

GUIDANCE NOTE 9: COSTS ORDER

Overview

The Panel only has power to order a costs award where it has made a declaration of unacceptable circumstances and where it considers that the order would not unfairly prejudice any person. There is no requirement or principle that costs should follow the event. This is consistent with the Panel's function to resolve disputes quickly and informally.

The limits on the Panel's power mean that it is rarely able to award costs to a successful respondent, or where no declaration is made because the Panel accepts an undertaking that remedies the unacceptability, or where it reviews an ASIC decision. Further, the Panel is not able to determine that a party bear the costs incurred by the Panel in relation to proceedings.

In some cases, the Panel may consider, in deciding whether to make interim orders, conduct proceedings or consent to a review, an offer of an undertaking by a party to pay the costs of either the Panel or other parties arising from the decision.

The Panel's approach 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. It will be rare that costs orders will be made at first instance. However, costs may be awarded, or a costs undertaking enforced, against a party whose case was not arguable, who engaged in delay or obstruction, abused process, made unsubstantiated assertions or sought an unmeritorious review.¹

In review proceedings, costs may be awarded more frequently, particularly if the party seeking review failed to put material before the first Panel or re-ran a case that had been clearly rejected without error (unless the applicant has remedied the reasons for rejection).

In considering whether to award costs, success in obtaining a declaration of unacceptable circumstances will be generally necessary, except in the case of ASIC. The conduct of the other party (delay or obstruction, intransigence in the negotiations, presentation of cases without merit, disputing facts without basis or abuse of process) will then be relevant, as may be the financial position of the parties if one party took advantage of the financial weakness of the other.

Costs will generally be awarded on the Federal Court scale of fees on a party-party basis. The Panel may award higher levels of costs, up to and including full indemnity.

¹ See *Taipan Resources NL (No. 11)* [2001] ATP 16 at [100]-[101].

The Panel's power to make a costs order

The power in general terms

- 9.1 The power of the Takeovers Panel (**Panel**) to make orders is set out in section 657D of the Corporations Act 2001 (Cth) (**Corporations Act**).² The types of orders that can be made, including orders as to costs, are set out in subsection 657D(2). By reason of subsection 657D(1), an order under subsection 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 the Australian Securities and Investments Commission (**ASIC**), the opportunity to make submissions.
- 9.2 Subsection 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.
- 9.3 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 (subsection 657D(3)).
- 9.4 There is no express requirement that costs follow the event.

Limits on costs power

- 9.5 Since 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

- 9.6 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 (subsubsection 656A(3)). This function replaces a function of the Administrative Appeals Tribunal, which in general has no power to award costs.

² In this Guidance Note, statutory references are to the Corporations Act, unless it is otherwise indicated.

No orders for the Panel's own costs

- 9.7 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

- 9.8 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 Australian Securities and Investments Commission Act 2001 (**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.
- 9.9 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.³ The sitting President of 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.
- 9.10 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.
- 9.11 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

- 9.12 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

³ See *Taipan Resources NL* (No. 11).

declaration of unacceptable circumstance in proceedings at first instance are made infrequently. Costs orders are the exception, not the rule.

- 9.13 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.
- 9.14 The Panel will generally 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.
- 9.15 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.
- 9.16 Regulation 16(1) of the ASIC Regulations 2001 (Cth) 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

- 9.17 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)).
- 9.18 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)).
- 9.19 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

- 9.20 While a party's success in obtaining a declaration is insufficient in itself to warrant the Panel making a costs order, it will generally be a necessary condition (ie. orders will generally only be made in favour of a party which is successful).
- 9.21 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.

- 9.22 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

- 9.23 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.⁴ 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.
- 9.24 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

- 9.25 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

- 9.26 Costs may also be awarded when a party runs an application or a defence that is without merit.
- 9.27 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.
- 9.28 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.

⁴ See *Pinnacle VRB Limited (No. 02)* [2000] ATP 12 at [41]-[42].

Financial position of the parties

- 9.29 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

- 9.30 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.
- 9.31 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

- 9.32 Where a costs order is made, the Panel will generally stipulate the procedure for ensuring the costs are appropriately assessed and paid.
- 9.33 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.
- 9.34 The Appendix below describes one possible procedure by which a Panel may determine costs.
- 9.35 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.
- 9.36 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 Government Gazette.

Publication History

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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.