



**Public Consultation Response Statement 2 issued on 30 August 2002**

**CONFLICTS OF INTEREST GUIDANCE NOTE**

**STATEMENT BY**

**THE CONFLICTS SUB-COMMITTEE OF THE TAKEOVERS PANEL**

**FOLLOWING THE PUBLIC CONSULTATION PROCESS ON CONFLICTS**

**1. Introduction**

- 1.1. On 7 June 2002, the Conflicts Sub-Committee of the Takeovers Panel released for public comment a draft Guidance Note on conflicts of interest as they relate to Panel members sitting on individual matters.
- 1.2. The Panel invited comments from interested persons by 19 July 2002.
- 1.3. Consistent with the Panel's Guidance Note on Consultation Procedures, the purpose of this paper is to provide details of the Sub-Committee's response to the public consultation process on the draft Guidance Note.
- 1.4. The Panel received one submission in response to the draft Guidance Note during the public consultation period. The respondent considered that the draft Guidance Note adopted a sensible approach to the issue of conflicts, but made some comments relating primarily to transparency of process. Those comments, and the response of the Sub-Committee, are outlined in paragraph 2 below.

**2. Material Comments Received and the Sub-Committee's Conclusions**

- 2.1. The respondent made submissions in relation to the transparency of process involved in the assessment by members of their interests, their appointment to a sitting Panel, and disclosure of members' interests to the parties to Panel proceedings. The respondent commented that paragraph 14 of the draft Guidance Note adopted the right approach by stating that all interests disclosed by a member to the President of the Panel would be disclosed to the parties. The respondent submitted, however, that paragraph 32 of the draft

Guidance Note detracted from this by suggesting that the President may vet a member's disclosure of interests before providing that disclosure to the parties.

The respondent also submitted that paragraph 36 of the draft Guidance Note suggested that a member's interest would not be disclosed to parties if the President considers the interest to be too remote. The respondent queried how the President would decide that an interest is too remote if the member is aware of the interest and discloses that interest to the President.

*The Sub-Committee's conclusion: The Sub-Committee agrees that, in the interests of transparency of process, all interests disclosed by a member to the President as being potentially relevant should be disclosed to the parties. It has amended paragraphs 32, 33 and 36 of the Guidance Note accordingly.*

- 2.2. In relation to the materiality of a member's interest which affects whether or not it will prevent that member from being appointed to a sitting Panel, the respondent submitted that the President should not take a "robust view" of materiality (as stated in paragraph 34 of the draft Guidance Note), but that materiality should be determined in the reasonable opinion of the President.

*The Sub-Committee's conclusion: The Sub-Committee agrees that the materiality of a member's interest should be determined in the reasonable opinion of the President. However, given that the Australian takeovers community is small, the Sub-Committee considers that it would be impractical to exclude a member from sitting on a matter merely because there is, or has been, some connection between that member's firm or company and a party to proceedings. Therefore, the Sub-Committee considers that it would be reasonable in such cases for the President to take a robust view that the interest is immaterial, provided the interest is disclosed to the parties. It, therefore, maintains its position in relation to paragraph 34 of the Guidance Note.*

- 2.3. Finally, the respondent submitted that the Panel's approach taken to member's conflicts as set out in paragraphs 30 and 36 of the draft Guidance Note was inconsistent with one another. Paragraph 30 of the draft Guidance Note stated that members who worked for large international investment banks and accounting firms would not be required to inquire whether associated but distinct organisations provide services unconnected with the member or the transaction before the Panel. By way of example, it was stated that a member in the corporate finance division of a bank may not inquire about commercial lending services, not related to the Panel proceedings, provided to a party by a separate division of the bank and of which the member has no knowledge or involvement.

Paragraph 36 of the draft Guidance Note stated that a member whose firm has a relationship with a party to Panel proceedings would not be appointed to a sitting Panel unless the relationship is such that it clearly does not give

rise to a conflict or a reasonable apprehension of bias. This was stated to be the case even if the member has no direct involvement in the relationship. The example given was that of a member who is involved in the corporate finance division of an accounting firm, and whose firm provides audit, general tax, legal or accounting services to a party.

*The Sub-Committee's conclusion: The Sub-Committee notes that paragraphs 30 and 36 were intended to serve different purposes. Paragraph 30 was intended to convey that the scope of a member's conflict inquiry will be limited to what is reasonable in the circumstances, while paragraph 36 was intended to indicate that a member whose firm has a relationship with a party of which the member is aware (after having conducted reasonable inquiries) will not generally be appointed to a sitting Panel. The Sub-Committee has amended paragraphs 30 and 36 of the Guidance Note to state more clearly the intention of each paragraph, and to overcome any perceived inconsistency between the two.*

Alison Lansley, Alice McCleary and Professor Ian Ramsay

### **The Conflicts Sub-Committee**

*The Appendix to this document sets out in full the Guidance Note on Conflicts as amended by the Sub-Committee following the public consultation process.*

## APPENDIX

### Overview

The Panel aims to maintain open and transparent processes and lines of communication in assessing potential conflicts of interest in accordance with the requirements of the Australian Securities and Investments Commission Act 2001 (**ASIC Act**).

The Panel's position is that all material relevant interests of which the President of the Panel becomes aware as a result of inquiries for the purpose of appointing a sitting Panel to hear a matter will be disclosed to the parties to proceedings. This is the case even where those interests are not sufficiently direct to give rise to a conflict in respect of the relevant Panel member.

The Panel has in place procedures to assist members in assessing potential conflicts of interest, notifying these to the President of the Panel and to parties in order to facilitate a speedy appointment of an appropriate sitting Panel where proceedings are to be conducted.

This guidance note sets out the principles that the Panel and its members apply when assessing interests of the latter and potential conflicts of interest. The types of interest that the Panel considers do, or do not, give rise to a conflict of interest are discussed.

The guidance note is designed to provide takeovers market participants with an understanding of the process the Panel undertakes to ensure that conflicts of interest are appropriately dealt with, that parties are afforded due procedural fairness and that the Panel complies with its obligations under the ASIC Act.



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## Obligations under the ASIC Act

1. Division 2 of Part 10 of the ASIC Act contains the provisions regarding the assessment, and disclosure, of interests by Panel members and the President for the purpose of considering potential conflicts of interest.
2. Subsection 185(1) states that a member who has or acquires an interest that could conflict with the proper performance of the member's functions in relation to a particular matter must disclose the interest to the President and the parties involved in the matter. The member may not take part in the performance of the Panel's functions or powers in relation to that matter, without the President's consent.
3. Under subsection 185(1A), the President may not allow a member to take part in a sitting Panel on a matter if that member has an interest which could conflict with the proper performance of the member's duties and would prevent them from acting impartially in relation to the matter.
4. The President may, however, consent to the member taking part where the President believes, on reasonable grounds, that the member's interest is immaterial or indirect and will not prevent them from acting impartially in relation to the matter (subsection 185(1A)).

## *Process upon receipt of an application*

5. Upon receipt of an application to the Panel the President<sup>1</sup> of the Panel must appoint three members to be the sitting Panel (subsection 184(1)). The sitting Panel must then consider whether it will commence proceedings in relation to the matter (ASIC Regulation 20).

## *Consideration of substantive President's interests*

6. Before considering who should be appointed to the sitting Panel, the President must first consider whether they have any material conflicts or biases that would prevent them from appointing the sitting Panel. If such a conflict or bias exists, the President advises that they are absent from the office of President, due to a conflict which prevents them from carrying out the duties of President. An acting President is then charged with the responsibility for appointing the sitting Panel. Pursuant to a standing instrument under subsection 182(1)(b), there are currently two members who may become acting President.

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<sup>1</sup> Unless stated otherwise, the term "President" when used in this paper refers to the person appointed under section 173 of the ASIC Act.

### *Identifying potential sitting Panel members*

7. The President will consider which members should be asked to sit on the Panel for that particular matter. In addition to the other factors which the President may consider when appointing members to a sitting Panel (such as a member's availability, qualifications and expertise, etc), the President will use information provided by the applicant pursuant to Panel Rules 2.1(b), (c) and (d) to assist in considering whether a member has a material conflict that prevents them from being appointed to the sitting Panel.
8. Panel Rules 2.1 (b), (c) and (d) require an application initiating proceedings to identify:
  - any person (or class of persons) known to the applicant who would be materially affected by the grant of the relief;
  - the directors, legal and financial advisers, auditors and principal financiers of the applicant; and
  - each other person (other than ASIC) who is likely to become a party, so far as they are known to the applicant.
9. To assist a sitting Panel to be constituted expeditiously, it is important that the applicant provides the information required by Panel Rules 2.1(b), (c) and (d) at the time of the application.
10. With the Panel Executive's help, the President identifies three or more members who are available to sit on the Panel. The Panel Executive asks these members to consider their personal and professional interests in relation to the matter, and to advise the Panel Executive of any relevant interests. That information is taken into consideration by the President when they make an assessment as to whether any of these members has a material interest or other conflict which would prevent any of them from being appointed to the sitting Panel.
11. Panel members have deliberately been appointed from diverse disciplines and backgrounds to ensure that a wide range of views may be brought to bear on any given matter, particularly from a legal, financial and commercial perspective. This diverse membership reduces the potential for conflict, and ensures an appropriate membership of the sitting Panel for a particular matter.
12. Under section 185(1A) of the ASIC Act the onus is on the President to make that decision. If the President decides that there is no reason for them not to appoint a member to the sitting Panel then, pursuant to section 184, the President will direct that the Panel be constituted by those members for the purpose of the performance or exercise of its functions or powers in relation to the matter.
13. If the President determines that a member proposed for a sitting Panel has an interest or other relationship that could conflict with performance of their functions in

relation to a matter, then that member will not be appointed and the President will consider alternative members for that sitting Panel.

### **Disclosure and opportunity for parties to consider interests**

#### *Transparency of process*

14. The Panel believes that it is important for parties and their advisers to understand the process that the Panel adopts for members and the President to consider members' potential conflicts when appointing a sitting Panel. Accordingly, the Panel will disclose to parties all material relevant interests which a member discloses (including interests that the President does not consider to be sufficiently direct to give rise to a conflict). This ensures that parties are provided with as much information as practicable about members and afforded adequate opportunity to consider those interests.

#### *Parties should raise concerns and disclose information early*

15. In appropriate situations, the Panel Executive will discuss a potential conflict of interest with parties to a matter prior to the President deciding whether to appoint the member to a sitting Panel. Parties are encouraged to discuss with the Panel Executive potential conflicts of which they are aware, or in respect of which they have concerns, as soon as possible after an application is received to assist the Panel to appoint an appropriate sitting Panel in a timely manner.

#### *Declaration of interests*

16. Once the President has appointed the sitting Panel the parties will be notified and provided with a declaration of interests for each of the members. The declaration sets out any relevant interest that a member has (such as a shareholding in a party) and provides a brief curriculum vitae for each of them.
17. Parties are at liberty to make submissions in relation to any sitting Panel member on the basis of actual or perceived risk of conflict. Any such submission should be given to and discussed with the Panel Executive as soon as possible after the declaration of interests is received, before the matter progresses.

### **Conflicts arising or discovered after proceedings have commenced**

18. It is possible that sources of conflict may be discovered by a member or a party during the course of Panel proceedings. They may not have existed, or may not have been discovered, at the outset. (For example, a member's firm accepts instructions to act for a financier involved in the transaction that is the subject of Panel proceedings.)
19. The Panel mitigates the risk of a pre-existing potential source of conflict not being discovered by following a defined procedure for identifying potential conflicts (including explaining the legislative provisions dealing with conflicts to parties and inquiring for possible sources of conflict). The parties also have an opportunity to



make submissions to the President in relation to any suspected conflicts. The Panel Executive updates each member's curriculum vitae and checks the currency of the information with members to be appointed to a sitting Panel before sending extracts to parties in a declaration.

20. The Panel will treat seriously any failure to bring to the Panel's attention, as soon as possible, a potential source of conflict of which a party becomes aware (whether at the commencement of, or later in, proceedings). The Panel considers that it is in both its and the parties' best interests for the timely and efficient operation of Panel processes for parties to provide any relevant information as soon as proceedings are commenced.
21. If the Panel becomes aware, during proceedings, of an interest which may give rise to a conflict then, (after consulting the member and parties) the President will consider whether the relevant member's ability to complete the matter is likely to be affected and therefore that the member should take no further part in the proceedings. If the President considers that the interest is immaterial or indirect and will not prevent the member from acting impartially in relation to the matter (subsection 185(1A)), having regard to the types of considerations outlined in this Guidance Note, then the President may decide to continue with the sitting Panel as originally constituted.

### *Process if new sitting Panel member appointed*

22. If an existing sitting Panel member is conflicted and the President revokes the direction that appointed them (subsection 185(2)) a direction must be given appointing a new member to form the required number of three members for the sitting Panel (subsections 184(1) and (4)).
23. A new member joining a sitting Panel part-way through proceedings raises issues concerning the process of the sitting Panel hearing and resolving the matter before it. The new member will require time to familiarise themselves with the issues in dispute and any submissions. Where the proceedings are advanced and, for example, the original Panel had the benefit of a conference with parties, the Panel will consult parties and the new member to ensure the most timely, practical and procedurally fair resolution of the matter.
24. A sitting Panel may stay proceedings, with any interim orders needed to preserve the status quo, for the period necessary to allow the new member to become familiar with the matter and issues. Alternatively, if the originally constituted Panel has already conducted significant parts of the proceedings, it may be appropriate in certain circumstances for the reconstituted sitting Panel to rehear all or part of the matter.
25. The Panel's concern will be to ensure that all parties receive a fair hearing and that the new member has adequate opportunity to consider the evidence and issues in question. Because of the emphasis on fast and efficient resolutions of disputes by the Panel, the appropriate course will depend on the particular circumstances of the matter including the urgency with which a decision is required.

### Interests considered by members when undertaking conflict checks

26. The declaration of interests provided to parties at the beginning of a matter requires members to consider and disclose, as far as possible, any interests that might give rise to a conflict or a perception of bias. The Panel Executive provides details of the parties to members including whatever details are then available of their directors, major shareholders, their legal and financial advisers and auditors (applicants and parties are required to provide this information as early as possible). Members are asked to consider any material professional and personal interests that may give rise to a conflict.

### *Timing*

27. When an application is received, the Panel attempts to lose no time in commencing proceedings and issuing a brief to parties. Accordingly, it is usual for the President and Panel Executive to discuss potential sources of conflict with possible sitting Panel members when establishing those members' availability and to continue the more detailed conflict checks at the same time as the potential sitting Panel is appointed and commences considering the application. This ensures that the main sources of potential conflict are investigated prior to a member's appointment but also that consideration of the application is not unnecessarily delayed.

### *Professional interests*

28. Members consider matters such as whether:
- the member's firm / company is advising a party or performing work for the party in connection with the transaction the subject of Panel proceedings;
  - the member, or his or her firm / company, currently performs other work for a party, its related entity or directors or has done so in the past;
  - the member, or his or her firm / company, has a business relationship with a party, its related entity or directors; and
  - the member's firm / company has a shareholding (direct or indirect) in a party or its related entity.
29. Members who work for large law and accounting firms or investment banks will perform conflict searches through their organisations to determine whether the firm or bank acts for a party to the proceedings or has an established relationship with a party.
30. However, particularly in the case of large international investment banks and accounting firms, the extent of the member's conflict search will be limited to that which is reasonable in the circumstances. If a member conducts a preliminary conflict search which is sufficiently wide in all the circumstances and that search does

not disclose any relationship between the member's firm and a party, that member will not be required to exhaust all avenues of inquiry to determine whether or not any such relationship exists. This is particularly the case in respect of a division of the member's bank or firm which is unconnected with the member or the transaction before the Panel. For example, a member in the corporate finance division of a bank may not search for commercial lending services, not related to the Panel proceedings, provided to a party by a separate division of the bank and of which the member has no involvement or knowledge after having conducted a reasonably wide preliminary conflict search.

### Personal interests

31. Members consider matters such as whether:
  - the member has a personal relationship with a party, its related entity or directors;
  - the member has a personal relationship with a firm, or particular persons in a firm, that is advising a party; and
  - the member, or members of their immediate family, holds shares in a party or their related entity.
32. In most situations, a member's personal relationships with individuals associated in some way with a party or their adviser are unlikely to be sufficiently material to give rise to a conflict of interest. In some cases, however, the nature of that relationship may be such that there may be a reasonable apprehension of bias on the part of the member. This depends on the circumstances of the relationship. Whenever a member discloses to the President a personal relationship which they consider to be potentially relevant, that relationship will be disclosed to parties in the declaration of interests.
33. If a Panel member discloses to the President a shareholding in a party or their related entity which the President considers is not sufficient to prevent their appointment to a sitting Panel, the disclosure to the parties with respect to the size of the member's holding will normally be either in absolute terms or as a percentage of the member's investment portfolio.

### Material interests

34. In any matter relating to takeovers involving public commercial organisations in Australia, it is likely that the companies and firms from which a number of the Panel's members come or are connected will have some involvement. The Panel's policy in relation to members' conflicts recognises that the Australian takeovers community is small and that it would be impractical for a member to be excluded from sitting on a matter merely because there is, or has been, some connection between that member's firm or company and a party to proceedings. The President will naturally consider all interests disclosed by a member carefully and will act

reasonably in deciding whether any such interest is sufficiently material to prevent their appointment to a sitting Panel. However, where a member has a more remote or indirect connection with a party or adviser in a matter, generally the President will take a robust view that the interest is immaterial, although it will nonetheless be disclosed to the parties.

### Relevance of particular interests or relationships

#### *The relationship of a member's firm with a party*

35. A Panel member whose firm is advising a party on a transaction which is the subject of Panel proceedings will generally be considered to have a conflict of interest and the President will not appoint them to a sitting Panel. This will be the case even if the Panel member is not directly involved.
36. It may be the case that the member's firm is not acting in respect of the relevant transaction but the member, having undertaken reasonable inquiries, becomes aware that the member's firm nonetheless has a current relationship with a party to Panel proceedings. Unless the relationship is such that it clearly does not give rise to a conflict or reasonable apprehension of bias, the President will not appoint the Panel member to a sitting Panel. This will be the case even if the Panel member has no direct involvement in the relationship. For example, the Panel member is involved in the corporate finance division of an accounting firm, and the firm provides audit, general tax, legal or accounting services to a party. If the relationship clearly does not give rise to a conflict or a reasonable apprehension of bias, the President may appoint the member to a sitting Panel, but will disclose the relationship to the parties.

#### *Consultants*

37. A number of Panel members are consultants to (rather than members or employees of) major Australian accounting and legal firms or investment banks. Generally, the Panel does not consider the fact that a member is a consultant to a particular firm (or that the member was formerly a partner of that firm) necessarily gives rise to a material conflict of interest. The Panel's view in this regard has found support from the Federal Court in *C P Ventures Pty Ltd v McKeon* [1999] FCA 1272. Relevant factors which supported the President's decision that no perception of bias arose in that matter were the amount of consulting work actually undertaken by the member for the firm, the fact that the member had little or no contact with the firm's office in another State advising a party and the lack of any direct connection or relationship between the member and any party to the proceedings.
38. There is no absolute rule, and the Panel will look to the nature and closeness of a member's relationship with a party or its adviser and the amount of work undertaken by the member as a consultant when assessing whether a potential conflict or bias exists. The Panel will disclose the existence of the consultancy and, where appropriate, the reasons the President considers that the relationship is sufficiently indirect or immaterial where this is the case.

### *Members' firms acting for third parties*

39. Where a member's firm acts for a third party that is connected with the parties to the Panel proceedings, unless the third party is directly involved in the transaction that is the subject of the proceedings, the Panel does not usually consider that such a relationship gives rise to a conflict of interest. An example of such a situation is where a member's firm acts for a bank that is a lender to a party and has ongoing business with the party, but not in any way relating to the transaction that is the subject of Panel proceedings. In that situation, the Panel will generally consider the member's interest or connection with the relevant party to be remote and not to give rise to a conflict.
40. However, if the member acts directly for that party, or the member's firm acts for the party in connection with the transaction before the Panel even though the member does not directly act for that party, the President may consider that the member has a material interest that may impact on their ability to act impartially in relation to the relevant proceedings. Parties would also receive the usual opportunity to raise their concerns prior to a decision by the President whether to appoint the member to a sitting Panel.

### **Panel Executive**

#### *Permanent members of the Panel Executive*

41. The Panel is supported by a Panel Executive which, at present, comprises a Director and Counsel, both of whom are permanent full-time employees, a number of legal secondees, and support staff.
42. The Panel Executive:
- co-ordinate proceedings, provide advice and support to the Panel, and liaise with parties on behalf of the Panel;
  - are not delegates of the Panel and, therefore, do not perform any of its discretionary or adjudicative roles. In other words, the Panel Executive do not make decisions in Panel proceedings regarding the merits of an application – those decisions are for the sitting Panel members; and
  - pass on all submissions received in respect of an application to members of the sitting Panel – the Executive have no filtering or selection role.
43. The Panel's approach to potential conflicts involving secondees is set out below. With respect to the permanent members of the Panel Executive, given their full-time status, any potential conflict would be limited to those arising from personal interests of the kind referred to in paragraph 31 above. Any personal interest which the President considers relevant will be disclosed to the parties. However, given their non-decision making role, a personal interest would need to be material before it

would prevent a permanent member of the Panel Executive from assisting a sitting Panel.

### *Secondees to the Panel*

44. As mentioned above, the Panel Executive is, in part, staffed with secondees from major Australian firms. Secondees to the Panel Executive assist sitting Panel members in relation to each application. In general, Panel secondees are seconded to the Panel from large commercial law firms for a period of about 12 months.
45. During their time with the Panel, secondees are full time members of the Panel Executive and are not actively involved in their firm's business. Secondment arrangements deal with confidential information and with conflicts. The firm, the Panel and the secondee agree that the secondee may not:
  - disclose to the firm information they learn while working for the Panel, or vice versa; or
  - work on the same matter for both the firm and the Panel in succession.
46. In any matter relating to takeovers involving a number of public commercial organisations in Australia, it is likely that the firms from which the Panel's secondees come will have some involvement. In a small takeovers community such as Australia's, it would be impractical for the Panel to exclude secondees from involvement in all matters in which their firms were involved.
47. The Panel considers that it need not exclude a secondee from assisting or advising Panel members on a matter merely because their firm is acting for an interested party, unless there is a direct relationship between the secondee and the partner or other person in the firm who is acting for that party. Indirect connections such as where an interstate office of the relevant firm (or a related firm) is acting will not preclude a secondee from assisting the Panel in relation to a matter. Where there is a known connection between secondees and firms representing parties to a matter, the sitting Panel will note this in the declaration of members' interests which is sent to parties. Parties may make submissions in relation to Panel secondees.
48. The Panel is further assured in its position given the role of the Panel Executive described in paragraph 42 above, and the fact that secondees are supervised by the Director and Counsel of the Panel in assisting, advising and briefing Panel members.