation to voting by the vendors to the Kaolin Acquisition given that, “*in the absence of an interim order, those vendors are contractually bound to vote a total of 7,000,000 [shares] against the resolutions at [the s249D General] Meeting in circumstances where multiple breaches of Chapter[s] 6 and 6A had been identified in the Application*”.

DISCUSSION

Consent to review

20. Section 657EA(2) provides:

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.

21. In *Austral Coal 03R*⁵ and most recently in *Careers Australia Group 03R*⁶ the respective substantive acting Presidents refused to grant consent. The acting Presidents in those matters based their considerations on essentially three tests:

³ See paragraph 13

⁴ The substantive President was made aware of the Review Application at approximately 10.36am (Melbourne time) the following day on 20 March 2020.

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

⁶ *Careers Australia Group Limited 03R* [2015] ATP 2

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- (a) the policy underpinning s657EA(2)
- (b) whether there was any potential error in the sitting Panel's decision and
- (c) whether there was any other basis for granting consent.

22. In *Austral Coal 03R*, the acting President said:⁷

The President considered 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.

23. The Interim Orders 02 Decision was a decision not to grant interim orders and did not involve a declaration of unacceptable circumstances or orders. Accordingly, the consent of the President was necessary before the Review Application could proceed to consideration by a review Panel.

24. It was also stated in *Austral Coal 03R* that: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.

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

- (a) the original applications (without annexures) to the Panel on *Accelerate 01* and *Accelerate 02*
- (b) Interims Orders 01 and the submissions received from the parties in respect of making Interim Orders 01 and
- (c) the email to the parties setting out the Interim Orders 02 Decision.

26. Given the urgency of the Applicant's various requests, I did not have the benefit of reviewing the sitting Panel's reasons for making Interim Orders 01 or the Interim Orders 02 Decision.⁹ However, having considered the materials set out above, I am not satisfied that there is any potential error in the Interim Orders 02 Decision of the sitting Panel.

27. I also consider that there is no new relevant evidence presented in the Review Application which would lead me to conclude that consent to a review application should be granted.

28. The concern raised by the Applicant in the Review Application appeared to be that the s249D General Meeting would proceed unconstrained if the Panel did not make the interim orders requested in *Accelerate 02* to disallow votes by the vendors to the Kaolin Acquisition. In *Accelerate 01*, the Applicant had sought to address the concerns related to the s249D General Meeting by requesting an interim order that the s249D

⁷ *Austral Coal Limited 03R* [2005] ATP 15 at [9]

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

⁹ The sitting Panel will provide its reasons at the conclusion of its proceedings

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General Meeting be deferred by one week beyond the two month time requirement stipulated in s249D(5).

29. In the submissions received from the parties in respect of making Interim Orders 01, both Accelerate and ASIC referred to *ASIC v NRMA* as the authority on the issue of adjourning a s249D meeting. In *ASIC v NRMA*, Windeyer J said:¹⁰
- The simple argument of ASIC is that “held” means a meeting commenced and concluded. The simple argument of NRMA is that “held” means duly convened and commenced and lawfully adjourned or at least includes such a meeting. The ASIC argument relies on the ordinary meaning of the word. It is a verb of past tense or a past participle. But people often refer to matters in progress such as continuing court actions as being held before a particular judge. In that case, however, “being” involves continuing. The NRMA says that it could not have been the intention to abrogate the power to adjourn a meeting so as to make it a requirement to complete a requisitioned meeting within the stipulated time. Without going to authority I would have considered that the ordinary meaning of “held” in s249D(5) requires completion and does not allow adjournment outside the statutory date, unless by order of the court. The clear intention is to require the resolution proposed to be dealt with within a limited time which intention would be abrogated if the chairman could exercise his power of adjournment to fix some future time which time would presumably have to be fixed by him or by the directors. This is particularly so when the resolutions would determine the future of directors.*
30. The s249D Notice was given by the Applicant on 22 January 2020. Therefore, pursuant to s249D(5), Accelerate had until 22 March 2020 to hold the s249D meeting. The deferral sought by the Applicant, to defer the s249D General Meeting from 20 March 2020 until 27 March 2020, would take the meeting beyond the time set out in s249D(5) for such a meeting to be “held”.¹¹ Based on the submissions referred to above, it is doubtful that the Panel has the power to defer the s249D General Meeting beyond two months. Accordingly, I agree with the sitting Panel’s decision not to defer the s249D General Meeting.
31. The sitting Panel in *Accelerate 01* specifically requested submissions on alternative interim orders to address the Applicant’s concerns if its power to defer the meeting was in doubt.
32. As set out above, the Panel determined as part of Interim Orders 01 to tag the votes of certain shareholders at the s249D General Meeting and to defer the General Meeting to the later of the date seven days after the date of Interim Orders 01 or the conclusion of both the *Accelerate 01* and *Accelerate 02* applications.¹² In formulating those orders, the Panel was of the view that concerns in the requested interim orders in *Accelerate 02*¹³ were sufficiently addressed. I agree with that conclusion for the following reasons:

¹⁰ *ASIC v NRMA Ltd* [2002] NSWSC 1135 at [12]. See also *Guss v Veenhuizen* [1976] HCA 25, to which Windeyer J referred

¹¹ *ASIC v NRMA Ltd* [2002] NSWSC 1135

¹² See paragraph 15

¹³ See paragraph 13

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- (a) for the reasons set out above, it is doubtful the Panel had the power to defer the s249D General Meeting. Therefore, in the alternative, the Panel determined to tag the votes of certain shareholders at the s249D General Meeting (being the placees under the Placement (primarily the subject of *Accelerate 01*) and the Accelerate directors and the parties to the Voting Agreements (primarily the subject of *Accelerate 02*)). By doing so, the Panel would be able to determine how the outcomes of the results at the s249D General Meeting would have differed in the instance that unacceptable circumstances are found and
- (b) by deferring the General Meeting, the resolutions at the General Meeting (including the resolution to ratify the issue of 7,000,000 shares to the vendors of the Kaolin Acquisition) would not be considered until after the determination of the *Accelerate 01* and *Accelerate 02* applications. Delaying the General Meeting for the period of the proceedings has the same effect in preserving the status quo as preventing the vendors of the Kaolin Acquisition voting at the General Meeting (one of the two interim orders requested in the *Accelerate 02* application).
33. It also seems to me that the interim orders requested in *Accelerate 02* by the Applicant to disallow votes by Accelerate's directors and parties to the Voting Agreements are more akin to final orders.
34. Further, having regard to Guidance Note 4: Remedies General, the interim orders requested by the Applicant in *Accelerate 02* could be adequately remedied by final orders.¹⁴ For example, in the instance that the sitting Panel finds unacceptable circumstances that changed the outcome of the results at the s249D General Meeting, the sitting Panel could make final orders requiring Accelerate to call a new meeting with the same resolutions as the s249D General Meeting.
35. In considering whether to grant consent, the acting Presidents in *Austral Coal 03R* and *Careers Australia Group 03R* also considered it relevant whether a review Panel would be likely to decide to conduct proceedings if consent were given. In *Careers Australia 03R*, the acting President said (footnotes omitted):¹⁵
- 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.*
36. In my view, whether a review Panel would be likely to decide to grant the interim orders requested in *Accelerate 02* is a relevant consideration. For the reasons set out above, I do not think it is likely that a review Panel would come to a different conclusion on interim orders on the *Accelerate 02* application if consent to such a review were granted.

¹⁴ Guidance Note 4: Remedies General, paragraph 12(c)

¹⁵ *Careers Australia Limited 03R* [2015] ATP 2 at [29]

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37. Lastly, I am not satisfied that there would be material prejudice to the Applicant by refusing consent.

Alternative interim order request

38. The s249D General Meeting was scheduled to be held at 1:00pm (Melbourne time)¹⁶ on 20 March 2020. Accordingly, the Review Application was considered on an urgent basis and a decision on the Review Application was made at approximately 11.30am (Melbourne time) prior to the s249D General Meeting being held.
39. At approximately 12.44pm (Melbourne time), the Panel executive received an email from the Applicant stating that Accelerate had refused to allow the Applicant to inspect the proxies for the s249D General Meeting and urgently requesting that, in the alternative to the interim orders requested in *Accelerate 02*, “a further interim order that the poll for today’s [s249 General] [M]eeting not be declared before further order of the Panel”.
40. At approximately 2.13pm (Melbourne time) on 20 March 2020, Accelerate released the results of the s249D General Meeting.
41. I note that there was insufficient time to consider and respond to the alternative interim order (of which I was made aware of at approximately 1.13pm (Melbourne time)) prior to Accelerate’s results announcement.

DECISION

42. On the basis of the above, I decline to grant consent under s657EA(2) to a review of the Interim Orders 02 Decision.

Alex Cartel

President of the Panel

Decision dated 20 March 2020

Reasons given to parties 9 April 2020

Reasons published 21 April 2020

¹⁶ 10.00am (WST)

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Advisers

Party	Advisers
Applicant	Bennett + Co
Accelerate	DLA Piper
Jonathan Davies	Not applicable