

# Policy 4

## Remedies and Enforcement

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### REMEDIES AVAILABLE TO THE PANEL

- 4.1 This policy discusses the types of remedies available to the Takeovers Panel (*Panel*). In particular it provides guidance on the types of remedies the Panel will use and the circumstances in which remedies will be enforced.
- 4.2 The primary remedies available to the Panel are declarations of unacceptable circumstances and orders. It can make final orders under s657D(2) of the Corporations Law if it has made a declaration of unacceptable circumstances. It can make interim orders under s657E without having made a declaration of unacceptable circumstances.
- 4.3 The Panel may make any order to:
- protect rights or interests of affected persons; or
  - ensure a bid proceeds as if unacceptable circumstances had not occurred.
- 4.4 In particular, the Panel may make remedial orders as defined in s9, ancillary and consequential orders and orders as to parties' costs.
- 4.5 Whether or not the Panel makes a declaration of unacceptable circumstances or any orders, it may:
- issue a statement of reasons or other policy document; or
  - publicly or privately reprimand parties or advisers.

### DECLARATIONS OF UNACCEPTABLE CIRCUMSTANCES

- 4.6 The Panel can declare that specified circumstances in relation to the affairs of a company are unacceptable. A declaration serves both to convey the Panel's view that, and how, the relevant facts fall short of the standards applicable in takeover

matters and to open the way for final orders to deal with the unacceptable circumstances.

- 4.7 A declaration records a finding by the Panel that the policy of Chapter 6 is not being given effect in relation to a takeover or other acquisition of a substantial interest in a company or listed scheme. That may happen because Chapter 6 is breached or avoided. It may also happen for reasons which involve no misconduct, such as where Chapter 6 produces anomalous results in a particular case, or its intended operation is frustrated for some other reason.

## **TYPES OF ORDERS AND UNDERTAKINGS**

- 4.8 In deciding what, if any, orders to make in a particular case, the Panel will consider whether making an order would promote the objectives set out in s602 of the Law and whether it would be contrary to the public interest.
- 4.9 Generally when using a remedy the Panel will be seeking to achieve one or more of the following outcomes:
- (a) getting a bid back on track;
  - (b) correcting any misinformation or omission and reversing any mischief to investors (including compensation) or the market; and
  - (c) establishing benchmarks and standards of corporate behaviour.

### **Getting the bid back on track**

- 4.10 The Panel's objective is not to assess the commercial merits of a bid or other proposal, such as approval of an acquisition of shares: that is a matter for the shareholders of the relevant company. Rather it is the role of the Panel to ensure that the proposal is put to the shareholders in such a way that the shareholders have sufficient time and information to make an informed decision. Therefore, the desired outcome will often be to get a proposal back on track (that is, to where it would have been if not for the unacceptable circumstances) in order to allow the shareholders to assess the merits of the proposal.

### **Compensating disadvantaged parties and collateral damage**

- 4.11 Where a declaration of unacceptable circumstances has been made, the primary aim of the Panel will be to restore any disadvantaged parties to the position they would have been in had unacceptable circumstances not occurred. The Panel has a broad range of remedial powers that are designed to enable the Panel to carry out this aim. These include orders canceling contracts, freezing transfers of, and rights attached to, securities, and forcing a party to dispose of securities.
- 4.12 The Panel will always give careful consideration to whether the chosen remedy is adequate in all the circumstances and proportionate to the mischief. For example, an order that was appropriate at the commencement of a matter may be entirely inappropriate just days later because, in the meantime, the market has moved, or third persons have acted in reliance on the *status quo*.
- 4.13 Although orders may adversely affect some parties, it is not the role of the Panel to punish parties. The Panel may feel justified in pursuing the most effective

remedy for a disadvantaged party, however, even if the remedy has a collateral deleterious effect on a person:

- (a) whose actions, omissions, statements or inactivity contributed or led to the unacceptable circumstances;
- (b) who would normally have borne a corresponding cost, in the absence of unacceptable circumstances;
- (c) who benefits from the unacceptable circumstances; or
- (d) whose role includes protecting the interests harmed by the unacceptable circumstances.

### **Interim Orders**

4.14 Interim orders may be made in the absence of a declaration of unacceptable circumstances or even of an application for such a declaration. Interim orders can be to the same effect as final orders, but can operate for no longer than two months and cease to operate when relevant proceedings are determined. Such orders can be made to prevent unacceptable circumstances from happening, continuing or getting worse, while proceedings are conducted in relation to them.

4.15 Before making an interim order, the Panel must consider whether the risk that unacceptable circumstances will occur, continue or worsen in the absence of an order outweighs the adverse effects of the order on the person to whom it is directed and the market. That will obviously depend on the strength of the evidence, on what particular circumstances are apprehended, on whether they can be overcome by final relief and on the availability of alternative remedies such as undertakings.

4.16 In general, the Panel will not hold up a transaction by interim relief, unless mischief will occur if it proceeds which cannot be reversed by final orders. For instance, if it is alleged that a bidder's statement omits some of the information which it is required to contain, but the statement does not appear to be misleading, it will usually be preferable to allow it to be dispatched pending a final decision. If the Panel makes a final order that the bidder issue a supplementary statement, it may also order the bidder to give offerees an opportunity to withdraw acceptances.

### **Costs Orders**

4.17 While the Panel has the power to make an order determining who is to bear the costs of parties to the Panel proceedings, there is no automatic rule that costs follow the event. The Panel will not 'automatically' award costs to successful parties and where the other parties are business-like in their approach to proceedings, the Panel will generally make no order as to costs.

4.18 The Panel will generally only make a costs order against a party if it concludes that the party has caused other parties to incur unnecessary costs by its:

- (a) time wasting or delay; or
- (b) hindering or obstructing proceedings.

Such an order would generally be limited to the unnecessary costs incurred as a result of the delay and/or obstruction. As a general rule, the Panel will not make a costs order entitling a party to recover all of its costs in relation to the proceedings.

- 4.19 While s657E appears to give the Panel power to order costs of an application for interim orders, those orders may be largely nullified by the time limits in sub-section 657E(1) and (2).

### **Undertakings**

- 4.20 Matters before the Panel may be resolved by undertakings under section 201A of the ASIC Act. Since an agreed resolution of a matter is likely to be more flexible, quicker and surer than making and enforcing orders, the public interest is generally better served by accepting undertakings than by pursuing equivalent remedies by declaration and orders (*interest reipublicae ut sit finis litium*). Accordingly, where the Panel accepts an undertaking from a party and the undertaking is performed, it will not normally make any declaration or order against that party. Accordingly, an undertaking needs to deal with all issues in the proceedings: if the Panel makes no declaration, it can make no orders under section 657D. The undertaking will generally be published and the Panel may publish reasons for its decision, for guidance in future matters.

## **OTHER OUTCOMES**

- 4.21 To encourage acceptable conduct or 'best practice' by market participants, the Panel will seek to establish benchmarks by publishing policy, making public announcements and pursuing a range of other options, which may include reflections on the conduct of particular matters.
- 4.22 The Panel's functions extend beyond resolving disputes between parties to setting general benchmarks for the conduct of takeovers matters. This is explicit in the rule-making function under section 658C. It is implicit in the dispute resolution function, which depends on a retrospective determination that unacceptable circumstances exist (or are impending) in a particular case. Because this is an undefined concept, in the absence of published precedents and policies this function could become regulation by ambush.

### **Reasons and Reproaches**

- 4.23 If it makes a declaration or order, the Panel must give the parties in the relevant matter a statement of reasons for its decision (subsections 657A(6) and 657D(4)) and gazette the declaration or order (subsections 657A(5) and 657D(4)). The statement of reasons given to the parties may be the vehicle for reflections on the conduct of a bid, including any necessary reprimands addressed to the parties or their advisers. While the Panel has no formal powers to deal with advisers and intermediaries as such, it needs to obtain their compliance and support. One means of doing that is to hold them responsible for their clients' conduct, particularly by stressing their actual role in determining that conduct in particular matters.

- 4.24 Since the fact of the decision will be public and since reasons for the decision may better inform the market and be useful as a precedent, the Panel will usually publish reasons for making a declaration or order. While private reprimands will be omitted from the published reasons, they will need to say why the circumstances of a bid were unacceptable, which may in turn involve a conclusion that certain conduct contravened the Law.
- 4.25 The Panel will generally publish its decision not to make a declaration or orders. This is appropriate when the existence of proceedings is public knowledge, in the interests of an informed market and the reputations of people affected by the proceedings. A statement may indicate that the Panel was satisfied that the relevant circumstances were acceptable, that the Panel accepted an undertaking or remedial action, or that the Panel did not find sufficient evidence to make a declaration or orders.
- 4.26 The Panel may also publish its reasons for a decision to accept an undertaking or to take no action. Like reasons for making declarations and orders, they relate to a public event and they may be of use to inform the market and as a precedent. Published reasons may need to include reflections on whether conduct complied with the Law and whether the circumstances of a bid were unacceptable, or would have been unacceptable in the absence of remedial action and undertakings.
- 4.27 Published reasons are not a vehicle for recriminations or speculation unsupported by evidence.
- 4.28 The Panel has wide immunities in making this sort of comment, despite the possible effects on people's reputations and businesses. Of course, the Panel's comment must be fair, based on credible information and proportionate to the events and the Panel must give the person a chance to defend their conduct.

## **ENFORCING ORDERS AND UNDERTAKINGS**

- 4.29 Under s657G, if a person contravenes or proposes to contravene a Panel order, the Court may make any orders it considers appropriate to secure compliance with the Panel's order. The President of the Panel can apply to the Court for such orders, as can ASIC, a party or a person to whom the order relates. Similarly, under section 201A of the *Australian Securities and Investments Commission Act 1989*, the Court can order specific performance of an undertaking, or compensation.