



Australian Government

Takeovers Panel

Consultation Paper

Guidance Note 4 Remedies General

2 September 2016

Introduction

1. The Panel invites comments on the draft Guidance Note attached. The time for comments is open until Friday, 14 October 2016.
2. Comments or queries can be directed to:

<p>Allan Bulman Director, Takeovers Panel Email: takeovers@takeovers.gov.au</p>

3. It is Panel policy that submissions are published on its website.
4. The Panel will consider all comments and reserves the right to make changes to the draft Guidance Note in response to comments or otherwise.

Background

5. It is usual Panel practice to provide parties with a draft of any declaration of unacceptable circumstances that the Panel is minded to make and seek comments before finalising the declaration.¹
6. Guidance Note 4 indicates the Panel's willingness to accept undertakings in the following terms:

An agreed resolution, such as by undertakings, can be more flexible and quicker than orders. It may also obviate the need for the Panel to make a declaration. A party may offer an undertaking to resolve the matter at any point in the Panel's process.²

and

The Panel encourages parties to resolve matters wherever possible and welcomes any offer by a party to remedy potential unacceptable circumstances at any stage of Panel proceedings. The Panel is more receptive to resolutions proposed by the parties if they are offered earlier in the process. It may require more from a party offering a resolution if the Panel has already communicated its intention to make a declaration.³

7. In a post-matter review, a party to the proceedings stated that it had an expectation based on the Panel's Procedural Rules and Guidance Note 4 that it was not too late to offer an undertaking at the "minded to declare" stage of proceedings and have it accepted. In that matter, the Panel declined the offer of the undertaking.

¹ Note 1 to Procedural Rule 7.1.1

² Guidance Note 4 *Remedies General* at [39]

³ Guidance Note 4 at fn 8

8. The Panel has recently declined to accept an undertaking and made a declaration in *Brisbane Markets*⁴ and (in slightly different circumstances) *Condor Blanco*⁵ but accepted undertakings and declined to make a declaration in *Ainsworth Game Technology*.⁶
9. The revised Guidance Note 4 amends paragraph 39 and footnote 8 to clarify that, while a party may offer an undertaking to resolve a matter at any point in the Panel's process, the timing of the offer is a relevant factor when the Panel is exercising its discretion whether to accept an undertaking in lieu of a declaration or orders.

Issues

10. Comments are sought on whether the amendment to the Guidance Note clarifies that the Panel considers a balance of factors, including timing, when exercising its discretion whether to accept an undertaking in lieu of a declaration or orders.
11. Comments are also sought on whether the Panel's general policy in favour of accepting an undertaking in lieu of a declaration (see paragraph 40 of the Guidance Note) acts as a disincentive to parties to offer undertakings earlier in the process when the benefits of resolving the matter are at their greatest.
 - a) If so, should the general policy be changed?
 - b) Does the amendment to the Guidance Note at paragraph 39 provide sufficient flexibility to allow the Panel to decline to accept an undertaking in lieu of a declaration on the basis that little or no benefit is gained from accepting the undertaking at the "minded to declare" stage of proceedings?
12. Comments are also sought on whether the policy should expressly state that the Panel is unlikely to accept an undertaking late in the process if it may deprive a party of an outcome having regard to the conduct of the party offering the undertaking (for example, a costs order for unnecessarily delaying or obstructing proceedings).
 - a) Does the Guidance Note already provide sufficient flexibility to the Panel to consider such concerns? See, for example, paragraphs 24 and 40. If not, are other – and what – amendments warranted?

Attachments

- 1 Draft updated GN 4 Remedies General

⁴ *Brisbane Markets Limited* [2016] ATP 3

⁵ *Condor Blanco Mines Limited* [2016] ATP 8

⁶ *Ainsworth Game Technology Limited 01 & 02* [2016] ATP 9



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Takeovers Panel

Guidance Note 4 - Remedies General

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Background

1. This guidance note has been prepared to assist market participants understand the Panel’s approach to remedies generally. The examples are illustrative only and nothing in the note binds the Panel in a particular case.
2. If the Panel makes a declaration of unacceptable circumstances,¹ it may make orders:

¹ Section 657A of the *Corporations Act 2001* (Cth). All references are to the Corporations Act unless otherwise indicated

- (a) to protect rights or interests affected by the unacceptable circumstances or
 - (b) to ensure (as far as possible) that a bid proceeds as if the unacceptable circumstances had not occurred.²
3. The Panel may not make an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C.
4. The Panel may make interim orders.³ These can be to the same effect as final orders, can operate for up to 2 months and do not require a declaration of unacceptable circumstances to be made first.
5. The Panel does not seek to punish when deciding on a remedy. But the remedy may adversely affect a person, provided it is not unfairly prejudicial.⁴ In addition, a declaration, orders or other statement (eg, reasons) may expressly or impliedly involve a reprimand of a party or adviser.

Declaration of unacceptable circumstances

6. The Panel may declare circumstances unacceptable in relation to the affairs of a company. This both conveys the Panel's view that standards have not been met and enables the Panel to make final orders.⁵
7. Declarations are published in the Government Gazette.⁶
8. A copy of a declaration (and of the Panel's reasons for making it) must be given to each person to whom the declaration relates.⁷
9. The Panel usually informs the parties of its intention to make a declaration, inviting comments on technical and factual aspects of the

² Section 657D(2)

³ Section 657E

⁴ This may be described as the fairest order having regard to the various interests to be reconciled and the discretion to be exercised. Cases include *Gjergja v Cooper* [1987] VR 163; *ASIC v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 at [117]-[169]; *Flinders Diamonds Ltd v Tiger International Resources Ltd* [2004] SASC 119 at [63]-[79]. As to balancing the rights of buyers and sellers on market, examples include *NCSC v Monarch Petroleum NL* [1984] VR 733, 8 ACLR 785, 2 ACLC 256 and *ASC v Mt Burgess Gold Mining Co NL* (1994) 62 FCR 389, 15 ACSR 714, 13 ACLC 271

⁵ The Panel may make a declaration of unacceptable circumstances but no orders: Examples - *BreakFree Limited 04* [2003] ATP 39; *BreakFree Limited 04(R)* [2003] ATP 42; *Summit Resources Limited* [2007] ATP 09; in *Gondwana Resources Limited* [2014] ATP 9, the Panel accepted undertakings in lieu of orders. See also GN 1

⁶ Section 657A(5)

⁷ Section 657A(6)

draft document. The Panel may at that stage be prepared to consider a remedy for the unacceptable circumstances, without the need for a declaration and orders, although of course parties are free to offer a remedy at any time.⁸

Interim orders

10. Interim orders are usually made to prevent unacceptable circumstances from happening, continuing or getting worse while proceedings are conducted. They may be made to preserve the status quo until proceedings are completed. They may also be made to ensure that the Panel's power to fashion the most appropriate remedy in the circumstances is not forestalled by intervening events.
11. The Panel can make any order as an interim order that it can make as a final order.
12. Relevant factors for making an interim order include:
 - (a) whether the risk that unacceptable circumstances will occur, continue or worsen in the absence of an order outweighs the adverse effects of the order on the person to whom it is directed and the market
 - (b) the strength of the evidence
 - (c) whether the circumstances can be adequately remedied by final relief alone and
 - (d) the availability of alternative measures, such as undertakings.
13. In general, the Panel will not hold up a transaction by interim orders, unless mischief will occur that cannot, or cannot conveniently, be reversed by final orders.⁹

Example: Unless the information deficiencies are significant, it will usually be preferable to allow a bidder's statement to be dispatched pending a final decision on the alleged deficiencies.

⁸ The Panel encourages parties to resolve matters wherever possible and welcomes any offer by a party to remedy potential unacceptable circumstances at any stage of Panel proceedings. The Panel is more receptive to resolutions proposed by the parties if they are offered earlier in the process. It may require more from a party offering a resolution if the Panel has already communicated its intention to make a declaration. [See paragraph 39 below](#)

⁹ See eg, *Village Roadshow Limited* [2004] ATP 04 at [94]; *Gondwana Resources Limited 02* [2014] ATP 15 at [16] and [18]; *Ambassador Oil and Gas Limited 02* [2014] ATP 17 at [12]

Final orders

14. The Panel may make any final order that meets the description in paragraph 2. This includes remedial orders,¹⁰ ancillary or consequential orders, and costs orders.
15. The Panel considers that its power to make orders includes power to make an order:
 - (a) that a person do something contrary to a relevant provision in the Act (eg, Chapter 6). The Panel does not consider that the power extends to making an order that a person do something contrary to another law (eg, Foreign Acquisitions and Takeovers Act).¹¹ As part of their submissions on proposed orders parties should refer to any such issues, in which case the Panel will consider how it might recast the order to avoid that issue
 - (b) that affects property interests¹² or existing legal rights and obligations.¹³
16. Before making final orders the Panel must:
 - (a) have made a declaration of unacceptable circumstances
 - (b) give each party, each person to whom the proposed order would be directed and ASIC an opportunity to make submissions. If there are identified persons or groups who may be affected, the Panel may seek their comments even if they are not parties. This may be done by inviting them to become a party¹⁴ or by allowing them to make a submission without becoming a party (in this case the invitation may be by media release and not direct correspondence)¹⁵
 - (c) be satisfied that the order would not unfairly prejudice any person. This involves consideration of the prejudice that different

¹⁰ Defined in section 9

¹¹ See *Attorney-General (Cth) v Alinta* [2008] HCA 2 esp at [14] per Gummow J and [96] per Hayne J; *ASC v Bank Leumi Le-Israel (Switzerland) & Ors* (1996) 14 ACLC 1576 at 1588-9. There may be limited other areas with a sufficient nexus to Chapter 6 that an order under section 657D also overrides that law. The party asserting this in a particular case would need to convince the Panel of it

¹² *AMP Shopping Centre Trust (No. 2)* [2003] ATP 24 at [38]-[41]

¹³ *Pinnacle VRB Ltd (No. 11)* [2001] ATP 23

¹⁴ This was done in *AMP Shopping Centre Trust (No 1) and (No 02)*. Not accepting an invitation until late in the proceedings may have costs implications: *AMP Shopping Centre Trust (No 01)* [2001] ATP 21 at [117]

¹⁵ ASIC Regulations 23 and 24 and see *BreakFree 04(R)* [2003] ATP 42 at [77]

persons or groups may suffer by making or not making the order¹⁶ and

- (d) consider that the proposed order protects rights or ensures that the bid proceeds as it should have (see paragraph 2).
17. In deciding what orders to make, the Panel considers how the order would promote the objectives set out in section 602 and whether the remedy is proportionate to the mischief.
18. Orders may be time sensitive. An order that is appropriate at the commencement of a matter may be inappropriate days later because the market has moved or third persons have changed their positions.
19. A copy of an order (and of the Panel's reasons for making it) must be given to:
- each party
 - each person to whom the order is directed (if not a party)
 - the company (if the order relates to its securities) and
 - ASIC.
20. Orders are published in the Government Gazette.¹⁷ However, the order takes effect when made.
21. In the event of non-compliance with an order, the Panel, ASIC, a party or a person to whom the order relates may apply to the Court for an order to secure compliance.¹⁸ The Court may make any orders it considers appropriate to secure compliance with the Panel's order.

Protecting rights or interests

22. Final orders to protect rights might include (for example) cancelling contracts,¹⁹ freezing transfers, freezing rights attached to securities,

¹⁶ See footnote 4

¹⁷ Section 657D(4)

¹⁸ Section 657G

¹⁹ *Allegiance Mining NL* [2008] ATP 3; *Mount Gibson Iron Ltd* [2008] ATP 4; *Touch Holdings Limited* [2013] ATP 3; *STI-Global Limited* [2013] ATP 12

forcing the disposal of securities²⁰ and establishing rights to withdraw acceptances.²¹

Getting the bid back on track

23. Final orders to get the bid back on track might include (for example) allowing more time or information for shareholders to assess the merits of the proposal²² or establishing rights to withdraw acceptances.

Costs orders

24. Costs may be a relevant factor in deciding whether to make an interim order, conduct proceedings, consent to a review or accept an undertaking instead of making a declaration.

Power to order costs

25. The Panel only has power to order costs of parties if it has made a declaration.²³ It cannot order costs:
 - (a) to a successful respondent, even if it declines to conduct proceedings because they are frivolous or vexatious
 - (b) if it finds unacceptable circumstances, but makes no declaration because it accepts an undertaking to remedy the circumstances
 - (c) to the Panel or non-parties or
 - (d) in an application under s656A (review of ASIC's exemption or modification power).
26. Costs may be directed to be borne by a party or another person.
27. It may be appropriate to award costs to ASIC where it has participated as a party in an application under s657C.

²⁰ *Midwest Corporation Ltd 02* [2008] ATP 15; *DataDot Technology Limited* [2009] ATP 13; *Bowen Energy Limited 02R* [2009] ATP 19; *Viento Group Limited* [2011] ATP 1; *CMI Limited* [2011] ATP 4; *CMI Limited 01R* [2011] ATP 6; *Real Estate Capital Partners USA Property Trust* [2012] ATP 6; *Avalon Minerals Limited* [2013] ATP 11; *Gondwana Resources Limited 02* [2014] ATP 15

²¹ See *Skywest Limited 03R* [2004] ATP 20; *Consolidated Minerals Limited 03* [2007] ATP 25; *Consolidated Minerals Limited 03R* [2007] ATP 28; *Firestone Energy Limited* [2013] ATP 4; *Avalon Minerals Limited* [2013] ATP 11; *Ambassador Oil and Gas Limited 01* [2014] ATP 14. In *Goodman Fielder Limited* [2003] ATP 1 an undertaking (with ASIC relief) was accepted for offering of withdrawal rights. Similarly in *Mildura Co-operative Fruit Company Limited* [2004] ATP 5

²² *Ranger Minerals Ltd* [2002] ATP 11; *Skywest Limited 04* [2004] ATP 26; for an example of an order having the same effect see *Firestone Energy Limited* [2013] ATP 4

²³ Sections 657D(1) and 675D(2)(d). A costs order is a type of final order. The Panel has recently made cost orders, for example, in *Minemakers Limited* [2012] ATP 8, *Austock Group Limited* [2012] ATP 12, *IFS Construction Services Limited* [2012] ATP 15 and *Northern Iron Limited* [2014] ATP 11

Considerations

28. The Panel's approach to cost orders is guided by the following considerations:
- (a) the Panel's primary role is to resolve disputes expeditiously and informally
 - (b) a declaration relates to circumstances, not conduct, and may involve no finding of fault
 - (c) costs orders are the exception not the rule, so may not follow to a 'successful' party and
 - (d) a party is entitled to make, or resist, an application once without exposure to a costs order, provided it presents a case of reasonable merit in a businesslike way.²⁴
29. Costs may be awarded against a party if it:
- (a) presented a case that was not arguable or made unsubstantiated assertions²⁵
 - (b) delayed or obstructed proceedings,²⁶ abused the process²⁷ or unreasonably refused to negotiate²⁸
 - (c) sought an unmeritorious review²⁹ or put material before a review Panel that it failed to put before the initial Panel
 - (d) wasted time on a particular issue or elongated proceedings³⁰ (partial costs referable to the additional expenses may be appropriate in this case) or
 - (e) failed to comply with a direction under ASIC regulation 16(1) or Panel order³¹ (the costs of the other parties attributable to the failure may be ordered).

²⁴ For an example of a case presented without reasonable merit see *Northern Iron Limited* [2014] ATP 11 at [64]

²⁵ Includes reckless or deliberate misquoting of source documents

²⁶ *Infratil Australia 02* [2000] ATP 1 at [63]

²⁷ Including taking advantage of the financial weakness of another party. See also *Pinnacle VRB Limited (No. 11)* [2001] ATP 23

²⁸ Including refusing a reasonable compromise during negotiations

²⁹ *Taipan Resources NL (No. 11)* [2001] ATP 16 at [100]-[101]

³⁰ For example by providing multiple drafts of inadequate additional disclosure, *Minemakers Limited* [2012] ATP 8 at [73]-[76]

³¹ *IFS Construction Services Limited* [2012] ATP 15 at [79]

Undertakings to pay costs

30. The Panel has power to accept a written undertaking from a person to pay such costs as determined by the Panel if an application fails.³²
31. An undertaking may be offered, for example:
 - (a) to persuade a Panel to conduct proceedings or grant an interim order where it has otherwise formed a preliminary view that it will not do so³³ or
 - (b) to persuade a review Panel to conduct proceedings.
32. Such an undertaking would be to pay the costs of the other parties in the event that the application (review) fails. In the case of a review, it might extend to the costs of other parties on the initial application and on review.

Amount of costs

33. The scale is usually the Federal Court scale of fees on a party-party basis, but it may be higher, including full indemnity costs.
34. In general, costs orders or costs undertakings are limited to the costs actually, necessarily, properly and reasonably incurred in the course of the proceedings.³⁴ They may include costs of legal and other advisers and of directors, and extend to the costs incurred in recovering costs.

Procedural issues regarding costs orders

35. The Panel will generally include a procedure for assessing and paying costs when making a costs order. Undertakings should also address this.
36. An example costs order is Attachment A.
37. The confidentiality undertaking in relation to Panel proceedings applies to the whole of the proceedings. It therefore applies to the production of documents to an independent cost consultant for assessment.

Undertakings

38. Matters before the Panel may be resolved by undertakings under section 201A of the *ASIC Act 2001* (Cth).

³² Section 201A of the ASIC Act

³³ *Taipan Resources NL (No. 11)* [2001] ATP 16 at [98]-[99]

³⁴ *Skywest Ltd 04* [2004] ATP 26 at [93]. In *Realestate.com.au Ltd* [2001] ATP 1 the Panel suggested that cost claims needed to set out and justify the amount claimed

39. An agreed resolution, such as by undertakings, can be more flexible and quicker than orders. It may also obviate the need for the Panel to make a declaration. A party may offer an undertaking to resolve the matter at any point in the Panel's process. [However, the timing of the offer is a relevant factor that the Panel considers when exercising its discretion whether to accept an undertaking in lieu of a declaration or orders.](#)³⁵
40. The Panel considers that the public interest is generally served by accepting an undertaking that addresses unacceptable circumstances to the Panel's satisfaction.³⁶ The Panel may not then need to make a declaration or orders, although it may still make a declaration if it wants to send the market a signal.³⁷
41. An undertaking should be as simple and direct as possible.
42. If not addressed, the following provisions will be implied into an undertaking:
 - (a) the person offering it will do all that is necessary to secure performance of it and to enable persons whose rights and interests are affected by the circumstances to have the benefit of it³⁸ and
 - (b) it will be fulfilled as soon as practicable.
43. In the event of non-compliance with an undertaking, the Panel may apply to the Court for an order directing the person to comply.³⁹ The Court can make any order including that a person comply with the undertaking or pay compensation.

Other outcomes

44. The Panel's functions extend beyond resolving disputes. This is explicit from the rule-making power under section 658C, which gives the Panel power to establish standards. The Panel also publishes guidance, media announcements and reasons.

³⁵ [For example, the Panel considered the approaching deadline to make a declaration under s657B, as well as the time required to address satisfactorily the Panel's disclosure concerns, as relevant factors in declining to accept an undertaking in lieu of a declaration in *Brisbane Markets Limited* \[2016\] ATP 3 at \[108\]-\[111\]. See also footnote 8 above](#)

³⁶ Similar to the maxim "It is in the republic interest that there be an end to litigation" (*interest reipublicae ut sit finis litium*)

³⁷ *Summit Resources Limited* [2007] ATP 09; *Mildura Co-operative Fruit Company Limited* [2004] ATP 5 at [96]

³⁸ *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 26 ALR 567

³⁹ Section 201A(3) of the ASIC Act

Reasons

45. If the Panel decides not to conduct proceedings,⁴⁰ or makes a declaration⁴¹ or orders,⁴² it must give the parties a statement of reasons for its decision, although these may not address all the submissions made. The Panel may also give reasons when it accepts an undertaking or takes no action. The President may give reasons when consenting or declining to consent to a review of a Panel decision.⁴³
46. The Panel will normally publish its reasons.⁴⁴ It generally gives parties a confidential draft of its reasons and an opportunity to make submissions on issues of fact or unfair prejudice. Reasons may include reflections on the actions of a person or a reprimand of a person. The person should not be unaware of the risk of an adverse finding.⁴⁵ The Panel has wide immunities for comments it might make,⁴⁶ but of course must be fair, proportionate and base its comments on credible information.

Advisers

47. In most cases advisers are more familiar than their clients with the technical, procedural, strategic and tactical aspects of takeovers. The Panel has no formal powers to deal with advisers, but expects advisers to take all reasonable steps to ensure their clients comply with the law, ASIC policies, stock market rules and Panel policies (and, if there is an application, with the Panel's *Rules for Proceedings*).⁴⁷
48. Advisers may be referred to (and even criticised) in the reasons for decision.

⁴⁰ ASIC regulation 21(2)(c)

⁴¹ Section 657A(6)

⁴² Section 657D(4)

⁴³ Section 657EA(2). The reasons for consent may be incorporated into the sitting Panel's reasons. The President has published separate reasons for declining to consent in *Careers Australia Group Limited 03R* [2015] ATP 2 and *Austral Coal Limited 03R* [2005] ATP 15

⁴⁴ Including the reasons of any member dissenting from the majority, see *Pasminco Ltd (Administrators Appointed)* [2002] ATP 6 and *Touch Holdings Limited* [2013] ATP 3. Findings of fact in an order or reasons are *prima facie* evidence of the fact: s658B

⁴⁵ *Annetts v McCann* (1990) 170 CLR 596

⁴⁶ Section 197 of the ASIC Act

⁴⁷ Note that a party's undertaking concerning confidentiality and media canvassing under section 201A of the ASIC Act is given on behalf of its advisers as well. The Panel considers that it is accordingly an obligation of the advisers not to act in a way that would lead to a breach of its client's undertaking

Other actions

49. The Panel may take other actions as well. These include:
- (a) privately admonishing a person
 - (b) reporting its findings to ASIC,⁴⁸ or a person’s ‘employer’, or a person’s professional organisation or
 - (c) including its findings in a media release.

Publication History

GN 4		GN 9	
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Second Issue	12 July 2004	Second Issue	12 July 2004
Third issue	17 September 2007	Withdrawn	1 October 2008
Fourth issue	1 October 2008		
Fifth issue	27 May 2015		
<u>Sixth issue</u>			

Related material

GN 5: Specific remedies - Information deficiencies

⁴⁸ ASIC regulation 18

Attachment A: Example of costs order terms

A costs order may include the following terms:

1. Within 10 business days of the date of the order, each payee (ie, a party in whose favour the costs order is made) must provide the payer (ie, the party against whom the costs order was made) with a bill of their costs actually, necessarily, properly and reasonably incurred in the course of the proceedings.
2. The bill must be itemised in sufficient detail for the payer to make an assessment of whether it will agree to pay it.
3. Within 5 business days of receipt of the bill, the payer must tell the Panel and the payee whether it will pay the bill.
4. If the payer does not object, it must pay the costs within 10 business days of receipt of the bill.
5. If the payer objects:
 - (a) the Panel will appoint an independent cost consultant to assess the costs and
 - (b) if required by the Panel, the payee must provide a bill of costs in taxable form and make its file available to the cost consultant
6. Within 10 business days of the assessment:
 - (a) the assessed costs must be paid by the payer and
 - (b) the consultant's costs must be paid:
 - (i) by the payee, if the cost consultant reduced the costs by 10% or more or
 - (ii) otherwise, by payer.
7. The Panel may, on application, make a further order for payment of interest if a person fails to meet the deadlines in these costs orders.