



Australian Government

Takeovers Panel

**Reasons for President's Decision
Moreton Resources Limited (Administrators Appointed) 02
(Consent to Review)
[2020] ATP 15**

Catchwords:

Consent to review – decline to consent – company under administration – company in liquidation

Corporations Act 2001 (Cth), section 436A, 657EA(2)

Guidance Note 4: Remedies General

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 *Moreton Resources Limited (Administrators Appointed) 02*.

2. In these reasons, the following definitions apply.

Administrators	Messrs Grant Sparks and David Orr from Deloitte in their capacity as joint and several administrators of Moreton and its subsidiaries
Applicant	Mr Alexander Jason Elks
Deloitte	Deloitte Financial Advisory Pty Ltd
First Samuel	First Samuel Limited
sitting Panel	The Panel in <i>Moreton Resources Limited (Administrators Appointed) 02</i>
Moreton	Moreton Resources Limited (Administrators Appointed)

FACTS

3. Moreton is an ASX listed company (ASX code: MRV).
4. The background facts are set out in detail in the sitting Panel's reasons. Below is a summary.
5. On 26 May 2020, Moreton announced that one of its directors had resigned. From this point in time, Moreton had two directors.

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6. On 10 June 2020, Moreton announced that its “*board of directors have appointed Grant Sparks and David Orr of Deloitte Financial Advisory Pty Ltd as administrators of the Group*”.
7. On 26 June 2020, Moreton announced that the “*Administrators have commenced a process to sell or recapitalise the Group and are seeking urgent expressions of interested parties... Non-Binding Indicative Offers (NBIO) for the recapitalisation of the Group or acquisition of its assets (in full or in part) are requested by 5pm 29 June 2020*”.
8. On 8 July 2020, the Administrators provided a report to the creditors of Moreton, which stated among other things that the Administrators had “*received two proposals to deal with the Companies’ assets through a [Deed of Company Arrangement]*”. The report to creditors stated that the Administrators’ preferred proposal was a proposal received from Mr Philip Anthony (Tony) Feitelson, and also convened the second meeting of Moreton’s creditors to be held on 15 July 2020.
9. On 10 July 2020, the Applicant sought a declaration of unacceptable circumstances in relation to a number of matters, including the validity of the appointment of administrators to Moreton and an alleged association between two substantial holders and creditors of Moreton, Mr Feitelson and First Samuel.
10. On 14 July 2020, the sitting Panel decided not to conduct proceedings. This decision was communicated via email sent by the Panel executive, 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). These matters were that:
 - (a) “*The Panel did not consider that Moreton Resources’ administration prevented it from considering the matter. However, the applicant did not provide the Panel with a sufficient body of material: for the Panel to doubt the administrators’ assessment of the solvency of the company and the likely return to creditors ... for the Panel to examine whether the administration was a device for any person to gain control of Moreton Resources or subvert the operation of Chapter 6 ... or to otherwise justify the Panel making further enquiries, including as to whether an association exists or existed between Mr Feitelson and First Samuel Limited*” and
 - (b) “*Some of the allegations in the application may be more appropriately assessed by other regulators or a court – for instance, a court is a more appropriate forum to adjudicate upon the validity of the administrators’ appointment*”.

REQUEST FOR CONSENT

11. On 15 July 2020, the Applicant sought consent to review the sitting Panel’s decision not to conduct proceedings.
12. The Applicant submitted, among other things, that:
 - (a) “*What is evident, is either a genuine and Bonafede [sic] Board must resolve an appointment to that effect for 436A to take effect, or the alternate is to apply to the relevant Court for an appointment which was not undertaken in these circumstances... What is clear from the information before the Takeover Panel and where they have erred*

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is the ASIC Company searches confirm there were not three Company Directors... Turning the Panels mind to 435A and should it be true a deficiency has occurred, then it must follow the provisions of sec602 both by intent and legislation have been compromised, which is in keeping with why the Panel does not just bind itself to prescriptive breaches."

- (b) *"There are multiple emails and documents between the parties which shows a prior association and an effort to collude to bring about a beneficial outcome for those parties and those parties alone."* and
- (c) *"Further to this, there are allegations and concerns of the Administrator also not following the legally required process..."*

13. On 15 July 2020, subsequent to the Applicant making his application for consent, Moreton's solicitors emailed the Panel executive stating that: *"At the creditors meeting today, the DOCA proposed by Mr Feitelson was not approved and Moreton Resources and its subsidiaries are now in liquidation"*. The Applicant then provided a further submission by email, stating, among other things, that:

- (a) *"The basis of the Corporations Act is to allow Companies to survive and thrive, not to liquidate them"*
- (b) *"The point of any alternate proposal which is before the TO panel, is that an administration [sic] who is validly appointed to restructure the business, not liquidate it is sort [sic]"* and
- (c) *"A decision is still required by the panel as if the panel conducts proceedings, the Company may be able to survive and continue in a free, transparent market"*.

DISCUSSION

Consent to review

14. 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."

15. 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 the Applicant reviewing that decision.

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

- (a) the *Moreton Resources Limited (Administrators Appointed) 02* application and its attachments
- (b) the email communicating the sitting Panel's decision
- (c) the application for consent and its attachments and

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- (d) the email chain referred to in paragraph 13 (and the attachments to that email chain).
17. In *Austral Coal 03R*,¹ *Careers Australia Group 03R*² and most recently in *Accelerate 02 (Consent to Review of Interim Orders)*, the respective Presidents³ refused to grant consent. The Presidents in those matters based their considerations on essentially three tests:
- (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.
18. Such an approach is consistent with Guidance Note 2: Reviewing Decisions, which states at [29] that the President’s approach to consenting to a review is guided by the above considerations.

Policy underpinning s657EA(2)

19. In *Austral Coal 03R*,⁴ the reasons record at [9] that:

“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.”

20. I agree with the above statement, and note that a policy underpinning s657EA(2) is that there should be a prompt conclusion to Panel proceedings.⁵

Potential error in the initial decision / new evidence

21. The *Austral Coal 03R*⁶ reasons also state that:

“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.”

22. Here, the primary concern raised by the Applicant is that the sitting Panel erred in taking the view that a court is a more appropriate forum to adjudicate upon the validity of the Administrators’ appointment (the consent application contained this information under the heading “*Core Consideration Invalid Appointment*”).
23. I did not have the benefit of reviewing the sitting Panel’s reasons for declining to conduct proceedings when I made my decision as the reasons had not been prepared at the time I considered the Applicant’s request. However, having considered the

¹ *Austral Coal Limited 03R* [2005] ATP 15

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

³ Or acting President, as the case may be

⁴ *Austral Coal Limited 03R* [2005] ATP 15 at [9]

⁵ See Guidance Note 2: Reviewing Decisions at [29(a)]

⁶ *Austral Coal Limited 03R* [2005] ATP 15 at [10]

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materials set out above in paragraph 16, I am not satisfied that there is any potential error in the sitting Panel's decision. Given the powers and role of the Panel, I do not see any potential error in the statement that some of the allegations in the application may be more appropriately assessed by other regulators or a court and, in particular, that a court is the appropriate forum to adjudicate upon the validity of the Administrators' appointment. In addition, I am not satisfied that there is any potential error in the view of the sitting Panel that an insufficient body of material was provided with the application.

24. I also consider that there is no new relevant material presented in the Applicant's application for consent (including its attachments and the other new materials set out above in paragraph 16), which would lead me to conclude that consent to a review application should be granted. In fact, correspondence from Moreton's lawyers to the Applicant in relation to the validity of the Administrators' appointment (which was provided with the email chain referred to in paragraph 13 and was not before the sitting Panel) includes a cogent legal argument as to why the appointment was valid. The existence of such an argument reinforces the view that a court is the appropriate forum to adjudicate upon the validity of the Administrators' appointment, and so supports not granting consent.

Other bases for granting consent and the effect of Moreton's entry into liquidation

25. In considering whether to grant consent, the 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.⁷ In *Careers Australia 03R*, the President expressed this as follows:

"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."

26. I agree that it is a relevant consideration whether a review Panel would be likely to decide to conduct proceedings if consent were given. Here, Moreton's entry into liquidation (subsequent to the sitting Panel making its decision) would be a factor likely to weigh strongly against a review Panel deciding to conduct proceedings, as a company's entry into liquidation is likely to be a relevant public interest consideration affecting the likelihood of a declaration.⁸ In addition, the matters set out above in paragraphs 23 and 24 are also reasons why I do not think it is likely that a review Panel would decide to conduct proceedings if consent were given.
27. Lastly, I am not satisfied that there would be any material prejudice to the Applicant by refusing consent. This is because my decision does not affect the availability of

⁷ In *Accelerate 02 (Consent to Review of Interim Orders)*, the President considered it relevant whether a review Panel would be likely to grant interim orders if consent were given

⁸ See s657A(2)

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other forums (such as a court – identified by the sitting Panel as a more appropriate forum to adjudicate upon the validity of the Administrators' appointment) in which the Applicant can pursue his claims regarding the validity of the Administrators appointment and the conduct of the administration, should he wish to continue to pursue them.

DECISION

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

Alex Cartel

President of the Panel

Decision dated 16 July 2020

Reasons given to parties 10 August 2020

Reasons published 12 August 2020

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Advisers

Party	Advisers
Alexander Jason Elks	-