

GUIDANCE NOTE 11: CONFLICTS OF INTEREST

Overview

The Panel aims to maintain open and transparent processes and lines of communication in assessing potential conflicts of interest or duty (**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 anything giving rise to a potential conflict of interest 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.

The Panel has procedures to assist members to identify and assess potential conflicts of interest, notifying these to the President of the Panel and to parties in order to facilitate the 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 potential conflicts of interest. The types of interests that the Panel considers are likely or unlikely to give rise to a conflict of interest are discussed.

The Guidance Note is designed to explain the process the Panel undertakes to ensure that conflicts of interest are appropriately dealt with, that parties are afforded procedural fairness and that the Panel complies with its obligations under the ASIC Act.

Obligations under the ASIC Act

- 11.1 Division 2 of Part 10 of the ASIC Act¹ contains provisions regulating the assessment and disclosure of interests by Panel members and the President of the Panel² for the purpose of considering potential conflicts of interest.
- 11.2 Subsection 185(1) provides 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.
- 11.3 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, such as preventing them from acting impartially in relation to the matter.
- 11.4 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)).
- 11.5 Although section 185 refers to interests, (pecuniary or otherwise), the Panel applies the same tests and procedures to other potential sources of conflicts, such as obligations of any sort and personal relationships which may conflict with actual or apparent impartiality.

Consideration of President's interests in appointing sitting Panel

- 11.6 Upon receipt of an application to the Panel, the President must appoint three members to be the sitting Panel (subsection 184(1)).
- 11.7 Before doing so, the President must first consider whether he or she has any material conflicts that would prevent him or her from appointing the sitting Panel. If such a conflict exists, the President advises that he or she will not exercise the powers because he or she is absent from the office of the President, due to a conflict which prevents him or her from carrying out the duties of President. An acting President³ will then appoint the sitting Panel, first considering his or her own conflicts.

¹ Statutory references are to the ASIC Act unless otherwise indicated. References to the Regulations are to the Australian Securities and Investments Commission Regulations 2001.

² "President" in this note refers to the substantive President appointed under section 173 or to an acting President appointed under subsection 182(1), as the context requires.

³ Under a standing instrument under subsection 182(1), there are currently three members who may become acting President.

Identifying potential sitting Panel members

- 11.8 The President will consider which members might be asked to sit on the Panel for that particular matter.
- 11.9 Panel members are appointed from diverse disciplines, backgrounds and organisations so that a wide range of skills, experience, qualifications and views may be brought to bear on each matter, particularly from the legal, financial and commercial perspectives. This diverse membership reduces the potential for conflict, and assists the appointment of an appropriate sitting Panel for each matter.
- 11.10 In addition to the other factors which the President may consider when appointing members to a sitting Panel (such as each member's availability, qualifications and expertise, etc), the President will use information provided by the applicant pursuant to the Panel's Procedural Rules⁴ 2.1(c), (d) and (e) to assist in deciding whether a member has a material conflict that prevents them from being appointed to the sitting Panel. The inclusion of this information in the application in as full a form as possible assists the President to appoint the Panel in a timely manner.
- 11.11 The Panel's Procedural Rules 2.1 (c), (d) and (e) require an application initiating proceedings to identify:
- any person (or class of persons) whose interests would be materially affected by the making of the decision or declaration or the granting of the orders;
 - the directors, principal shareholders, controllers, advisers (legal, corporate and financial), auditors and principal financiers of the applicant and any person with whom, or on whose behalf, the applicant is acting in relation to the application or the matters described in it; and
 - the directors, advisers (legal, corporate and financial), auditors and principal financiers of each other person (other than ASIC) likely to become a party, so far as they are known to the applicant.
- 11.12 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 (if any), and to advise the Panel Executive of any relevant interests. The President takes that advice into consideration in deciding whether any of these members has a material interest or other source of possible conflict which might prevent any of them from being appointed to the sitting Panel.

⁴ Takeovers Panel Rules for Proceedings, 18 June 2004

- 11.13 If the President forms the view that a member proposed for a sitting Panel has an interest, relationship or other matter that could conflict with performance of their functions in relation to the proceedings, in general the President will not appoint that member to that sitting Panel. However, the President may appoint the member if he or she is satisfied that the member's conflict is so indirect or immaterial as not to pose a risk (actual or perceived) to the impartial performance of the member's functions. In this case, the interest is nonetheless disclosed to the parties, as required by paragraph 185(1)(a).

Disclosure and opportunity for parties to consider interests

Parties should raise concerns and disclose information early

- 11.14 When an application is received, 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. Members who are partners or executives of large organisations may continue to conduct more detailed conflict checks while the sitting Panel is appointed and starts to consider the application. This ensures that the main sources of potential conflict are investigated before each member's appointment, but also that consideration of the application is not unnecessarily delayed while full checks are made.
- 11.15 In appropriate situations, the Panel Executive will discuss a potential conflict of interest with parties before the President decides whether to appoint the member to a sitting Panel. Parties are encouraged to discuss with the Panel Executive potential sources of conflict of which they are aware, or in respect of which they have concerns, as soon as possible after an application is received. This assists the President to appoint the sitting Panel in a timely manner.

Declaration of interests

- 11.16 Once the President has appointed the sitting Panel, the parties will be given a declaration of interests for each of the sitting Panel members. The declaration will provide a brief curriculum vitae for each member and set out any interest they have which is relevant to the matter. These details are checked with the member before being sent out, as mentioned above.
- 11.17 Parties may 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 proceeding progresses.
- 11.18 If a party fails to raise with the Panel their concern over a conflict of which they are aware (from a member's declaration of interests or otherwise) promptly after becoming aware of it, they may waive their right to object to the relevant member sitting on the matter in question. Raising the issue later

hinders timely and efficient proceedings. If valuable time has been used up or costs have been incurred in the meantime, it may also be unfair to other parties.

Conflicts arising or discovered after proceedings have commenced

- 11.19 A conflict may come into existence, or be discovered by a member or a party, during the course of Panel proceedings. (For example, where a member's firm accepts instructions to act for a person who becomes involved in a transaction that is the subject of the Panel proceedings.) If this happens, the President will consult the member and the parties and consider whether the relevant member's ability to participate in the proceedings is likely to be affected. If so that member will take no further part in the proceedings.
- 11.20 If the President considers that the interest is immaterial or indirect and will not prevent the member from acting impartially in relation to the proceedings (subsection 185(2)), having regard to the matters outlined in this Guidance Note, the President may decide that the proceedings should continue with the sitting Panel as originally constituted. In this case, parties are notified of the interest and the President's decision (paragraph 185(2)(b)).

Process if new sitting Panel member appointed

- 11.21 If the President revokes the appointment of a sitting Panel, because a member is conflicted, subsection 185(2) requires the President to reconstitute the sitting Panel to omit the conflicted member and include a new member to make up the three members required by subsections 184(1) and (4).
- 11.22 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 sitting Panel has 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.
- 11.23 A sitting Panel may stay proceedings, with or without making interim orders, 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.
- 11.24 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, submissions and issues in question. Because of the emphasis on informal, timely and efficient resolution of disputes by the Panel, the Panel

will be flexible in its choice of an appropriate course, depending on the particular circumstances of the matter, including the urgency with which a decision or other action is required.

Interests considered by members when undertaking conflict checks

Professional interests

- 11.25 In preparing the declaration of interests provided to parties at the beginning of proceedings (see [11.16]), members consider matters such as whether:
- (a) the member, or their firm, company or other organisation, is advising a party or performing work for a party in connection with the transaction which is the subject of the Panel proceedings;
 - (b) the member, or their organisation, currently performs other work for a party, or any of its related entities or directors, or has done so in the past;
 - (c) the member, or their organisation, has a business relationship with a party, or any of its related entities or directors;
 - (d) the member or their organisation has any financial interest (direct or indirect) in a party or any of its related entities; and
 - (e) the member or their organisation has any other involvement with the relevant transaction, such as instructions to act for a person who is not a party but is involved in the transaction.
- 11.26 Members who work for large law and accounting firms or investment banks will perform conflict checks through their organisations to determine whether the organisation has or has had any of the relationships identified above. 11.27 However, particularly in the case of large international organisations, 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 organisation and a party, that member will not be required to exhaust all avenues of inquiry to determine whether or not any other relationship exists. This is particularly the case in respect of a division of the member's organisation which is unconnected with the member or the transaction before the Panel. For example, a member in the corporate finance division of an investment bank will not be required to 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

- 11.28 Panel members consider matters such as whether:
- (a) they have a personal relationship with a party, any related entity or their directors;
 - (b) they have a personal relationship with an organisation or particular persons in an organisation, that is advising a party; and
 - (c) they, or members of their immediate family, hold (directly or indirectly) any financial interest in a party or any related entity.
- 11.29 In most situations, a member's personal relationships with individuals associated in some way with a party or 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 advises the President of a personal relationship which the President considers to be potentially relevant, that relationship will be disclosed to parties in the declaration of interests.
- 11.30 If a Panel member discloses to the President a shareholding in a party or any 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

- 11.31 In any matter relating to takeovers involving public commercial organisations in Australia, it is likely that the organisations from which a number of the Panel's members come, or with which they are connected, will have some involvement. The Panel's policy in relation to members' conflicts recognises that the Australian business and takeovers communities are relatively small by international standards 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 organisation and a party to proceedings. The President will naturally consider each interest disclosed by a member carefully and will act reasonably in deciding whether that interest is sufficiently material to prevent their appointment to a sitting Panel. However, where a member has only a remote or indirect connection with a party or adviser in a matter, the President may decide that the interest could not reasonably be considered to affect (or appear to affect) the impartial performance of the member's duties, although it will nonetheless be disclosed to the parties.

Relevance of particular interests or relationships

The relationship of a member's organisation with a party

- 11.32 A Panel member who is a partner or a senior executive of an organisation which 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 in the transaction.
- 11.33 It may be the case that the member's organisation is not acting in respect of the relevant transaction but the member, having undertaken reasonable inquiries, becomes aware that the member's organisation 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, where 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. For instance, the President may appoint a Panel member who is a partner in a firm which has no ongoing relationship with a party, although another partner in that firm had recently prepared for that party a deed for a debenture issue, which was not connected with the Panel matter.

Consultants

- 11.34 A number of Panel members are consultants to (rather than partners or senior 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 organisation (or that the member was formerly a partner of that firm or a senior employee of that organisation) 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 1272.⁵ 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.
- 11.35 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

⁵ This decision can be obtained through the Panel's website at <http://www.takeovers.gov.au/display.asp?ContentID=456#court>

work undertaken by the member as a consultant when assessing whether a reasonable apprehension of 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

- 11.36 Where a member's organisation acts for a third party that is connected with the parties to the Panel proceedings, unless the third party is (or may become) 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 organisation 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.
- 11.37 However, if the member acts directly for that party, or the member's organisation acts for the party in connection with the transaction before the Panel (even though the member does not act directly for that party), the President may consider that the member has a material interest that may affect their ability to act impartially in relation to the proceedings. Parties would also have 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

- 11.38 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.
- 11.39 The Panel Executive staff:
- (a) co-ordinate proceedings, provide advice and support to the Panel, and liaise with parties on behalf of the Panel;
 - (b) 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 made by the sitting Panel members; and
 - (c) pass on all submissions received in respect of an application to members of the sitting Panel – the Executive has no filtering or editorial role.

- 11.40 Since the permanent members of the Panel Executive work full-time for the Panel, any potential conflict would be limited to those arising from personal interests of the kind referred to in [11.28]. 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

- 11.41 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 6-12 months.
- 11.42 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:
- (a) disclose to the firm information they learn while working for the Panel, or vice versa; or
 - (b) work on the same matter for both the firm and the Panel in succession.
- 11.43 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 advisory 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.
- 11.44 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.
- 11.45 The Panel is further assured in its position given the role of the Panel Executive described in [11.39], and the fact that secondees are supervised by

the Director and Counsel of the Panel in assisting, advising and briefing Panel members.

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