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Australian Securities &  
Investments Commission

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Mr Allan Bulman  
Director  
Takeovers Panel  
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By email: [takeovers@takeovers.gov.au](mailto:takeovers@takeovers.gov.au)

23 October 2020

Dear Mr Bulman

**Takeovers Panel Consultation Paper - Remaking of Procedural Rules**

ASIC appreciates the opportunity to provide comments on the Takeovers Panel's proposed procedural rules. This letter sets out ASIC's general comments on the draft procedural rules and guidelines and responses to the questions raised in the Panel's consultation paper.

**General comments**

1. ASIC broadly welcomes each of the Panel's proposals, the procedural rules and the procedural guidelines. ASIC notes these documents will further assist parties and ASIC in understanding how Panel proceedings are conducted and the relevant expectations for those involved.
2. In relation to the proposed procedural guidelines, while ASIC recognises some of the content of the guidelines is currently included as notes to the procedural rules or is available on the Panel's website, consolidating the various guidance about the Panel and its operations into the procedural guidelines will likely greatly assist participants to Panel proceedings

**Response to consultation paper questions**

**1. Are the existing procedural rules currently operating effectively and efficiently?**

3. ASIC considers the existing procedural rules generally operate effectively and efficiently. There are however areas that can be improved, and we note the Panel has proposed various amendments which seek to address these matters to avoid concerns arising in future Panel proceedings and otherwise seek to refine the operations of the Panel.

<b>2. Do you have any comments on the proposed changes from the existing procedural rules outlined in the section above?</b>
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*Media canvassing*

4. ASIC notes the Panel's proposal to incorporate a carve out to the media canvassing restriction to allow communications about matters concerning upcoming spill meetings that do not directly relate to issues before the Panel (see proposed rule 19(3)).
5. ASIC understands the Panel's proposal is designed to:
  - a. ensure that applications to the Panel, given media canvassing restrictions, do not in some way put respondents to the application at a disadvantage (see for example *Resources Generation Limited* [2016] ATP 12 at [50]); and
  - b. ensure the Panel's rules do not otherwise limit appropriate communications about spill meetings and the usual publication of information concerning spill resolutions to ensure investors can make informed voting decisions.

These are concerns shared by ASIC, and so we acknowledge the merits of the proposal.

6. ASIC however considers the proposed rule 19(3) may, in its current form, create some uncertainty for parties as to what matters are within the scope of the carve out. This is because it may not always be clear whether an announcement or communication "directly relate to issues before the Panel", particularly in cases where an application to the Panel that concerns a spill meeting is cast in broad terms or canvasses various interactions or allegations about certain shareholders and/or board members.
7. ASIC also notes that it is unclear to what extent proposed rule 19(3) has application beyond what rule 19(1) itself provides, noting rule 19(1) would not restrain publication of information relating to any issue not before, or likely to be before, the Panel.
8. Given the above, ASIC encourages the Panel to consider how to ensure that parties can easily understand what matters may fall with the scope of the intended carve out.
9. An alternative approach may be to include in the procedural guidelines an explanation of how rule 19 applies. These guidelines could provide examples specific to spill meeting matters to assist parties in understanding their obligations in this context.

*ASIC's obligations as applicant*

10. ASIC notes the Panel's proposed rules 12(1)(g) and 14(1)(c) appear to require ASIC, if it is the applicant, to enclose a 'notice to become a party' with its application. In contrast, ASIC notes proposed rules 16(1), 18(5) and 19(6) do not apply to ASIC.
11. ASIC understands that the Panel's general expectation is that ASIC is not required to provide a 'notice to become a party'. Accordingly, we suggest it would be useful to clarify that proposed rules 12(1)(g) and 14(1)(c) exclude ASIC.

**3. Are the new procedural rules and procedural guidelines easy to follow?**

12. Other than as noted in response to question 2, ASIC considers the procedural rules and procedural guidelines are easy to follow.

**4. Are there any other aspects of the rules and guidance that may need updating to accommodate current Panel or market practice, including any new matters that are not currently addressed?**

13. Other than as noted in response to question 2, ASIC does not consider there are any other aspects of the rules or guidance that may need updating at this time.

**Contact**

ASIC would be happy to discuss the contents of this submission and any queries the Panel may have regarding the comments made. Please contact me to do so.

Yours sincerely,



Rachel Howitt  
Senior Executive Leader  
Corporations  
Australian Securities and Investment Commission

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Trench, Rossi e Watanabe  
Advogados

24 October 2020

The Takeovers Panel

Dear Allan and the Takeovers Panel

## Remaking of Procedural Rules

We refer to the Consultation Draft of the Remade Procedural Rules and Guidelines issued by the Takeovers Panel on 2 October 2020.

We make the following brief comments in relation to them.

### 1. General

The Panel should be congratulated for codifying in a helpful and detailed fashion the way in which it operates. We consider that the Rules represent a substantial and sensible codification, and we endorse this approach. Please treat the suggestions below as minor improvements as part of an iterative process, rather than being critical changes.

### 2. Confidential Information

The Rules could be improved in the area of confidential information (Rule 18, Guideline 10). The Panel has had recent occasion to look closely at the issue, and there are various learnings and intelligence which have been obtained as a consequence which could be incorporated. For example:

- (a) a definition of confidential information would be helpful;
- (b) greater clarity could be provided on how the exceptions to confidentiality arise;
- (c) reference could be made to confidentiality undertakings given by Panel participants under section 201A as well as undertakings given as part of the data room process;
- (d) the confidentiality intersection with court processes could be teased out; and
- (e) clarity could be provided whether emails to and from the Panel other than under Rule 18(2) are confidential. For example, if a party applies to the Panel for a determination that another party has breached Panel Orders, are the various communications between the various parties (and from the Panel) confidential?

By email

takeover@takeovers.gov.au

### **3. Provision of Documents**

The references to the President in Rules 10(1) and (2) are confusing (since access to the President does not occur in practice) and should be deleted or revisited.

### **4. Application for Review of Panel Decision**

Rule 14(1) should list as a new item whether interim orders are being sought regarding a stay of the earlier Panel decision.

### **5. Page Limits**

Guidelines as to page limits (eg: Guideline 3.6, Guideline 4.5(b)) should cross refer to the succinct requirement of Rule 9.

### **6. Rules v Guidelines**

Various aspects are dealt with in each of the Rules and Guidelines, and the repetition/overlap is sub-optimal. See for example Rule 12 and Guideline 3.5(a). Also see for example Guideline 5.2(b) and Rule 9.

### **7. Fees**

Guideline 3.4 could note that the fees are updated from time to time, and how or when such changes typically occur. They could explain the circumstances in which an application might involve 2 or more fees.

### **8. Multi Applications**

The Rules/Guidelines could explain that multiple applications which cover similar subject matters can be heard together, and how such matters are addressed.

### **9. Official**

Communications from the Panel are now issued with "Official" terminology. The significance of this could be explained.

### **10. Standard Processes**

The Panel has a number of standard processes it follows, such as standard texts of emails which it issues during the course of a matter. It would be worthwhile cross checking these against the Rules/Guidelines to see if there are other aspects from them which should be incorporated.

### **11. Interim Orders**

Guideline 6.4 could explain that the President can make interim orders off the back of an undertaking to make an application in urgent circumstances. The Panel recently had an occasion where the President was requested to make urgent interim orders, and it took the requesting party an overly lengthy 11 days to follow through with its undertaking to then lodge an application. The Guidelines should specify a time period (eg: 2 business days) to make an application in the case of such an undertaking.

Please let us know if you would like clarification of the above.

Kind regards

A handwritten signature in cursive script that reads "Richard Lustig".

Richard Lustig  
Partner

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27 October 2020

Allan Bulman  
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**By email:** takeovers@takeovers.gov.au

Dear Mr Bulman,

### Remaking of Procedural Rules

This submission is made by the Corporations Committee (**Committee**) of the Business Law Section of the Law Council of Australia in response to the Takeovers Panel's (**Panel**) consultation paper in relation to the proposed new Takeovers Panel Procedural Rules 2020 (Cth) (**New Rules**).

#### 1. GENERAL OBSERVATION

The Committee shares the Panel's view that the existing *Takeovers Panel Procedural Rules 2010* (Cth) (**Existing Rules**) are operating efficiently, effectively, and (for the most part) without significant issues.

Comments and recommendations on points of detail in the New Rules follow.

#### 2. DEFINITIONS

##### 2.1. *Interested Person*

Paragraph (a) of the definition of "*Interested Person*" is "*a person entitled to be heard by the Panel before it makes a decision sought by the application*".

- (a) The Committee queries the utility of that limb of the definition, and whether it adds anything meaningful to paragraphs (b) or (c).
- (b) The breadth of the definition invites the applicant to send the application far and wide in purported compliance with the rule, which is not appropriate.
- (c) To the extent that broad distribution may prompt parties with a marginal interest to seek to be involved – it may unnecessarily prolong or complicate proceedings, with little or no benefit.

**Recommendation:** that paragraph (a) of the definition of "*Interested Person*" be removed.

##### 2.2. *Notice to Become a Party*

The proposed definition of 'Notice to Become a Party' in the Rules currently reads "means a notice in the form by which a person seeks to become a party". This appears incomplete.

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**Recommendation:** to add '*prescribed by the Panel*' after "form".

2.3. *Spill meeting*

Limb (a) of the definition of '*spill meeting*' does not specifically include a spill motion under the entity's constitution: "*a meeting of members at which a resolution will be moved to remove a director under section 203D of the Corporations Act or appoint a director in place of a director removed under that section*".

**Recommendation:** include a reference to a spill motion under the entity's constitution.

3. **APPLICATIONS UNDER S.675C**

An application for a declaration of unacceptable circumstances (Rule 12(1)) does not require the applicant to provide transparency in relation to other proceedings on foot or anticipated in another forum (for example, a court).

**Recommendation:** include a requirement to disclose if there are other proceedings on foot or anticipated in another forum.

4. **SEEKING TO BECOME A PARTY**

4.1. *Notice to Become a Party*

Rule 16(3) only indicates that the Panel will notify a person if the person's Notice to Become a Party is not accepted. While it is implicit – it should also notify a person where their Notice is accepted.

**Recommendation:** Rule 16(3) should have a notification for acceptance or rejection of a Notice to Become a Party.

4.2. *Interested person*

Rule 16(6) gives the Panel the ability to appoint or remove an interested person as a "party" to proceedings.

It is unclear whether, by virtue of its status as a party, this may allow every interested person to seek to review a Panel decision as a party to the proceedings. While the Panel Rules may not determine the interpretation of section 657EA(1), they may influence it.

As noted at paragraph 3.2(b) of the Guidelines, only parties to the proceedings or ASIC are able to apply for a review of a Panel decision. Query whether this right should be limited to original or central parties to the proceedings.

**Recommendation:** The Panel should clarify the ability of "interested persons" to seek review, and consider whether all participants should be on an equal footing as "parties".

5. **CONFIDENTIALITY**

Rule 18(4) obliges a person to ensure that each of its Representatives who receive confidential information complies with Rule 18(1).

This does not allow for the possibility that the person has taken reasonable endeavours to alert their Representatives of this information and requires compliance, but, for reasons outside of their control or for some other unusual reason, the Representative has not received this alert.

**Recommendation:** Consider whether reasonable endeavours to procure compliance should be sufficient.



## 6. PUBLICITY AND ANNOUNCEMENTS

Rule 19 concerns the undertakings required by a party in relation to publicity and media canvassing.

### 6.1. *Location of undertakings*

The Committee agrees with the Panel that these undertakings are better placed in the Rules, rather than in the form of Notice of Appearance annexed to the Existing Rules.

### 6.2. *Panel Announcements – receipt of application*

There is a preference for less detail to be included in initial announcements by the Panel, made when an application is received. This is particularly the case where matters asserted as facts may be disputed and prejudicial. The allegations in the application are picked up by the media, and the parties do not have the ability to respond to them. The applicant's framing of the issue is captured in the public narrative, irrespective of the merits of the application.

Alternatively – if details of assertions in the application are to be included, there should be a reasonable opportunity for other parties to comment on those before an initial media release is published.

This may properly be the subject of Guidelines, rather than the New Rules.

**Recommendation:** That the Panel:

- (a) clarify the circumstances in which it will publish a media release, having regard to its confidentiality obligations under section 186 of the *Australian Securities and Investments Commission Act 2001* (Cth); and
- (b) limit the content of any such media release, particularly the recitation of allegations that are not established facts.

### 6.3. *Canvassing stakeholders*

Committee members noted that they had observed incidents of parties to Panel proceedings approaching stakeholders of other parties, to canvass matters directly with stakeholders that would be restricted by the media canvassing rules.

**Recommendation:** While there should not be an impediment under Panel rules or orders to normal activist activities, or normal shareholder engagement, it should not be possible to directly approach stakeholders regarding matters that could not be canvassed in the media.

## 7. PANEL GUIDELINES

### 7.1. *Preliminary submissions*

The Guidelines do not currently advise to whom preliminary submissions should be sent.

**Recommendation:** clarify that a preliminary submission should be sent to each person who received the application and anyone else who has participated since then.

### 7.2. *How long does the Panel process take?*

The Guidelines at paragraphs 6(c) and 6(d) allow the Panel a period of 1 - 2 weeks and 2 - 4 weeks respectively, to make certain decisions.

**Recommendation:** timeframes are more clearly articulated as a number of business days.

## 8. OTHER OBSERVATIONS AND RECOMMENDATIONS

### 8.1. *Hyperlinking*

The Committee notes the restrictions on content of legislative instruments, and accepts the necessity of deleting Notes that are within the Existing Rules.

However hyperlinking a copy of the documents would make the Rules and Guidelines more user-friendly and significantly enhance the ease in which users can cross-reference across the two documents.

**Recommendation:** where the New Rules are published on the Panel website - hyperlinking should be introduced between the Rules and the Guidelines, to improve compliance and ease of use.

### 8.2. *Online Hearings vs written submissions*

There is a diversity of views within the Panel as to whether online hearings would be beneficial to the swift resolution of matters before the Panel.

Many members commented that written submissions have been effective for distilling and dealing the issues at the heart of the controversy, efficiently and without undue burden on Panel members.

However, given the broader usage in 2020 of virtual meeting platforms, the Committee acknowledges that there may be circumstances in which an online hearing would be an effective supplement to written submissions to address a particular issue.

**Recommendation:** that the Panel should have a discretion to require parties to attend an online hearing, where appropriate. However, this should not be the typical path adopted, and in the normal course, parties should be kept to the discipline of confined written submissions.

Committee representatives would be happy to discuss any of the matters raised, or provide further detail. If you have any questions – please contact Chair of the Committee, Shannon Finch ([shannonfinch@jonesday.com](mailto:shannonfinch@jonesday.com) or 0428 894 002) or Committee member, Rodd Levy ([rodd.levy@hsf.com](mailto:rodd.levy@hsf.com) or 0417 053 177)

Yours faithfully,



**Greg Rodgers**  
**Chair, Business Law Section**