

Corporations and Securities Panel

Rules

for

Proceedings

DRAFT

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Preface

- 1.0 These rules have been made by the Panel under section 195 of the ASC Law, to govern procedure in Panel proceedings.
- 1.1 The object of the rules is to strike a balance between the following objectives:
- (a) a proceeding before the Panel is completed as quickly and as cheaply as the nature of the matter, the requirements of natural justice and the time limits imposed by statute allow;
 - (b) the Panel decides any matter before it on sufficient and reliable information;
 - (c) Panel proceedings do not unnecessarily delay commercial transactions;
 - (d) decisions made by the Panel or by ASIC are set aside on review if and only if they are clearly unsustainable; and
 - (e) without losing an opportunity for effective action, the Panel gives a person liable to be prejudiced by an order or declaration a fair opportunity to make submissions on the relevant facts, law and discretionary considerations.
- 1.2 To that end, the rules are designed to ensure that:
- (a) wherever possible, decisions are made on written submissions and evidence;
 - (b) proceedings are held in private, with all parties having access to all information which is put before the Panel, and being obliged to treat that information as confidential;
 - (c) the conduct of a proceeding is controlled by the sitting President;
 - (d) procedural matters in relation to a hearing may be dealt with by the sitting President or the executive, without the need to convene the sitting Panel or a formal directions hearing;
 - (e) the time available to make an order or declaration and the time of the sitting Panel is used as efficiently as possible; and
 - (f) costs orders are used to sanction failure to comply with these rules and with directions of the sitting President, which lead to delay or expense.

The rules should be read in the light of that policy.

- 1.3 The rules will be amended from time to time.

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Applications

2.0 Proceedings in the Panel must be commenced by an application for review under section 656A or 657EA, for a declaration under section 657A or for an order under section 657D or section 657E.

Note: Under the Fees Regulations, a fee of \$200 is payable on an application to the Panel under Chapter 6. (The figure is current as at 13 March 2000.)

2.1 Where different applications have been made to the Panel and it appears to the substantive President that they involve common issues of fact or that it would be convenient for the matters to be heard together, the substantive President may direct under section 184 that the Panel be constituted by the same members in relation to each of those matters, and that the proceedings be combined.

Parties

3.0 A person is a party to a proceeding if:

- (a) the application initiating the proceeding is served on the person; and
- (b) the person lodges a notice of appearance in the requisite form and within two days after service of the application.

If a document must be served on all parties during the two days after an application has been served on a person under paragraph (a), the document should be served on the person.

3.1 Every application must be served on ASIC. An application concerning an acquisition of shares in a company must be served on that company and on the person acquiring the shares. An application need not be served on the applicant.

3.2 The sitting President or the executive may direct that an application be served on any person, if it appears to the sitting President or the executive that:

- (a) the person's interests are liable to be affected by a declaration or order sought in the proceedings, or by the proceedings themselves;
- (b) the person is able to represent the interests of a class of persons who are liable to be so affected, whether or not the person is a member of that class; or
- (c) the person is likely to be able to assist the Panel, even if neither of paragraphs (a) and (b) applies.

Note: The primary purpose of making directors of a target company parties to a proceeding concerning a bid for the company, is to represent the interests of holders of securities of the company.

A person who makes submissions under regulation 24 in connection with a proceeding is not a party to the proceeding. Under subrule 8.3, the sitting President may make an order that such a person may be given access to some or all of the documents lodged in connection with a proceeding.

Contents of Documents

- 4.0 An application, submission or other document in proceedings must:
- (a) be in writing, signed on behalf of the applicant or party;
 - (b) identify the proceedings, the person making the application or submission, and any other person on whose behalf it is made;
 - (c) set out any matters of fact and any submissions on law or the exercise of discretion on which the party relies, in sufficient detail to allow a proper consideration of them; and
 - (d) be lodged with the Panel executive.

Note: Applications to the Panel will be primarily decided on written applications, evidence and submissions. The Panel or the sitting President may give directions as to the issues to be addressed in submissions and evidence. A party which fails to comply with these rules or such a direction may pass up its opportunity to be heard on those matters.

Applications generally

- 4.1 An application initiating proceedings must:
- (a) set out in sufficient detail to allow a proper consideration of the application:
 - (i) the relief which the applicant seeks; and
 - (ii) any matters of fact and any submissions on law or the exercise of discretion on which the applicant relies; and
 - (b) identify any person (or class of persons) known to the applicant who would be materially affected by the grant of the relief.

Application for Review of ASIC or Panel Decision

- 4.2 An application under section 656A or section 657EA for the review of a decision by ASIC or the Panel must specify the decision, the officer or body who or which made the decision and the grounds for review.
- 4.3 The ground of the application for review must be one or more of the following:
- (a) the policy under which the decision was made was invalid or inapplicable;
 - (b) ASIC or the Panel did not apply, or did not properly apply, an ASIC or Panel policy which governed the application;
 - (c) the materials now before the Panel differ from those previously before ASIC or the Panel and require different findings of fact from those made by ASIC or the Panel;
 - (d) ASIC's or the Panel's weighting of the relevant considerations was plainly wrong, having regard to:
 - (i) the relief that ASIC or the Panel gave or withheld;
 - (ii) the sanctions ASIC or the Panel attached or refused to attach to that relief; and
 - (iii) the commercial and regulatory effects of that relief and those sanctions.

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Note: The application may also raise grounds appropriate to judicial review, such as those mentioned in sections 5 and 6 of the *Administrative Decisions (Judicial Review) Act*. These grounds are unlikely to enable the Panel to substitute a different decision for the decision under appeal. See Policy Statement 2 *Reviewing Decisions*.

Application for Consent to Apply for Review

- 4.4 An application under subsection 657EA(2) for the President's consent to apply for review of a decision of the Panel must:
- (a) be addressed to the sitting President;
 - (b) identify the decision against which the appeal would be brought;
 - (c) contain enough information to allow a proper consideration of the effects of the decision and the case for reviewing it.

Note: Under Corporations Regulation 6.10.01, the application must be made within 2 days after the relevant decision.

Submissions, other than Applications

- 4.5 A submission in response to an application or to another submission must state which, if any, of the matters of fact and law stated in the relevant application or submission are disputed, and the grounds on which they are disputed. It need not repeat a statement which the party has already made in a document lodged in the proceedings.

Additional Documents to be Lodged

- 5.0 An application under section 656A for review of a decision by ASIC must be accompanied by a copy of each of the following, if the document is available to the applicant:
- (a) the relevant application to ASIC for relief and each submission in support of the application;
 - (b) any other submissions received by ASIC in relation to the application;
 - (c) any instrument granted by ASIC in relation to the application; and
 - (d) any notice of ASIC's decision and any statement of reasons for the decision provided by ASIC.
- 5.1 ASIC must lodge copies of the following documents, within two days of being served:
- (a) any paper to the Commission or the Regulatory Policy Group concerning the decision, any attachments to the paper and minutes of any decision which was minuted;
 - (b) if there is no statement of reasons and no paper mentioned in paragraph (a), each internal paper or note concerning the decision, including internal legal and policy advice; and
 - (c) any document mentioned in the preceding subrule which was not lodged by the applicant.

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- 5.2 The sitting President may make directions as to the documents that parties are to lodge in relation to proceedings.
- 5.3 The sitting President may direct the parties to a matter to lodge a statement of agreed facts. The statement must set out the matters of fact and law which are not in dispute and state whether any party disputes a fact alleged by any party in a document lodged in the proceedings. If a party disputes a fact and the Panel later decides there was no ground for disputing it, the sitting President may order that party to pay the other parties' costs of establishing the fact.

Lodgement and Service of Submissions and Evidence

- 6.0 Any submission or written evidence lodged in a proceeding must be served on each party to the proceeding, as nearly as practicable at the same time as it is lodged with the Panel executive.
- 6.1 All documents must be lodged with the Panel executive as attachments to electronic mail, and are taken to be received when that mail is received. If a paper copy must be lodged as well, it must be posted on the same day as the electronic mail is sent.
- 6.2 Unless the sitting President or the Panel executive agree to the use of another format, all electronic documents must be provided in RTF or ASCII text format. Documents available only as images may be lodged in GIF format.
- 6.3 To ensure that all parties have access to the same materials and to facilitate reference to those materials, the Panel executive will number each document lodged with the Panel and will provide a copy to each party as an attachment to electronic mail. The number given by the Panel executive should be used in all subsequent references to the document.
- 6.4 The rules in this part are subject to any direction under Part 8.

Evidence

- 7.0 Evidence may be provided to the Panel for the purposes of a proceeding in the form of:
- (a) a statutory declaration in accordance with the law of the place where it is made;
 - (b) oral or written sworn testimony in accordance with section 192; or
 - (c) a statement in writing, signed by the person making the statement, which includes statements to the effect that:
 - (i) the person is aware that section 199 of the ASC Law makes it an offence, punishable by imprisonment, to make a false or misleading statement in a submission to the Panel, unless the person making the statement believes, on reasonable grounds, that the statement is true and not misleading; and
 - (ii) there are no material omissions from the statement.

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- 7.1 A paper original of a declaration, affidavit, statement or other document must be lodged, as well as any electronic copy.
- 7.2 In a declaration, affidavit or statement, the deponent must state whether he or she has personal knowledge of the matters which he or she is representing to be true.
- 7.3 Documentary evidence must be:
- (a) tendered by a witness giving oral testimony; or
 - (b) attached to a declaration, affidavit or statement.
- 7.4 If a document is attached to a declaration, affidavit or statement, the deponent must set out the provenance of the document and must state one or more of the following:
- (a) that specified contents of the document are true, to the personal knowledge of the deponent;
 - (b) that the deponent represents that specified contents of the document are true, but without personal knowledge;
 - (c) that the document is a true copy of the original it represents.
- 7.5 Any member of the sitting Panel may summons a person to give evidence or to produce specified documents, on application by a party, or without any application.
- 7.6 The Panel may use information published, by parties or other persons, under the Corporations Law, or the Listing Rules of Australian Stock Exchange Limited or of another stock exchange (e.g. company searches and stock exchange announcements) and representations made to the Panel or the executive in circumstances to which section 199 would apply. Copies of relevant documents, or notes of discussions, will be provided to parties.

Disclosures

- 8.0 Subject to this Part, all information provided to the Panel in connection with a proceeding must be disclosed to the other parties to that proceeding.
- 8.1 Pursuant to section 190, the sitting President may direct that certain information be:
- (a) provided to a party's legal representatives only, and withheld by them from the party itself; or
 - (b) withheld from a party and its legal representatives.
- 8.2 An application for a direction to withhold information from a party must provide all of the information necessary for the sitting President to consider whether:
- (a) the direction would adversely affect the ability of the Panel to afford that party natural justice;
 - (b) the party is likely to contravene the confidentiality obligations of this rule; and
 - (c) the prospect of adverse effects on that party resulting from the direction is clearly outweighed by the prospect of adverse effects on other persons flowing from unauthorized use or disclosure of the information, if it is provided to the party or its legal representatives.

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- 8.3 The sitting President may direct that all or any information which is provided for the purposes of a proceeding be provided to a person who is not a party to the proceeding, but who may make a submission to the Panel concerning the proceeding under regulation 24.
- 8.4 A person must not use or disclose information which is disclosed to the person in connection with a proceeding, except:
- (a) for the purposes of the proceeding. A person to whom the information is disclosed must be put on notice that it is confidential and the disclosure must be conditional on the information not being used or further disclosed, except for the purposes of the proceeding and in accordance with this rule; or
 - (b) as authorized by the person who disclosed the information or by another person with the right in equity to give that authorization, and in accordance with any conditions affecting that authorization.

This sub-rule does not apply to information which is not confidential in fact.

- Note The Panel will generally endeavour to prevent unauthorized use and disclosure of information provided to it in connection with a proceeding. However:
- (a) use and disclosure for purposes connected with the Panel's functions (for instance, to staff, legal and other expert advisors, the Ombudsman and the Parliamentary Committee) are authorized use and disclosure; and
 - (b) the Panel may disclose information under other legislation (in particular, section 127 of the ASC Law and the Freedom of Information Act).

Conduct of Proceeding

Generally

- 9.0 The sitting President for a proceeding:
- (a) has control over the entire conduct of the proceeding;
 - (b) may give directions from time to time concerning the conduct of the proceeding.
- 9.1 The sitting President may consult with other members of the sitting Panel before giving directions. Where convenient, the sitting Panel may give directions concerning the conduct of the proceeding.
- 9.2 The directions the sitting President or Panel may give include directions:
- (a) that a copy of an application or other submission be given to a person;
 - (b) that a response or other submission be lodged with the Panel by a certain date;
 - (c) as to confidentiality, under these rules and under section 190;
 - (d) that a person be a party to the proceeding, or be allowed or invited to make submissions without being a party;
 - (e) about the issues to be addressed in submissions;
 - (f) about the timing of a directions or other hearing, and as to the persons who are to be present and the matters to be addressed in evidence or submissions to the

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- hearing;
- (g) that parties lodge a statement of agreed facts;
 - (h) referring a question of law to the Court;
 - (j) to the executive to apply to the Court in the name of the President for an order under section 657G or subsection 658C(5);
 - (k) relating to legal representation of a party;
 - (m) dismissing an application as frivolous or vexatious;
 - (n) requiring the production of any documents;
 - (p) abridging or extending a time specified in these rules, or otherwise varying the requirements of these rules;
 - (q) on any of the matters mentioned in subregulation 16(1), which are not dealt with elsewhere in these rules;
 - (r) that a party pay specified costs of another party.
- 9.3 Subject to any directions made by the sitting President or Panel, a proceeding, including any conference in relation to the proceeding, will take place in private.

Specific Rules

- 9.4 The sitting Panel or President may settle, or direct the executive to settle, a brief under regulation 20 or a statement under regulation 38. The brief or statement, or a notice accompanying the brief or statement, may direct a particular party to address particular issues raised by the brief or statement.
- 9.5 The substantive or sitting President (as the case requires) or the executive may give directions on all or any of the following:
- (a) whether additional persons should be served;
 - (b) defining the issues between the parties;
 - (c) further proceedings concerning the application.
- Such directions may be given by whatever means are suitable in a particular case. In particular, they may be given at a procedural conference held face to face, by audio conference or by video conference.
- 9.6 If a party wishes to apply for a direction, the application and each submission in support of the application must be lodged at least one day before the direction is required.
- 9.7 A person who fails to comply with a direction will normally be ordered to pay the costs of the other parties which are attributable to the failure.

Time Periods

- 9.8 When the sitting President invites a person to make a submission or requires a person to lodge any document, the sitting President will specify a date and time by which the submission or document must be lodged. In general, the sitting President will give a party:
- (a) three days to respond to an initial application for a declaration or order, other

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- than an interim order;
- (b) one day to respond to:
 - (i) an application for an interim order or to review a decision of ASIC or the Panel; or
 - (ii) a submission other than an originating application.

However, shorter or longer times may be allowed, depending on the time at the Panel's disposal, difficulties over obtaining information and other relevant matters. See also subrule 1.1.

Review on Referral by the Court

- 9.9 If the Court refers a matter to the Panel for review under section 657EB:
- (a) these rules apply, as if the referral was an application for review;
 - (b) subject to any direction of the sitting President, the parties to the review are the persons who were parties to the Court proceedings; and
 - (c) the sitting President may invite any or all of the parties to lodge submissions in response to the referral.

Referral of an Issue to the Court

- 9.10 An application for an order referring a question of law to the Court under section 659A must be made to the sitting President and must be accompanied by a draft of a case stated, setting out the question of law and the facts to which it relates.

Application for Interim Order

- 9.11 An application for an order under section 657E and any supporting submission must be lodged at least one day before the application needs to be decided. If the application relates to proceedings which are already on foot, the application must be served on all parties. Otherwise, the applicant must serve each person who would be directly or indirectly affected by the order to a material extent and ASIC, and apply to the sitting President or the executive for directions about service on other persons.

Consultation with Executive

- 9.12 Participants in matters which may come before the Panel are encouraged to approach the Panel executive to seek their advice about the Panel's likely response to a course of conduct, to circumstances or a proposed application, or to discuss possible resolution of any issue without an application to the Panel.
- 9.13 The Panel's executive are not delegates of the Panel, in respect of its fact-finding or its discretionary powers. No view expressed by the executive binds the Panel. However, in considering what remedies are appropriate in a particular case, the Panel will consider whether the executive were consulted in advance, and whether any advice they gave was followed.

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- 9.14 The executive are the Panel's principal advisers on law and policy. Parties should assume that any information provided to (or by) the executive will be communicated to a sitting Panel and to parties to proceedings, if it is relevant to the proceedings.

Hearings

- 10.0 The sitting President may direct that a specified part of a proceeding be dealt with at a hearing, at which a quorum of the sitting members will be present. The hearing may be held face to face, or by video or audio conference. A hearing will be held in private, unless the sitting President or Panel directs that it be held in public.
- 10.1 The sitting President may direct what evidence or submissions are to be provided at a hearing, for instance, by specifying the issues to be addressed. Since issues are, as far as possible, to be resolved by written submissions, time at a hearing will be used to take evidence and submissions to supplement written submissions.
- 10.2 In particular, the sitting President may allot a period of time to a party and direct the party to address specified issues. The Panel may direct the party to cease addressing the Panel when the party has used up its allotted time, or when the Panel has heard all it requires on the issues the party has been directed to address.
- 10.3 The sitting President is not required to allot parties equal amounts of time to address the Panel and parties should not rely on being able to traverse in oral submissions all of the issues which concern them.
- 10.4 An application to issue a summons to witness shall state the matters to be dealt with in the witness's evidence. The sitting President may direct the proposed witness to answer specific questions, in writing, before appearing before the Panel.

Legal Representation at Hearings

- 11.0 In general, oral and written submissions to the Panel may only be made by persons who have taken direct part in the relevant transactions. This includes solicitors advising the parties.
- 11.1 A person may be accompanied and advised at a hearing by a lawyer.
- 11.2 The sitting President may give leave for a party to be represented by a lawyer or other advocate, for specific purposes e.g. to argue a point of law or to examine a witness.

Note: Under section 194 of the ASC Law, 'A party to Panel proceedings may be legally represented in the proceedings only with the leave of the Panel.'

Contempt and Publicity

- 12.0 Proceedings before the Panel are confidential, and a person may not publish any report of an incomplete proceeding.
- 12.1 A party to proceedings in the Panel which have been completed may publish a statement that the proceedings took place, the subject of the proceedings, the outcome of the proceedings and whether the party proposes to seek review of the Panel's decision.
- 12.2 The Panel strongly reprobates any attempt to:
- (a) influence a decision of the Panel or a member of the Panel; or
 - (b) detract from the authority of a decision of the Panel,
- by means other than submissions made to the Panel in proceedings, and judicial or Panel review of a decision of the Panel.

Note: Unless Panel proceedings had ceased to be confidential in fact, Listing Rule 3.1 would not usually require disclosure of the existence of unfinished proceedings. A party which believes it may be required to notify ASX of unfinished proceedings should consult the executive.

When a matter is complete, the Panel will normally issue a press release dealing with the matters mentioned in subrule 12.1 and with the Panel's reasons for its decision.

Undertakings

- 13.0 A person may offer an undertaking under section 201A to the sitting Panel. Copies of the proposed undertaking and of any submissions in support must be lodged. If the sitting Panel is prepared to consider accepting the undertaking, the sitting President will direct that copies be served on parties to the proceeding and how those parties may make submissions on the proposed undertaking.

Note: Parties should consult the executive about any other proposal to settle a matter on which an application has been made to the Panel which has not been finally disposed of. In general, the Panel supports the settlement of a disputes about a takeover, but it needs to ensure that the settlement overcomes any unacceptable circumstances affecting the takeover.

Definitions and Interpretation

- 14.0 In these rules:

'lodge' means lodge with the Panel executive, in writing;

'regulation 15' and similar means the regulation of that number in the ASC Regulations;

'section 192' and similar - references to legislative provisions numbered from 171 to 201A are to

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provisions of the ASC Law; and references to legislative provisions numbered from 602 to 673 are to provisions of the Corporations Law;

Note: The ASC Law and the ASC Regulations will soon be renamed the ASIC Law and the ASIC Regulations: see subsection 2(4) and Schedule 12 of the *Corporate Law Economic Reform Program Act 1999*.

'**sitting members**' has the same meaning as in section 184;

'**sitting President**' for a proceeding is:

- (a) the person who is President for the proceeding, either the substantive President, if he or she is a sitting member, or the member appointed by the substantive President under paragraph 184(3)(a) as President for the proceeding; or
- (b) in that person's absence, the member appointed by the substantive President under paragraph 184(3)(b) as Deputy President for the proceeding (the 'sitting Deputy President');

'**substantive President**' is the person appointed as President of the Panel by the Governor-General, under section 173, or the person appointed as Acting President by the Minister, under section 182;

'**target company**' - where an application concerns the affairs of a body corporate, the body is a target company for the purposes of the proceedings;

- 14.1 Time periods specified in days before or after a day or an event are clear business days, as defined in regulation 15. One day after a day ends at midnight ending the first business day following that day; one day before an event commences at midnight commencing the last business day before the day on which that event happens.
- 14.2 Otherwise, an expression defined in the Corporations Law or the ASC Law is used in the sense so defined, and the interpretation provisions in Part 1.2 of the Corporations Law apply to these rules.

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NOTICE OF APPEARANCE**

[INSERT THE NAME OF THE MATTER]

[INSERT THE NAME OF THE PARTY] ('the Company') notifies the Corporations and Securities Panel and the parties to this matter that it will be a party to the matter.

[OPTIONAL] The Company will be advised in the matter by [NAME THE COMPANY'S SOLICITORS OR OTHER ADVISORS]

Documents can be served on the Company by sending them to:

Courier:

Postal:

DX:

E-mail

Fax:

Telephone:

Contact:

[PROVIDE AN ADDRESS OF EACH KIND FOR THE COMPANY OR ITS ADVISORS.
AN E-MAIL ADDRESS IS ESSENTIAL.]

The Company undertakes to the Panel and the other parties that the Company and its advisors will respect the confidentiality of information disclosed to it in connection with the matter.

Dated:

Signed on behalf of the Company by [GIVE NAME AND AUTHORITY TO BIND THE COMPANY]