



CONSULTATION PAPER

Remaking of Procedural Rules

Why is the Panel consulting?

Under the *Legislation Act 2003*, legislative instruments, such as the Panel's [*Procedural Rules to be followed in Panel Proceedings \(made on 12 April 2010\) \(F2010L00948\)*](#) (**Procedural Rules**), will repeal automatically, or 'sunset', after 10 years, unless action is taken to preserve them.

The Panel's existing Procedural Rules are due to sunset on 1 April 2021.

The Procedural Rules set out the procedure to be followed in Panel proceedings. Our preliminary view is that within the legislative framework, the Procedural Rules are operating effectively and efficiently, and continue to be necessary to ensure that Panel proceedings are as fair and reasonable and conducted with as little formality and in as timely a manner, as the relevant legislation, and a proper consideration of the matters before the Panel, permit. We are not aware of significant issues with the current operation of the Procedural Rules.

Accordingly, the Panel proposes to remake the Procedural Rules in a new instrument prior to the sunset date of 1 April 2021 without significant changes, so that the ongoing effect of the Procedural Rules is preserved.

The new Procedural Rules simplify the existing Procedural Rules by removing the 'guidance' (which currently appears as notes under the existing Procedural Rules) from the 'rules' themselves.

The 'guidance' has been incorporated into a separate Procedural Guidelines document. The Procedural Guidelines have been prepared to assist market participants, parties and advisers understand and apply the new Procedural Rules. The Procedural Guidelines cross-refer to relevant governing provisions.

While the Panel proposes a change to the way in which the 'rules' and 'guidance' is presented, it is the Panel's intention that the procedure to be followed in Panel proceedings will remain fundamentally the same following the implementation of the new Procedural Rules.

What is the Panel proposing?

Draft new Procedural Rules

Attached are the draft new Procedural Rules (**Annexure A**). The main proposed changes are as follows:

- The Notice of Appearance has been renamed Notice to Become a Party and will be available on the Panel's website. In addition to accepting a Notice to Become a Party, the Panel may consider an interested person a party where the person participates in proceedings (see new Rule 16(6)).
- A definition of "interested person" has been included to assist applicants in identifying to whom to send an application.

- The confidentiality and media canvassing undertakings (which currently exist in the form of Notice of Appearance annexed to the existing Procedural Rules) have been moved into the Rules (see new Rules 18 and 19). Parties will still be expected to undertake to comply with these Rules in the Notice to Become a Party (see new Rule 16(1)), but the confidentiality obligation will apply as soon as an application is made (rather than from when a person submits its Notice to Become a Party) (see new Rule 18(1) and the definition of “proceedings”).
- A party must ensure that its representatives (which now include employees, agents, contractors and service providers of the party or its Related Bodies Corporate, and any other person acting on behalf of the party) comply with these Rules (see Rules 18(4) and 19(5) and the definition of “Representatives”).
- The media canvassing rule has been clarified to cover forms outside of traditional media, such as online platforms (see definition of “media” in new Rule 19(1)). The Panel is of the view that this reflects the growing avenues of communication used by companies, their advisers and shareholders.
- The media canvassing restriction has been narrowed as follows:
 - A carve-out in relation to board spills has been included to allow communications about matters concerning an upcoming spill meeting that do not directly relate to issues before the Panel (see new Rule 19(3)). The Panel is of the view that the making of an application should not restrain these communications.
 - The restriction only applies until the later of the proceedings being determined or the expiry of the review period for a Panel decision (see new Rule 19(1)). From that point in time, a separate rule applies until the date the Panel’s reasons are published, which prohibits a party from misrepresenting a Panel decision (see new Rule 19(4)). The Panel is of the view parties should be permitted to discuss the outcome of proceedings publicly from the determination of proceedings, rather than waiting until the reasons are published.
- Elements which are essential to making a valid Panel application have been specified, with further guidance on desirable (but non-essential) elements of an application set out in the Procedural Guidelines (see new Rules 12(1), 13(1) and 14(1)). A pro forma application will be available on the Panel’s website.

The draft new Procedural Rules also:

- incorporate certain notes under the existing Procedural Rules (that create rights or obligations and reflect existing rules of practice) into the ‘rules’
- update the name of the legislative instrument
- reflect current drafting practice for legislative instruments and update the format of the current document and
- simplify the drafting to give greater clarity.

Draft Procedural Guidelines

Also attached are the draft Procedural Guidelines (**Annexure B**) which the Panel plans to release when the new Procedural Rules become effective. The draft Procedural Guidelines contain most of the notes that exist under the current Procedural Rules. However, they have been restructured to aid in explaining how the Panel's processes work in the usual case.

The Procedural Guidelines include a proposal for Panel applications to be provided through an online system to be available on the Panel's website.

Invitation to comment

The final Procedural Rules and Procedural Guidelines will be determined by the Panel after taking into account the comments received as part of the consultation process.

Comments are sought generally from the public regarding the Panel's proposal to remake the Procedural Rules without any significant changes, on the basis that it is operating effectively and efficiently. We are also seeking comments from the public regarding the accompanying Procedural Guidelines. In particular, submissions are sought on the following questions:

1. Are the existing Procedural Rules currently operating effectively and efficiently?
2. Do you have any comments on the proposed changes from the existing Procedural Rules outlined in the section above?
3. Are the new Procedural Rules and Procedural Guidelines easy to follow?
4. Are there any other aspects of the rules and guidance that may need updating to accommodate current Panel or market practice, including any new matters that are not currently addressed?

Submissions

Comments on the draft new Procedural Rules and draft Procedural Guidelines are due by **Friday, 23 October 2020**.

Please send any submissions or consultation enquires to takeovers@takeovers.gov.au.

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note that your submission will be published unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our [privacy policy](#) for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by the Panel.

2 October 2020



Australian Government

Takeovers Panel

Takeovers Panel Procedural Rules 2020

The Takeovers Panel makes the following Rules.

Dated [date of making]

Alex Cartel **DRAFT ONLY—NOT FOR SIGNATURE**
President
Takeovers Panel

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Part 1 Preliminary

1 Name

These Rules are the *Takeovers Panel Procedural Rules 2020*.

2 Commencement

These Rules commence on [1 April 2021].

3 Authority

These Rules are made under section 195 of the ASIC Act.

4 Repeal

- (1) The *Procedural Rules to be followed in Panel Proceedings (made on 12 April 2010)* (F2010L00948) are repealed.
- (2) The repeal of the former Rules by this section does not affect the continuing operation of the former Rules to an application made to the Takeovers Panel before these Rules take effect.

5 Definitions

In these Rules:

application means an application:

- (a) under section 657C of the Corporations Act for a declaration of unacceptable circumstances or an order
- (b) under section 657EA of the Corporations Act for a review of a Panel decision or
- (c) under section 656A of the Corporations Act for a review of an ASIC decision.

ASIC means the Australian Securities and Investments Commission.

ASIC Act means the *Australian Securities and Investments Commission Act 2001* (Cth).

ASIC Regulations means the *Australian Securities and Investments Commission Regulations 2001* (Cth).

ASX means Australian Securities Exchange.

case stated means a statement of the question of law that the Court is asked to answer and any facts relevant to the Court's consideration of that question.

Corporations Act means the *Corporations Act 2001* (Cth).

Corporations Regulations means the *Corporations Regulations 2001* (Cth).

Court has the meaning given in section 58AA of the Corporations Act.

declaration means a declaration of unacceptable circumstances made under section 657A of the Corporations Act.

Executive means any or all of the staff of the Commonwealth Department of Treasury, and secondees, working for the Takeovers Panel.

final orders means orders made under section 657D of the Corporations Act.

guidelines means the guidelines to these Rules as published by the Takeovers Panel from time to time.

interested person includes:

- (a) a person entitled to be heard by the Panel before it makes a decision sought by the application
- (b) a person to whom a proposed declaration relates or
- (c) a person to whom a proposed order would be directed.

interim orders means orders made under section 657E of the Corporations Act.

matter means a particular matter in which the Panel performs or exercises its functions or powers.

Notice to Become a Party means a notice in the form by which a person seeks to become a party.

Note: The form of Notice to Become a Party is available on the Takeovers Panel's website (<https://www.takeovers.gov.au/>).

orders means final orders or interims orders.

Panel means the sitting Panel constituted under section 184 of the ASIC Act in relation to a matter.

party means, in relation to proceedings:

- (a) an applicant
- (b) ASIC
- (c) any person who provides a Notice to Become a Party which is accepted by the Panel
- (d) any person deemed to be a party by the Panel under Rule 16(6) and
- (e) any person who is a party within the meaning of section 657EA(1)(a) of the Corporations Act.

President means the substantive President of the Takeovers Panel appointed under section 173 of the ASIC Act and includes, where relevant, an Acting President appointed under section 182 of the ASIC Act.

proceedings means the proceedings commenced upon receipt by the Executive of an application in accordance with Rule 10(2).

Related Bodies Corporate has the meaning given in section 50 of the Corporations Act.

Representatives means the directors, officers, employees, agents, contractors, service providers and advisers of a person or party (as the context requires) or its Related Bodies Corporate, and any other person acting on behalf of the person or party.

spill meeting means:

- (a) a meeting of members at which a resolution will be moved to remove a director under section 203D of the Corporations Act or appoint a director in place of a director removed under that section
- (b) a meeting of members at which resolutions will be moved to appoint directors who would constitute a majority of the board of directors if elected
- (c) a spill meeting to be held pursuant to section 250V of the Corporations Act
- (d) a meeting of scheme members at which a resolution will be moved to remove the responsible entity and choose a new responsible entity or
- (e) any similar meeting.

Takeovers Panel means the Panel established under section 171 of the *Australian Securities and Investments Commission Act 1989* (Cth) and continued in existence by section 261 of the ASIC Act.

Part 2 Overview

6 Objectives

- (1) The objectives of these Rules are to promote:
 - (a) timely and cost-effective completion of matters before the Panel
 - (b) not unnecessarily delaying commercial transactions
 - (c) procedural fairness and
 - (d) obtaining the best available information.
- (2) Given the objectives of these Rules, the Panel:
 - (a) generally makes decisions on written submissions and materials
 - (b) prefers to conduct proceedings in private
 - (c) prefers to give all parties access to all material before it in proceedings and
 - (d) keeps time limits as short as is reasonable and consistent with procedural fairness.
- (3) These Rules are to be interpreted:
 - (a) according to their spirit
 - (b) by looking beyond form to substance and
 - (c) in a way that best promotes the objectives in Rule 6(1).

7 Application of Rules

- (1) These Rules apply in proceedings of the Takeovers Panel unless the Panel as constituted in relation to a particular matter determines or directs otherwise.
- (2) The Panel:
 - (a) has control over the entire proceedings and
 - (b) may give directions from time to time concerning the proceedings, including the application of these Rules.

Note: The Panel has the power to make directions under regulation 16(1) of the ASIC Regulations.
- (3) If a direction by the Panel is inconsistent with a Rule, the direction prevails to the extent of the inconsistency. The Panel (or before the Panel has been appointed, the President) may excuse any failure by a person to comply with a Rule.
- (4) A party must comply with any direction of the Panel and, where necessary, cooperate with other parties in good faith for the purposes of complying with any direction.
- (5) A party may request in writing that the Panel give a direction.

8 Guidelines to Rules

From time to time the Takeovers Panel may publish guidelines to assist parties and advisers to understand and apply these Rules.

Note: Any guidelines are available on the Takeovers Panel's website (<https://www.takeovers.gov.au/>).

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Part 3 Documents

9 Form

- (1) Any document intended for the Panel must:
 - (a) be in writing
 - (b) be in a form (if any) required by the Panel
 - (c) include any content required by these Rules
 - (d) be succinct, on point and avoid repetition (including of previously submitted material)
 - (e) be expressed simply and clearly
 - (f) be accompanied by any relevant material including any market announcements or documents lodged with ASIC that are referred to in the document (unless already provided to the Panel) and
 - (g) identify the matter, the party, the person providing the document and the type of document (e.g., submissions on brief).
- (2) If a document does not comply with this Rule or is otherwise inaccessible, the Panel (or before the Panel is appointed, the President) may direct that a further document be provided before being considered.

10 Provision of documents

- (1) All documents in proceedings must be provided to the Panel (or before the Panel is appointed, the President).
- (2) A document is provided to the Panel (or before the Panel is appointed, the President) when it is received by the Executive.

Note: Further detail regarding the provision of documents (including the lodgement of applications) is set out in the guidelines.
- (3) An application under section 657C of the Corporations Act for a declaration of unacceptable circumstances or an order must be provided by the applicant to ASIC and, using the applicant's reasonable endeavours, any person identified in the application as an interested person.
- (4) An application under section 657EA of the Corporations Act seeking review of a decision of the Panel must be provided by the applicant to ASIC and each party to the proceedings in which the decision was made.
- (5) An application under section 656A of the Corporations Act seeking review of a decision of ASIC must be provided by the applicant to ASIC, the entity to which the decision relates or would have related and each other party who, to the knowledge of the applicant, made submissions to ASIC in relation to that decision.
- (6) Any other document (including a Notice to Become a Party, any submission or request) in connection with proceedings must be provided to ASIC and each other party to the proceedings, except as provided in Rule 11 and Rule 27(3).

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- (7) A party providing a document to another person should inform the Executive as soon as possible if it appears that the other person has not received the document.
 - (8) A person required to provide a document, or who has accepted an invitation to make a submission, must do so by the time specified by the Panel (or before the Panel is appointed, the President).
 - (9) The Panel (or before the Panel is appointed, the President) may consider a request for an extension of time to provide a document or make a submission. The person seeking the extension should:
 - (a) make the request as soon as possible after anticipating that the time specified by the Panel (or before the Panel is appointed, the President) does not give them sufficient time to respond
 - (b) explain why additional time is required and
 - (c) provide an estimate of the additional time required.

11 Withholding information or documents

- (1) A person may request the Panel (or before the Panel is appointed, the President) to withhold information from a party (for confidentiality or other reasons). The person making the request should:
 - (a) make the request before the information is provided to the Panel or the President (as relevant)
 - (b) explain why the information needs to be withheld and
 - (c) include everything necessary for the Panel or the President (as relevant) to consider:
 - (i) any effect on procedural fairness and
 - (ii) any adverse effect to the person of providing the information.
- (2) A party that wishes to claim client legal privilege over advice given in a document (and that wishes to withhold that document or part of it) should identify:
 - (a) the holder of the privilege
 - (b) the circumstances in which the advice was given and
 - (c) the subject matter or question(s) to which the advice was directed.
- (3) A party that wishes to inquire whether an undertaking under section 201A of the ASIC Act might satisfy the Panel may contact the Executive if it wishes to provide a draft undertaking confidentially before circulating the draft to all parties.

Part 4 Applications

12 Application under section 657C

- (1) An application under section 657C of the Corporations Act for a declaration of unacceptable circumstances or an order does not need to be in a particular form but must (except as provided in Rule 12(2)):
 - (a) identify the company whose affairs are affected by the circumstances
 - (b) set out the relevant circumstances and the key reasons as to why those circumstances are alleged to be unacceptable
 - (c) state when the circumstances first arose (or where a precise date is unknown, a time period in which the circumstances first arose)
 - (d) state the interim orders or final orders sought
 - (e) identify interested persons
 - (f) where submissions to support the application are included, the submissions should not exceed 10 A4 pages in minimum 10 point font and
 - (g) be accompanied by a Notice to Become a Party.
- (2) A request under section 657D(3) of the Corporations Act for a variation, revocation or suspension of a final order or an application under section 657E(1)(b) of the Corporations Act for an interim order does not need to comply with Rules 12(1)(a) through (d) but must explain what is sought by the applicant and set out the submissions to support it.
- (3) If an application under section 657C of the Corporations Act does not comply with Rule 12(1), the Panel (or before the Panel is appointed, the President) may direct that an amended application be provided before being considered.

13 Application for review of ASIC decision

- (1) An application under section 656A of the Corporations Act for review of an ASIC decision must:
 - (a) explain how the applicant's interests are affected by the decision and, to the extent available, include a copy of:
 - (i) the application to ASIC
 - (ii) any relevant submissions received by ASIC
 - (iii) any instrument granted by ASIC and
 - (iv) any notice of the decision and any statement of grounds or reasons for the decision provided by ASIC
 - (b) where submissions to support the application are included, the submissions should not exceed 10 A4 pages in minimum 10 point font and
 - (c) be accompanied by a Notice to Become a Party.
- (2) A review of a decision of ASIC is a *de novo* consideration on the merits, having regard to the information available at the time of the review.

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- (3) As soon as practicable after receipt of an application for review of an ASIC decision, ASIC must give the Panel and each party a statement of its findings of fact and reasons for its decision.
 - (4) If an application under section 656A of the Corporations Act does not comply with Rule 13(1), the Panel (or before the Panel is appointed, the President) may direct that an amended application be provided before being considered.

14 Application for review of Panel decision

- (1) An application under section 657EA of the Corporations Act for a review of a Panel decision does not need to be in a particular form, but must:
 - (a) identify the relevant decision of the Panel to which the review application relates
 - (b) where submissions to support the application are included, the submissions should not exceed 10 A4 pages in minimum 10 point font and
 - (c) be accompanied by a Notice to Become a Party.
- (2) A review of a decision of the Panel is a *de novo* consideration on the merits, having regard to the information available at the time of the review.
- (3) If the consent of the President for a review of a Panel decision is required under section 657EA(2) of the Corporations Act, the request must:
 - (a) be addressed to the President
 - (b) identify the relevant decision and
 - (c) contain enough information to allow a proper consideration of the effects of the decision and the reasons for review.

Note: Regulation 6.10.01 of the Corporations Regulations provides that an application for review of a decision of the Panel must not be made later than 2 business days after the day on which the decision was made.

- (4) If an application under section 657EA of the Corporations Act does not comply with Rule 14(1), the Panel (or before the Panel is appointed, the President) may direct that an amended application be provided before being considered.

15 Withdrawal of an application

An applicant may only withdraw its application with the consent of:

- (a) the Panel or
- (b) if the request for consent to withdraw is made before the appointment of a Panel, the President.

Part 5 Parties

16 Seeking to become a party

- (1) A person who would like to become a party to proceedings must provide the Panel with a Notice to Become a Party in which the person undertakes to comply with Rule 18 and Rule 19. This Rule does not apply to ASIC.
- (2) A person not identified in an application as an interested person who wishes to become a party to the proceedings should, when submitting a Notice to Become a Party, explain why they may be a potentially interested person or why they may be able to assist the Panel.
- (3) Unless otherwise determined by the Panel, a person does not become a party to proceedings until that person's Notice to Become a Party is accepted by the Panel.
- (4) The Panel will notify a person if the person's Notice to Become a Party is not accepted.
- (5) The Panel may withdraw its acceptance of a party's Notice to Become a Party if in the Panel's opinion:
 - (a) the person is not or is no longer an interested person in the matter or
 - (b) the person is not a proper or necessary party to the proceedings or
 - (c) it is otherwise appropriate to do so.
- (6) The Panel may inform a person that the person is a party to proceedings if the Panel considers the person is an interested person and the person participates in the proceedings, notwithstanding that the person has not provided the Panel with a Notice to Become a Party. The Panel may subsequently inform the person that they are no longer deemed to be a party to proceedings if in the Panel's opinion:
 - (a) the person is not or is no longer an interested person in the matter or
 - (b) the person is not a proper or necessary party to the proceedings or
 - (c) it is otherwise appropriate to do so.

17 Seeking legal representation

- (1) The form of request for the Panel's consent under section 194 of the ASIC Act to be legally represented in proceedings is set out in the Notice to Become a Party.
- (2) A party that wishes to be legally represented other than by its commercial lawyers should state that and explain why when requesting consent.

Part 6 Confidentiality and Publicity

18 Confidentiality

- (1) A person (whether or not a party) must not use or disclose any confidential information provided to it in proceedings, except:
 - (a) in the proceedings itself as permitted under these Rules or
 - (b) as required by law or the rules of a securities exchange.
- (2) Any communications from, and any document provided by, the Panel (or before the Panel is appointed, the President) for comment or which is marked as a draft is confidential information.
- (3) A person may disclose confidential information to its Representatives to the extent that the relevant Representative needs that information for the purposes of the proceedings as permitted under these Rules.
- (4) A person provided with confidential information in proceedings must ensure that each of its Representatives who receives such information complies with Rule 18(1).
- (5) This Rule 18 does not apply to ASIC.

19 Publicity

- (1) A party must not directly or indirectly cause, participate in or assist the canvassing in any media of any issue that is before (or likely to be before) the Panel in proceedings:
 - (a) until the proceedings are determined or the time limit within which an application under section 657EA of the Corporations Act may be made for review of a Panel decision has expired, whichever is longer and
 - (b) if a request is made, or proposed to be made, to vary, revoke or suspend any final orders, from the time the person becomes aware of the request or proposed request until it is determined by the Panel.

For the purposes of this Rule 19(1), **media** refers to a means of communication through which the subject information reaches or influences people widely, including (but not limited to): radio, television, newspapers, magazines, letters, the internet, emails, social media and online platforms.

- (2) Rule 19(1) does not apply to statements that, without discussing merits:
 - (a) identify the parties or the subject matter of the application or the broad nature of the unacceptable circumstances alleged or the orders sought or
 - (b) describe any decision of the proceedings,to the extent such matters have been disclosed publicly by the Panel.
- (3) Where the subject matter of an application concerns a spill meeting, Rule 19(1) does not prevent announcements or other communication in relation to the spill meeting or the matters or the resolutions proposed to be moved at the spill meeting that do not directly relate to issues before the Panel.

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- (4) From the relevant time period in Rule 19(1)(a) or (b) until the Panel publishes its reasons for decision, a party must not directly or indirectly cause a decision of the Panel to be misrepresented in any media.
 - (5) A party must ensure that each of its Representatives complies with this Rule 19.
 - (6) This Rule 19 does not apply to ASIC.

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Part 7 Material before the Panel

20 Preliminary submissions

- (1) A party may make preliminary submissions concerning whether the Panel should conduct proceedings in relation to an application, but is not entitled to make rebuttal submissions to a preliminary submission unless the Panel agrees to accept such submissions.
- (2) An applicant must not make preliminary submissions.
- (3) The Panel may accept preliminary submissions from a person that is not a party.

21 Submissions

- (1) Submissions in response to a brief issued by the Panel do not need to be in a particular form other than to comply with any directions in the brief.
- (2) Submissions in response to any other requests by the Panel do not need to be in a particular form other than to comply with any directions given by the Panel.

22 Evidence

- (1) The Panel is not bound by the rules of evidence and may act on any logically probative material.
- (2) A person who does not have personal knowledge of a matter included in a submission must make appropriate inquiries that the matter is true and not misleading.
- (3) A party may provide statements and documents to support any matter raised in an application or in submissions.
- (4) A party may request the Panel to issue a summons to a witness. The request should set out the matters to be dealt with in the witness' evidence. The Panel may direct the proposed witness to answer specific questions in writing before appearing before the Panel.

Note: The Panel may summons a person to give evidence or to produce specified documents under section 192 of the ASIC Act.

23 Conferences

- (1) The Panel may hold a conference (for all or part of the proceedings):
 - (a) at the request of a party or
 - (b) of its own volition.
- (2) A party requesting a conference should indicate the issues to be addressed, the persons to attend, the reasons why a conference is desirable and the estimated time it would take.
- (3) A conference is held subject to any directions the Panel gives.

Part 8 Decision

24 Date of decision

A decision of the Panel is made on the date it is communicated to the parties in final form.

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Part 9 Court referrals

25 Referral by Panel to Court

A party may request that the Panel refers a question of law arising in proceedings to the Court. A request should:

- (a) be accompanied by a draft of a case stated
- (b) explain how the question of law is relevant to a decision of the Panel in the proceedings and
- (c) indicate whether the requesting party is willing to give an undertaking in favour of the Panel to pay or reimburse on demand all costs of the Panel in the matter on a solicitor and own client basis.

26 Referral by Court to Takeovers Panel

A referral by a Court to the Takeovers Panel under section 657EB of the Corporations Act shall be conducted in the same manner as an application for review of a decision of the Panel under section 657EA of the Corporations Act, unless the Court directs otherwise.

Part 10 Panel and Executive

27 Conflict of interest

- (1) A party must notify the Executive as soon as possible after it becomes aware of an interest of a member of the Panel that:
 - (a) could conflict with the proper performance or exercise of that member's functions or powers in relation to a matter and
 - (b) it believes, on reasonable grounds, is not immaterial or indirect and will prevent the member from acting impartially in relation to the matter.
- (2) The notification must describe the interest and explain why both paragraphs (a) and (b) of Rule 27(1) are met.
- (3) Rule 10(6) does not apply to a party who gives notice of a conflict, unless the President directs otherwise.

28 Role of Executive

- (1) The Executive does not bind the Panel unless the context indicates otherwise.
- (2) The Executive is the point of contact for parties and other interested persons with the President or the Panel and, subject to Rule 28(1), acts with the authority of the President or the Panel in the conduct of the Panel's business.

**ANNEXURE B:
DRAFT PROCEDURAL GUIDELINES**



Australian Government

Takeovers Panel
Procedural Guidelines

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1. Introduction

- (a) This document is dated [*date*]. It may be amended from time to time.
- (b) These Guidelines have been prepared to assist market participants, parties and advisers in understanding the Panel's processes.

Rule 8

- (c) These Guidelines explain how the Panel's processes work in the usual case. They are not intended to provide an inflexible or exhaustive description of the Panel's processes or the rules of procedural fairness.
- (d) These Guidelines cross-reference relevant governing provisions.
- (e) For the purposes of these Guidelines, the **Panel** means, as the context requires:
 - (i) the Panel established under section 171 of the *Australian Securities and Investments Commission Act 1989* (Cth) and continued in existence by section 261 of the ASIC Act (more commonly referred to as the "Takeovers Panel") or
 - (ii) the sitting Panel constituted under section 184 of the ASIC Act in relation to a matter (more commonly referred to as the "sitting Panel")
- (f) Other expressions used in these Guidelines are defined in the [*Takeovers Panel Procedural Rules 2020*] registered under the *Legislation Act 2003* (Cth) (the **Rules**).

See Rule 5

2. Objectives and application of the Rules

- (a) The Panel's processes are governed by:
 - (i) Part 6.10 of the Corporations Act – this sets out the primary powers of the Panel to review decisions and make declarations and orders
 - (ii) regulation 6.10.01 of the Corporations Regulations – this sets the time limit within which an application may be made for review of a Panel decision
 - (iii) Part 10 of the ASIC Act – this contains most of the machinery provisions for the Panel, including its establishment and the processes for conducting its proceedings
 - (iv) Part 3 of the ASIC Regulations – this gives further specific powers to the Panel and
 - (v) the Rules – these set out the procedural rules to be followed in Panel proceedings.
- (b) In relation to Panel proceedings, the Panel must act:

- (i) as fairly and reasonably and
- (ii) with as little formality and
- (iii) having regard to the time available before the decision must be made, in as timely a manner

as the requirements of the Panel's governing legislation, and a proper consideration of the matters before the Panel, permit.

ASIC Regulations regs 13 and 16(2), Rules 6(1) and (2)

- (c) The Panel has control over the entire proceedings. The Rules apply to Panel proceedings, except to the extent the Panel determines or directs otherwise.

ASIC Act s 195, Rule 7

- (d) The Panel may give a direction of its own volition or on request by a party. Any request should set out the direction which the party wants the Panel to consider and its submissions in support of the request.

ASIC Regulations reg 16(1), Rule 7(5)

- (e) The President may perform certain actions before the appointment of the Panel.

See, for example, Rule 15

3. Making an application

3.1 Applications

- (a) The Panel can only consider whether circumstances are unacceptable if it receives an application. The Panel does not make declarations or orders of its own volition.

Corporations Act s 657C

- (b) The Panel considers three types of applications under the Corporations Act:

- (i) an application under section 657C for a declaration of unacceptable circumstances or orders
- (ii) an application under section 657EA for a review of a decision of the Panel made on an application under section 657C and

See 7 of these Guidelines below

- (iii) an application under section 656A for a review of a decision of ASIC's exercise of its exemption or modification powers under section 655A or section 673.

See Rule 13

- (c) The Panel may refer a matter to ASIC for ASIC to consider whether to make an application to the Panel.

ASIC Regulations reg 18

3.2 Who can apply?

Application under section 657C

- (a) An application for a declaration under section 657A or an order under section 657D or section 657E of the Corporations Act may be made by:
 - (i) the bidder or
 - (ii) the target or
 - (iii) ASIC or
 - (iv) any other person whose interests are affected by the relevant circumstances.

This could include, for example, a shareholder in relation to a proposed corporate action by a company or in relation to an alleged association in respect of a company.

Corporations Act s 657C(2)

Application for review of Panel decision

- (b) An application for review of a Panel decision may be made by a party to the proceedings in which the decision was made or ASIC.

Corporations Act s 657EA(1)

Application for review of ASIC decision

- (c) An application for review of a decision of ASIC under section 656A of the Corporations Act may be made by any person whose interests are affected by an ASIC decision under section 655A or under section 673 in relation to securities of the target of a takeover bid during the bid period. This could include, for example, a company that made an application to ASIC for relief that was refused by ASIC.

Corporations Act s 656A(2)

3.3 Providing an application to the Panel

- (a) The Panel's preference is for an application to be provided through the Panel's online system available on the Panel's website (<https://www.takeovers.gov.au/>). If the Panel's online system is unavailable, an application must be sent to the Executive by email at takeovers@takeovers.gov.au.

See Rule 10(2)

- (b) An applicant should also contact the Executive as soon as possible after it sends an application to confirm that it has been received by the Executive.
- (c) In making an application (whether through the Panel's online system or by email to the Executive), a Microsoft Office word version (.doc or .docx) of the application should be included where possible.
- (d) A copy of the application must also be provided to other persons as set out in Rules 10(3), (4) and (5) including to ASIC by email to AsicTakeoverMatters@asic.gov.au (or to relevant ASIC action officers, if identified). The applicant should identify in its application, as far as possible, all persons who may be interested persons. The applicant must use reasonable endeavours to provide such persons with a copy of the application.

Definition of "interested person" in Rule 5

- (e) If an applicant refers to a person in the application, the applicant should consider whether the person may be an interested person and should be identified.

See 9.1(b) of these Guidelines below

- (f) The Panel may, if it subsequently identifies a person as a potentially interested person, provide that person with a copy of the application.
- (g) A potential applicant should contact the Executive as soon as it considers it is likely to make an application, and advise the Executive of the persons and advisers involved (to the extent known). The Executive will not communicate this information to Panel members or any other person unless an application is made. Contacting the Executive in this way does not result in any commitment to make an application, but assists the Executive in planning for the application.

3.4 Fee

- (a) A fee of A\$2,400 is payable on an application to the Panel. Applicants will be issued an invoice with electronic funds transfer and credit card payment options.

See Corporations (Fees) Act 2001 (Cth) and Corporations (Fees) Regulations 2001 (Cth)

3.5 Form of application

Application under section 657C

- (a) An application under section 657C of the Corporations Act for a declaration of unacceptable circumstances or an order does not need to be in a particular form but must include the following information:
 - (i) identify the company whose affairs are affected by the circumstances
 - (ii) set out the relevant circumstances and the key reasons as to why those circumstances are alleged to be unacceptable

- (iii) state when the circumstances first arose (or where a precise date is unknown, a time period in which the circumstances first arose)
- (iv) state the interim orders or final orders sought and
- (v) identify interested persons.

Rules 9(1) and 12(1)(a)-(e). See also 5.2 and 5.4 of these Guidelines below

- (b) The application must also be accompanied by a Notice to Become a Party.

Rule 12(1)(g)

- (c) If an application does not comply with Rule 12(1), the Panel (or before the Panel is appointed, the President) may require that the applicant provide an amended application that does comply. The President or Panel (as relevant) may treat the original application as received but may not consider it if it directs an amended document be provided.

Rule 12(3)

- (d) While not essential for a valid application under section 657C of the Corporations Act, applicants are encouraged to provide the following information in their application (where possible) to aid the Panel in considering the application:
 - (i) identify the basis on which the declaration is sought
 - (ii) identify contraventions of Chapter 6-6C of the Corporations Act (if any)
 - (iii) background information which is relevant to the application, including (where possible) a diagram of the relevant corporate/shareholding relationships
 - (iv) a chronology of key events relevant to the application
 - (v) submissions to support each claim of unacceptability in the application (i.e. policy considerations, submissions on law or the exercise of discretion relevant to the claim)
 - (vi) submissions to support the interim orders or final orders sought (i.e. policy considerations, unfair prejudice submissions and how the orders sought protect rights or interests or ensure the takeover bid proceeds as it should have)

See Corporations Act ss 657D(2)(a) and 657D(2)(b). See also Guidance Note 4 – Remedies General

- (vii) if an application is being submitted more than 2 months after the circumstances first occurred, submissions to support the Panel granting an extension of time for making the application and

See 3.9(b) of these Guidelines below

- (viii) details of interested persons to assist in the assessment of conflicts when appointing a Panel (i.e. principal shareholders, directors and advisers of the interested persons).
- (e) Note that any submissions in support of the application (i.e. the items in paragraphs 3.5(d)(v)-(vii) above) must not exceed 10 A4 pages in minimum 10 point font.

Rules 9(1) and 12(1)(f). See also 3.6, 5.2 and 5.4 of these Guidelines below

Application for review of Panel decision

- (f) An application under section 657EA of the Corporations Act for a review of a Panel decision does not need to be in a particular form but must identify the relevant decision of the Panel to which the review application relates (i.e. the declaration or orders, or both the declaration and orders).

Rules 9(1) and 14(1)(a). See also 3.6, 5.2 and 5.4 of these Guidelines below

- (g) The application must also be accompanied by a Notice to Become a Party.

Rule 14(1)(c)

- (h) If an application does not comply with Rule 14(1), the Panel (or before the Panel is appointed, the President) may require that the applicant provide an amended application that does comply. The President or Panel (as relevant) may treat the original application as received but may not consider it if it directs an amended document be provided.

Rule 14(4)

- (i) While not essential for a valid application under section 657EA of the Corporations Act, applicants are encouraged to provide submissions in support of their application for review to aid the Panel in considering the application (subject to the page limit requirements).

Rules 9(1) and 14(1)(b). See also 3.6, 5.2 and 5.4 of these Guidelines below

Application for review of ASIC decision

- (j) An application under section 656A of the Corporations Act for a review of an ASIC decision does not need to be in a particular form but must explain how the applicant's interests are affected by the decision and, to the extent available, include a copy of:
 - (i) the application to ASIC
 - (ii) any relevant submissions received by ASIC
 - (iii) any instrument granted by ASIC and
 - (iv) any notice of the decision and any statement of grounds or reasons for the decision provided by ASIC.

Rule 13(1)(a)

- (k) The application must also be accompanied by a Notice to Become a Party.

Rule 13(1)(c)

- (l) If an application does not comply with Rule 13(1), the Panel (or before the Panel is appointed, the President) may require that the applicant provide an amended application that does comply. The President or Panel (as relevant) may treat the original application as received but may not consider it if it directs an amended document be provided.

Rule 13(4)

- (m) While not essential for a valid application under section 656A of the Corporations Act, applicants are encouraged to provide submissions in support of their application for review to aid the Panel in considering the application (subject to the page limit requirements).

Rules 9(1) and 13(1)(b). See also 3.6, 5.2 and 5.4 of these Guidelines below

3.6 Page limits

- (a) While not essential for a valid application, applicants are encouraged to make submissions in support of an application under sections 657C, 656A or 657EA of the Corporations Act. Such submissions must not exceed 10 A4 pages in minimum 10 point font. Any submissions included in attachments to an application are included in the page limit.

Rules 12(1)(f), 13(1)(b) and 14(1)(b). See also 3.5 of these Guidelines above

- (b) An applicant should contact the Executive if it is likely to exceed the page limit. A request to exceed the page limit should explain why the additional pages are necessary.
- (c) If the page limit is exceeded, the President or Panel may require the applicant to provide an alternative document that complies with Rule 12(1)(f), 13(1)(b) or Rule 14(1)(b) (as applicable).

Rules 12(3), 13(4) and 14(4)

3.7 Accompanying material

- (a) An application should also be accompanied by any relevant material including any market announcements or documents lodged with ASIC that are referred to in the application. If the accompanying material is long, relevant provisions should be extracted or highlighted in the application or attachment for ease of reference. Any accompanying material should be clearly labelled.

Rule 9(1)

- (b) Any material accompanying an application is not included as part of the page limit specified in Rules 12(1)(f), 13(1)(b) or 14(1)(b), unless there are submissions in the attachments (which are included as part of the page limit).

See also 3.6(a) of these Guidelines above

3.8 Pro-forma applications

- (a) While an application under sections 657C or 657EA does not need to be in a particular form, the Panel has approved a pro-forma application (one in respect of an application under section 657C and one in respect of an application under 657EA) to aid an applicant in preparing an application. The pro-forma applications are available on the Panel's website (<https://www.takeovers.gov.au/>).

3.9 Timeliness of application

- (a) The Panel encourages parties to resolve issues by negotiation. However, applicants should not delay unreasonably in making an application (noting the 2 month time limit in section 657C of the Corporations Act and that, in deciding whether to conduct proceedings, the Panel will consider the timeliness of the application).

See 4.6(b)(iv) of these Guidelines below

- (b) If an application is being submitted more than 2 months after the circumstances first occurred, an applicant should state why the Panel should make a determination to extend the time for making the application.

See Corporations Act s 657C(3)

3.10 Additional applications

- (a) A party (including the applicant) may make an additional application.
- (b) The additional application may include a request that the President appoint the same Panel appointed to consider the initial application and that the Panel direct the applications be considered in the same proceedings. The Panel may also of its own volition direct that some or all of the applications be considered in the same proceedings. The Panel may decide not to give such a direction if it considers that it would be inconvenient or inappropriate to do so. For example, if the additional application canvasses significant new factual material or would unreasonably delay consideration of the preceding application.

ASIC Regulations reg 16(1), Rule 7(5)

4. Receipt of an application

4.1 Media release

On receiving an application, the Executive normally publishes a media release on the Panel's website and any relevant Australian securities exchange (for example, ASX)

which states that an application has been received and provides an outline of the issues. This media release is generally not provided in draft to the applicant or any other person for comment. It will normally not be necessary for parties to make a separate media release (although listed parties remain subject to their continuous disclosure obligations).

4.2 Process letter

After publishing a media release, the Executive normally sends the applicant, ASIC and all potentially interested persons a letter setting out important information for the administration of the matter, including:

- (a) becoming a party to proceedings before the Panel
- (b) the Panel process in considering issues in proceedings and
- (c) protocols for communicating with the Panel and other parties.

4.3 Appointment of sitting Panel

- (a) As soon as possible following receipt of an application, the President appoints three members from the full Panel membership to constitute the Panel to consider the matter. If a President or Acting President appoints themselves to a Panel then that President will be the “sitting President”. Otherwise another member of the Panel is appointed as its “sitting President”.

ASIC Act s 184

- (b) The President, and the selected Panel members, must ensure that they do not have any material conflicts.

ASIC Act s 185

- (c) The Executive provides parties with a Declaration of Interests which includes the identity of each member of the Panel, information about each member and certain interests or connections that were disclosed by the member but considered by the President to be immaterial or indirect and not such as to prevent the member from acting impartially in relation to the matter. Any interests of the Executive are also disclosed.

- (d) A party must notify the Executive as soon as possible after it becomes aware of a conflict of interest in accordance with Rule 27. Failure to do so may result in waiver of the right to object.

Rule 27, Guidance Note 11 – Conflicts of Interest

- (e) If the President believes that an interest is immaterial or indirect and will not prevent the member from acting impartially in relation to the matter, the President can decide that no change to the composition of the Panel is required.

See ASIC Act s 185, Guidance Note 11 – Conflicts of Interest

4.4 Interim orders

- (a) The Panel's first tasks are to decide whether to conduct proceedings and whether to make any interim orders.
- (b) The Panel, or the President, may make an interim order to preserve the status quo while an application is being considered. The President will consider an interim order when an interim order is so urgent that it cannot wait until the appointment of a Panel.

Corporations Act s 657E, Guidance Note 4 – Remedies General

- (c) In determining whether to make an interim order, the Panel or the President may take into consideration any delay by the applicant in making its application.
- (d) The usual minimum time in which the Panel or the President can deal with an application for an interim order is 1 business day. If less time is provided, the applicant should explain why it could not have applied earlier.
- (e) To support the case for making an interim order, the applicant should address the impact of the proposed interim order and the need to protect the status quo while the Panel considers the application.

See Guidance Note 4 – Remedies General at [10]-[13]

- (f) The Panel or the President may seek submissions on an interim order request. However, the Panel or the President may make an interim order without seeking submissions from or consulting any other person if the interim order request requires urgent resolution. In these circumstances, an interim order may operate for a very short time to allow the Panel or the President to obtain more information.
- (g) The Panel or the President may allow a person who may be affected by the proposed interim order the opportunity to provide an undertaking in lieu of the interim order.
- (h) The Panel will normally announce the interim order in a media release published on its website and any relevant Australian securities exchange (for example, ASX). Beforehand, parties are normally provided with a draft of the media release for any comments on matters of factual accuracy and unfair prejudice. However, given the nature of interim orders (which are often sought on an urgent basis), this may not always be possible or any time allowed for comment may be very limited.

4.5 Preliminary submissions

- (a) A party (other than the applicant) may make preliminary submissions about whether the Panel should conduct proceedings in relation to an application. A party is not entitled to make rebuttal submissions to a preliminary submission unless the Panel agrees to accept such submissions.

Rule 20

- (b) Preliminary submissions should be brief (generally no more than 2 pages). They should be directed to whether the Panel should conduct proceedings having regard to the considerations in 4.6(b) of these Guidelines below. If appropriate, they should propose any undertakings that the party is willing to give which may remedy some or all of the concerns in the application. They might also identify any additional facts or matters the Panel should take into account when deciding whether to conduct proceedings.
- (c) Preliminary submissions may be made on a review application.
- (d) The Panel may accept a preliminary submission from a person that is not a party. The Panel may require the person's consent to disclosing the submission to parties, ASIC and potentially interested persons before considering the submission. Generally, the Panel will accept a submission from a person that is not a party if it appears that the person is an interested person or the person is likely to be able to assist the Panel.

ASIC Regulations regs 16(1)(g), 23 and 24, Rules 10(6) and 20(3)

4.6 Decision whether to conduct proceedings

- (a) As soon as practicable after an application is received, the Panel convenes to decide whether to conduct proceedings in relation to the application.

ASIC Act s 188, ASIC Regulations reg 20(a)

- (b) As part of making this decision, the Panel considers:
 - (i) whether the Panel has jurisdiction
 - (ii) whether the claims would give rise to unacceptable circumstances if established
 - (iii) the strength of the preliminary evidence
 - (iv) the remedies available
 - (v) whether the circumstances are the subject of court proceedings
 - (vi) whether the application is out of time and, if not, whether it is timely and
 - (vii) whether the application is trivial, frivolous or vexatious.

Corporations Act s 658A

- (c) The Panel may, if necessary, ask preliminary or clarifying questions before deciding whether to conduct proceedings.
- (d) As soon as practicable after deciding whether or not to conduct proceedings, the Panel will notify its decision to parties, ASIC and persons to whom the application relates.

ASIC Regulations reg 21

- (e) If the Panel decides to conduct proceedings, a brief will be issued.

See 5.1 of these Guidelines below

4.7 Decision not to conduct proceedings

- (a) If the Panel decides not to conduct proceedings, a brief will not be issued.
- (b) A decision not to conduct proceedings is made on the date it is communicated to the parties in final form.

Rule 24

- (c) The Panel will normally announce the decision in a media release published on its website and any relevant Australian securities exchange (for example, ASX). Beforehand, parties are normally provided with a draft of the media release for any comments on matters of factual accuracy and unfair prejudice. Any Panel media release does not constitute the Panel's reasons. The Panel will separately issue reasons for the decision.

See 5.11 of these Guidelines below

5. Conducting proceedings

5.1 Brief

- (a) A brief is normally provided to parties as soon as practicable after the Panel decides to conduct proceedings. The brief sets out a general description of the matters to be examined and the key issues or questions that the Panel requires be addressed, invites the parties to make submissions on those issues or questions, and sets out the timetable for parties to make submissions and rebuttal submissions. A sample brief is available on the Panel's website.

ASIC Regulations regs 20(b), 25 and 28

- (b) The Panel may issue one or more supplementary briefs or otherwise invite further submissions at any stage of the proceedings.

ASIC Regulations reg 30

- (c) If the Panel is minded to make a declaration, it will normally issue a supplementary brief on orders at that time.
- (d) If a party would like to address in its submissions any other issue or question not raised in a brief (either for that party or generally), it should be clearly identified as additional.
- (e) Parties are usually provided with 2 business days from receipt of a brief to provide submissions and 1 business day from receipt of submissions to provide rebuttal submissions. However, shorter or longer times may be allowed. The Panel may also require that certain documents be provided prior to submissions.

- (f) If a submission is provided after the time specified by the Panel, the Panel may decide not to consider it.

See 5.7 of these Guidelines below

5.2 Form of documents

- (a) Documents and other material provided to the Panel must be in the form required by the Rules or as otherwise directed by the Panel.

See Rule 9

- (b) Submissions (including in applications) which are unnecessarily lengthy or complex, which use jargon or emotive language, or contain defamatory statements are strongly discouraged by the Panel.
- (c) If a document does not comply with Rule 9 or is otherwise inaccessible, the Panel may require that the party provide a further document that does comply. The Panel may treat the original document as received but may not consider it if it directs a further document be provided.

See Rule 9(2)

- (d) Documents should refer to past submissions or cross-reference other parts of the document, not repeat the submissions.
- (e) Submissions should identify clearly what matters of fact or policy are in dispute.
- (f) Submissions should be accompanied by any relevant material including any market announcements or documents lodged with ASIC that are referred to in the submissions. If the accompanying material is long, relevant provisions should be extracted or highlighted in the application or attachment for ease of reference. Any accompanying material should be labelled in accordance with any instructions in the brief.

Rule 9(1)

- (g) It is not necessary for parties to provide copies of documents which have already been provided to the Panel unless specifically requested by the Panel. Where documents have already been provided to the Panel, parties referring to those documents should note the date and author of the document and indicate how and when it was previously provided.
- (h) Parties are requested to provide documents in Microsoft Office word (.doc or .docx), excel or PDF files. Parties should contact the Executive if other file types are to be provided. Wherever possible, a document provided as a PDF file must be text-searchable. Any PDF file that is not text-searchable must be identified. The Panel may request that a further PDF file that is text searchable is provided.

- (i) The Panel will accept as 'signed' submissions that have the name of the signatory typed in the signature line. This does not apply to sworn evidence (see 5.4(h) and 5.4(i) of these Guidelines below).

5.3 Providing material to the Panel

- (a) If the Panel conducts proceedings, it will normally establish a virtual data room for the matter. Unless the Panel agrees or advises otherwise, submissions must be provided through the virtual data room. The brief will outline the procedures for using the virtual data room. Each party will only receive access to other parties' submissions once the time specified for submissions has expired.
- (b) Prior to the Panel deciding whether to conduct proceedings or for any "out of process" submissions or requests, communication with the Panel is to be made by email to the Executive sent to takeovers@takeovers.gov.au (unless otherwise directed).
- (c) If a party intends the Executive to give an email to the Panel, the email must ordinarily be sent to each party at the same time (so far as practicable) as it is sent to the Executive. This should be clear on the face of the email (i.e., no "blind copies"). In limited circumstances, the Panel may agree to receive an email that has not been copied to other parties, provided it is satisfied there will be compliance with procedural fairness.

Rule 10(6) and 10.8 of these Guidelines below

- (d) A single email should not be larger than 15 megabytes in total.
- (e) The subject of the email must contain the matter name.
- (f) The Panel operates within short deadlines. If a document is sent by post, it may not be received in time for the Panel to consider. If a person is unable to send a document by email, the person should contact the Executive.

5.4 Evidence

- (a) The Panel is not bound by the rules of evidence. However, the rules of procedural fairness do apply to Panel proceedings, to the extent that they are not inconsistent with the Panel's legislation.

ASIC Act s 195(4), ASIC Regulations reg 16(2), Rules 6(1) and 22

- (b) It is an offence if a person gives information or evidence that is false or misleading in a material particular in written submissions to the Panel or while appearing before the Panel in proceedings, unless it is proved that the person, when giving the information or evidence, believed on reasonable grounds that it was true and not misleading.

ASIC Act s 199

- (c) The Panel may act on any logically probative material.

Rule 22(1)

- (d) The Panel has limited investigatory powers. An applicant should consider whether there are any enquiries it can make in the circumstances before making its application to the Panel.
- (e) The Panel may inform itself of any publicly available information, including information published by parties or other persons under the Corporations Act, or the rules of ASX or another securities exchange. In accordance with the requirements of procedural fairness, the Panel will normally seek submissions on such information before relying on it.
- (f) A party may provide statements and documents to support any matter raised in an application or in submissions.

Rule 22(3)

- (g) Evidence may be provided to the Panel in the form of a document that is signed and includes statements to the effect that:
 - (i) the person is aware of the offence and its particulars in section 199 of the ASIC Act
 - (ii) there are no material omissions from the statement and
 - (iii) any attachments are true copies of the originals.
- (h) Sworn evidence may be provided to the Panel in the form of a statutory declaration or affidavit that has been declared, sworn or affirmed in accordance with the law of the place where it is made.
 - (i) A declaration, affidavit or statement may be sent to parties and the Panel electronically (as a scanned copy of the original). The Panel may request that the original be provided.
 - (j) The Panel may also summons a person to appear before the Panel to give evidence or to produce specified documents on request of a party or of its own volition.

ASIC Act s 192, Rule 22(4)

- (k) The Panel may give more weight to sworn evidence but it will depend on the facts of each case. The Panel will consider, among other things, any contemporaneous documentary evidence, whether the person providing the statement has personal knowledge of matters contained in the sworn evidence and whether matters contained in the sworn evidence express facts or opinions.

5.5 Keeping the Panel updated

- (a) A party is expected to keep the Panel up to date during the proceedings with relevant announcements it makes.

5.6 Conferences

- (a) Proceedings are primarily determined on written submissions. However, the Panel may convene a conference. At a conference, the Panel's powers include to take evidence on oath, subpoena witnesses, examine witnesses or subpoena documents.

ASIC Act ss 192 and 199 and ASIC Regulations regs 35 to 41

- (b) A Panel may consider convening a conference to clarify matters arising from documents, resolve inconsistent statements or otherwise assist the Panel to inform itself. If it proposes a conference, the Panel will provide written notice to the parties.
- (c) A conference may be held in person, by video, by audio or by any combination of communication facilities.
- (d) A conference is held subject to any directions the Panel gives. The Panel may, for example, direct what evidence will be taken in a conference and may specify time periods for parties to address the conference.
- (e) A party may request at any time during the proceedings that the Panel hold a conference. The decision to hold a conference is at the discretion of the Panel.

Rule 23

5.7 Out of process submissions

- (a) If a submission is provided after the time specified by the Panel or is not made in response to a brief or request by the Panel (or before the Panel is appointed, the President), the Panel or the President (as relevant) may decide not to consider it.
- (b) The Executive will inform the Panel (or before the Panel is appointed, the President) that an out of process submission has been received. Depending on the nature of the submission, the Panel or President (as relevant) may seek submissions from other parties as to whether the Panel or President (as relevant) should receive the out of process submission.

5.8 Submissions from a person that is not a party

- (a) The Panel may invite submissions from a person that is not a party. A person that is not a party may seek to make submissions to the Panel in relation to a matter.

ASIC Regulations regs 16(1), 23 and 24

- (b) Normally, before the Panel receives any submissions from a non-party, it will seek submissions from parties as to whether the Panel should receive the non-party submissions. Parties will also be given the opportunity to provide rebuttal submissions in respect of the non-party submissions. The non-party will generally not receive these rebuttal submissions.
- (c) The Panel will endeavour to advise parties and the relevant non-party in a timely manner as to whether the Panel decides to consider the non-party submissions.

5.9 Considerations of the Panel

- (a) In deciding issues raised in an application (other than an application for review of an ASIC decision), the Panel has to decide whether unacceptable circumstances have occurred. This requires the Panel to consider legal and policy issues as required in section 657A of the Corporations Act. In particular, the Panel has to consider whether the circumstances are unacceptable in light of the principles referred to in section 602 of the Corporations Act. This includes whether the holders of voting shares know the identity of the bidder, have a reasonable time to consider the bid, have sufficient information to make a decision, have a reasonable and equal opportunity to participate in any benefits arising from the bid and that the bid takes place in an efficient, competitive and informed market.
- (b) The Panel also considers whether there has been or will be a contravention of Chapters 6, 6A, 6B or 6C of the Corporations Act. However, even if it determines that there has been or will be a contravention, it does not have to make a declaration of unacceptable circumstances: it is required to consider the section 602 principles and any other policy matters that it considers relevant and the public interest. On the other hand, if the Panel does not find a contravention of Chapters 6, 6A, 6B or 6C, it can still make a declaration of unacceptable circumstances, particularly in light of the section 602 principles.

Corporations Act s 657A. See Guidance Note 1 – Unacceptable Circumstances

- (c) If the Panel declares circumstances unacceptable it may make any order (except an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C) it thinks appropriate to:
 - (i) protect the rights or interests of any person affected or likely to be affected by the circumstances or
 - (ii) ensure that a takeover bid or proposed takeover bid in relation to securities proceeds (as far as possible) in a way that it would have proceeded if the circumstances had not occurred.

The Panel may also make an order determining who is to bear the costs of the parties to the proceedings.

Corporations Act s 657D(2). See Guidance Note 4 – Remedies General

- (d) It must not make an order if it is satisfied that the order would unfairly prejudice any person.

Corporations Act s 657D(1)

5.10 Decision

- (a) The Panel will normally first provide parties with a proposed decision it is minded to make (which may include a draft of a declaration and supplementary brief on orders or draft of final orders). Parties should not treat this as a decision in final form. The proposed decision will normally include a list of factors which the Panel considers important to its proposed decision. Those factors should not be taken as the Panel's reasons for its decision.

- (b) Before finalising the declaration and any final orders, the Panel will seek submissions on the form of those documents.

Corporations Act ss 657A(4), 657D(1), 657D(3)

- (c) In some cases, before providing parties with a proposed decision, the Panel may provide parties with proposed findings it is considering making. The Panel does this to seek comments on possible findings before they are made. Parties should also not treat these as findings or a decision in final form.

- (d) The decision in final form will normally be accompanied by a signed copy of the declaration and final orders (as applicable).

See Rule 24

- (e) After the decision in final form is communicated, the Panel will normally announce the decision in a media release published on its website and any relevant Australian securities exchange (for example, ASX). Beforehand, parties are normally provided with a draft of the media release for any comments on matters of factual accuracy and unfair prejudice. Any Panel media release also does not constitute the Panel's reasons.

5.11 Reasons

- (a) Reasons are normally provided to parties separately after the decision.
- (b) Before the Panel's reasons are published, parties are provided with an opportunity to provide any non-substantive corrections to the reasons or to propose any redactions of unnecessary material which adversely affects an individual or is unfairly prejudicial.
- (c) Parties should be careful not to selectively use or quote statements from a decision, reasons or a media release in a way which might mislead a reader who has not read them in full.

6. How long does the Panel process take?

- (a) Applications to the Panel move very quickly and therefore parties and their advisers need to be prepared.

- (b) The time a matter takes from application to conclusion will depend on a number of factors, including:
 - (i) the availability of Panel members – conflict checks may take time depending on the identity and number of parties and their advisers
 - (ii) whether the Panel decides to conduct proceedings – matters will usually take longer if the Panel decides to conduct proceedings
 - (iii) the complexity of the matter – more complex or document-intensive matters take longer and
 - (iv) the urgency of the application – timing constraints involved in a transaction may be relevant to the proceedings.
- (c) If the Panel decides not to conduct proceedings on a matter, the matter will usually conclude approximately 1 – 2 weeks after the application is made.
- (d) If the Panel decides to conduct proceedings, the matter will usually conclude approximately 2 - 4 weeks after the application is made. Matters can take shorter or longer than this, depending on the circumstances and the urgency involved.
- (e) The Panel does not normally update the market on the progress of a matter (including whether the Panel has decided to conduct proceedings) during the course of proceedings.
- (f) Notwithstanding the above, the Panel may give notice to a person (or the public at large) of a decision to conduct proceedings and may invite a person who is not a party to the proceedings to give a written expression of interest in the proceedings. This must be given within a time allowed by the Panel. The Panel typically gives such notice when it is aware of a potentially interested person who is not a party or considers that a person may be able to assist the proceedings.

ASIC Regulations reg 23. See also 5.8 of these Guidelines above

7. Seeking a review of a Panel decision

- (a) Parties have the right to apply (in certain circumstances this can only be done with the President's consent) for a review of a Panel decision on an application under section 657C by another Panel (referred to as a review Panel).

Corporations Act s 657EA, Guidance Note 2 – Reviewing Decisions

- (b) A request for the President's consent may be included in the application for review of the Panel decision. However, a request for consent should be made in a reasonably sufficient time before the time limit (see below) in order for the Executive to obtain the President's consent.

Corporations Act s 657EA(2), Rule 14(3)

- (c) An application for review of a Panel decision must not be made later than 2 business days after the date on which that decision was made. The Executive will accept a review application made by 11:59pm (Melbourne time) on the 2nd business day.

Corporations Act s 657EA(3), Corporations Regulations reg. 6.10.01

- (d) The Panel treats reviews as a *de novo* consideration of the matter on the merits. This means that the review Panel considers afresh the circumstances in the application being reviewed and any new circumstances raised (which may have arisen subsequent to the initial decision) and makes what it considers to be the correct or preferable decision.

See Rule 14(2), Guidance Note 2 – Reviewing Decisions

- (e) It is open to a review Panel to decide not to conduct proceedings in relation to a review application if it agrees with the decision of the initial Panel (and the form of any declaration or final orders) and the reasons for that decision, and considers that it would not come to a different decision. However, typically a review Panel will decide to conduct proceedings in relation to a review application in circumstances where the initial Panel has made a declaration and final orders.
- (f) The initial Panel seeks to issue its reasons promptly although it normally will not have done so within the 2 business day deadline for a review application. While the review is a *de novo* consideration, the Panel recognises that it is desirable for parties to have the initial Panel's reasons when making submissions to the review Panel. If it is practicable, and consistent with the Panel's legislation, the review Panel may seek to conduct the review in such a way that the parties and the review Panel will have access to the reasons of the initial Panel in formulating the issues to be considered and in making submissions in relation to them.

8. Undertakings

- (a) In Panel proceedings, the Panel may accept a written undertaking from a person affected, or likely to be affected, by the proceedings about a matter relevant to the proceedings.

ASIC Act s 201A

- (b) The Panel is generally willing to consider undertakings to resolve a matter, although the Panel may still make a declaration or final orders in conjunction with acceptance of an undertaking. Undertakings offered in lieu of all orders should deal with all issues in the proceedings which might otherwise have been dealt with in final orders.
- (c) A party that wishes to inquire whether an undertaking might satisfy the Panel may contact the Executive if it wishes to provide a draft undertaking confidentially before circulating the draft to all parties.

Rule 11(3)

- (d) Parties may offer an undertaking at any point in the proceedings. However, the timing of the offer is a relevant factor that the Panel considers when exercising its discretion whether to accept the undertaking.

See Guidance Note 4 – Remedies General

- (e) Undertakings are received on the basis that the offer of the undertaking does not imply any admission by the person offering the undertaking.

9. Parties

9.1 Seeking to become a party to proceedings

- (a) Any person who would like to become a party to the proceedings must provide the Panel with a Notice to Become a Party *[insert link]*. The Notice to Become a Party includes an undertaking under section 201A of the ASIC Act to the effect that the proposed party will comply with the confidentiality obligations and media canvassing restrictions in Rules 18 and 19 respectively.

Rule 16(1)

- (b) Applicants are required to list any person who may be an interested person in their application and, using reasonable endeavours, provide a copy of the application to each of those persons. Applicants should provide the Executive with proof that the application has been provided to interested persons (e.g., by copying the Executive at takeovers@takeovers.gov.au on the email sent to each interested person).

Definition of “interested person” in Rule 5 and Rules 10(3) and 12(1)(e)

- (c) A person not identified in an application as an interested person who wishes to become a party to proceedings should, when submitting a Notice to Become a Party, explain why they may be a potentially interested person or why they may be able to assist the Panel.

Rule 16(2)

- (d) The Panel may invite a person to become a party if it appears that the person is an interested person or the person is likely to be able to assist the Panel.
- (e) Given the speed of Panel proceedings, any person who would like to become a party after becoming aware of an application should not delay in providing a Notice to Become a Party.
- (f) The requirement for a Notice to Become a Party does not apply to ASIC.

Rule 16(1)

9.2 Becoming a party to proceedings

- (a) Unless otherwise determined by the Panel, a person does not become a party to proceedings until a Notice to Become a Party from that person is accepted by the Panel.

Rule 16(3)

- (b) The Panel only notifies a person if the person's Notice to Become a Party is not accepted by the Panel. A person can generally assume that the Panel has accepted the person's Notice to Become a Party if the person is identified as a party in the Panel's brief and no issues have been raised about the person's participation in the proceedings.

Rule 16(4)

- (c) If a person has not provided a Notice to Become a Party but the Panel considers the person is an interested person and that person participates in the proceedings, the Panel may consider that person to be a party in relation to the proceedings.

ASIC Regulations reg 15, Rule 16(6)

9.3 Seeking legal representation

- (a) The Panel must consent before a party can be legally represented in proceedings. The Panel will notify a party if the party's request is not accepted or leave to be legally represented is withdrawn. A party can assume that the Panel has consented to the party's lawyers if the lawyers are identified in the Panel's brief and no issues have been raised with the party.

ASIC Act s 194

- (b) The form of request is set out in the Notice to Become a Party [*insert link*].

Rule 17(1)

- (c) There is no requirement that a party be legally represented and a party may make submissions directly to the Panel or through other representatives.
- (d) If a party is to be legally represented, the Panel prefers it to be by the commercial lawyers who have been advising it in the transaction the subject of the application. If a party seeks consent to be represented by lawyers different to those who have advised it on the transaction (even from the same firm), it should explain why.

Rule 17(2)

10. Confidentiality and Publicity

10.1 Panel proceedings are conducted privately

- (a) The Panel prefers to conduct proceedings in private. This enables the Panel, among other things, to resolve disputes as quickly and efficiently as possible.

Rule 6

- (b) The Panel has established rules to protect confidential information disclosed in the course of proceedings and to prevent issues before the Panel being publicly debated during the course of proceedings.

10.2 Confidentiality obligation

- (a) Rule 18 requires that a person (whether or not a party) must not use or disclose any confidential information provided to it in the proceedings (including information disclosed in an application, a preliminary submission or a submission to the Panel), except –
 - (i) in the proceedings itself as permitted under the Rules or
 - (ii) as required by law or the rules of a securities exchange

ASIC Act ss 127 and 186, Rule 18(1)

- (b) Any communications from, and any document provided by, the Panel (or before the Panel is appointed, the President) for comment or which is marked as a draft is confidential information.

Rule 18(2)

- (c) A person may disclose confidential information provided to it in proceedings to its Representatives to the extent that the relevant Representative needs that information for the purposes of the proceedings as permitted under the Rules.

Rule 18(3)

- (d) For the purposes of the Rules, a person's Representatives is a reference to the directors, officers, employees, agents, contractors, service providers and advisers of the person or its Related Bodies Corporate, and any other person acting on behalf of that person.

Definition of "Representatives" in Rule 5

- (e) The confidentiality obligations are without limit in time and continue for so long as the information remains confidential.
- (f) Any person provided with confidential information in the proceedings must ensure that each of its Representatives who receives such information complies with the confidentiality obligations.

Rule 18(4)

- (g) The confidentiality obligations in Rule 18 do not apply to ASIC.

Rule 18(5)

10.3 Restriction on media canvassing

- (a) Rule 19(1) requires that a party must not directly or indirectly cause, participate in or assist the canvassing in any media of any issue that is before (or likely to be before) the Panel in proceedings:
 - (i) until the proceedings are determined or the time limit within which an application under section 657EA of the Corporations Act may be made for review of a Panel decision has expired, whichever is longer and

- (ii) if a request is made, or proposed to be made, to vary, revoke or suspend any final orders, from the time the person becomes aware of the request or proposed request until it is determined by the Panel.

Rule 19(1)

- (b) Rule 19(1) does not prevent a party from making statements that, without discussing merits:
 - (i) identify the parties or the subject matter of the application or the broad nature of the unacceptable circumstances alleged or the orders sought or
 - (ii) describe any decision of the proceedings,to the extent such matters have been disclosed publicly by the Panel.

Rule 19(2)

- (c) Where the subject matter of an application concerns a spill meeting, the media canvassing rule does not prevent announcements or other communication in relation to the meeting or the matters or the resolutions proposed to be moved at the meeting that do not directly relate to issues before the Panel.

Rule 19(3) and definition of "spill meeting" in Rule 5

- (d) Rule 19(4) requires that from the relevant time period in Rule 19(1) until the Panel publishes its reasons for decision, a party must not directly or indirectly cause a decision of the Panel to be misrepresented in any media.

Rule 19(4). See also 5.11(c) of these Guidelines above

- (e) A party must ensure each of its Representatives complies with the restrictions in Rule 19.

Rule 19(5)

- (f) For the purposes of the Rules, a party's Representatives means the directors, officers, employees, agents, contractors, service providers and advisers of the party or its Related Bodies Corporate, and any other person acting on behalf of that party.

Definition of "Representatives" in Rule 5

- (g) The Panel expects that parties will not attempt to circumvent the media canvassing restriction by talking to the media about closely related issues to those in the proceedings or by briefing the media prior to the lodgement of an application.
- (h) The restrictions on media canvassing in Rule 19 do not apply to ASIC.

Rule 19(6)

10.4 Non-public information

- (a) Parties should note that they may receive non-public, material information during proceedings that may create disclosure obligations or give rise to insider trading restrictions.
- (b) Parties must comply with the law and listing rules, but should do so in a manner consistent with Rules 18 and 19.

See 10.2 and 10.3 of these Guidelines above

10.5 Obligations of the Panel in respect of confidentiality

- (a) The Panel is required to take all reasonable measures to protect from unauthorised use or disclosure information given to it in confidence in connection with the performance of its functions or the exercise of its powers.

ASIC Act ss 127 and 186

- (b) However, use and disclosure is permitted for the purposes of performing the Panel's functions including disclosure to staff, consultants or advisers, the Ombudsman and a Parliamentary Committee and as may be required by legislation including section 127 of the ASIC Act and the *Freedom of Information Act 1982* (Cth).

10.6 Restricting the publication of information

- (a) The Panel may give directions, during proceedings, preventing or restricting the publication of submissions or evidence made or given to, or of matters contained in documents lodged with, the Panel.

ASIC Act s 190

- (b) If a party has a concern about commercially sensitive information, they should contact the Executive to discuss reasonable measures by which the Panel can keep such information confidential.

10.7 Panel media releases

The Panel will consider carefully the timing of its media releases having regard to the urgency of a matter, the price sensitivity of the information and market trading hours. If a party has any concerns regarding the timing of a media release to be published by the Panel, the party should contact the Executive.

10.8 Withholding information or documents

- (a) The Panel prefers to give all parties access to all material before it in proceedings.

ASIC Act s 195(4), ASIC Regulations reg 28(2), Rules 6 and 10(6)

- (b) A person may request the Panel (or before the Panel is appointed, the President) to withhold information from a party.

ASIC Act ss 190 and 195(4), Rule 11(1)

- (c) The request must be provided to all other parties but does not need to include any of the information that the party proposes to withhold.
- (d) Given the need for procedural fairness, a request under Rule 11(1) will only be accepted in exceptional cases. However, if accepted, the Panel (or before the Panel is appointed, the President) may direct that information is:
 - (i) withheld or redacted from a party and its legal representatives
 - (ii) provided to a party's legal representatives only, and must be withheld by them from the party itself or
 - (iii) subject to other requirements specified by the Panel or the President (as relevant) to mitigate adverse effects of providing the information.
- (e) If a party's request to redact a document (for confidentiality or other reasons) is refused, the party should decide whether there are any other reasonable measures to mitigate adverse effects of providing the information, and if not, whether it is prepared to submit the complete document. If it is not, the party may wish to consider whether it should withdraw from the proceedings. If the party is the applicant it would require the consent of the Panel (or before the Panel is appointed, the President) to withdraw its application, which may be more readily given in these circumstances.

See Rule 15

11. Withdrawal of an application

- (a) An applicant may only withdraw its application with the consent of the Panel or if the request for consent to withdraw is made before a Panel is appointed, the President.

Rule 15

- (b) If the dispute is resolved, the Panel (or before the Panel is appointed, the President) will generally give consent to withdraw. However, consent may be refused if there is reason to suspect that unacceptable circumstances will occur or continue to occur.

12. Panel members

- (a) When exercising their statutory functions and powers in relation to Panel proceedings, Panel members have the same immunity and protection from suit in civil actions as a Justice of the High Court.

ASIC Act s 197(1)

- (b) Panel members also have protection from improper advances. Forms of interference such as threats, intimidation or attacks on the professional competence or impartiality of a Panel member may constitute an offence under section 200 of the ASIC Act. Under this section, a person is prohibited from obstructing or hindering the Panel or a member and from disrupting Panel proceedings, as well as contravening a Panel direction given under section 190(1) of the ASIC Act. Contravention carries penalties and/or imprisonment.

See ASIC Act ss 190 and 200

13. Executive

- (a) The Executive manages the administration of matters on behalf of the President and the Panel.

Rule 28

- (b) All communication between parties and the President or the Panel is made through the Executive. Parties should not communicate directly with the President or a Panel in anticipation of, or during, proceedings.
- (c) The Executive:
 - (i) assists the President to identify a Panel for a matter
 - (ii) assists Panel members with conflict checks
 - (iii) conducts research for the Panel
 - (iv) prepares draft documents for the Panel (for example, correspondence, media releases, briefs, declarations, interim and final orders and reasons for decision) and
 - (v) if requested, assists the President or the Panel in the performance or exercise of their functions or powers.
- (d) The Executive does not make decisions on the merits of an application (as this is the function of a Panel) and does not filter submissions.
- (e) A party or potentially interested person can contact the Executive to discuss the process for the matter or related issues at any time during proceedings.
- (f) After proceedings are completed, the Panel invites any party who wants to discuss the conduct of the proceedings and Panel processes to a meeting with the Executive and a Panel member who was not involved in the matter. Feedback received in these meetings helps the Panel develop its processes to ensure that it conducts fair and commercial proceedings.
- (g) The Executive also liaises with market participants on current and prospective takeovers and other control transactions and policy issues to provide a perspective on the Panel's Guidance Notes and decisions. The Executive may give market participants its views on the Panel's likely view in relation to any real or hypothetical circumstances. These discussions do not bind the Panel.

14. Miscellaneous

- (a) Panel matters are named with the name of the company to which the application relates. If the company has previously been the subject of a Panel matter, a sequential number will be added to the matter name. Review applications are identified with the addition of "R" to the sequential number.

Note: The current numbering system for Panel matters has been adopted since 1 June 2017.

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