



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:
 - (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

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

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

Interim orders

9. 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

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. See also GN 1

⁶ Section 657A(5)

⁷ Section 657A(6)

that the Panel's power to fashion the most appropriate remedy in the circumstances is not forestalled by intervening events.

10. The Panel can make any order as an interim order that it can make as a final order.
11. 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.
12. 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.⁸

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.

Final orders

13. The Panel may make any final order that meets the description in paragraph 2. This includes remedial orders,⁹ ancillary or consequential orders, and costs orders.
14. 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).¹⁰ As part of their submissions on proposed orders parties should refer

⁸ See *Village Roadshow Limited* [2004] ATP 04 at [94]

⁹ Defined in section 9

¹⁰ 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

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 interests¹¹ or existing legal rights and obligations.¹²
15. 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 party¹³ 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)¹⁴
 - (c) be satisfied that the order would not unfairly prejudice any person. This involves consideration of the prejudice that different persons or groups may suffer by making or not making the order¹⁵ and
 - (d) consider that the proposed order protects rights or ensures that the bid proceeds as it should have (see paragraph 2).
16. 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.
17. 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.
18. 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

¹¹ *AMP Shopping Centre Trust (No. 2)* [2003] ATP 24 at [38]-[41]

¹² *Pinnacle VRB Ltd (No. 11)* [2001] ATP 23

¹³ 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]

¹⁴ ASIC Regulations 23 and 24 and see *BreakFree 04(R)* [2003] ATP 42 at [77]

¹⁵ See footnote 4

- ASIC.
19. Orders are published in the Government Gazette.¹⁶ However, the order takes effect when made.
 20. 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.¹⁷ The Court may make any orders it considers appropriate to secure compliance with the Panel's order.

Protecting rights or interests

21. Final orders to protect rights might include cancelling contracts,¹⁸ freezing transfers, freezing rights attached to securities, forcing the disposal of securities¹⁹ and establishing rights to withdraw acceptances.²⁰

Getting the bid back on track

22. Final orders to get the bid back on track might include allowing more time or information for shareholders to assess the merits of the proposal²¹ or establishing rights to withdraw acceptances.

Costs orders

23. 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

24. The Panel only has power to order costs of parties if it has made a declaration.²² 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

¹⁶ Section 657D(4)

¹⁷ Section 657G

¹⁸ *Allegiance Mining NL* [2008] ATP 3; *Mount Gibson Iron Ltd* [2008] ATP 4

¹⁹ *Midwest Corporation Ltd 02* [2008] ATP 15

²⁰ 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

²¹ *Ranger Minerals Ltd* [2002] ATP 11

²² Sections 657D(1) and 657D(2)(d). A costs order is a type of final order

- (c) to the Panel or non-parties or
 - (d) in an application under s656A (review of ASIC's exemption or modification power).
25. Costs may be directed to be borne by a party or another person.
26. It may be appropriate to award costs to ASIC where it has participated as a party in an application under s657C.

Considerations

27. 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.
28. Costs may be awarded against a party if it:
- (a) presented a case that was not arguable or made unsubstantiated assertions²³
 - (b) delayed or obstructed proceedings,²⁴ abused the process²⁵ or unreasonably refused to negotiate²⁶
 - (c) sought an unmeritorious review²⁷ 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 proceedings (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) (the costs of the other parties attributable to the failure may be ordered).

²³ Includes reckless or deliberate misquoting of source documents

²⁴ *Infratil Australia 02* [2000] ATP 1 at [63]

²⁵ Including taking advantage of the financial weakness of another party. See also *Pinnacle VRB Limited (No. 11)* [2001] ATP 23

²⁶ Including refusing a reasonable compromise during negotiations

²⁷ *Taipan Resources NL (No. 11)* [2001] ATP 16 at [100]-[101]

Undertakings to pay costs

29. 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.²⁸
30. 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 so²⁹ or
 - (b) to persuade a review Panel to conduct proceedings.
31. 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

32. The scale is usually the Federal Court scale of fees on a party-party basis, but it may be higher, including full indemnity costs.
33. In general, costs orders or costs undertakings are limited to the costs actually, necessarily, properly and reasonably incurred in the course of the proceedings.³⁰ 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

34. The Panel will generally include a procedure for assessing and paying costs when making a costs order. Undertakings should also address this.
35. An example costs order is Attachment A.
36. 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

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

²⁸ Section 201A of the ASIC Act

²⁹ *Taipan Resources NL (No. 11)* [2001] ATP 16 at [98]-[99]

³⁰ *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

38. An agreed resolution, such as by undertakings, can be more flexible and quicker than orders. The Panel considers that the public interest is generally served by accepting an undertaking that addresses unacceptable circumstances to the Panel's satisfaction.³¹ The Panel may not then need to make orders although it may still make a declaration if it wants to send the market a signal.³²
39. An undertaking should be as simple and direct as possible.
40. 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 it³³ and
 - (b) it will be fulfilled as soon as practicable.
41. In the event of non-compliance with an undertaking, the Panel may apply to the Court for an order directing the person to comply.³⁴ The Court can make any order including that a person comply with the undertaking or pay compensation.

Other outcomes

42. 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.

Reasons

43. If the Panel decides not to conduct proceedings,³⁵ or makes a declaration³⁶ or orders,³⁷ 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.

³¹ Similar to the maxim "It is in the republic interest that there be an end to litigation" (*interest reipublicae ut sit finis litium*)

³² *Summit Resources Limited* [2007] ATP 09; *Mildura Co-operative Fruit Company Limited* [2004] ATP 5 at [96]

³³ *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 26 ALR 567

³⁴ Section 201A(3) of the ASIC Act

³⁵ ASIC regulation 21(2)(c)

³⁶ Section 657A(6)

³⁷ Section 657D(4)

44. The Panel will normally publish its reasons.³⁸ 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.³⁹ The Panel has wide immunities for comments it might make,⁴⁰ but of course must be fair, proportionate and base its comments on credible information.

Advisers

45. 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*).⁴¹

46. Advisers may be referred to (and even criticised) in the reasons for decision.

Other actions

47. The Panel may take other actions as well. These include:

- (a) privately admonishing a person
- (b) reporting its findings to ASIC,⁴² or a person's 'employer', or a person's professional organisation or
- (c) including its findings in a media release.

Publication History

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³⁸ Findings of fact in an order or reasons are *prima facie* evidence of the fact: s658B

³⁹ *Annetts v McCann* (1990) 170 CLR 596

⁴⁰ Section 197 of the ASIC Act

⁴¹ 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

⁴² ASIC regulation 18

GN 4 Remedies - general

Second Issue	12 July 2004	Second Issue	12 July 2004
Third issue	17 September 2007	Withdrawn	1 October 2008
Fourth issue	1 October 2008		

Related material

GN 5: Specific remedies - Information deficiencies

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.