



**Australian Government**

**Takeovers Panel**

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## **REWRITE OF PROCEDURAL RULES**

### **PUBLIC CONSULTATION RESPONSE STATEMENT**

#### **Introduction**

On 1 October 2009, the Takeovers Panel released a Consultation Paper seeking public comment on the rewrite of its procedural rules.

Comments on the Consultation Paper were due by 26 October 2009 and the Panel received five submissions in response. The Panel thanks those who made submissions for their comments. Consistent with the Panel's published policy on responding to submissions, this paper sets out the Panel's response to the public consultation process and its conclusions on the main comments received from respondents.

Attached to this paper is a marked-up copy of the procedural rules, showing changes from the consultation version dated October 2009.

#### **Material comments received and Panel's conclusions**

##### **Applicant to identify interested parties**

###### *Comment*

Rule 2.2.2 provides that an application must be provided to ASIC and any person identified in the application as a potentially interested person. One respondent suggested that it would assist if the rules required an applicant to identify persons known to the applicant whose interests would be materially affected by the application (although the respondent noted that the requirement to include such details was already set out in the note to section 4.4 of the pro-forma application).

###### *Response*

The Panel has added a new note 1 to rule 2.2.2 which states that an applicant should identify all persons who potentially have an interest in the subject matter of the application.

## **Undertakings in lieu of orders**

### *Comment*

Rule 2.2.3 provides that any document provided to the Panel must be provided to ASIC and each party to the proceedings. Some respondents suggested that it may be desirable during a proceeding to state expressly that a party may seek the Panel's preliminary views on a proposed undertaking, without notification to other parties. One respondent submitted that, without this, the offer may need to be notified to other parties which might in some cases discourage the offer.

### *Response*

The Panel has added a new note 5 rule 2.2.3 (with consequential amendments made to note 1 to rule 2.3.1) which provides that a party wishing to enquire whether an undertaking might satisfy the Panel should contact the Executive if it wishes to provide a draft undertaking confidentially before circulating the draft to all parties.

## **Form of documents**

### *Comment*

One respondent suggested that, when sending documents intended for the Panel, it would be helpful for parties to identify the proceeding, the party and the person providing the document in order to assist with the management of papers.

### *Response*

The Panel has amended rule 2.1.1 to include a new note 1 which provides that any document intended for the Panel must (among other things) identify the proceeding, the party and the person providing the document.

## **Review of ASIC decisions**

### *Comment*

Paragraph 16 of the Consultation Paper noted that the rule requiring ASIC to provide reasons for its decision where an ASIC decision is being reviewed has been deleted. One respondent submitted that a de novo hearing is not simply a decision made without disregard to the first decision. Accordingly, the reasons for the initial decision will always be relevant.

Another respondent submitted that it was ASIC's current practice to provide reasons as soon as practicable after the Panel receives a review application and it was therefore desirable for the rules to expressly reflect ASIC's practice.

### *Response*

The Panel has added new rule 3.2.3 which provides that as soon as practicable after receipt of an application for review of an ASIC decision, ASIC must give the Panel and each party a statement of its findings of fact and reasons for its decision.

### **Undertakings in the Notice of Appearance**

#### *Comment*

One respondent submitted that rule 4.2.1 was expressed too broadly as it attempted to bind third parties as well as parties to the proceedings. The respondent submitted that it may be unfair that other persons are bound by the undertaking to the extent that it relates to matters that are not within their control.

#### *Response*

The Panel has amended rule 4.2.1 to make it clear that the undertakings in the Notice of Appearance only bind the parties to the proceeding.

#### *Comment*

One respondent suggested that the first bullet point in clause A of the undertakings in the Notice of Appearance (confidentiality undertaking) should be clarified to confirm that the undertaking does not inhibit the use of confidential information in Panel proceedings in and for which it was provided.

#### *Response*

The Panel has amended the confidentiality undertaking to make it clear that it does not inhibit the use of confidential information in Panel proceedings.

### **Notes to Rules**

#### *Comment*

One respondent submitted that some of the notes to the rules seemed to be drafted as substantive rules.

#### *Response*

Some of the notes have been amended to make the language consistent with language ordinary adopted for notes rather than substantive rules.

## Legal Professional Privilege

### *Comment*

Paragraph 22 of the Consultation Paper stated that the Panel was considering inserting a note to rule 2.3.2 (based on an existing note in the procedural rules) which pointed to the *Bristile*<sup>1</sup> and *Daniels*<sup>2</sup> decisions and therefore admitted the possibility that the Panel may decline to allow a claim of legal professional privilege. The Panel received a number of responses in relation to this proposal. The respondents generally submitted that legal professional privilege serves the public interest by ensuring parties are properly advised which is particularly important in the mergers and acquisitions context where legal issues may often be very complex.

One respondent accordingly submitted that the proposed note regarding privilege should not be included. The respondent also submitted that a rule should be included which, for parties wishing to assert legal professional privilege over information requested, sets out a process for dealing with those assertions.

### *Response*

The Panel has not included the proposed note to rule 2.3.2 regarding privilege. However, the Panel has added two new notes (notes 2 and 3) to rule 2.3.2 which provide that a claim of privilege should be made on behalf of the named holder of the privilege and the Panel will consider whether the claim is established based on the information supplied and submissions made.

## Withdrawal of Guidance Note 8 (Matter Procedures)

### *Comment*

One respondent submitted that, although the revised rules capture parts of GN 8 which are in effect rules, something of value will be lost if the residue of GN8 is disregarded. The respondent further submitted that some parts of GN 8 are useful at providing a narrative explanation of the Panel's processes and procedures. Another respondent submitted that if GN8 is withdrawn, consideration should be given as to whether it contains anything that should be placed on the Panel's website.

### *Response*

The Panel intends to review GN8 with the aim of placing any relevant information regarding the Panel's procedures and processes on its website.

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<sup>1</sup> *Corporations and Securities Panel v Bristile Investments Pty Limited* (1999) 152 FLR 462

<sup>2</sup> *Daniels Corporation International Pty Ltd v Australia Competition and Consumer Commission* (2002) 213 CLR 543

## **ATTACHMENT**

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**Marked-up copy of Procedural Rules (showing changes made to Procedural Rules Consultation Draft dated October 2009)**