

GUIDANCE NOTE 3: MAKING RULES

Overview

The Panel can make rules under section 658C of the Corporations Act which clarify or supplement Chapter 6 (**Substantive Rules**) and under section 195 of the ASIC Act in relation to the procedures to be followed in Panel proceedings (**Procedural Rules**).

In the case of Substantive Rules, section 658C empowers the President of the Panel to make such rules after consultation with the members of the Panel. No procedure is specified in relation to Procedural Rules, although the Panel will use the same process as for Substantive Rules.

If a proposed rule involves an issue of regulation of policy development, which will usually be the case with Substantive Rules, the Panel will seek comments from the public, ASIC and Treasury before making the rule.

The Panel welcomes submissions on issues of uncertainty which may benefit from the making of a Substantive Rule or on improvements that might be made to its Procedural Rules.

What This Guidance Note is about

- 3.1 This Guidance Note sets out the policy upon the making of rules by the Takeovers Panel (**Panel**) under:
- section 658C of the Corporations Act 2001 (Cth) (**Corporations Act**)¹; and
 - section 195 of the Australian Securities and Investments Commission Act 2001 (Cth) (**ASIC Act**).

In particular it describes the procedure and consultation process that the Panel will follow.

- 3.2 The purpose of the power to make Substantive Rules is to reduce uncertainty in relation to the application of the Corporations Act, and to assist the promotion of the objectives of Chapter 6 of the Corporations Act which are set out in section 602. It is intended that by making Substantive Rules the Panel will be able to respond to new market conditions and developments.
- 3.3 In general, the Panel intends that its Substantive Rules will encapsulate policy which the Panel has already applied in particular cases. Accordingly, they are likely to be well understood before they are introduced, and participants in takeovers should not be disadvantaged by the continued application of the policy of the Substantive Rules.

Procedure

- 3.4 Pursuant to section 658C of the Corporations Act, the President of the Panel, after consultation with the members of the Panel, has the power to make rules to clarify or supplement the operation of the provisions of Chapter 6 of the Corporations Act. The rules must be gazetted and the Minister may disallow them.
- 3.5 Under section 195 of the ASIC Act, the Panel may determine the procedural rules to be followed in Panel proceedings. There is no provision for gazettal or disallowance of Procedural Rules. In making rules under section 195 of the ASIC Act, the Panel will use the same processes as under section 658C (ie. the substantive President of the Panel will consult with Panel members on the advice of the Panel Executive).²
- 3.6 Substantive Rules must be consistent with the Corporations Act and the Corporations Regulations 2001 (Cth). Procedural Rules must also be

¹ In this Guidance Note, statutory references are to the Corporations Act unless it is otherwise indicated.

² The Procedural Rules (titled "Takeovers Panel Rules for Proceedings") are available at <http://www.takeovers.gov.au>.

consistent with the rules of procedural fairness (ASIC Act sections 195 (1) and (4)).

Consultation on Substantive Rules

- 3.7 The Commonwealth Government's Guide to Regulation issued by the Office of Regulation Review sets out best practice processes for regulation and policy development.
- 3.8 In addition to consulting with the members of the Panel, before making a Substantive Rule, the President of the Panel will seek comments from the public, ASIC and Treasury. In general, the public will be invited to comment first on the policy of the proposed Substantive Rule, and then on the text. However, if a rule is needed urgently, consultation may be cut short, or an interim rule may be made pending completion of consultation.
- 3.9 Consultation is an opportunity for takeovers professionals to point out to the Panel any policy and drafting weaknesses in Substantive Rules the Panel proposes to make, and to ensure that those rules are already well understood when they commence operation.
- 3.10 The Panel also welcomes submissions on issues of uncertainty which may benefit from a Substantive Rule. The Panel requests that any submissions:
- (a) relate the proposal to the policy in section 602;
 - (b) provide any actual or hypothetical examples where the existing law is unsatisfactory or uncertain;
 - (c) advise of any discussions that have taken place with either ASIC or Treasury;
 - (d) canvass possible options for resolution; and
 - (e) explain how the options would supplement or clarify the existing law, overcoming the relevant shortfall or uncertainty.

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