



EXPLANATORY NOTE ON REVISED RULES FOR PROCEEDINGS

General

The Panel has taken the opportunity of a revision of the Panel's Rules for Proceedings (**Procedural Rules**) to simplify some of the language used in the Procedural Rules, to re-order certain of the Procedural Rules and otherwise to make some housekeeping amendments. Amendments and revisions of this kind are not specifically commented on in this note, which is confined to those alterations which are regarded as having a material effect.

Rule 1.2(b)

Reworded to focus on the purpose of the Rule rather than to suggest that it may restrict the Panel's ability to act in a particular case.

Rule 1.3(a)

Amended to indicate that conferences will only usually be held in limited circumstances to deal with a specific part of the proceeding.¹

Rule 1.3(b)

Amended to clarify the confidentiality obligations of the parties.²

Rule 1.5

Inserted to indicate that further directions may be given by the sitting Panel under section 195 and to clarify the precedence of those directions over the Procedural Rules, to the extent of any inconsistency between the directions and the Procedural Rules.

Rule 1.6

Inserted to clarify that the sitting Panel may waive a Procedural Rule or excuse a failure strictly to comply with a Procedural Rule in a proceeding.

Rule 2.1

Amended so that the applicant must include in the application:

¹ see also the amendments to Rules 10 and 10.1

² see also the amendments to Rule 8.5

- (a) the basis on which it claims to be entitled to bring the application;³ and
- (b) to enable the Panel, if required, to determine whether it should make a determination under paragraph 657C(3)(b) in the relevant circumstances have occurred more than two months before the date of the application.⁴

Rule 2.2

Amended to clarify that directors and members of a person identified in an application as having an interest do not need to be notified of the application where their interest is solely in that capacity.

Rule 2.5

Inserted to ensure that a copy of an application for review of a decision of ASIC is provided to all relevant parties.

Rule 2.6

Inserted to allow for a party (who may or may not be the original applicant) to make an additional application which would have the effect that a proceeding would be expanded to cover further issues relating to a relevant set of facts and so that all orders sought may be considered in one proceeding by the same Panel.⁵ The rule is designed to facilitate convenient and speedy dispatch of all issues affecting the parties concerned with a particular set of facts. If the sitting Panel considers that it is inappropriate for the relevant matters to be considered together with the existing matters, an additional application made under this rule will be treated as a separate application.

Rule 4.1(a)

The requirement that documents submitted to the Panel (except witness statements – see Rule 7.1(c)) do not need to be signed. The change is made to facilitate the electronic lodgment of documents.

Rule 4.1(d)

Inserted to allow for the Panel to establish forms for use in proceedings before it.

Rules 5.4-5.9

³ although standing is rarely an issue in Panel proceedings, the applicant should address its standing under section 657C(2) in its application so that the Panel can decide whether it is a proper application for it to consider

⁴ this issue has arisen in several Panel decisions: see, for example, *Brickworks Limited (No 1)* [2000] ATP 6 at [28]-[32], *Advance Property Fund* [2000] ATP 7 at [24] and *Trysoft Corporation Limited* [2003] ASTP 26 at [95]-[99].

⁵ the sitting Panel would use its power under Regulation 16(1)(a) to combine the matters arising on the original application with those arising on the additional application.

Inserted to allow for the Panel to have access to all relevant information previously provided to the market by relevant parties and to require parties to keep the Panel informed of the release of further information to the market. The Panel is required to consider whether there is an informed market and whether shareholders have been provided with all relevant information. This rule will assist the Panel by requiring parties to assist the Panel so that it may be aware of the current state of information in the market. At a practical level, the Panel expects parties to forward material released through ASX to the Panel once the lodging party has received acknowledgment from ASX that the material has been released to the market.

Rule 5.10

Inserted to allow the Panel to have access to telephone information campaign scripts and any amendments to them.

Rule 6.2

Amended to make it clear that an e-mail attaching a document is only regarded as having delivered the document to the Panel when both the message and the document are received electronically.

Rule 6.3

Amended to permit the giving of documents electronically using a wider range of acceptable software and to describe the acceptable range of software in a functional way.

Rule 7 -- Introduction

Inserted to encourage parties to provide evidence in the most convenient and persuasive form and not to rely excessively on introducing evidence through submissions. The note has been introduced to provide guidance concerning the Panel's approach to legal professional privilege.

Rule 7.8

Inserted to allow material provided in other proceedings or otherwise available to the Panel to be deemed to be evidence in the current proceedings. The Rule is designed to facilitate the speedy and efficient conduct of proceedings.

Rule 8.3A

Inserted to encourage the early offer to the Panel of undertakings, in the knowledge that, until the Panel is seriously considering accepting the undertakings, they are only communicated to the Panel and not to other parties (see also Rule 13.1). This is an exception to the principle that all communications between a party and the Panel should be shown to all parties.

Rule 8.5

Amended to clarify the obligations to preserve the confidentiality of information imposed on each person who obtains information from the Panel, or another person, in connection with a Panel proceeding where that information is in fact confidential.

A further note is inserted following the Rule to indicate the extent of the obligations and to contrast the obligations under this rule with the obligations under Rule 12 relating to media canvassing.

Rule 9.5

Inserted to provide a mechanism for the making of all requests to the Panel which do not need to be by way of application. The Panel envisages this as being equivalent to a notice of motion in Court proceedings.⁶

Rule 9.6

Amended to make specific reference to Regulation 28(3). The Panel has received late and additional submissions and rebuttals and wishes to emphasise its discretion to decide to proceed without regard to such late or additional submissions or rebuttals.

Rule 9.8(b)

The Panel has received several applications that it refer a particular matter to the Court on the basis that the matter is a question of law. A note indicating the Panel's requirements in relation to whether the matter is properly described as a question of law has been added. In addition, as the Panel becomes a party to any Court proceeding on such a referral as a result of the applicant's request, a requirement has been inserted that the applicant offer an undertaking under section 201A that it pay, or reimburse on demand, the costs of the Panel in that matter. The Panel may act of its own motion to refer a matter to the Court, and this power is not fettered or restricted by these Rules.

Rule 9.10

The ASIC Regulations do not specifically cover the Panel's practice in certain cases of obtaining submissions from the relevant parties when it is deciding under Regulation 20 whether to conduct proceedings in relation to an application. The Regulations only envisage obtaining submissions following the issue of a brief after that determination has been made. This rule is inserted to cover this practice. Note that it is not a requirement that the Panel seek such submissions before making determining whether or not to conduct proceedings under Regulation 20.

Rule 9.11

The ASIC Regulations only expressly contemplate the issue of one brief in connection with each application. Although the *Acts Interpretation Act* provision relating to the

⁶ see for example Rules 2.1(b), 2.6(a), 4.3, 8.2, 10.1, 12.3, 13.2, 14.1 and 14.2.

singular including the plural (and vice versa)⁷ would apply to allow multiple briefs, this Rule is inserted to provide expressly for the procedure and to put parties on notice that it may be used where the Panel considers it to be appropriate.

Rule 10 -- Introduction

Inserted to clarify the role of conferences in Panel proceedings, in particular to emphasise that conferences are not the rule and are used to deal with some specific parts of a proceeding in a more efficient way.

Rule 10.1

Inserted to clarify the matters that must be included in a request by a party that the Panel hold a conference.

Rule 12 - Introduction

The introduction to this Rule has been expanded and amended to provide a more detailed explanation for the rationale for the Panel's Rule that Parties and their advisers not canvass issues before the Panel in the media.

Rule 12.1

Amended to insert a definition of the completion of a Panel proceeding so that it is clear when the strict non-canvassing obligation under Rule 12.1 ceases and the more liberal obligation under Rule 12.2 commences.

Rule 13.2

Inserted to make it clear that correspondence concerning an offer of an undertaking to the Panel is "without prejudice".

Rule 14

Amended to indicate that once the Panel has determined to conduct proceedings following an application, a party no longer "owns" the proceeding but rather that it is "owned" by the Panel. Accordingly, the applicant does not seek to withdraw the application but rather to cease to be a party. Also, any other party can seek to withdraw as a party.

Rule 15.4

Inserted to allow the definitions and interpretation provisions set out in Rules 15.1-15.3 (inclusive) to apply to all documents issued by the Panel in connection with an application or a proceeding and to allow other persons issuing documents in connection with a proceeding to choose to use the same definitions and interpretation provisions.

⁷ *Acts Interpretation Act 1901 (Cth)* section 23(a)

Appendix

Amended so that the undertakings expressly cover not only the party giving them but also its advisers and impose relevant obligations to ensure that the party's promises in connection with those obligations are more effective.