



Public Consultation Response Statement 1 issued on 15 August 2002

COSTS GUIDANCE NOTE

STATEMENT BY

THE COSTS SUB-COMMITTEE OF THE TAKEOVERS PANEL

FOLLOWING THE PUBLIC CONSULTATION PROCESS ON COSTS

1. Introduction

- 1.1. In January 2002 the Costs Sub-Committee of the Takeovers Panel released for public comment a draft Guidance Note on the Panel's powers to make costs orders in matters before the Panel.
- 1.2. The Panel invited comments from interested persons by March 2002.
- 1.3. Consistent with the Panel's Guidance Note on Consultation Procedures, the purpose of this paper is to provide details of the Costs Sub-Committee's response to the external consultation process on the draft Guidance Note.
- 1.4. Most of the submissions supported the general thrust of the draft Guidance Note and other than those listed below there were no material conflicts of view with the proposals.

2. Number of Responses Received

A total of six responses were received, from law firms and from the Australian Securities and Investments Commission.

The Panel is very appreciative of the responses it has received from the market. All of the views expressed were considered by the Sub-Committee in settling the Guidance Note and a number of adjustments were made in response.

The Panel is keen to have market feedback in designing Guidance Notes because the closer that the Panel is to the market, the more likely its guidance is to be accepted and supported by the market

3. Material Conflicts of View and Conclusions by the Sub-Committee

- 3.1. Two respondents submitted that the Panel ought to accept undertakings in preference to making a declaration only where it also receives an undertaking to pay costs, in circumstances where the Panel would otherwise be inclined to make a costs order. One respondent submitted that refusal to give an undertaking to pay costs in this situation should amount to unacceptable circumstances. One respondent submitted that the Panel ought to prefer making a declaration of unacceptable circumstances to accepting an undertaking in circumstances where a party has conducted itself in such a manner as to warrant the making of a costs order.

The Sub-Committee considers that it would be a departure from the Panel's policy on unacceptable circumstances to provide that failure to give an undertaking to pay costs can constitute unacceptable circumstances forming the basis of a declaration, or to make a declaration rather than accept an undertaking in order to enliven the Panel's costs power. The Sub-Committee accepted the submission that an undertaking to pay costs may be a relevant consideration in deciding whether to accept an undertaking to remedy circumstances that would otherwise be unacceptable circumstances (see Paragraph 11 of the Guidance Note on Costs).

- 3.2. Two respondents submitted that, generally, the Panel should be more ready to make costs orders.

The Sub-Committee considers that the Guidance Note provides the appropriate guidance on the Panel's preparedness to make costs orders and has amended Paragraph 12 of the Guidance Note on Costs to clarify the reasons for this approach.

- 3.3. One respondent submitted that in some circumstances, bringing an unmeritorious claim (even if not vexatious) might merit a declaration of unacceptable circumstances and the making of a costs order.

The Sub-Committee considers that bringing or continuing Panel proceedings is unlikely to constitute unacceptable circumstances and that the legislature has put several mechanisms in place for dealing with unmeritorious applications, including Regulation 20 of the ASIC Act and section 658A of the Corporations Act.

- 3.4. One respondent submitted that the financial position of the relevant parties should be one of the considerations for the Panel in deciding whether to make a costs order.

The Sub-Committee notes that the financial position of the parties is a relevant consideration only in the situation where a wealthy party takes

advantage of its disregard of costs and the relative impecunious nature of the other party (see Paragraph 29). In particular, the Panel would not wish the risk of exposure to a costs order to make the Panel an unacceptably risky place for retail shareholders to bring serious issues.

- 3.5. One respondent submitted that the Panel should consider requiring parties to deposit an amount with the Panel by way of security for costs in certain circumstances.

The Sub-Committee considers that requiring security for costs is not likely to be warranted given the addition to the time, cost and formality of proceedings.

- 3.6. One respondent referred to the costs implications of “unmeritorious review” and of re-running a case that had been “squarely rejected”, and submitted that these are perhaps unduly restrictive in circumstances where written reasons are rarely if ever likely to have been available at the time review is sought.

The Sub-Committee notes that the Panel’s current practice is to give the parties at least the draft reasons before requiring them to decide whether to proceed with an application for review, and that the Panel will seek to have the legislation amended to remedy this problem.

- 3.7. One respondent submitted that applicants for review of a Panel decision ought not be ordered to pay costs in circumstances where they re-run a case that has been squarely rejected by the Panel at first instance, since the function of the review Panel is to conduct a de novo hearing of the facts and policy covered by the matters the subject of the application for review.

The Sub-Committee considers that where nothing new is presented in addition to that which led the sitting Panel to make a declaration and orders and where there is no error demonstrated, a review Panel would be entitled to dismiss the application for review and make an order for costs. The Sub-Committee also notes that, although a review is de novo, a review Panel also has to consider the threshold question whether a matter ought to be heard - the review is not strictly ‘as of right’.

- 3.8. One respondent submitted that the concept of merits review is inconsistent with the suggestion that a costs order may be justified where a party re-runs a case squarely rejected at first instance without remedying the reasons for the rejection.

The Sub-Committee considers that the Guidance Note on Costs ought not constrain the review Panel to decide whether to make a costs order on the basis of whether the application had merit.

- 3.9. Several respondents commented on the procedure for recovering costs. One respondent submitted that the costs incurred in recovering costs ought to be themselves recoverable. Another respondent submitted that it is too prescriptive to require compliance with the Federal Court scale. Another respondent noted that the procedure for enforcing costs orders in the event of non-compliance ought to be set out.

The Sub-Committee agrees with most of the suggestions in relation to the procedure for recovering costs (see Paragraphs 30 and 35). However, the Sub-Committee considers that it will usually be more appropriate for the Panel to base any costs orders it makes in relation to proceedings on party-party costs with reference to the Federal Court scale. In the Guidance Note, the Panel retains the discretion to award a higher level of costs up to and including full indemnity costs (see Paragraph 30).

- 3.10. Several respondents submitted that the legislation should be amended to enable the Panel to award costs in circumstances that it considers appropriate and whether or not it has made a declaration of unacceptable circumstances. One respondent noted that applicants are presently favoured because they are less exposed to the possibility of adverse costs orders because they can only be made after a declaration of unacceptable circumstances, a situation most likely to arise when an applicant is successful (whether at first instance or on review). One respondent suggested that if legislative review or a more rigorous use of declarations or undertakings was impractical at this time, then the Panel ought to delay institution of any policy concerning costs until such time as it is able to fairly enforce it.

The Sub-Committee agrees with the suggestion to remove the legislative constraint on the Panel's power to make costs orders. Nevertheless, the Panel considers that the Guidance Note on Costs provides useful guidance to the market.

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The Costs Sub-Committee

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

APPENDIX

THE PANEL'S POWER TO MAKE A COSTS ORDER

The power in general terms

1. The power of the Panel to make orders is set out in section 657D of the Corporations Act. The types of orders that can be made, including orders as to costs, are set out in section 657D(2). By reason of section 657D(1), an order under section 657D(2) may only be made if the Panel has declared circumstances to be unacceptable under section 657A, and in circumstances where the Panel is satisfied that the order would not unfairly prejudice any person. Further, the Panel must give to each person to whom the proposed order relates, each party and ASIC, the opportunity to make submissions.
2. Section 657D(2) provides, inter alia, that the Panel may make an order that it thinks appropriate to determine who is to bear the costs of the parties to the proceedings before the Panel and may also make ancillary and consequential orders as it thinks appropriate. The order may be for the costs of the parties but not for the costs of the Panel or of non-parties and the costs may be directed to be borne by a party or another person.
3. The Panel may vary, revoke or suspend a costs order, after first giving each person to whom the order relates, each party and ASIC an opportunity to make further submissions about the matter (section 657D(3)).
4. There is no express requirement that costs follow the event.

Limits on costs power

5. Because the Panel has no power to make a costs order if it declines to make a declaration of unacceptable circumstances, it generally cannot award costs to a successful respondent. This applies, even if the Panel strikes out the application as frivolous and vexatious. It also applies if the Panel finds that unacceptable circumstances exist, but makes no declaration because it accepts an undertaking to remedy the circumstances.

No costs order on review of ASIC exemption or modification

6. There is no power for the Panel to make a costs order in relation to an application for the review of ASIC's exercise of its exemption or modification power (subsection 656A(3)). This function replaces a function of the Administrative Appeals Tribunal, which in general has no power to award costs.

No orders for the Panel's own costs

7. The costs power is limited to determining who will bear the costs incurred by the parties, which may include ASIC. There is no provision to make an order that a party bear costs incurred by the Panel in relation to a matter.

UNDERTAKINGS TO PAY COSTS

8. The Panel has the power to accept written undertakings from a person affected, or likely to be affected, by the proceedings about a matter relevant to the proceedings (section 201A of the ASIC Act). Accordingly, for example, the Panel may accept undertakings from applicants or other persons affected to pay such costs as determined by the Panel if the application fails.
9. Such an undertaking may be offered by an applicant in circumstances where a Panel has formed a preliminary view that it will not conduct proceedings or where a party applies for an interim order or consent to conduct review proceedings. The sitting President or the Panel may decide to conduct the proceedings or grant the consent upon such an undertaking in the event that the applicant fails. Similarly, a review Panel may accept an undertaking from an applicant to pay the costs of other parties, at first instance and on review, before it resolves to conduct proceedings.
10. The merits of the application (before it has been tested or explored) and the costs to the respondents of resisting the application would usually be factors relevant to the Panel in deciding whether to make an interim order, conduct proceedings or consent to a review. The fact that an undertaking to pay costs (for example, in the event that an applicant is unsuccessful in obtaining a declaration or an undertaking to remedy the circumstances) had been proffered could be a relevant consideration.
11. Where a Panel is offered an undertaking that would remedy circumstances that would otherwise be unacceptable, relevant considerations in determining whether to accept the undertaking or make a declaration include:
 - a. whether the Panel might be minded to make a costs order if it had made a declaration of unacceptable circumstances; and
 - b. whether the party has also offered an undertaking as to costs.

WHEN COSTS ORDERS OR UNDERTAKINGS MAY BE APPROPRIATE

12. The Panel's function is to resolve disputes expeditiously and informally. In addition, a finding adverse to a party may involve no finding of legal or moral fault. Consistent with this, costs orders on a decision to make a declaration of unacceptable circumstance in proceedings at first instance are made infrequently. Costs orders will generally be the exception, not the rule.
13. Accordingly, the Panel's policy is that a party is generally entitled to make or resist an application in relation to a specific issue once, presenting a case of reasonable merit, in a businesslike way, without exposure to a costs order.
14. The Panel may make a costs order under paragraph 657D(2)(d), or enforce a costs undertaking, against a party if the party presents a case that is not arguable, engages in delay or obstruction, abuses the process, makes unsubstantiated assertions, or seeks an unmeritorious review.

15. On a review application, an award of costs or enforcement of a costs undertaking will generally be considered more favourably. This is particularly where the review is required because a party failed to put available material before the Panel at first instance, or re-ran a case that had been rejected squarely and without error, unless the applicant remedies the reasons for rejection.
16. Regulation 16(1) of the ASIC Act provides that the Panel may make certain directions for the conduct of proceedings. Under subsection 657D(2), the Panel may order that a party who fails to comply with a direction pay the costs of the other parties that are attributable to the failure.

CONSIDERATIONS FOR THE PANEL IN DECIDING WHETHER TO MAKE A COSTS ORDER

17. When deciding whether or not to make an order for costs, the Panel must consider whether the order would unfairly prejudice any person (subsection 657D(1)).
18. The Panel is required to give ASIC and each of the parties and persons to whom the proposed orders relate an opportunity to make submissions to the Panel about the proposed orders (subsection 657D(1)).
19. In addition to these requirements, the Panel will also consider the following issues when deciding whether or not to make a costs order (although the examples given are not intended to be exhaustive).

Success

20. While it is not a sufficient condition for a costs order that a party was successful in obtaining a declaration, it will generally be a necessary condition: i.e. orders will generally only be made in favour of a party which is successful.
21. One exception is that it may be appropriate to award ASIC its costs, where it has participated as a party, but not as a principal party, and could not therefore be said to have been successful.
22. Another exception is that it may be appropriate to award some costs against a party that was successful overall. For example, costs may be awarded against an applicant in relation to a particular day's hearing, where that applicant was successful, but wasted the Panel's and parties' time on the particular day's hearing or issue in proceedings.

Delay or obstruction

23. Where a party to an application has delayed or obstructed proceedings, an award of costs for the additional expenses incurred by other parties to the proceedings as a result of the delay or obstruction may be an appropriate sanction for the inconvenience caused to those parties and a suitable deterrent for future delay. It should be proportionate to the amounts that the other parties were compelled to spend preparing their case due to the

time wasting or obstruction. This is consistent with the intent in ASIC Regulation 16(2) that, in the performance of its functions and the exercise of its powers in relation to Panel proceedings, the Panel must act in a timely manner.

24. However, the Panel's costs orders are not punitive; any order will be directed to reimbursing parties for the additional or unnecessary costs incurred as a result of another party's delay or obstruction.

Intransigence in negotiations which could have avoided proceedings

25. Another relevant consideration for the Panel in determining whether or not to make costs orders is whether the parties were involved in settlement negotiations prior to or during the course of the Panel proceedings. Clear evidence that a party had been offered a reasonable compromise during the course of these negotiations, but refused this offer or made unreasonable demands, would be a relevant factor in considering whether a costs order for or against that party may be justified.

Case without merit

26. Costs may also be awarded when a party runs an application or a defence that is without merit.
27. If a party alleges or disputes a fact and the Panel later decides there was no ground for alleging or disputing it, the Panel may order that party to pay the other parties' costs of disproving or proving the fact.
28. The Panel may also make a costs order against a party that abuses the process by, for instance, reckless or deliberate misquotation of source documents.

Financial position of the parties

29. The financial position of the parties may also be a relevant consideration in deciding whether or not to make an order for costs in circumstances where a party took advantage of the financial position of another party.

TYPES OF COSTS COVERED

30. In general, the Panel's costs orders or costs undertakings will be limited to the costs actually, necessarily, properly and reasonably incurred in the course of the proceedings before the Panel. They include legal costs and those of other advisers and those of directors. In some cases, a costs order or costs undertaking may also cover the cost of obtaining an expert's opinion, for the purposes of or as part of the proceedings. The Panel's costs orders will also include the costs incurred in recovering costs. In determining reasonable legal costs, parties should be guided by the Federal Court scale of fees on a party-party basis. However, the Panel

retains the discretion to award a higher level of costs up to and including full indemnity costs.

31. An order may apply to all of the costs incurred by all parties or a particular party in relation to a matter, to costs incurred in relation to a particular stage or aspect of a matter, or to a specified fraction of a party's costs in relation to a matter.

PROCEDURES FOR GIVING EFFECT TO A COSTS ORDER OR UNDERTAKING

32. Where a costs order is made, the Panel will generally stipulate the procedure for ensuring the costs are appropriately assessed and paid.
33. The undertaking that parties provide in relation to confidentiality applies to the whole of the proceedings and therefore applies to the production of documents to an independent cost consultant for assessment. Accordingly, the production of documents does not waive legal professional privilege.
34. The Appendix below describes one possible procedure by which a Panel may determine costs.
35. In the event of non-compliance with a costs order, the Panel or a person to whom the order relates may apply to the Court for an order to secure compliance. In the event of non-compliance with an undertaking to pay costs, the Panel may apply to the Court for an order directing the person to comply.
36. Subsection 657D(4) provides that a copy of the order and of the reasons must be given to each party, each person to whom the order is directed, the issuer of securities to which the order relates and ASIC. The Panel must also publish the order in the Gazette.

APPENDIX – EXAMPLE PROCEDURE FOR DETERMINING LEGAL COSTS

1. Where a costs order or enforcement of an undertaking in relation to costs is made against a party, within 10 business days each party in whose favour it is made must provide the first party with an itemised bill of their reasonable costs in relation to the relevant proceedings. The bill of costs should contain sufficient detail for the first party to make an assessment of whether or not the claim is reasonable.
2. The party against whom the costs order is made must inform the Panel Executive and each relevant party that:

- (a) it will pay the amount claimed in the itemised bill of costs submitted by that party; or
- (b) that it objects to the amount claimed in the itemised bill of costs submitted by that party,

within 5 business days of receipt of the itemised bill of costs.

3. If the party against whom the costs order is made objects to an itemised bill of costs submitted by a party, the Panel Executive will appoint an independent cost consultant to assess the costs to be paid in respect of that party.
4. To enable the independent cost consultant to assess the costs to be paid, the party whose costs are to be assessed must provide either:
 - (a) a bill of costs in taxable form, or
 - (b) the itemised bill of costs,

and make its file available to the independent cost consultant.

5. If the independent cost consultant determines that the costs proposed by a party are to be reduced by 10% or more, then the costs of employing the independent cost consultant to assess costs are to be paid by that party. Otherwise, those costs are to be paid by the party against whom the costs order is made.
6. The party against whom the costs order is made must pay the costs assessed within 10 business days of receipt of an itemised bill of costs, unless it has objected to the itemised bill of costs, in which case the costs assessed by the independent costs consultant must be paid within 10 business days of receipt of notification of the independent cost consultant's assessment of costs.
7. The independent costs consultant's own costs must be paid by the relevant party within 10 business days of receipt of the costs assessment.
8. Failure to meet the time deadlines above may result in default interest payments.