

TAKEOVER PANEL MATTER PROCEDURES GUIDANCE NOTE

TABLE OF CONTENTS

INTRODUCTION

OUTLINE OF PROCESS OF A PANEL MATTER

1. Panel Executive
2. Receipt of application
3. Initial media release
4. Selection and appointment of a Sitting Panel
5. Conflicts
6. Parties
7. Process letter
8. Notice of appearance required from parties
9. Submissions from other interested persons
10. Legal representation
11. Communications between the Executive, parties and the sitting Panel
12. Panel meetings
13. Deciding to conduct proceedings & jurisdictional issues
14. The brief
15. Interim orders
16. Submissions and rebuttals
17. Document list
18. Conferences
19. Decisions
20. Interim Orders and Final Orders
21. Reasons
22. Reviews of ASIC decisions
23. Post Matter Reviews (post mortems)

**Panel Executive
February 2002**

INTRODUCTION

This Guidance Note has been prepared by the Takeovers Panel Executive to assist market participants and advisers in understanding internal Panel processes where it is seized of an application.

This document is not intended to provide an exhaustive description of Panel processes - each matter will have particular nuances that require the Panel members, parties and Panel Executive to act and respond accordingly. Rather, the intention is to provide market participants and advisers with a general overview of what to expect from Panel proceedings.

OUTLINE OF PROCESS OF A PANEL MATTER

1. Panel Executive

The Panel Executive acts as the liaison and interface between parties to Panel proceedings and the sitting Panel members for that matter.

The Executive is staffed by the Director (Mr Nigel Morris), Counsel (Mr George Durbridge) and two Legal Secondees (taken on 8 to 12 month secondment from Australian law firms). In addition, there is an Office Manager (Ms Silvia Hajas) and Executive Assistant who take responsibility for managing the matter files.

The Executive's role is to manage matters on behalf of the Panel and to advise the Panel in relation to parties' submissions and questions of law and policy where appropriate. The Executive is the primary point of contact for parties and the Director, Counsel and Legal Secondees make themselves available to parties to discuss progress of the matter. The requirements of natural justice prevent Panel members informally discussing issues relating to a matter with parties.

The Executive does not make decisions on the merits of an application in Panel proceedings. This is the function of the sitting Panel and is not delegated to the Executive. The Director and Counsel (together with Legal Secondees) assist, advise, brief and conduct research on behalf of, the Panel members. They also prepare draft documents (media releases, briefs and reasons for decision) for review by the sitting Panel and conduct post matter reviews. The Executive assists the President in identifying members to sit in relation to an application and assists members with conflict checks and disclosure of relevant information to parties.

The Executive provides all submissions and other communications received from parties to the sitting Panel members - the Executive does not filter information received by the members.

The Panel deals with the majority of applications it receives within approximately one week of receiving the application. The timing for considering and completing a matter depends upon such factors as the issues raised by the matter, their complexity, time pressures surrounding a bid or transaction and availability of Panel members. The Executive will generally update parties regularly as to the progress of the sitting Panel's deliberations and likely timetable for resolving the matter.

2. Receipt of application

When a party submits an application to the Panel they must pay a fee set under the Corporations (Fees) Regulations 2001, Schedule item 23(b).¹ The application will be allocated to a case officer (one of the Panel's Legal Secondees) and copies given to the Director and Counsel.

3. Initial media release

The Executive drafts a media release which is generally approved by the sitting Panel (if it has been appointed at that point) prior to publication. It usually states that an application has been received, provides an outline of the issues in contention and that the substantive President is convening a sitting Panel to consider the matter.

4. Selection and appointment of a Sitting Panel

The substantive President must first ensure that he/she is free from any conflict that would prevent him/her from appointing a sitting Panel. If he/she cannot, one of the two appointed Acting Presidents will fulfil the role of President.

Assuming the President is free of conflict, he/she will consider the composition of a potential sitting Panel on the basis of known interests notified by the members (section 185(1) ASIC Act). The Director and Counsel will assist in finding members available to sit on the matter and suggest appropriate names to the substantive President.

The substantive President will then invite three Panel members to form a sitting Panel, with one as the sitting President and one as the sitting Deputy President (section 184 ASIC Act). Generally the Panel aims to ensure a mix of expertise for each sitting Panel including a lawyer, banker and, if possible, a member with particular skills relevant to the matter.

The case officer liaises with the members to obtain information as to any potential conflicts of interest that may exist. The case officer sends interested parties a declaration of interests which is a letter advising of any relevant interest or connection a sitting member has with a party and its advisers together with a brief background on each of the sitting members. Any interests held by members of the Executive are also disclosed in this letter.

5. Conflicts

The purpose of the declaration of interests is to provide parties with the opportunity early in the process to raise an objection to a potential sitting member if they believe that member may be conflicted from sitting on the Panel. If this occurs, the Executive will discuss the objection with the substantive President and he/she may determine to vary the make-up of the sitting Panel (sections 185(2) and 184(4) ASIC Act) or that the interest will not prevent that member from sitting (section 185(1A)).

6. Parties

Applicants are required to identify potential parties in their application, to the extent known to the applicant, and to serve a copy of the application on those interested parties (refer to Rule 2.1(b)). ASIC is always invited to become a party (refer to ASIC Regulation 22(1)) and must be copied with the application (ASIC Regulation 21). Other interested parties may include the target/ bidder, rival bidders, financiers, target shareholders and ASX.

7. Process letter

As soon as possible after receipt of an application, the case officer sends a process letter to interested parties. That letter sets out basic information about the application and the process for an interested person to become a party to the proceedings. It also informs recipients of the steps that the Panel will take in considering the matter (eg. whether interim orders are/ have been considered and that an opportunity will be given to make submissions and rebuttal submissions) and a protocol for communicating with the Executive during proceedings.

8. Notice of appearance required from parties

If a person wishes to become a party, which allows them to make submissions to the Panel and to be copied in to all correspondence in the proceedings, they must lodge a notice of appearance with the Executive within 2 days of service of the application or process letter. The Panel may accept the notice of appearance if the person is an interested party or will otherwise advise the person.

The Notice of Appearance (refer to the Appendix to the Rules) contains a confidentiality undertaking which parties must complete (except in the case of ASIC). It also contains an undertaking that parties will not induce or facilitate canvassing in the media of issues that are, or are likely to be, before a sitting Panel.

The notice must be received in respect of a party before that party's submissions will be accepted or correspondence from other parties is copied to that party.

9. Submissions from other interested persons

The Panel has discretion under Regulation 24 of the ASIC Regulations to consider submissions from non-parties. Parties will be advised if the sitting Panel decides to consider such submissions.

10. Legal representation

Legal representation is only permitted with the consent of the sitting Panel (section 194 ASIC Act). Rule 11 states that the Panel prefers parties to be represented by their commercial solicitors who have taken part in the relevant transactions. Occasionally a party will request leave to be represented by a litigation lawyer and/or counsel.

The Panel's policy is generally not to allow counsel to represent parties at conferences but a sitting Panel may exercise its discretion and allow counsel to attend to address specific legal issues if it considers it desirable.

11. Communications between the Executive, parties and the sitting Panel

Unless a conference is held, the parties do not communicate directly with Panel members, for natural justice reasons and to ensure procedural fairness to all parties. The case officer is responsible for the dissemination of submissions and other relevant documentation between the Executive and the sitting Panel. It is important, in order to afford due procedural fairness, that parties ensure all correspondence to the Panel is copied to all other parties as well as to the appropriate contacts within the Executive.

Submissions and other correspondence received from parties are sent by the case officer to the sitting Panel members as soon as practicable after they are received. Email is the Panel's preferred communication method.

The case officer and Executive Assistant also keep an up to date document list which is sent to parties during proceedings.

The case officer and Director seek to inform parties in advance, as far as possible, of the progress of the sitting Panel's consideration of a matter, deadlines and any other information or developments relevant to the proceedings.

12. Panel meetings

The case officer liaises with the sitting Panel members to determine their availability to meet during the course of proceedings. The sitting Panel generally meets shortly after an application is received (to decide whether to conduct proceedings, and if so, to settle a brief) and once rebuttal submissions have been received. Usually it is necessary for the sitting Panel to meet on more occasions, depending on how the proceedings develop and the complexity of the issues being considered. Almost all Panel meetings occur by teleconference.

13. Deciding to conduct proceedings & jurisdictional issues

The sitting Panel's first decision is whether or not to conduct proceedings in relation to a matter (ASIC Regulation 20).

Factors to be considered include whether the Panel has jurisdiction to consider the matter, whether the accusations would give rise to unacceptable circumstances if proven, whether and what remedies may be available and/or whether the application is frivolous or vexatious.

14. The brief

If the sitting Panel decides to conduct proceedings, it must then issue a brief to the parties (ASIC Regulation 20). The brief determines the scope of the proceedings. It sets out the key issues the Panel wishes to be addressed, invites the parties to make submissions on those issues, and sets out the timetable for parties to make those submissions and rebuttals. Unless there are special circumstances (eg urgency of the matter or complexity of the issues involved), parties are provided with **2 business days** from receipt of the brief to lodge submissions and **1 business day** from receipt of submissions to lodge rebuttal submissions. However, parties have the opportunity to make submissions to the Panel as to the timetable for submissions and resolution of the proceedings.

The Executive drafts the brief and provides it to the sitting Panel for them to settle. A supplementary brief may be issued by the sitting Panel if issues continue to develop during the proceedings. If this is required, the Executive will let the parties know in advance.

If the application is for a declaration under section 657A of the Corporations Act, the brief will request parties to provide submissions as to the grounds upon which the Panel might consider unacceptable circumstances to have arisen as set out in section 657A(2)

of the Corporations Act having regard to the Eggleston Principles set out in section 602 and in section 657A(3).

15. Interim orders

If an interim order is requested in the application, an initial brief may be sent to parties requesting submissions and rebuttals on that aspect of the application only. Tight time frames may be imposed on parties in such circumstances if the question of whether to grant interim orders requires urgent resolution. Depending on the circumstances, after considering the parties' submissions, the sitting Panel may extend to an affected party the opportunity to provide undertakings to the Panel in lieu of interim orders being made. The Panel or the sitting President may make interim orders *ex parte*. However, in such circumstances the applicant would need to satisfy a much higher threshold for the Panel to consider exercising such powers. The applicant would need to demonstrate some urgency for the interim orders to be made, that they would have minimal impact on other parties and the market, that the orders would protect the *status quo* while the Panel considers an application and would not unfairly prejudice any other person.

Once interim orders have first been considered, a further brief is distributed seeking submissions and rebuttals on the substantive matters raised in the application.

16. Submissions and rebuttals

Parties must send their submissions to all other parties who have filed an appearance as well as to the case officer, Director, Counsel and Office Manager and confirm to the Executive that they have done so. The case officer, Director and Counsel are responsible for sending submissions to the sitting Panel.

Depending on the nature of the issues in question and the time available, the Executive may provide the sitting Panel members with a summary and comparison of the submissions received and/ or a paper setting out the key issues arising from the application which the members should consider and address in reaching their decision. In some cases there may be a period of 1 or 2 days (and occasionally longer) where, after lodging rebuttal submissions, parties do not hear from the Executive. This is because the sitting Panel is usually considering the submissions and issues relevant to the respective arguments in order to formulate its decision during this period. Nevertheless, the Executive will endeavour to keep the parties informed of progress.

17. Document list

The Executive maintains a document list for each matter. It lists all documents submitted by a party to the Panel or the Executive, the date received, the party who sent it and to whom it has been provided. This list is circulated to all parties and the sitting Panel usually shortly after rebuttal submissions have been received. If appropriate, an updated list may be circulated later in proceedings if further material has been received from parties.

18. Conferences

The sitting Panel has a discretion whether to hold a conference. Parties may submit a request for a conference to the sitting Panel, which it will consider. A majority of matters are determined without a conference, however the Panel may convene a conference

where it considers, having regard to any time pressures, that a conference will elicit information to assist it in reaching a decision promptly.

The Panel may determine to hold a conference where, for example, the issues or policy in question are complex and lend themselves to oral examination or where time is critical and a conference may assist the Panel with speedy resolution of the matter.

A conference can be held by teleconference, videoconference or in person. Parties will usually be given the option to attend a conference in person, if feasible.

The sitting President chairs the conference and Panel members may direct questions to particular parties. Conferences are kept as informal as possible. Transcripts are taken of conferences and copies made available to parties for a proportion of the transcription costs.

19. Decisions

The sitting Panel will convene to discuss the submissions and rebuttals (and any evidence elicited in conference) with the Executive. The Counsel may advise the sitting Panel as to any questions of legal interpretation and application. The sitting Panel will then make a decision. Alternatively, the sitting Panel may decide that, for complex issues, it requires further evidence from parties or may engage an independent expert to advise it.

Parties will be notified as soon as possible after the sitting Panel has reached a decision. Usually this is via email, but may also be by telephone call to each party from the Executive.

If a declaration of unacceptable circumstances is made, the declaration is generally signed by the President of the sitting Panel. Where the President is located interstate, it may be signed by the Counsel or Director at the direction of the President.

20. Interim Orders and Final Orders

Where the Panel makes proposes to make final orders in proceedings, and usually where it proposes to make interim orders, it will provide parties with an opportunity to make submissions to the Panel as to whether or not such orders should be made and if made, in what terms. The time permitted for parties to put such submissions varies, but will typically be no longer than 24 hours. Usually a copy of draft orders which the Panel is proposing to make will accompany the request for parties' submissions. However, in some cases, time may only permit for the Executive to canvass parties' views by telephone with the Executive passing those views on to the sitting Panel to reach a timely decision.

If orders are made, parties will receive a copy of the final orders together with a media release outlining the sitting Panel's decision, before they are published. In addition, all declarations and orders made by the Panel are published in the Government Gazette.

If the sitting Panel decides that no declaration or orders will be made, the Executive notifies parties of that decision and publishes a media release to that effect once approved by the sitting Panel.

21. Reasons

The Executive prepares draft reasons for review and comment by the sitting Panel. The Executive aims to have reasons ready for distribution in draft form to parties within 5 business days of the Panel reaching a decision on a matter. However, reasons for decision may take longer to settle depending on such things as workload of the Panel (particularly if there are a series of applications in relation to a particular bid being considered contemporaneously), complexity of the issues, availability of members and urgency with which reasons are required by parties.

Where a party has indicated that it might lodge an application for review of a decision at first instance, the Panel endeavours to provide parties with draft reasons for the original decision within 2 to 3 business days to allow the applicant access to the reasons with which to frame arguments in the review application.

Once the reasons have been settled by the sitting Panel, they are circulated to parties for comment on factual accuracy and matters of unfair prejudice before they are published on the Panel's website. A media release is also published when the reasons are released.

22. Reviews of ASIC decisions

Where an application is made under section 656A of the Corporations Act, the Panel may decide to affirm, vary or set aside an ASIC decision. Where it sets aside an ASIC decision, the Panel may substitute its own decision or remit the matter back to ASIC for reconsideration. The process of proceedings for review of ASIC decisions is similar to that for applications for declarations of unacceptable circumstances.

Whatever the Panel's decision, it must be published in the Government Gazette.

23. Post Matter Reviews (post mortems)

The Panel's policy is to review each matter which has come before it and to improve its processes based on the experience of parties and their advisers.

The Executive offers each party and its advisers the opportunity to participate in a post matter review with the Executive once proceedings are completed. This may include a discussion of Panel and Executive processes, conferences, briefs, deadlines, decisions and orders, reasons, composition of the sitting Panel, confidentiality, interaction with ASIC and ASX, timeliness of communication from the Executive to parties and availability of information. A post matter review typically lasts for approximately 1 hour.

The Executive uses feedback it receives to:

- (a) brief Panel members at their quarterly group meetings; and
- (b) prepare a list of suggestions/ issues to follow-up.

This may include suggested changes to the Panel's process or even changes to the Panel's legislative powers.

24. Contact for further information

For more information please contact the Executive:

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www.takeovers.gov.au

1 The current fee prescribed is \$500.00, as at February 2002.