



PUBLIC CONSULTATION RESPONSE STATEMENT

Remaking of Procedural Rules

Introduction

On 2 October 2020, the Takeovers Panel released a Consultation Paper seeking public comments on the proposed remake of its Procedural Rules. The Consultation Paper also sought public comments on a separate Procedural Guidelines document which is to accompany the Procedural Rules.

Comments on the Consultation Paper were due by 23 October 2020. The Panel received submissions from three respondents (**Annexure A**). The Panel thanks the respondents for their comments. Consistent with the Panel's published policy on responding to submissions, this statement sets out the Panel's response to the public consultation.

Attached are copies of the final Procedural Rules and final Procedural Guidelines in clean (**Annexure B**) and in mark-up (**Annexure C**) to show the changes from the drafts circulated with the Consultation Paper (**Consultation Drafts**).

The new Procedural Rules will come into operation on 1 April 2021 (being the date on which the Panel's existing Procedural Rules are due to sunset).

Material comments received and Panel's conclusions

Are the existing Procedural Rules currently operating effectively and efficiently?

Comments

All respondents generally shared the Panel's view that the existing Procedural Rules are operating effectively and efficiently.

A number of specific comments and recommendations were also received on certain proposed changes to the existing Procedural Rules, and the new Procedural Rules and Procedural Guidelines generally (see below).

Panel Response

In light of the submissions, the Panel considers that it is appropriate for the existing Procedural Rules to be remade without any significant changes on the basis that the existing instrument is operating effectively and efficiently.

Do you have any comments on the proposed changes from the existing Procedural Rules outlined in the Consultation Paper?

Comments and Panel Response

A summary of material comments received on the Consultation Drafts of the new Procedural Rules and Procedural Guidelines, and the Panel's response to that feedback (including whether amendments to the new Procedural Rules or Procedural Guidelines have been made in response), is set out in **Annexure D**.

Are the new Procedural Rules and Procedural Guidelines easy to follow?

Comments

All respondents were broadly supportive of the form of the new Procedural Rules and Procedural Guidelines.

One respondent specifically commented that the new Procedural Rules and Procedural Guidelines were easy to follow and that *“consolidating the various guidance about the Panel and its operations into the procedural guidelines will likely greatly assist participants to Panel proceedings”*.

Panel Response

In light of the submissions, the Panel considers that it is appropriate for the new Procedural Rules and Procedural Guidelines to be finalised in their respective forms set out in Annexure B.

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?

Comments

One respondent commented that given the broader usage of virtual meeting platforms in 2020, there may be circumstances in which an online hearing would be an effective supplement to written submissions to address a particular issue. Accordingly, the respondent submitted that the Panel should have a discretion to require parties to attend an online hearing, where appropriate. However, the respondent also noted that online hearings should not be the typical path adopted, and in the normal course, parties should be kept to the discipline of confined written submissions.

Panel Response

The Panel considers that online hearings and conferences are already permitted under the new Procedural Rules and Procedural Guidelines. Specifically, Rule 23(1) stipulates that the Panel may hold a conference (for all or part of the proceedings) at the request of a party or of its own volition. The Procedural Guidelines at paragraphs 5.7(a)-(c) further stipulate that *“Proceedings are primarily determined on written submissions. However, the Panel may convene a conference...”* and *“A conference may be held in person, by video, by audio or by any combination of communication facilities”*. Accordingly, the Panel did not consider that any changes to the new Procedural Rules and Procedural Guidelines were required.

22 February 2021

Annexure A – Submissions



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Mr Allan Bulman
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By email: takeovers@takeovers.gov.au

23 October 2020

Dear Mr Bulman

Takeovers Panel Consultation Paper - Remaking of Procedural Rules

ASIC appreciates the opportunity to provide comments on the Takeovers Panel's proposed procedural rules. This letter sets out ASIC's general comments on the draft procedural rules and guidelines and responses to the questions raised in the Panel's consultation paper.

General comments

1. ASIC broadly welcomes each of the Panel's proposals, the procedural rules and the procedural guidelines. ASIC notes these documents will further assist parties and ASIC in understanding how Panel proceedings are conducted and the relevant expectations for those involved.
2. In relation to the proposed procedural guidelines, while ASIC recognises some of the content of the guidelines is currently included as notes to the procedural rules or is available on the Panel's website, consolidating the various guidance about the Panel and its operations into the procedural guidelines will likely greatly assist participants to Panel proceedings

Response to consultation paper questions

1. Are the existing procedural rules currently operating effectively and efficiently?
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3. ASIC considers the existing procedural rules generally operate effectively and efficiently. There are however areas that can be improved, and we note the Panel has proposed various amendments which seek to address these matters to avoid concerns arising in future Panel proceedings and otherwise seek to refine the operations of the Panel.

2. Do you have any comments on the proposed changes from the existing procedural rules outlined in the section above?

Media canvassing

4. ASIC notes the Panel's proposal to incorporate a carve out to the media canvassing restriction to allow communications about matters concerning upcoming spill meetings that do not directly relate to issues before the Panel (see proposed rule 19(3)).
5. ASIC understands the Panel's proposal is designed to:
 - a. ensure that applications to the Panel, given media canvassing restrictions, do not in some way put respondents to the application at a disadvantage (see for example *Resources Generation Limited* [2016] ATP 12 at [50]); and
 - b. ensure the Panel's rules do not otherwise limit appropriate communications about spill meetings and the usual publication of information concerning spill resolutions to ensure investors can make informed voting decisions.

These are concerns shared by ASIC, and so we acknowledge the merits of the proposal.

6. ASIC however considers the proposed rule 19(3) may, in its current form, create some uncertainty for parties as to what matters are within the scope of the carve out. This is because it may not always be clear whether an announcement or communication "directly relate to issues before the Panel", particularly in cases where an application to the Panel that concerns a spill meeting is cast in broad terms or canvasses various interactions or allegations about certain shareholders and/or board members.
7. ASIC also notes that it is unclear to what extent proposed rule 19(3) has application beyond what rule 19(1) itself provides, noting rule 19(1) would not restrain publication of information relating to any issue not before, or likely to be before, the Panel.
8. Given the above, ASIC encourages the Panel to consider how to ensure that parties can easily understand what matters may fall within the scope of the intended carve out.
9. An alternative approach may be to include in the procedural guidelines an explanation of how rule 19 applies. These guidelines could provide examples specific to spill meeting matters to assist parties in understanding their obligations in this context.

ASIC's obligations as applicant

10. ASIC notes the Panel's proposed rules 12(1)(g) and 14(1)(c) appear to require ASIC, if it is the applicant, to enclose a 'notice to become a party' with its application. In contrast, ASIC notes proposed rules 16(1), 18(5) and 19(6) do not apply to ASIC.
11. ASIC understands that the Panel's general expectation is that ASIC is not required to provide a 'notice to become a party'. Accordingly, we suggest it would be useful to clarify that proposed rules 12(1)(g) and 14(1)(c) exclude ASIC.

3. Are the new procedural rules and procedural guidelines easy to follow?

12. Other than as noted in response to question 2, ASIC considers the procedural rules and procedural guidelines are 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?

13. Other than as noted in response to question 2, ASIC does not consider there are any other aspects of the rules or guidance that may need updating at this time.

Contact

ASIC would be happy to discuss the contents of this submission and any queries the Panel may have regarding the comments made. Please contact me to do so.

Yours sincerely,



Rachel Howitt
Senior Executive Leader
Corporations
Australian Securities and Investment Commission

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* Associated Firm

** In cooperation with
Trench, Rossi e Watanabe
Advogados

24 October 2020

The Takeovers Panel

Dear Allan and the Takeovers Panel

Remaking of Procedural Rules

We refer to the Consultation Draft of the Remade Procedural Rules and Guidelines issued by the Takeovers Panel on 2 October 2020.

We make the following brief comments in relation to them.

1. General

The Panel should be congratulated for codifying in a helpful and detailed fashion the way in which it operates. We consider that the Rules represent a substantial and sensible codification, and we endorse this approach. Please treat the suggestions below as minor improvements as part of an iterative process, rather than being critical changes.

2. Confidential Information

The Rules could be improved in the area of confidential information (Rule 18, Guideline 10). The Panel has had recent occasion to look closely at the issue, and there are various learnings and intelligence which have been obtained as a consequence which could be incorporated. For example:

- (a) a definition of confidential information would be helpful;
- (b) greater clarity could be provided on how the exceptions to confidentiality arise;
- (c) reference could be made to confidentiality undertakings given by Panel participants under section 201A as well as undertakings given as part of the data room process;
- (d) the confidentiality intersection with court processes could be teased out; and
- (e) clarity could be provided whether emails to and from the Panel other than under Rule 18(2) are confidential. For example, if a party applies to the Panel for a determination that another party has breached Panel Orders, are the various communications between the various parties (and from the Panel) confidential?

By email

takeover@takeovers.gov.au

3. Provision of Documents

The references to the President in Rules 10(1) and (2) are confusing (since access to the President does not occur in practice) and should be deleted or revisited.

4. Application for Review of Panel Decision

Rule 14(1) should list as a new item whether interim orders are being sought regarding a stay of the earlier Panel decision.

5. Page Limits

Guidelines as to page limits (eg: Guideline 3.6, Guideline 4.5(b)) should cross refer to the succinct requirement of Rule 9.

6. Rules v Guidelines

Various aspects are dealt with in each of the Rules and Guidelines, and the repetition/overlap is sub-optimal. See for example Rule 12 and Guideline 3.5(a). Also see for example Guideline 5.2(b) and Rule 9.

7. Fees

Guideline 3.4 could note that the fees are updated from time to time, and how or when such changes typically occur. They could explain the circumstances in which an application might involve 2 or more fees.

8. Multi Applications

The Rules/Guidelines could explain that multiple applications which cover similar subject matters can be heard together, and how such matters are addressed.

9. Official

Communications from the Panel are now issued with "Official" terminology. The significance of this could be explained.

10. Standard Processes

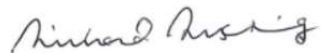
The Panel has a number of standard processes it follows, such as standard texts of emails which it issues during the course of a matter. It would be worthwhile cross checking these against the Rules/Guidelines to see if there are other aspects from them which should be incorporated.

11. Interim Orders

Guideline 6.4 could explain that the President can make interim orders off the back of an undertaking to make an application in urgent circumstances. The Panel recently had an occasion where the President was requested to make urgent interim orders, and it took the requesting party an overly lengthy 11 days to follow through with its undertaking to then lodge an application. The Guidelines should specify a time period (eg: 2 business days) to make an application in the case of such an undertaking.

Please let us know if you would like clarification of the above.

Kind regards

A handwritten signature in cursive script, appearing to read "Richard Lustig".

Richard Lustig
Partner



27 October 2020

Allan Bulman
Director, Takeovers Panel
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By email: takeovers@takeovers.gov.au

Dear Mr Bulman,

Remaking of Procedural Rules

This submission is made by the Corporations Committee (**Committee**) of the Business Law Section of the Law Council of Australia in response to the Takeovers Panel's (**Panel**) consultation paper in relation to the proposed new Takeovers Panel Procedural Rules 2020 (Cth) (**New Rules**).

1. GENERAL OBSERVATION

The Committee shares the Panel's view that the existing *Takeovers Panel Procedural Rules 2010* (Cth) (**Existing Rules**) are operating efficiently, effectively, and (for the most part) without significant issues.

Comments and recommendations on points of detail in the New Rules follow.

2. DEFINITIONS

2.1. *Interested Person*

Paragraph (a) of the definition of "*Interested Person*" is "*a person entitled to be heard by the Panel before it makes a decision sought by the application*".

- (a) The Committee queries the utility of that limb of the definition, and whether it adds anything meaningful to paragraphs (b) or (c).
- (b) The breadth of the definition invites the applicant to send the application far and wide in purported compliance with the rule, which is not appropriate.
- (c) To the extent that broad distribution may prompt parties with a marginal interest to seek to be involved – it may unnecessarily prolong or complicate proceedings, with little or no benefit.

Recommendation: that paragraph (a) of the definition of " <i>Interested Person</i> " be removed.

2.2. *Notice to Become a Party*

The proposed definition of 'Notice to Become a Party' in the Rules currently reads "means a notice in the form by which a person seeks to become a party". This appears incomplete.

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Recommendation: to add '*prescribed by the Panel*' after "form".

2.3. *Spill meeting*

Limb (a) of the definition of '*spill meeting*' does not specifically include a spill motion under the entity's constitution: "*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*".

Recommendation: include a reference to a spill motion under the entity's constitution.

3. **APPLICATIONS UNDER S.675C**

An application for a declaration of unacceptable circumstances (Rule 12(1)) does not require the applicant to provide transparency in relation to other proceedings on foot or anticipated in another forum (for example, a court).

Recommendation: include a requirement to disclose if there are other proceedings on foot or anticipated in another forum.

4. **SEEKING TO BECOME A PARTY**

4.1. *Notice to Become a Party*

Rule 16(3) only indicates that the Panel will notify a person if the person's Notice to Become a Party is not accepted. While it is implicit – it should also notify a person where their Notice is accepted.

Recommendation: Rule 16(3) should have a notification for acceptance or rejection of a Notice to Become a Party.

4.2. *Interested person*

Rule 16(6) gives the Panel the ability to appoint or remove an interested person as a "party" to proceedings.

It is unclear whether, by virtue of its status as a party, this may allow every interested person to seek to review a Panel decision as a party to the proceedings. While the Panel Rules may not determine the interpretation of section 657EA(1), they may influence it.

As noted at paragraph 3.2(b) of the Guidelines, only parties to the proceedings or ASIC are able to apply for a review of a Panel decision. Query whether this right should be limited to original or central parties to the proceedings.

Recommendation: The Panel should clarify the ability of "interested persons" to seek review, and consider whether all participants should be on an equal footing as "parties".

5. **CONFIDENTIALITY**

Rule 18(4) obliges a person to ensure that each of its Representatives who receive confidential information complies with Rule 18(1).

This does not allow for the possibility that the person has taken reasonable endeavours to alert their Representatives of this information and requires compliance, but, for reasons outside of their control or for some other unusual reason, the Representative has not received this alert.

Recommendation: Consider whether reasonable endeavours to procure compliance should be sufficient.

6. PUBLICITY AND ANNOUNCEMENTS

Rule 19 concerns the undertakings required by a party in relation to publicity and media canvassing.

6.1. *Location of undertakings*

The Committee agrees with the Panel that these undertakings are better placed in the Rules, rather than in the form of Notice of Appearance annexed to the Existing Rules.

6.2. *Panel Announcements – receipt of application*

There is a preference for less detail to be included in initial announcements by the Panel, made when an application is received. This is particularly the case where matters asserted as facts may be disputed and prejudicial. The allegations in the application are picked up by the media, and the parties do not have the ability to respond to them. The applicant's framing of the issue is captured in the public narrative, irrespective of the merits of the application.

Alternatively – if details of assertions in the application are to be included, there should be a reasonable opportunity for other parties to comment on those before an initial media release is published.

This may properly be the subject of Guidelines, rather than the New Rules.

Recommendation: That the Panel:

- (a) clarify the circumstances in which it will publish a media release, having regard to its confidentiality obligations under section 186 of the *Australian Securities and Investments Commission Act 2001* (Cth); and
- (b) limit the content of any such media release, particularly the recitation of allegations that are not established facts.

6.3. *Canvassing stakeholders*

Committee members noted that they had observed incidents of parties to Panel proceedings approaching stakeholders of other parties, to canvass matters directly with stakeholders that would be restricted by the media canvassing rules.

Recommendation: While there should not be an impediment under Panel rules or orders to normal activist activities, or normal shareholder engagement, it should not be possible to directly approach stakeholders regarding matters that could not be canvassed in the media.

7. PANEL GUIDELINES

7.1. *Preliminary submissions*

The Guidelines do not currently advise to whom preliminary submissions should be sent.

Recommendation: clarify that a preliminary submission should be sent to each person who received the application and anyone else who has participated since then.

7.2. *How long does the Panel process take?*

The Guidelines at paragraphs 6(c) and 6(d) allow the Panel a period of 1 - 2 weeks and 2 - 4 weeks respectively, to make certain decisions.

Recommendation: timeframes are more clearly articulated as a number of business days.

8. OTHER OBSERVATIONS AND RECOMMENDATIONS

8.1. *Hyperlinking*

The Committee notes the restrictions on content of legislative instruments, and accepts the necessity of deleting Notes that are within the Existing Rules.

However hyperlinking a copy of the documents would make the Rules and Guidelines more user-friendly and significantly enhance the ease in which users can cross-reference across the two documents.

Recommendation: where the New Rules are published on the Panel website - hyperlinking should be introduced between the Rules and the Guidelines, to improve compliance and ease of use.

8.2. *Online Hearings vs written submissions*

There is a diversity of views within the Panel as to whether online hearings would be beneficial to the swift resolution of matters before the Panel.

Many members commented that written submissions have been effective for distilling and dealing the issues at the heart of the controversy, efficiently and without undue burden on Panel members.

However, given the broader usage in 2020 of virtual meeting platforms, the Committee acknowledges that there may be circumstances in which an online hearing would be an effective supplement to written submissions to address a particular issue.

Recommendation: that the Panel should have a discretion to require parties to attend an online hearing, where appropriate. However, this should not be the typical path adopted, and in the normal course, parties should be kept to the discipline of confined written submissions.

Committee representatives would be happy to discuss any of the matters raised, or provide further detail. If you have any questions – please contact Chair of the Committee, Shannon Finch [REDACTED] or Committee member, Rodd Levy [REDACTED]

Yours faithfully,



Greg Rodgers
Chair, Business Law Section

Annexure B – Procedural Rules (Final)



Australian Government

Takeovers Panel

Takeovers Panel Procedural Rules 2020

The Takeovers Panel makes the following Rules.

Dated 3 December 2020

Alex Cartel
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 *Procedural Rules to be followed in Panel Proceedings (made on 12 April 2010) (F2010L00948)* by this section does not affect the continuing operation of those 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 the 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 approved by the Panel 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 interim 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.

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/>).

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 Executive. The Executive will provide documents to the Panel or the President as applicable.
- (2) A document is provided to the Panel 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).

-
- (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) provide details of any proceedings threatened or commenced in another forum which are directly or indirectly related to the circumstances
 - (e) state the interim orders or final orders sought
 - (f) identify interested persons
 - (g) where submissions to support the application are included, the submissions should not exceed 10 A4 pages in minimum 10 point font and
 - (h) be accompanied by a Notice to Become a Party (except where the applicant is ASIC).
- (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.
 - (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 (except where the applicant is ASIC).
- (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
 - (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
 - (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 communication from, and any document provided by, the Panel (or before the Panel is appointed, the President) is confidential information (including a communication or document provided for comment or which is marked as a draft) unless or until the Panel publishes such 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 Rule 19, *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) 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.
 - (4) A party must ensure that each of its Representatives complies with this Rule 19.
 - (5) This Rule 19 does not apply to ASIC.

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 Rule 9 and 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 Rule 9 and 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's 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.

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 – Procedural Guidelines (Final)



Australian Government

Takeovers Panel

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1. Introduction

- (a) This document is dated [1 April 2021]. 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

- (f) For a matter that is not an application under sections 657C, 657EA or 656A of the Corporations Act, the President or the Panel constituted in relation to that particular matter will determine the procedural rules to be followed in relation to that particular matter. Such matters include a request to make an application under section 657G of the Corporations Act to the Court to enforce a Panel order and an application under section 201A of the ASIC Act to withdraw or vary an undertaking accepted by the Panel. Generally speaking, the Rules will apply to any such matter unless the President or the Panel constituted in relation to that particular matter determines or directs otherwise.

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. A party to the proceedings in which the decision was made includes an interested person who participated in proceedings and was deemed to be a party by the Panel pursuant to Rule 16(6).

Corporations Act s 657EA(1). See also definition of "party" in Rule 5

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 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) provide details of any proceedings threatened or commenced in another forum which are directly or indirectly related to the circumstances (this requirement only applies to the extent that the applicant is aware of such information – the Panel does not expect an applicant to, for example, undertake independent litigation searches to ascertain whether there are any proceedings on foot which are related to the circumstances)
 - (v) state the interim orders or final orders sought and
 - (vi) identify interested persons.

Rules 9(1) and 12(1)(a)-(f). 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 (except where the applicant is ASIC).

Rule 12(1)(h)

- (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)(g). 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 (except where the applicant is ASIC).

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). Applicants are also encouraged to specify whether an interim order is being sought regarding a stay of any orders of the initial Panel.

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 9(1), 12(1)(g), 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 Rules 12(1)(g), 13(1)(b) or 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)(g), 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

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 together 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

- (a) 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. In preparing the media release, the Executive will carefully consider and be mindful of matters asserted in the application which may be prejudicial to a party. Typically, the media release will be drafted only to address issues regarding Chapter 6 of the Corporations Act.
- (b) The media release on receipt of an application 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) There may also be instances in which an interim order is so urgent that an applicant may request the interim order prior to making an application. In these circumstances, the President may ask the applicant to provide an undertaking that the application be made within a certain time after receiving such a request, in the event that an interim order is made.
- (e) 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.
- (f) 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]

- (g) 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.
- (h) 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.
- (i) 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 sent to each person who has received the application and any person subsequently identified by the Panel.

- (c) 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.

See Rule 9(1)

- (d) Preliminary submissions may be made on a review application.
- (e) 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. Parties will generally be informed about the timing of the first Panel meeting.

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 5.12 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) A party 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. If a document or submission is provided after the time specified by the Panel, the Panel may continue with the proceedings without regard to the document or submission.

ASIC Regulations regs 28, 30 and 34, Rule 10(8). See also 5.8 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(1)

- (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(1) 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 (as set out in the brief) has expired.
- (b) The brief also specifies that any person accessing the virtual data room for a matter undertakes not to use or disclose any confidential information provided to it in the proceedings (including confidential information in the virtual data room).

ASIC Act s 201A

- (c) 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).
- (d) 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

- (e) A single email should not be larger than 15 megabytes in total.
- (f) The subject of the email must contain the matter name.
- (g) 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 party is expected to keep the Panel up to date during the proceedings with relevant announcements it makes.

5.6 Panel meetings

Parties will generally be kept up to date about the timing of Panel meetings in relation to the proceedings. Where possible, the Panel will provide feedback from the meeting. However, this may not always be possible (for example, if the meeting does not result in a decision).

5.7 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

5.8 Out of process submissions

- (a) If a submission 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.

5.9 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.

5.10 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)

5.11 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.

5.12 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 5.9 of these Guidelines above

7. Seeking a review of a Panel decision

- (a) Parties may 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)(f)

- (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). See also 5.3(b) of these Guidelines above

- (b) Any communication from, and any document provided by, the Panel (or before the Panel is appointed, the President) is confidential information (including a communication or document provided for comment or which is marked as a draft) unless or until the Panel publishes such 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) The intent of the media canvassing rule is not to prevent discussion of matters which do not directly relate to issues in proceedings before the Panel. For example, where an application is made regarding an alleged association between shareholders in the context of a requisitioned spill meeting, the Panel proceedings are focused on the alleged association between the requisitioning shareholders. In this instance, the media canvassing rule would operate to prevent parties from discussing the alleged association. However, the rule would not prevent announcements or other communications in relation to the requisitioned meeting or the matters or the resolutions proposed to be moved at that meeting, as these issues do not directly relate to the association issue before the Panel.
- (d) Rule 19(3) 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(3). See also 5.12(c) of these Guidelines above

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

Rule 19(4)

- (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:
 - (i) talking to the media about closely related issues to those in the proceedings
 - (ii) briefing the media prior to the lodgement of an application or
 - (iii) directly approaching stakeholders regarding matters that could not be canvassed in the media.

- (h) The restrictions on media canvassing in Rule 19 do not apply to ASIC.

Rule 19(5)

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,

in each case, subject to the requirements of procedural fairness.

- (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.

- (b) All communications sent by the Executive are issued with an “Official” classification. This is a security classification used within the Department of Treasury (within which the Takeovers Panel sits). The classification does not have any particular meaning for the purposes of Panel proceedings.

Publication History

First issue: [1 April 2021]

Annexure C – Procedural Rules
(Compare against Consultation Draft)



Australian Government

Takeovers Panel

Takeovers Panel Procedural Rules 2020

The Takeovers Panel makes the following Rules.

Dated ~~{date of making}~~ 3 December 2020

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~~ *Procedural Rules to be followed in Panel Proceedings (made on 12 April 2010) (F2010L00948)* by this section does not affect the continuing operation of ~~the former Rules~~ those 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 the 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 approved by the Panel 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~~interim 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/>).

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 Executive.~~ The Executive will provide documents to the Panel ~~is appointed, or~~ the President ~~as applicable.~~
- (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).

-
- (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) provide details of any proceedings threatened or commenced in another forum which are directly or indirectly related to the circumstances
 - ~~(d)~~(e) state the interim orders or final orders sought
 - ~~(e)~~(f) identify interested persons
 - ~~(f)~~(g) where submissions to support the application are included, the submissions should not exceed 10 A4 pages in minimum 10 point font and
 - ~~(g)~~(h) be accompanied by a Notice to Become a Party- (except where the applicant is ASIC).
- (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.
 - (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- (except where the applicant is ASIC).
- (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~~communication from, and any document provided by, the Panel (or before the Panel is appointed, the President) is confidential information (including a communication or document provided for comment or which is marked as a draft-is confidential) unless or until the Panel publishes such 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.~~

~~(4)~~(3) 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)~~(4) A party must ensure that each of its Representatives complies with this Rule 19.

~~(6)~~(5) This Rule 19 does not apply to ASIC.

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 Rule 9 and 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 Rule 9 and 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'~~witness's 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.

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 C – Procedural Guidelines
(Compare against Consultation Draft)



Australian Government

Takeovers Panel

Procedural Guidelines

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1. Introduction

- (a) This document is dated ~~[Date]~~[1 April 2021]. 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

- (f) For a matter that is not an application under sections 657C, 657EA or 656A of the Corporations Act, the President or the Panel constituted in relation to that particular matter will determine the procedural rules to be followed in relation to that particular matter. Such matters include a request to make an application under section 657G of the Corporations Act to the Court to enforce a Panel order and an application under section 201A of the ASIC Act to withdraw or vary an undertaking accepted by the Panel. Generally speaking, the Rules will apply to any such matter unless the President or the Panel constituted in relation to that particular matter determines or directs otherwise.

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. A party to the proceedings in which the decision was made includes an interested person who participated in proceedings and was deemed to be a party by the Panel pursuant to Rule 16(6).

Corporations Act s 657EA(1~~7~~). See also definition of "party" in Rule 5

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)~~ provide details of any proceedings threatened or commenced in another forum which are directly or indirectly related to the circumstances (this requirement only applies to the extent that the applicant is aware of such information – the Panel does not expect an applicant to, for example, undertake independent litigation searches to ascertain whether there are any proceedings on foot which are related to the circumstances)

~~(iv)~~(v) state the interim orders or final orders sought and

~~(v)~~(vi) identify interested persons.

Rules 9(1) and 12(1)(a)-~~(ef)~~. 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: (except where the applicant is ASIC).

Rule 12(1)(~~gh~~)

(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)(fg). 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: (except where the applicant is ASIC).

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). Applicants are also encouraged to specify whether an interim order is being sought regarding a stay of any orders of the initial Panel.

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 9(1), 12(1)(~~fg~~), 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~~Rules 12(1)(~~fg~~), 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)(~~fg~~), 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 together 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

- (a) 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. In preparing the media release, the Executive will carefully consider and be mindful of matters asserted in the application which may be prejudicial to a party. Typically, the media release will be drafted only to address issues regarding Chapter 6 of the Corporations Act.
- (b) The media release on receipt of an application 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) There may also be instances in which an interim order is so urgent that an applicant may request the interim order prior to making an application. In these circumstances, the President may ask the applicant to provide an undertaking that the application be made within a certain time after receiving such a request, in the event that an interim order is made.

~~(d)~~(e) 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)~~(f) 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)~~(g) 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)~~(h) 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)~~(i) 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 sent to each person who has received the application and any person subsequently identified by the Panel.

- ~~(b)~~(c) 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.

See Rule 9(1)

- ~~(c)~~(d) Preliminary submissions may be made on a review application.

- ~~(d)~~(e) 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. Parties will generally be informed about the timing of the first Panel meeting.

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 party 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. If a document or~~ submission is provided after the time specified by the Panel, the Panel may ~~decide not to consider it~~ continue with the proceedings without regard to the document or submission.

See 5.7 ASIC Regulations regs 28, 30 and 34, Rule 10(8). See also 5.8 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.
- (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(1) 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 (as set out in the brief) has expired.

(b) The brief also specifies that any person accessing the virtual data room for a matter undertakes not to use or disclose any confidential information provided to it in the proceedings (including confidential information in the virtual data room).

ASIC Act s 201A

~~(b)~~(c) 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)~~(d) 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)~~(e) A single email should not be larger than 15 megabytes in total.

~~(e)~~(f) The subject of the email must contain the matter name.

~~(f)~~(g) 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 Panel meetings

Parties will generally be kept up to date about the timing of Panel meetings in relation to the proceedings. Where possible, the Panel will provide feedback from the meeting. However, this may not always be possible (for example, if the meeting does not result in a decision).

5.6.7 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

5.75.8 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.

5.85.9 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.

5.95.10 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)

5.405.11 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.

5.115.12 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 5.89 of these Guidelines above

7. Seeking a review of a Panel decision

- (a) Parties ~~have the right to~~ may 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)(ef)

- (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). See also 5.3(b) of these Guidelines above

- (b) Any ~~communications~~communication from, and any document provided by, the Panel (or before the Panel is appointed, the President) is confidential information (including a communication or document provided for comment or which is marked as a draft-is confidential) unless or until the Panel publishes such 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~~ The intent of the media canvassing rule is not to prevent discussion of matters which do not directly relate to issues in proceedings before the Panel. For example, where an application concerns a requisitioned spill meeting, the media canvassing rule does not prevent Panel proceedings are focused on the alleged association between the requisitioning shareholders. In this instance, the media canvassing rule would operate to prevent parties from discussing the alleged association. However, the rule would not prevent announcements or other communication communications in relation to the requisitioned meeting or the matters or the resolutions proposed to be moved at the that meeting that, as these issues do not directly relate to issues the association issue 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(43). See also 5.1112(c) of these Guidelines above

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

Rule 19(54)

- (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.~~
 - (i) talking to the media about closely related issues to those in the proceedings
 - (ii) briefing the media prior to the lodgement of an application or

(iii) directly approaching stakeholders regarding matters that could not be canvassed in the media.

- (h) The restrictions on media canvassing in Rule 19 do not apply to ASIC.

Rule 19(65)

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 information⁷

in each case, subject to the requirements of procedural fairness.

- (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.

- (b) All communications sent by the Executive are issued with an "Official" classification. This is a security classification used within the Department of Treasury (within which the Takeovers Panel sits). The classification does not have any particular meaning for the purposes of Panel proceedings.

Publication History

First issue: [1 April 2021]

Annexure D – Summary of Submissions

Remaking of Procedural Rules – Summary of material submissions and Panel response

This table summarises the material comments received from stakeholders in response to the Panel’s consultation paper on remaking the Procedural Rules, and the Panel’s response to that feedback. This table does not capture every comment received from stakeholders. It is intended to be a summary of material comments only and should not be considered a substitute for reading the full submissions.

Unless otherwise specified:

- References to the Procedural Rules and Procedural Guidelines in the “Comment” column are to the versions in the Consultation Drafts.
- References to the Procedural Rules and Procedural Guidelines in the “Panel’s Response” column are to the final versions in Annexure B to this Public Consultation Response Statement.

#	Comment	Panel’s response
Definitions		
1.	<p>Interested person</p> <p>Paragraph (a) of the definition of “interested person” in Rule 5 is “<i>a person entitled to be heard by the Panel before it makes a decision sought by the application</i>”. Consider whether paragraph (a) of the definition should be deleted as:</p> <ul style="list-style-type: none"> • query whether it adds anything meaningful to paragraphs (b) or (c) of the definition. • the breadth of the definition invites the applicant to send an application far and wide in purported compliance with the rule, which is not appropriate. 	<p>The Panel has not made this change. The Panel is of the view that the change is inappropriate as a definition of “interested person” which only includes paragraphs (b) and (c) (i.e. a person to whom a proposed declaration relates or to whom a proposed order would be directed) would be too narrow.</p> <p>The Panel does not agree that the breadth of the definition invites the applicant to send an application “far and wide”. The Panel notes that existing Procedural Rule 2.2.2 states that “<i>An application must be provided to ASIC and any person identified in the application as a <u>potentially interested person</u>.</i>” Note 1 to that rule further provides that “<i>As far as possible the applicant should identify all persons who <u>potentially have an interest</u> in the subject matter of an application.</i>”</p> <p>The Panel considers that the “<i>entitled to be heard by the Panel...</i>” standard in the definition of “interested person” in the new Rules reflects the hearing rule of procedural fairness. This standard is a more precise and narrow concept than the “potentially interested” standard in the existing Procedural Rules, but wider than the requirements outlined in</p>

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		paragraphs (b) and (c) of the definition of "interested person" in the new Rules.
2.	Notice to Become a Party The definition of "Notice to Become a Party" in Rule 5 should read " <i>a notice in the form <u>prescribed by the Panel</u> by which a person seeks to become a party</i> ".	The Panel agrees that this clarification is required to the definition of "Notice to Become a Party". However, the Panel has added the words "approved by the Panel" (rather than "prescribed by the Panel").
Provision of documents		
3.	Provision of documents References to "the President" in Rules 10(1) and (2) are confusing since access to the President does not occur in practice.	The Panel has amended Rule 10(1) to make clear that all documents in proceedings must be provided to the Executive. The Executive will then provide documents to the Panel or the President as applicable. The reference to "the President" has been removed from Rule 10(2).
Applications		
4.	Application for declaration and orders under s 657C Rule 12(1) should require the applicant to disclose if there are other proceedings on foot or anticipated in another forum (for example, a court).	The Panel agrees that disclosure of this information by the applicant should be required and has amended Rule 12(1) to include a new paragraph (d): " <i>provide details of any proceedings threatened or commenced in another forum which are directly or indirectly related to the circumstances</i> ".
5.	Application for review of Panel decision under s 657EA Rule 14(1) should list as a new item whether interim orders are being sought regarding a stay of the earlier Panel decision.	The Panel is of the view that this comment is better addressed in the Guidelines. Paragraph 3.5(i) of the Guidelines has been amended to include: " <i>Applicants are also encouraged to specify whether an interim order is being sought regarding a stay of any orders of the initial Panel.</i> "
Seeking to become a party		
6.	Acceptance of a party Rule 16(3) should require the Panel to notify a person when their Notice of Appearance has been accepted (not just when it has been rejected).	The Panel has not made this change. The Panel's practice regarding acceptance of a party to proceedings is explained in the Guidelines at paragraph 9.2(b).
7.	Notice to Become a Party – ASIC Clarify that the Notice to Become a Party requirement in Rules 12(1)(g) and 14(1)(c) do not apply to ASIC.	The Panel agrees with this clarification sought, which is consistent with the Panel's current practice. See amendments made to Rule 12(1)(h) (Rule 12(1)(g) of the Consultation Draft) and Rule 14(1)(c).

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8.	Interested person Rule 16(6) gives the Panel the ability to appoint or remove an interested person as a "party" to proceedings. It is unclear whether, by virtue of its status as a party, this may allow every interested person to seek to review a Panel decision as a party to the proceedings (i.e. whether the right is limited to the original/central parties to the proceedings). The Panel should clarify the ability of "interested persons" to seek review of a Panel decision, and consider whether all participants should be on an equal footing as "parties".	The Guidelines have been amended to provide clarification around this issue. Paragraph 3.2(b) of the Guidelines has now been amended to include: <i>"A party to the proceedings in which the decision was made includes an interested person who participated in proceedings and was deemed to be a party by the Panel pursuant to Rule 16(6)."</i>
Confidentiality obligation		
9.	Confidential information The Rules should include a definition of "confidential information" for the purposes of the confidentiality rule.	The Panel has not made this change. Given that the Panel has not encountered any substantive issues regarding what constitutes confidential information for the purposes of Panel proceedings, the Panel does not consider that any change is necessary. If there is uncertainty as to whether information constitutes "confidential information" for the purposes of the confidentiality rule, the relevant party should approach the Panel for clarification.
10.	Reasonable endeavours Rule 18(4) obliges a person to ensure that each of its Representatives who receives confidential information complies with Rule 18(1). Consider whether a "reasonable endeavours" standard to procure compliance is sufficient.	The Panel has not made this change because it only has visibility on parties and interested persons who have received confidential information in proceedings (and not the Representatives who receive confidential information).
11.	Exceptions to confidentiality The Rules/Guidelines should clarify how exceptions to confidentiality arise.	The Panel has not made this change. The Panel does not consider it necessary to be overly prescriptive in terms of the exceptions to the confidentiality obligation.
12.	Undertakings The Rules/Guidelines should reference confidentiality undertakings given by parties (section 201A of the ASIC Act and data room).	The Panel is of the view that this comment is best addressed in the Guidelines and has added as new paragraph 5.3(b) to the Guidelines: <i>"The brief also specifies that any person accessing the virtual data room for a matter undertakes not to use or disclose any confidential information provided to it in the proceedings (including confidential information in the virtual data room)."</i> The new paragraph cross references to section 201A of the ASIC Act.

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13.	Court processes The Panel should clarify how confidentiality obligations work alongside court processes.	The Panel has not made this change. The Panel is of the view that it would be difficult to provide general guidance to address this comment as the issue is matter specific.
14.	Panel communications Clarify whether emails to/from the Panel (other than under Rule 18(2)) are confidential. For example, if a party applies to the Panel for a determination that another party has breached Panel orders, are the various communication between the parties (and from the Panel) confidential?	The Panel has added a new paragraph 2(f) to the Guidelines to provide clarification on this issue: <i>"For a matter that is not an application under sections 657C, 657EA or 656A of the Corporations Act, the President or the Panel constituted in relation to that particular matter will determine the procedural rules to be followed in relation to that particular matter. Such matters include a request to make an application under section 657G of the Corporations Act to the Court to enforce a Panel order and an application under section 201A of the ASIC Act to withdraw or vary an undertaking accepted by the Panel. Generally speaking, the Rules will apply to any such matter unless the President or the Panel constituted in relation to that particular matter determines or directs otherwise."</i>
Publicity / Media canvassing restriction		
15.	Board spill exception Proposed Rule 19(3) provides a carve-out to the media canvassing restriction in relation to board spills. The rule may create some uncertainty for parties as to what matters are within the scope of the carve-out. It may not always be clear whether an announcement or communication <i>"directly relate to issues before the Panel"</i> , particularly in cases where an application that concerns a spill meeting is cast in broad terms or canvasses various interactions or allegations about certain shareholders and/or board members. Suggest the Guidelines could include an explanation of how Rule 19 applies (i.e. what matters fall within the scope of the intended carve out).	<p>The Panel has removed Rule 19(3) from the Rules. On reflection, the Panel is of the view that the proposed exception is not any different from the current position in respect of the application of the media canvassing rule (and adding a specific carve-out to the rule could therefore cause confusion).</p> <p>Instead, the Guidelines have been amended to provide clarification on the application of the media canvassing rule and explain that the intent is not to prevent discussion around issues that are not the focus of the Panel proceedings.</p> <p>Paragraph 10.3(c) of the Guidelines has been amended to read: <i>"The intent of the media canvassing rule is not to prevent discussion of matters which do not directly relate to issues in proceedings before the Panel. For example, where an application is made regarding an alleged association between shareholders in the context of a requisitioned spill meeting, the Panel proceedings are focused on the alleged association between the</i></p>

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		<p><i>requisitioning shareholders. In this instance, the media canvassing rule would operate to prevent parties from discussing the alleged association. However, the rule would not prevent announcements or other communication in relation to the requisitioned meeting or the matters or the resolutions proposed to be moved at that meeting, as these issues do not directly relate to the association issue before the Panel."</i></p> <p>Given the removal of Rule 19(3) from the Rules, the definition of "spill meeting" is not used and has been removed from the Rules.</p>
16.	<p>Media release on receipt of application</p> <p>Preference for less detail to be included in initial announcements by the Panel made when an application is received. This is particularly the case where matters asserted as facts may be disputed and prejudicial.</p> <p>Alternatively – if details of assertions in the application are to be included, there should be a reasonable opportunity for other parties to comment on those before an initial media release is published.</p> <p>The Guidelines should clarify the circumstances in which the Panel will publish a media release, having regard to its confidentiality obligations under section 186 of the ASIC Act and limit the content of any such media release, particularly the recitation of allegations that are not established facts.</p>	<p>The Panel considers it appropriate to update the Guidelines to specify that:</p> <ul style="list-style-type: none"> • The Executive will carefully consider and be mindful when drafting an application media release where matters asserted in the application may be prejudicial. • The application media release will typically be drafted to only raise issues regarding Chapter 6 of the <i>Corporations Act 2001</i>. <p>These changes are reflected at paragraph 4.1(a) of the Guidelines.</p> <p>The Panel does not consider that it would be practical to allow parties to comment on an initial media release prior to its publication (i.e. it would lead to parties making substantive submissions on the issues in the application). To allow parties to comment could also lead to delays in notifying the market of the application.</p> <p>The Panel is of the view that the publication of a media release upon receipt of an application is authorised by section 127(3) of the ASIC Act.</p>
17.	<p>Canvassing stakeholders</p>	<p>The Panel has added a new paragraph 10.3(g)(iii) to the Guidelines to provide clarification on this issue: <i>"The Panel expects that parties will not attempt to circumvent the media canvassing restriction by: (iii) directly</i></p>

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	<p>There have been instances where parties to Panel proceedings have approached stakeholders of other parties, to canvass matters directly with stakeholders that would be restricted by the media canvassing rules.</p> <p>While there should not be an impediment under Panel rules or orders to normal activist activities, or normal shareholder engagement, it should not be possible to directly approach stakeholders regarding matters that could not be canvassed in the media.</p>	<i>approaching stakeholders regarding matters that could not be canvassed in the media”.</i>
Other matters in the Guidelines		
18.	<p>Panel process – timing</p> <p>The Guidelines at paragraphs 6(c) and 6(d) allow the Panel a period of 1-2 weeks and 2-4 weeks respectively, to make certain decisions. This would be more clearly articulated in terms of business days.</p>	The Panel has not made this change given that the Panel does not operate strictly on business day terms.
19.	<p>Preliminary submissions</p> <p>The Guidelines should clarify that a preliminary submission should be sent to each person who received the application and anyone else who has since participated.</p>	The Panel has added a new paragraph 4.5(b) to the Guidelines to provide clarification on this issue: <i>“Preliminary submissions should be sent to each person who has received the application and any person subsequently identified by the Panel.”</i>
20.	<p>Page limits</p> <p>The Guidelines as to page limits (e.g. paragraphs 3.6 and 4.5(b)) should cross refer to the “succinct” requirement of Rule 9.</p>	The Panel has added cross references to Rule 9(1) in the relevant paragraphs of the Guidelines which comment on the form of documents to be provided to the Panel (including as to page limits) – see changes at paragraphs 3.6, 4.5(c) and 5.2(a).
21.	<p>Multiple applications</p> <p>The Rules/Guidelines could explain that multiple applications which cover similar subject matters can be heard together, and how such matters are addressed.</p>	The Panel has not made this change as it is of the view that this comment is sufficiently covered by paragraph 3.10(b) in the Guidelines.
22.	<p>Fees</p> <p>The Guidelines at paragraph 3.4 could:</p> <ul style="list-style-type: none"> note that Panel application fees are updated from time to time, and how or when such changes typically occur. explain the circumstances in which an application might involve 2 or more fees. 	The Panel has not made this change as Panel application fees are not updated regularly. If there was a change to Panel fees under the <i>Corporations (Fees) Regulations 2001</i> , the Guidelines would be updated to reflect that change. A Panel application only attracts one fee. However, if an application combines two types of applications, e.g., an application

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		under section 657C for a declaration and orders and an application under section 656A for a review of a Panel decision, two fees are payable.
23.	Interim orders The Guidelines at paragraph 4.4 could: <ul style="list-style-type: none"> • explain that the President can make interim orders off the back of an undertaking to make an application in urgent circumstances. • specify a time period (e.g. 2 business days) to make an application in the case of such an undertaking. 	The Panel has included a new paragraph 4.4(d) in the Guidelines to provide guidance on this issue: <i>"There may also be instances in which an interim order is so urgent that an applicant may request the interim order prior to making an application. In these circumstances, the President may ask the applicant to provide an undertaking that the application be made within a certain time after receiving such a request, in the event that an interim order is made."</i>
24.	Classifications The Guidelines could explain what is meant by communications from the Panel issued with the "Official" terminology.	The Panel has included a new paragraph 14(b) in the Guidelines to explain the "Official" terminology used in its communications: <i>"All communications sent by the Executive are issued with an "Official" classification. This is a security classification used within the Department of Treasury (within which the Takeovers Panel sits). The classification does not have any particular meaning for the purposes of Panel proceedings."</i>