



CONSULTATION PAPER

Guidance Note 4 – Remedies General

Why is the Panel consulting?

One of the key objectives of the Takeovers Panel is to resolve Panel applications as quickly and efficiently as possible. Over the last few years, the Panel has noticed a trend of some parties and their solicitors engaging in uncooperative conduct which adversely impacts this key objective and interferes with the efficient running of Panel proceedings. This includes unnecessarily elongating proceedings by failing to answer questions directly or failing to produce documents or other materials when first requested. This may have an adverse effect on the commercial interests of the parties and other interested persons involved (such as shareholders) as well as adding to the time and costs for all concerned.

As part of a broader project being undertaken by the Panel aimed at improving Panel processes with parties, the Panel has been considering ways to minimise conduct that obstructs efficient Panel processes, including by reviewing its guidance on orders, costs, procedures and remedies.

The last major update to Guidance Note 4 (**GN 4**) was made in October 2008 (with minor amendments made in May 2015 and January 2017).

The Panel proposes to revise GN 4 to take a stronger stance on remedies including costs orders (**Revised Guidance Note**).

What is the Panel proposing?

Attached is a draft Revised Guidance Note. The main proposed changes are to:

- adjust the tone of GN 4 including, for example, by including a purpose statement (see paragraph 2)
- remove the reference to costs orders being the “*exception not the rule*”
- expand the list of circumstances where costs may be awarded against a party to include, for example, where parties unnecessarily elongate proceedings by failing to answer questions directly or failing to produce documents or other materials when first requested, act in an unnecessarily hostile manner or defend circumstances that are clearly unacceptable
- change the examples of circumstances in which the Panel may accept undertakings to pay costs
- update the Panel’s approach to the quantum of costs orders
- clarify that the Panel will expect certain provisions (which under the existing guidance are taken to be implied into undertakings) to be expressly included in any undertaking offered to the Panel,

for example that the undertaking will be fulfilled as soon as practicable

- provide further guidance on the circumstances in which the Panel may be less willing to accept undertakings, for example where the drafting of the undertaking may become overly complex or where the party offering the undertaking has been uncooperative and
- change the structure of GN 4, including by re-arranging the order of each section and adjusting the methodology in citing cases to focus on a selected set of examples (in view of the recently updated [Index of Reasons](#) resource which contains additional examples).

Invitation to comment

The final Revised Guidance Note will be determined by the Panel after taking into account the comments received as part of the consultation process.

Comments are sought generally from the public regarding the Panel's proposed Revised Guidance Note. In particular, submissions are sought on the following questions:

1. What are your views on the adjustments to the tone of GN 4? To what extent should the Panel take a stronger stance on the guidance on orders and costs orders than that proposed in the draft Revised Guidance Note (noting the Panel's power to make orders is remedial in nature)?
2. Do you agree with the expansion of the list of circumstances in paragraph 31 in which costs may be awarded against a party? What amendments or additions should be made to this list (if any)?
3. How useful is the revised guidance under the heading 'Amount of costs'? In what circumstances (if any) should the Panel have regard to the Federal Court scale of fees on costs?
4. Noting the limitations on the Panel's ability to make costs orders against an applicant, to what extent is the Panel's power to decline to conduct proceedings an adequate substitute to address this? Would it be useful for GN 4 to include a section on declining to conduct proceedings (even though this is not strictly a remedy)? Please explain.
5. Do you agree with the change to the examples of circumstances in which the Panel may accept undertakings to pay costs (see paragraph 33)? Please explain.
6. The revised guidance currently provides that the Panel will generally only make a costs order in favour of an unrepresented party in relation to the application fee and disbursements (see paragraph 37). Do you agree with this approach? Is there a basis on which the Panel could award other costs in favour of an unrepresented party? Please explain.
7. The current version of GN 4 states (at paragraph 34) that costs orders may include costs of legal "and other advisors and of

directors”. Should the revised guidance note also include this text? Please explain with reference to any relevant authorities.

8. How useful is the revised guidance provided under the heading ‘Undertakings’?
9. Do you have any comments on the approach to citing case examples in GN 4 (see footnote 1)?
10. Do you have any other comments or suggestions on the form or content of the draft Revised Guidance Note? If so, please provide them.
11. Should the Panel consult further on amendments to Rule 12 of the Takeovers Panel Procedural Rules 2020 to include additional requirements as to what constitutes a valid Panel application? If so, do you have any suggestions of what requirements could be incorporated in Rule 12?

Submissions

Comments on the draft Revised Guidance Note are due by **Monday, 2 March 2026**.

Please send any submissions or consultation enquiries to takeovers@takeovers.gov.au.

Please note that your submission will be published unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please refer to our [privacy policy](#) for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by the Panel.

Monday, 15 December 2025



Australian Government

Takeovers Panel

CONSULTATION DRAFT

Guidance Note 4 - Remedies General

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Background

1. This guidance note has been prepared to assist market participants understand the Panel's approach to remedies. The examples are illustrative only and nothing in the note binds the Panel in a particular case.¹
2. This guidance note is also designed to ensure that Panel applications are "*resolved as quickly and efficiently as possible by a specialist body largely comprised of takeover experts*"² and to help minimise conduct by parties or their legal advisers that may impede Panel proceedings (such as unnecessarily elongating proceedings by failing to answer questions directly or failing to produce documents or other materials when first requested to do so).

¹ Selected Panel decisions are cited in this guidance note. Please note that this is not intended to be exhaustive. For further examples, please refer to the Panel's Index of Reasons on its website

² Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 at 37 [7.3]

3. This guidance note is focussed on the Panel's power to make interim orders (section 657E³), declarations of unacceptable circumstances (section 657A) and final orders (including costs orders, section 657D). In relation to the Panel's power to review ASIC decisions under sections 656A and 656B, see Guidance Note 2: Reviewing Decisions.

Interim orders

4. The Panel or the President⁴ may make interim orders.⁵ They can be made in the absence of a declaration of unacceptable circumstances or even an application for a declaration.
5. Interim orders are usually made to prevent unacceptable circumstances from happening, continuing or getting worse while proceedings are conducted. They may be made to preserve the status quo until proceedings are completed. They may also be made to ensure that the Panel's power to fashion the most appropriate remedy in the circumstances is not forestalled by intervening events.
6. The Panel can make any order as an interim order that it can make as a final order (see paragraphs 14 to 26 below). However, interim orders cease to have effect at the earlier of the end of the period specified in the order (not to exceed two months) and the determination of the Panel's proceedings. The temporary nature of the order will factor into the type of order made.
7. Relevant factors for making an interim order include:
 - (a) 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 market⁶
 - (b) the strength of the evidence
 - (c) whether the circumstances can be adequately remedied by final relief alone and
 - (d) the availability of alternative measures, such as undertakings.

³ All references are to the *Corporations Act 2001* (Cth) (**Corporations Act**) unless otherwise indicated

⁴ Before the Panel is appointed. All references to President are to the President appointed under section 173 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) or an Acting President appointed under section 182 of the ASIC Act (in circumstances when the President cannot act)

⁵ Section 657E

⁶ In cases where an interim order may significantly prejudice other parties, the Panel may consider whether the applicant is willing to give an undertaking to compensate for any losses incurred by parties if an interim order is made: see e.g. *Powerlan Limited* [2010] ATP 2 at [21]

8. In general, the Panel will not hold up a transaction by interim orders, unless mischief will occur that cannot conveniently be reversed by final orders.⁷

Example: Unless the information deficiencies are significant, it will usually be preferable to allow a bidder's statement to be dispatched pending a final decision on the alleged deficiencies (see Guidance Note 5: Specific Remedies – Information Deficiencies at [5]–[12]).

Declaration of unacceptable circumstances

9. The Panel may declare circumstances unacceptable in relation to the affairs of a company.⁸ This conveys the Panel's view that the circumstances are unacceptable and enables the Panel to make final orders.⁹ The following describes the Panel's process for making a declaration. For more information about the Panel's approach to making a declaration of unacceptable circumstances, see Guidance Note 1: Unacceptable Circumstances.
10. Before making a declaration, the Panel must give each party to the proceedings, each person to whom the proposed declaration relates and ASIC an opportunity to make submissions.¹⁰ The Panel informs the parties of its intention to make a declaration, inviting submissions on the draft document.
11. The Panel may at that stage be prepared to consider an undertaking proposed by a party to remedy the unacceptable circumstances, without the need for a declaration and orders. However, the Panel is more receptive to resolutions proposed by the parties if they are offered earlier in the process.¹¹
12. Declarations are published in the Government Gazette.¹²
13. A copy of a declaration (and of the Panel's reasons for making it) must be given to each person to whom the declaration relates.¹³

⁷ See e.g. *Village Roadshow Limited* [2004] ATP 4 at [94], *Gondwana Resources Limited* 02 [2014] ATP 15 at [16] and [18], *Ambassador Oil and Gas Limited* 02 [2014] ATP 17 at [12] and *Energy Resources of Australia Limited* [2019] ATP 25 at [53]–[55]

⁸ Section 657A

⁹ Section 657D(1). The Panel may make a declaration of unacceptable circumstances but no orders: see e.g. *BreakFree Limited* 04 [2003] ATP 39, *BreakFree Limited* 04(R) [2003] ATP 42, *Summit Resources Limited* [2007] ATP 9 and *Pacific Smiles Group Limited* [2024] ATP 12. The Panel may also accept undertakings in lieu of orders: see e.g. *Gondwana Resources Limited* [2014] ATP 9, *Flinders Mines Limited* 02 and 03 [2019] ATP 12 and *Montu Group Pty Ltd* [2024] ATP 25

¹⁰ Section 657A(4)

¹¹ See paragraph 40 below

¹² Section 657A(5)

¹³ Section 657A(6)

Final orders

14. If the Panel makes a declaration of unacceptable circumstances, it may make orders:
 - (a) to protect rights or interests affected by the unacceptable circumstances or
 - (b) to ensure (as far as possible) that a bid proceeds as if the unacceptable circumstances had not occurred.¹⁴
15. Final orders to protect rights might include (for example) cancelling contracts,¹⁵ freezing transfers and/or rights attached to securities,¹⁶ forcing the disposal of securities¹⁷ and establishing rights to withdraw acceptances.¹⁸
16. Final orders to get the bid back on track might include (for example) allowing more time or information for shareholders to assess the merits of the proposal¹⁹ or establishing rights to withdraw acceptances.
17. The Panel's power to make orders is remedial in nature. However, an order may adversely affect a person, provided it is not unfairly prejudicial.²⁰
18. The Panel may make any final order that meets the description in paragraph 14 above. This includes remedial orders,²¹ ancillary or consequential orders, and costs orders.
19. The Panel may not make an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C.²²

¹⁴ Section 657D(2). For a discussion of this section see *Eastern Field Developments Ltd v Takeovers Panel* [2019] FCA 311 at [132]–[152]

¹⁵ *Allegiance Mining NL* [2008] ATP 3; *Mount Gibson Iron Limited* [2008] ATP 4; *STI-Global Limited* [2013] ATP 12; *Accelerate Resources Limited 01 & 02* [2020] ATP 7; *Virtus Health Limited* [2022] ATP 5

¹⁶ *The President's Club Limited 02* [2016] ATP 1; *Merlin Diamonds Limited* [2016] ATP 18; *Southern Cross Media Group Limited 02R & 03R* [2023] ATP 15; *Sequoia Financial Group Limited* [2024] ATP 14

¹⁷ *Midwest Corporation Limited 02* [2008] ATP 15; *DataDot Technology Limited* [2009] ATP 13; *CMI Limited* [2011] ATP 4; *Affinity Education Group Limited* [2015] ATP 9; *Molopo Energy Limited 03R, 04R & 05R* [2017] ATP 12; *The Market Herald Limited* [2023] ATP 7

¹⁸ *Consolidated Minerals Limited 03R* [2007] ATP 28; *Firestone Energy Limited* [2013] ATP 4; *Ambassador Oil and Gas Limited 01* [2014] ATP 14; *Keybridge Capital Limited 04, 05 & 06* [2020] ATP 6; *Bullseye Mining Limited 03* [2022] ATP 4; *Bullseye Mining Limited 06* [2023] ATP 11. In *Goodman Fielder Limited* [2003] ATP 1 an undertaking (with ASIC relief) was accepted for offering of withdrawal rights. Similarly in *The Mildura Co-operative Fruit Company Limited* [2004] ATP 5 and *Pact Group Holdings Ltd* [2024] ATP 4

¹⁹ *NGM Resources Limited* [2010] ATP 11; *Firestone Energy Limited* [2013] ATP 4; *Bullseye Mining Limited 03* [2022] ATP 4; *Bullseye Mining Limited 06* [2023] ATP 11

²⁰ See section 657D(1)

²¹ Defined in section 9

²² Section 657D(2)

20. The Panel considers that its power to make orders includes the power to make an order:
- (a) that a person do something contrary to a relevant provision in the Corporations Act (for example, Chapter 6). The Panel does not consider that the power extends to making an order that a person do something contrary to another law (for example, the *Foreign Acquisitions and Takeovers Act 1975* (Cth)).²³ As part of their submissions on proposed orders parties should raise any such issues, in which case the Panel will consider how it might recast the order to avoid that issue or
 - (b) that affects property interests²⁴ or existing legal rights and obligations.²⁵
21. Before making final orders the Panel must:
- (a) have made a declaration of unacceptable circumstances
 - (b) give each party to the proceedings, each person to whom the proposed order would be directed and ASIC an opportunity to make submissions. If there are identified persons or groups who may be affected, the Panel may seek their comments even if they are not parties. This may be done by inviting them to become a party²⁶ or by allowing them to make a submission without becoming a party (the invitation may be by media release²⁷ or direct correspondence)
 - (c) be satisfied that the order would not unfairly prejudice any person.²⁸ This involves consideration of the prejudice that different persons or groups may suffer by making or not making the order. In determining whether an order is unfairly prejudicial, it is appropriate for the Panel “to take into account the

²³ See *Attorney-General (Cth) v Alinta Ltd* [2008] HCA 2 especially at [14] per Gummow J and [96] per Hayne J and *ASC v Bank Leumi Le-Israel (Switzerland)* (1996) 139 ALR 527 at 540–541. There may be limited other areas with a sufficient nexus to Chapter 6 that an order under section 657D also overrides that law. The party asserting this in a particular case would need to convince the Panel of it

²⁴ *AMP Shopping Centre Trust 02* [2003] ATP 24 at [38]–[41]

²⁵ *Pinnacle VRB Limited 11* [2001] ATP 23 at [28]; *Golden West Resources Limited 03 and 04* [2008] ATP 1 at [40]; *Golden West Resources Limited 04R* [2008] ATP 2 at [29]

²⁶ This was done in *AMP Shopping Centre Trust 01 and 02*. Not accepting an invitation until late in the proceedings may have costs implications: *AMP Shopping Centre Trust 01* [2003] ATP 21 at [117]

²⁷ *Australian Securities and Investments Commission Regulations 2001* (Cth) (**ASIC Regulations**), regulations 23 and 24 and see *BreakFree 04(R)* [2003] ATP 42 at [77]

²⁸ This may be described as the fairest order having regard to the various interests to be reconciled and the discretion to be exercised. Cases include *Gjergja & Atco Controls Pty Ltd v Cooper* [1987] VR 167, *ASC v Bank Leumi Le-Israel* (1995) 134 ALR 101 at 151–154, *ASIC v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 at [117]–[169], *Flinders Diamonds Ltd v Tiger International Resources Inc* (2004) 88 SASR 281 at [63]–[79], *Glencore International AG v Takeovers Panel & Ors* (2005) 220 ALR 495 at [52]–[53] and *CEMEX Australia Pty Ltd v Takeovers Panel* (2008) 106 ALD 5 at [54]–[55]. As to balancing the rights of buyers and sellers on market, examples include *NCSC v Monarch Petroleum NL* [1984] VR 733 and *ASC v Mt Burgess Gold Mining Co NL* (1994) 62 FCR 389. As to the potential unfair prejudice of orders on market participants who are not parties, see *ASIC v Astra Resources Ltd (No 2)* (2016) 113 ACSR 162 at [254]

*degree of culpability of persons whose interests are affected by the orders, including whether those persons have acted dishonestly or in a manner that can be characterised as reckless*²⁹ and

- (d) consider that the proposed order protects rights or ensures that the bid proceeds as it should have (see paragraph 14 above).
- 22. In deciding what orders to make, the Panel considers how the order would promote the objectives set out in section 602 and whether the remedy is proportionate to the mischief.
- 23. Orders may be time sensitive. An order that is appropriate at the commencement of a matter may be inappropriate days later because the market has moved or third persons have changed their positions.
- 24. A copy of an order (and of the Panel's reasons for making it) must be given to:
 - (a) each party
 - (b) each person to whom the order is directed (if not a party)
 - (c) the company (if the order relates to its securities) and
 - (d) ASIC.
- 25. Orders are published in the Government Gazette.³⁰ However, the order takes effect when made.
- 26. In the event of non-compliance with an order, the President, ASIC, a party or a person to whom the order relates may apply to the Court for an order to secure compliance.³¹ The Court may make any orders it considers appropriate to secure compliance with the Panel's order.

Costs orders

Power to order costs

- 27. The Panel only has power to order costs of parties if it has made a declaration.³² It cannot order costs:
 - (a) to a successful respondent, even if it declines to conduct proceedings because the application is frivolous or vexatious
 - (b) if it finds unacceptable circumstances, but makes no declaration because it accepts an undertaking to remedy the circumstances
 - (c) to the Panel or non-parties or

²⁹ *ASIC v Terra Industries Inc* (1999) 92 FCR 257 at [97(g)]. See also *ASIC v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 at [142]

³⁰ Section 657D(4)

³¹ Section 657G

³² Sections 657D(1) and 675D(2)(d). A costs order is a type of final order. The Panel has made cost orders, for example, in *Minemakers Limited* [2012] ATP 8, *Austock Group Limited* [2012] ATP 12, *Richfield International Limited* [2015] ATP 4 and *Thorn Group Limited 01 & 02* [2020] ATP 29

- (d) in an application under section 656A (review of ASIC's exemption or modification power).
- 28. Costs may be directed to be borne by a party or another person.³³
- 29. It may be appropriate to award costs to ASIC where it has participated as a party in an application under section 657C.

Considerations

- 30. The Panel's approach to costs orders is guided by the following considerations:
 - (a) the Panel's primary role is to resolve quickly and efficiently the real issues in the proceedings that come before it
 - (b) a declaration relates to circumstances, not conduct, and may involve no finding of fault
 - (c) unlike the courts, costs orders do not follow to a 'successful' party as a matter of course and
 - (d) a party is entitled to make, or resist, an application once without exposure to a costs order, provided it presents a case of reasonable merit in a businesslike way.³⁴
- 31. Costs may be awarded against any party if it:
 - (a) presented a case that was not arguable, made misleading or unsubstantiated assertions,³⁵ was unnecessarily hostile, raised extraneous matters or defended circumstances that were clearly unacceptable³⁶
 - (b) delayed or obstructed proceedings (including unnecessarily elongating proceedings by failing to answer questions directly or failing to produce documents or other materials when first requested to do so),³⁷ abused the process³⁸ or unreasonably refused to negotiate³⁹
 - (c) unreasonably delayed in becoming a party and providing relevant material⁴⁰

³³ For example, the directors or legal advisers of a party, see paragraph 35

³⁴ For examples of cases presented without reasonable merit see *Condor Blanco Mines Limited* [2016] ATP 8 at [85] and *The Market Herald Limited* [2023] ATP 7 at [324]. See also *Regal Resources Limited* [2016] ATP 17 at [71]–[72], *Merlin Diamonds Limited* [2016] ATP 18 at [154]–[155], *Molopo Energy Limited 03R, 04R & 05R* [2017] ATP 12 at [296]–[298] and *Keybridge Capital Limited 04, 05 & 06* [2020] ATP 6 at [140]

³⁵ Includes reckless or deliberate misquoting of source documents

³⁶ *DRA Global Limited* [2022] ATP 16 at [155]–[159]

³⁷ *Thorn Group Limited 01 & 02* [2020] ATP 29 at [199]–[202]

³⁸ Including by making unnecessarily lengthy submissions or putting voluminous materials before the Panel without explaining their relevance or taking advantage of the financial weakness of another party. See also *Pinnacle VRB Limited 11* [2001] ATP 23

³⁹ Including refusing a reasonable compromise during negotiations

⁴⁰ *AMP Shopping Centre Trust 01* [2003] ATP 21 at [117]

- (d) sought an unmeritorious review⁴¹ or put material before a review Panel that it failed to put before the initial Panel
 - (e) wasted time or elongated proceedings on a particular issue⁴² (partial costs referable to the additional expenses may be appropriate in this case)
 - (f) submitted material that was materially inaccurate⁴³
 - (g) ignored a reasonable request by a party to mitigate any clearly unacceptable circumstances in correspondence prior to lodging a Panel application or during Panel proceedings⁴⁴ or
 - (h) failed to comply with a direction under regulation 16(1) of the ASIC Regulations, a Panel order,⁴⁵ an undertaking to the Panel⁴⁶ or the Panel's Procedural Rules including those concerning confidentiality and media canvassing⁴⁷ (the costs of the other parties attributable to the failure may be ordered).
32. However, this should not be seen as an exhaustive list of the circumstances in which the Panel may consider making a costs order.
33. The Panel has power to accept a written undertaking from a person to pay such costs as determined by the Panel if an application fails.⁴⁸ An undertaking may be offered, for example, to persuade a Panel to consider a particular issue or pursue a line of inquiry during proceedings, or to persuade a President to consent to the making of a review application under section 657EA(2).⁴⁹ Such an undertaking would be to pay the costs of the other parties in the event that the issue or inquiry is considered by the Panel to be frivolous or vexatious or not relevant to the proceedings or the review application fails.

Amount of costs

34. The Panel will make its own determination of what costs to award a party based on its assessment of information provided by the party.⁵⁰

⁴¹ *Taipan Resources NL 11* [2001] ATP 16 at [100]–[101], in circumstances where the applicant seeking a review had provided an undertaking as to costs, see paragraph 33

⁴² For example, by providing multiple drafts of inadequate additional disclosure (*Minemakers Limited* [2012] ATP 8 at [73]–[76])

⁴³ Parties should check the accuracy of the submissions or material they provide, particularly if generated by artificial intelligence

⁴⁴ *DRA Global Limited* [2022] ATP 16 at [156]–[158]

⁴⁵ *IFS Construction Services Limited* [2012] ATP 15 at [79]

⁴⁶ In *Montu Group Pty Ltd* [2024] ATP 25 at [83], the Panel, having made a declaration of unacceptable circumstances and accepted undertakings in lieu of orders, advised parties that it did not presently consider it necessary to make any orders, but reserved the right to do so (including as to costs) pending performance of undertakings to its satisfaction

⁴⁷ See rules 18 and 19 of the *Takeovers Panel Procedural Rules 2020*

⁴⁸ Section 201A of the ASIC Act

⁴⁹ *Taipan Resources NL 11* [2001] ATP 16 at [98]–[99]

⁵⁰ In appropriate cases, the Panel may appoint an independent cost consultant to assess costs: see e.g. *Thorn Group Limited 01 & 02* [2020] ATP 29

Any claim for costs should set out and justify the amount which the party claims.⁵¹

35. In determining costs the Panel may have regard to the Federal Court scale of fees on costs as between party and party, namely those costs that have been fairly and reasonably incurred by the party in the conduct of the proceedings.⁵² In matters where it is warranted, the Panel may award costs in favour of a party having regard to the Federal Court scale of fees on costs on an indemnity basis⁵³ or make a costs order against the directors of a party⁵⁴ or their legal advisers.⁵⁵
36. Costs orders may extend to the costs incurred in recovering costs.
37. The Panel will generally only make a costs order in favour of an unrepresented party in relation to the application fee and disbursements.⁵⁶
38. Where a party has unreasonably delayed part of the proceedings only, the Panel may (in appropriate cases) consider limiting a costs order by reference to costs incurred for that period.⁵⁷

Undertakings

39. Matters before the Panel may be resolved by undertakings under section 201A of the ASIC Act.
40. The Panel encourages parties to resolve matters wherever possible and welcomes any offer by a party to remedy potential unacceptable circumstances. An agreed resolution, such as by undertakings, can be more flexible and quicker than orders. It may also obviate the need for the Panel to make a declaration. A party may offer an undertaking to resolve the matter at any point in the Panel's process. However, the timing of the offer is a relevant factor that the Panel considers when

⁵¹ *Realestate.com.au Ltd* [2001] ATP 1 at [80]. Parties seeking costs may be asked to produce to the Panel and other parties copies of relevant invoices evidencing costs incurred and should keep this in mind during the course of proceedings

⁵² See definition of "costs as between party and party" in Schedule 1 of the Federal Court Rules 2011

⁵³ Defined in Schedule 1 of the Federal Court Rules 2011 as meaning "costs as a complete indemnity against the costs incurred by the party in the proceeding, provided that they do not include any amount shown by the party liable to pay them to have been incurred unreasonably in the interests of the party incurring them"

⁵⁴ *Merlin Diamonds Limited* [2016] ATP 18 at [154]–[155]; *Molopo Energy Limited* 12R [2018] ATP 19 at [30]–[37] and (in relation to bearing the costs of preparing an independent expert's report) *Nex Metals Explorations Ltd* 02 [2021] ATP 16 at [95]

⁵⁵ Noting that the Courts will only exercise their jurisdiction to award costs against a legal adviser "with care and discretion and only in clear cases", see *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at [92]

⁵⁶ See *Cachia v Hanes* (1994) 179 CLR 403. For examples of where the Panel awarded costs in favour of an unrepresented party, see *Condor Blanco Mines Limited* [2016] ATP 8 and *Strategic Minerals Corporation NL* [2018] ATP 2

⁵⁷ See *Minemakers Limited* [2012] ATP 8 at [71]–[76]

exercising its discretion whether to accept an undertaking in lieu of a declaration or orders.⁵⁸

41. The Panel considers that the public interest is generally served by accepting an undertaking that addresses unacceptable circumstances to the Panel's satisfaction. Accepting an undertaking may render it unnecessary for the Panel to make a declaration or orders. However, the Panel may still consider it appropriate to make a declaration in such situations (for example, where the Panel wants to send the market a signal).⁵⁹
42. The Panel may be less willing to accept an undertaking from a party who has been uncooperative or has unnecessarily delayed proceedings.⁶⁰
43. An undertaking should be as simple and direct as possible. The Panel may favour a final order over an undertaking if the drafting of any undertaking may become overly complex, noting that the Panel cannot unilaterally vary an undertaking.⁶¹
44. The Panel will expect provisions to the following effect in any undertaking offered:
 - (a) that the person offering it will do all that is necessary to secure performance of it and to enable persons whose rights and interests are affected by the circumstances to have the benefit of it⁶² and
 - (b) the undertaking will be fulfilled as soon as practicable.
45. In the event of non-compliance with an undertaking, the Panel may apply to the Court for an order directing the person to comply.⁶³ This includes the undertakings relating to confidentiality and publicity given by a party in a notice to become a party.⁶⁴ The Court can make any order including that a person comply with the undertaking or pay compensation.

⁵⁸ For example, the Panel considered the approaching deadline to make a declaration under section 657B, as well as the time required to address satisfactorily the Panel's disclosure concerns, as relevant factors in declining to accept an undertaking in lieu of a declaration in *Brisbane Markets Limited* [2016] ATP 3 at [108]–[111]. If the Panel is minded to make a declaration of unacceptable circumstances, it may provide the relevant parties with a short time to provide an undertaking to resolve issues as a way of resolving the matter promptly. See also paragraph 11 above

⁵⁹ *Summit Resources Limited* [2007] ATP 9; *Mildura Co-operative Fruit Company Limited* [2004] ATP 5 at [96]; *Montu Group Pty Ltd* [2024] ATP 25 at [66]; *Alara Resources Limited* [2025] ATP 1 at [94]

⁶⁰ *Montu Group Pty Ltd* [2024] ATP 25 at [82]

⁶¹ *Southern Cross Media Group Limited 02R & 03R* [2023] ATP 15 at [67]–[94]

⁶² *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596

⁶³ Section 201A(3) of the ASIC Act

⁶⁴ See rules 12(1)(h), 16(1) and 18 and 19 of the *Takeovers Panel Procedural Rules 2020*

Other outcomes

46. The Panel's functions extend beyond resolving disputes. This is explicit from the rule-making power under section 658C, which gives the Panel power to establish standards. The Panel also publishes guidance, media announcements and reasons.

Reasons

47. If the Panel makes a declaration⁶⁵ or orders,⁶⁶ it must give the parties a statement of reasons for its decision, although these may not address all the submissions made. The Panel also gives reasons when it decides not to conduct proceedings. The Panel may also give reasons when it accepts an undertaking or takes no action. The President may give reasons when consenting or declining to consent to a review of a Panel decision.⁶⁷
48. The Panel will normally publish its reasons.⁶⁸ It generally gives parties its reasons initially on a confidential basis and an opportunity to make submissions on non-substantive corrections to the Panel's reasons, including any proposed redactions of unnecessary material which adversely affects an individual or is unfairly prejudicial.
49. Reasons may include reflections on the actions of a person or a reprimand of a person. The person should be aware of the risk of an adverse finding.⁶⁹ The Panel has wide immunities for comments it might make,⁷⁰ but of course must be fair, proportionate and base its comments on credible information.

Advisers

50. In most cases advisers are more familiar than their clients with the technical, procedural, strategic and tactical aspects of takeovers and objectives of the Panel. The Panel has no formal powers to deal with advisers, but expects advisers to take all reasonable steps to ensure their clients comply with the law, ASIC policies, stock market rules

⁶⁵ Section 657A(6)

⁶⁶ Section 657D(4)

⁶⁷ Section 657EA(2). The reasons for consent may be incorporated into the sitting Panel's reasons. The President has published separate reasons for declining to consent: see e.g. *Austral Coal Limited 03R* [2005] ATP 15, *Careers Australia Group Limited 03R* [2015] ATP 2 and *Invest Blue Pty Ltd (Consent to Review)* [2025] ATP 6

⁶⁸ Including the reasons of any member dissenting from the majority, see *Pasminco Limited (Administrators Appointed)* [2002] ATP 6, *Touch Holdings Limited* [2013] ATP 3 and *Finders Resources Limited 03R* [2018] ATP 11. Findings of fact in an order or reasons for an order are *prima facie* evidence of the fact: section 658B

⁶⁹ *Annetts v McCann* (1990) 170 CLR 596

⁷⁰ Section 197 of the ASIC Act

and Panel policies (and, if there is an application, with the *Takeovers Panel Procedural Rules 2020*).⁷¹

51. Section 194 of the ASIC Act provides that “[a] party to *Takeovers Panel proceedings may be legally represented in the proceedings only with the leave of the Takeovers Panel*”. The Panel may refuse or withdraw consent if the Panel is concerned about the conduct of a party’s proposed legal advisers or the proposed legal advisers have a conflict.⁷²
52. Advisers may be referred to (and even criticised) in the reasons for decision.

Other actions

53. The Panel may take other actions as well. These include:
 - (a) privately admonishing a person
 - (b) reporting its findings to ASIC,⁷³ or a person’s ‘employer’, or a person’s professional organisation or
 - (c) including its findings in a media release.

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⁷¹ Note that a party’s undertaking concerning confidentiality and media canvassing under section 201A of the ASIC Act is given on behalf of its advisers as well. The Panel considers that it is accordingly an obligation of the advisers not to act in a way that would lead to a breach of its client’s undertaking

⁷² *DRA Global Limited* [2022] ATP 16 at [128]–[130]; *Avalon Minerals Limited* [2013] ATP 11 at [130]–[146]

⁷³ ASIC Regulations, regulation 18

Related material

GN 1: Unacceptable circumstances

GN 2: Reviewing Decisions

GN 5: Specific remedies - Information deficiencies

DRAFT



Australian Government

Takeovers Panel

CONSULTATION DRAFT

Guidance Note 4 - Remedies General

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Background

1. This guidance note has been prepared to assist market participants understand the Panel's approach to remedies ~~generally~~. The examples are illustrative only and nothing in the note binds the Panel in a particular case.⁷⁴
2. This guidance note is also designed to ensure that Panel applications are "resolved as quickly and efficiently as possible by a specialist body largely

⁷⁴ Selected Panel decisions are cited in this guidance note. Please note that this is not intended to be exhaustive. For further examples, please refer to the Panel's Index of Reasons on its website

comprised of takeover experts”⁷⁵ and to help minimise conduct by parties or their legal advisers that may impede Panel proceedings (such as unnecessarily elongating proceedings by failing to answer questions directly or failing to produce documents or other materials when first requested to do so).

3. This guidance note is focussed on the Panel’s power to make interim orders (section 657E⁷⁶), declarations of unacceptable circumstances (section 657A) and final orders (including costs orders, section 657D). In relation to the Panel’s power to review ASIC decisions under sections 656A and 656B, see Guidance Note 2: Reviewing Decisions.

Interim orders

2. ~~If the Panel makes a declaration of unacceptable circumstances,¹ it may make orders:~~
 - ~~(a) to protect rights or interests affected by the unacceptable circumstances or~~
 - ~~(b) to ensure (as far as possible) that a bid proceeds as if the unacceptable circumstances had not occurred.²~~
3. ~~The Panel may not make an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C.~~
4. The Panel or the President⁷⁷ may make interim orders.³~~These⁷⁸~~ They can be ~~to the same effect as final orders, can operate for up to 2 months and do not require~~made in the absence of a declaration of unacceptable circumstances ~~to be made first~~or even an application for a declaration.
5. ~~The Panel does not seek to punish when deciding on a remedy. But the remedy may adversely affect a person, provided it is not unfairly prejudicial.⁴In addition, a declaration, orders or other statement (eg,~~

⁷⁵ Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 at 37 [7.3]

⁷⁶ All references are to the *Corporations Act 2001* (Cth) (**Corporations Act**) unless otherwise indicated

¹ ~~Section 657A of the Corporations Act 2001 (Cth). All references are to the Corporations Act unless otherwise indicated~~

² ~~Section 657D(2)~~

⁷⁷ Before the Panel is appointed. All references to President are to the President appointed under section 173 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) or an Acting President appointed under section 182 of the ASIC Act (in circumstances when the President cannot act)

³ Section 657E

⁷⁸ Section 657E

⁴ ~~This may be described as the fairest order having regard to the various interests to be reconciled and the discretion to be exercised. Cases include *Gjergja v Cooper* [1987] VR 163; *ASIC v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 at [117] [169]; *Flinders Diamonds Ltd v Tiger International Resources Ltd* [2004] SASC 119 at [63] [79]. As to balancing the rights of buyers and sellers on market, examples include *NCSC v Monarch Petroleum NL* [1984] VR 733, 8 ACLR 785, 2 ACLC 256 and *ASC v Mt Burgess Gold Mining Co NL* (1994) 62 FCR 389, 15 ACSR 714, 13 ACLC 271~~

reasons) may expressly or impliedly involve a reprimand of a party or adviser.

Declaration of unacceptable circumstances

- ~~6. The Panel may declare circumstances unacceptable in relation to the affairs of a company. This both conveys the Panel's view that standards have not been met and enables the Panel to make final orders.⁵~~
- ~~7. Declarations are published in the Government Gazette.⁶~~
- ~~8. A copy of a declaration (and of the Panel's reasons for making it) must be given to each person to whom the declaration relates.⁷~~
- ~~9. The Panel usually informs the parties of its intention to make a declaration, inviting comments on technical and factual aspects of the draft document. The Panel may at that stage be prepared to consider a remedy for the unacceptable circumstances, without the need for a declaration and orders. The Panel encourages parties to resolve matters wherever possible and welcomes any offer by a party to remedy potential unacceptable circumstances. While parties are free to offer a remedy at any time, the Panel is more receptive to resolutions proposed by the parties if they are offered earlier in the process.⁸~~

Interim orders

- ~~5.~~ ~~10.~~ Interim orders are usually made to prevent unacceptable circumstances from happening, continuing or getting worse while proceedings are conducted. They may be made to preserve the status quo until proceedings are completed. They may also be made to ensure that the Panel's power to fashion the most appropriate remedy in the circumstances is not forestalled by intervening events.
- ~~6.~~ ~~11.~~ The Panel can make any order as an interim order that it can make as a final order: (see paragraphs 14 to 26 below). However, interim orders cease to have effect at the earlier of the end of the period specified in the order (not to exceed two months) and the determination of the Panel's proceedings. The temporary nature of the order will factor into the type of order made.
- ~~7.~~ ~~12.~~ Relevant factors for making an interim order include:

⁵ The Panel may make a declaration of unacceptable circumstances but no orders: Examples – *BreakFree Limited 04* [2003] ATP 39; *BreakFree Limited 04(R)* [2003] ATP 42; *Summit Resources Limited* [2007] ATP 9; in *Gondwana Resources Limited* [2014] ATP 9, the Panel accepted undertakings in lieu of orders. See also GN 1

⁶ Section 657A(5)

⁷ Section 657A(6)

⁸ See paragraph 39 below

- (a) 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 market⁷⁹
- (b) the strength of the evidence
- (c) whether the circumstances can be adequately remedied by final relief alone and
- (d) the availability of alternative measures, such as undertakings.

8. ~~13.~~ In general, the Panel will not hold up a transaction by interim orders, unless mischief will occur that cannot, ~~or cannot~~ conveniently, be reversed by final orders.⁹⁸⁰

Example: Unless the information deficiencies are significant, it will usually be preferable to allow a bidder's statement to be dispatched pending a final decision on the alleged deficiencies (see Guidance Note 5: Specific Remedies – Information Deficiencies at [5]–[12]).

Declaration of unacceptable circumstances

- 9. The Panel may declare circumstances unacceptable in relation to the affairs of a company.⁸¹ This conveys the Panel's view that the circumstances are unacceptable and enables the Panel to make final orders.⁸² The following describes the Panel's process for making a declaration. For more information about the Panel's approach to making a declaration of unacceptable circumstances, see Guidance Note 1: Unacceptable Circumstances.
- 10. Before making a declaration, the Panel must give each party to the proceedings, each person to whom the proposed declaration relates and ASIC an opportunity to make submissions.⁸³ The Panel informs the parties of its intention to make a declaration, inviting submissions on the draft document.
- 11. The Panel may at that stage be prepared to consider an undertaking proposed by a party to remedy the unacceptable circumstances,

⁷⁹ In cases where an interim order may significantly prejudice other parties, the Panel may consider whether the applicant is willing to give an undertaking to compensate for any losses incurred by parties if an interim order is made: see e.g. *Powerlan Limited* [2010] ATP 2 at [21]

⁹⁸⁰ See e.g. *Village Roadshow Limited* [2004] ATP 4 at [94]; *Gondwana Resources Limited* 02 [2014] ATP 15 at [16] and [18]; *Ambassador Oil and Gas Limited* 02 [2014] ATP 17 at [12] and *Energy Resources of Australia Limited* [2019] ATP 25 at [53]–[55]

⁸¹ Section 657A

⁸² Section 657D(1). The Panel may make a declaration of unacceptable circumstances but no orders: see e.g. *BreakFree Limited* 04 [2003] ATP 39, *BreakFree Limited* 04(R) [2003] ATP 42, *Summit Resources Limited* [2007] ATP 9 and *Pacific Smiles Group Limited* [2024] ATP 12. The Panel may also accept undertakings in lieu of orders: see e.g. *Gondwana Resources Limited* [2014] ATP 9, *Flinders Mines Limited* 02 and 03 [2019] ATP 12 and *Montu Group Pty Ltd* [2024] ATP 25

⁸³ Section 657A(4)

without the need for a declaration and orders. However, the Panel is more receptive to resolutions proposed by the parties if they are offered earlier in the process.⁸⁴

12. Declarations are published in the Government Gazette.⁸⁵
13. A copy of a declaration (and of the Panel's reasons for making it) must be given to each person to whom the declaration relates.⁸⁶

Final orders

14. If the Panel makes a declaration of unacceptable circumstances, it may make orders:
 - (a) to protect rights or interests affected by the unacceptable circumstances or
 - (b) to ensure (as far as possible) that a bid proceeds as if the unacceptable circumstances had not occurred.⁸⁷
15. Final orders to protect rights might include (for example) cancelling contracts,⁸⁸ freezing transfers and/or rights attached to securities,⁸⁹ forcing the disposal of securities⁹⁰ and establishing rights to withdraw acceptances.⁹¹
16. Final orders to get the bid back on track might include (for example) allowing more time or information for shareholders to assess the merits of the proposal⁹² or establishing rights to withdraw acceptances.

⁸⁴ See paragraph 40 below

⁸⁵ Section 657A(5)

⁸⁶ Section 657A(6)

⁸⁷ Section 657D(2). For a discussion of this section see *Eastern Field Developments Ltd v Takeovers Panel* [2019] FCA 311 at [132]–[152]

⁸⁸ *Allegiance Mining NL* [2008] ATP 3; *Mount Gibson Iron Limited* [2008] ATP 4; *STI-Global Limited* [2013] ATP 12; *Accelerate Resources Limited 01 & 02* [2020] ATP 7; *Virtus Health Limited* [2022] ATP 5

⁸⁹ *The President's Club Limited 02* [2016] ATP 1; *Merlin Diamonds Limited* [2016] ATP 18; *Southern Cross Media Group Limited 02R & 03R* [2023] ATP 15; *Sequoia Financial Group Limited* [2024] ATP 14

⁹⁰ *Midwest Corporation Limited 02* [2008] ATP 15; *DataDot Technology Limited* [2009] ATP 13; *CMI Limited* [2011] ATP 4; *Affinity Education Group Limited* [2015] ATP 9; *Molopo Energy Limited 03R, 04R & 05R* [2017] ATP 12; *The Market Herald Limited* [2023] ATP 7

⁹¹ *Consolidated Minerals Limited 03R* [2007] ATP 28; *Firestone Energy Limited* [2013] ATP 4; *Ambassador Oil and Gas Limited 01* [2014] ATP 14; *Keybridge Capital Limited 04, 05 & 06* [2020] ATP 6; *Bullseye Mining Limited 03* [2022] ATP 4; *Bullseye Mining Limited 06* [2023] ATP 11. In *Goodman Fielder Limited* [2003] ATP 1 an undertaking (with ASIC relief) was accepted for offering of withdrawal rights. Similarly in *The Mildura Co-operative Fruit Company Limited* [2004] ATP 5 and *Pact Group Holdings Ltd* [2024] ATP 4

⁹² *NGM Resources Limited* [2010] ATP 11; *Firestone Energy Limited* [2013] ATP 4; *Bullseye Mining Limited 03* [2022] ATP 4; *Bullseye Mining Limited 06* [2023] ATP 11

17. The Panel's power to make orders is remedial in nature. However, an order may adversely affect a person, provided it is not unfairly prejudicial.⁹³
18. ~~14.~~ The Panel may make any final order that meets the description in paragraph ~~2~~14 above. This includes remedial orders,¹⁰⁹⁴ ancillary or consequential orders, and costs orders.
19. The Panel may not make an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C.⁹⁵
20. ~~15.~~ The Panel considers that its power to make orders includes the power to make an order:
- (a) that a person do something contrary to a relevant provision in the Corporations Act (~~eg for example~~, Chapter 6). The Panel does not consider that the power extends to making an order that a person do something contrary to another law (~~eg for example, the~~ *Foreign Acquisitions and Takeovers Act 1975 (Cth)*).¹¹⁹⁶ As part of their submissions on proposed orders parties should ~~refer to~~raise any such issues, in which case the Panel will consider how it might recast the order to avoid that issue or
 - (b) that affects property interests¹²⁹⁷ or existing legal rights and obligations.¹³⁹⁸
21. ~~16.~~ Before making final orders the Panel must:
- (a) have made a declaration of unacceptable circumstances
 - (b) give each party to the proceedings, each person to whom the proposed order would be directed and ASIC an opportunity to make submissions. If there are identified persons or groups who may be affected, the Panel may seek their comments even if they are not parties. This may be done by inviting them to become a party¹⁴⁹⁹ or by allowing them to make a submission without

⁹³ See section 657D(1)

¹⁰⁹⁴ Defined in section 9

⁹⁵ Section 657D(2)

¹¹⁹⁶ See *Attorney-General (Cth) v Alinta Ltd* [2008] HCA 2 especially at [14] per Gummow J and [96] per Hayne J; and *ASC v Bank Leumi Le-Israel (Switzerland) & Ors* (1996) ~~14 ACLC 1576 at 1588-9~~139 ALR 527 at 540-541. There may be limited other areas with a sufficient nexus to Chapter 6 that an order under section 657D also overrides that law. The party asserting this in a particular case would need to convince the Panel of it

¹²⁹⁷ *AMP Shopping Centre Trust 02* [2003] ATP 24 at [38]–[41]

¹³⁹⁸ *Pinnacle VRB Limited 11* [2001] ATP 23 at [28]; Golden West Resources Limited 03 and 04 [2008] ATP 1 at [40]; Golden West Resources Limited 04R [2008] ATP 2 at [29]

¹⁴⁹⁹ This was done in *AMP Shopping Centre Trust 01 and 02*. Not accepting an invitation until late in the proceedings may have costs implications: *AMP Shopping Centre Trust 01* [2003] ATP 21 at [117]

becoming a party (~~in this case~~ the invitation may be by media release ~~and not~~¹⁰⁰ or direct correspondence)¹⁵

- (c) be satisfied that the order would not unfairly prejudice any person.¹⁰¹ This involves consideration of the prejudice that different persons or groups may suffer by making or not making the order¹⁶ ~~and~~. In determining whether an order is unfairly prejudicial, it is appropriate for the Panel "to take into account the degree of culpability of persons whose interests are affected by the orders, including whether those persons have acted dishonestly or in a manner that can be characterised as reckless"¹⁰² and
 - (d) consider that the proposed order protects rights or ensures that the bid proceeds as it should have (see paragraph ~~214~~ above).
22. ~~17.~~ In deciding what orders to make, the Panel considers how the order would promote the objectives set out in section 602 and whether the remedy is proportionate to the mischief.
23. ~~18.~~ Orders may be time sensitive. An order that is appropriate at the commencement of a matter may be inappropriate days later because the market has moved or third persons have changed their positions.
24. ~~19.~~ A copy of an order (and of the Panel's reasons for making it) must be given to:
- (a) ~~•~~ each party
 - (b) ~~•~~ each person to whom the order is directed (if not a party)
 - (c) ~~•~~ the company (if the order relates to its securities) and
 - (d) ~~•~~ ASIC.
25. ~~20.~~ Orders are published in the Government Gazette.¹⁷¹⁰³ However, the order takes effect when made.
26. ~~21.~~ In the event of non-compliance with an order, the ~~Panel~~ President, ASIC, a party or a person to whom the order relates may apply to the

¹⁰⁰ Australian Securities and Investments Commission Regulations 2001 (Cth) (ASIC Regulations), regulations 23 and 24 and see BreakFree 04(R) [2003] ATP 42 at [77]

¹⁵ ~~ASIC Regulations 23 and 24 and see BreakFree 04(R) [2003] ATP 42 at [77]~~

¹⁰¹ This may be described as the fairest order having regard to the various interests to be reconciled and the discretion to be exercised. Cases include *Gjergja & Atco Controls Pty Ltd v Cooper* [1987] VR 167, *ASC v Bank Leumi Le-Israel* (1995) 134 ALR 101 at 151–154, *ASIC v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 at [117]–[169], *Flinders Diamonds Ltd v Tiger International Resources Inc* (2004) 88 SASR 281 at [63]–[79], *Glencore International AG v Takeovers Panel & Ors* (2005) 220 ALR 495 at [52]–[53] and *CEMEX Australia Pty Ltd v Takeovers Panel* (2008) 106 ALD 5 at [54]–[55]. As to balancing the rights of buyers and sellers on market, examples include *NCSC v Monarch Petroleum NL* [1984] VR 733 and *ASC v Mt Burgess Gold Mining Co NL* (1994) 62 FCR 389. As to the potential unfair prejudice of orders on market participants who are not parties, see *ASIC v Astra Resources Ltd (No 2)* (2016) 113 ACSR 162 at [254]

¹⁶ ~~See footnote 4~~

¹⁰² *ASIC v Terra Industries Inc* (1999) 92 FCR 257 at [97(g)]. See also *ASIC v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 at [142]

¹⁷¹⁰³ Section 657D(4)

Court for an order to secure compliance.¹⁸¹⁰⁴ The Court may make any orders it considers appropriate to secure compliance with the Panel's order.

Protecting rights or interests

~~22. Final orders to protect rights might include (for example) cancelling contracts,¹⁹ freezing transfers, freezing rights attached to securities, forcing the disposal of securities²⁰ and establishing rights to withdraw acceptances.²¹~~

Getting the bid back on track

~~23. Final orders to get the bid back on track might include (for example) allowing more time or information for shareholders to assess the merits of the proposal²² or establishing rights to withdraw acceptances.~~

Costs orders

~~24. Costs may be a relevant factor in deciding whether to make an interim order, conduct proceedings, consent to a review or accept an undertaking instead of making a declaration.~~

Power to order costs

~~25.~~ ^{25.} The Panel only has power to order costs of parties if it has made a declaration.²³¹⁰⁵ It cannot order costs:

- (a) to a successful respondent, even if it declines to conduct proceedings because ~~they are~~ the application is frivolous or vexatious
- (b) if it finds unacceptable circumstances, but makes no declaration because it accepts an undertaking to remedy the circumstances

¹⁸¹⁰⁴ Section 657G

¹⁹ *Allegiance Mining NL* [2008] ATP 3; *Mount Gibson Iron Limited* [2008] ATP 4; *Touch Holdings Limited* [2013] ATP 3; *STI Global Limited* [2013] ATP 12

²⁰ *Midwest Corporation Limited 02* [2008] ATP 15; *DataDot Technology Limited* [2009] ATP 13; *Bowen Energy Limited 02R* [2009] ATP 19; *Viento Group Limited* [2011] ATP 1; *CMI Limited* [2011] ATP 4; *CMI Limited 01R* [2011] ATP 5; *Real Estate Capital Partners USA Property Trust* [2012] ATP 6; *Avalon Minerals Limited* [2013] ATP 11; *Gondwana Resources Limited 02* [2014] ATP 15

²¹ See *Skywest Limited 03R* [2004] ATP 20; *Consolidated Minerals Limited 03* [2007] ATP 25; *Consolidated Minerals Limited 03R* [2007] ATP 28; *Firestone Energy Limited* [2013] ATP 4; *Avalon Minerals Limited* [2013] ATP 11; *Ambassador Oil and Gas Limited 01* [2014] ATP 14. In *Goodman Fielder Limited* [2003] ATP 1 an undertaking (with ASIC relief) was accepted for offering of withdrawal rights. Similarly in *Mildura Co-operative Fruit Company Limited* [2004] ATP 5

²² *Ranger Minerals Limited* [2002] ATP 11; *Skywest Limited 04* [2004] ATP 26; for an example of an order having the same effect see *Firestone Energy Limited* [2013] ATP 4

²³¹⁰⁵ Sections 657D(1) and 675D(2)(d). A costs order is a type of final order. The Panel has made cost orders, for example, in *Minemakers Limited* [2012] ATP 8, *Austock Group Limited* [2012] ATP 12, *IFS Construction Services Richfield International Limited* [20122015] ATP 154 and *Northern Iron Thorn Group Limited* [201401 & 02 [2020] ATP 429

- (c) to the Panel or non-parties or
- (d) in an application under ~~s656A~~[section 656A](#) (review of ASIC's exemption or modification power).

~~28.~~ ~~26.~~ Costs may be directed to be borne by a party or another person.¹⁰⁶

~~29.~~ ~~27.~~ It may be appropriate to award costs to ASIC where it has participated as a party in an application under ~~s657C~~[section 657C](#).

Considerations

~~30.~~ ~~28.~~ The Panel's approach to ~~cost~~[costs](#) orders is guided by the following considerations:

- (a) the Panel's primary role is to resolve ~~disputes expeditiously and informally~~[quickly and efficiently the real issues in the proceedings that come before it](#)
- (b) a declaration relates to circumstances, not conduct, and may involve no finding of fault
- (c) [unlike the courts](#), costs orders ~~are the exception not the rule, so may do~~ not follow to a 'successful' party [as a matter of course](#) and
- (d) a party is entitled to make, or resist, an application once without exposure to a costs order, provided it presents a case of reasonable merit in a businesslike way.²⁴¹⁰⁷

~~31.~~ ~~29.~~ Costs may be awarded against ~~a~~[any](#) party if it:

- (a) presented a case that was not arguable ~~or made~~, [made misleading or unsubstantiated assertions](#)²⁵¹⁰⁸ [was unnecessarily hostile, raised extraneous matters or defended circumstances that were clearly unacceptable](#)¹⁰⁹
- (b) delayed or obstructed proceedings,²⁶ [\(including unnecessarily elongating proceedings by failing to answer questions directly or failing to produce documents or other materials when first](#)

¹⁰⁶ For example, the directors or legal advisers of a party, see paragraph 35

²⁴¹⁰⁷ For ~~an example of a case~~[examples of cases](#) presented without reasonable merit see ~~Northern Iron Condor Blanco Mines Limited~~ [2014] ATP 11 at [64] and ~~The Market Herald Limited~~ [2023] ATP 7 at [324]. See also ~~Regal Resources Limited~~ [2016] ATP 17 at [71]–[72], ~~Merlin Diamonds Limited~~ [2016] ATP 18 at [154]–[155], ~~Molopo Energy Limited~~ 03R, 04R & 05R [2017] ATP 12 at [296]–[298] and ~~Keybridge Capital Limited~~ 04, 05 & 06 [2020] ATP 6 at [140]

²⁵ ~~Includes reckless or deliberate misquoting of source documents~~

¹⁰⁸ ~~Includes reckless or deliberate misquoting of source documents~~

¹⁰⁹ ~~DRA Global Limited~~ [2022] ATP 16 at [155]–[159]

²⁶ ~~Infratil Australia 02~~ [2000] ATP 1 at [63]

requested to do so),¹¹⁰ abused the process²⁷¹¹¹ or unreasonably refused to negotiate²⁸¹¹²

- (c) unreasonably delayed in becoming a party and providing relevant material¹¹³
- (d) ~~(e)~~ sought an unmeritorious review²⁹¹¹⁴ or put material before a review Panel that it failed to put before the initial Panel
- (e) ~~(d)~~ wasted time or elongated proceedings on a particular issue ~~or elongated proceedings~~³⁰¹¹⁵ (partial costs referable to the additional expenses may be appropriate in this case) ~~or~~
- (f) submitted material that was materially inaccurate¹¹⁶
- (g) ignored a reasonable request by a party to mitigate any clearly unacceptable circumstances in correspondence prior to lodging a Panel application or during Panel proceedings¹¹⁷ or
- (h) ~~(e)~~ failed to comply with a direction under ~~ASIC~~ regulation 16(1) ~~or of the ASIC Regulations, a~~ Panel order³¹¹¹⁸ an undertaking to the Panel¹¹⁹ or the Panel's Procedural Rules including those concerning confidentiality and media canvassing¹²⁰ (the costs of the other parties attributable to the failure may be ordered).

Undertakings to pay costs

32. However, this should not be seen as an exhaustive list of the circumstances in which the Panel may consider making a costs order.

~~33.~~ ~~30.~~ The Panel has power to accept a written undertaking from a person to pay such costs as determined by the Panel if an application fails.³²

¹¹⁰ Thorn Group Limited 01 & 02 [2020] ATP 29 at [199]–[202]

²⁷¹¹¹ Including by making unnecessarily lengthy submissions or putting voluminous materials before the Panel without explaining their relevance or taking advantage of the financial weakness of another party. See also Pinnacle VRB Limited 11 [2001] ATP 23

²⁸¹¹² Including refusing a reasonable compromise during negotiations

¹¹³ AMP Shopping Centre Trust 01 [2003] ATP 21 at [117]

²⁹¹¹⁴ Taipan Resources NL 11 [2001] ATP 16 at [100]–[101], in circumstances where the applicant seeking a review had provided an undertaking as to costs, see paragraph 33

³⁰¹¹⁵ For example, by providing multiple drafts of inadequate additional disclosure. ~~(Minemakers Limited [2012] ATP 8 at [73]–[76])~~

¹¹⁶ Parties should check the accuracy of the submissions or material they provide, particularly if generated by artificial intelligence

¹¹⁷ DRA Global Limited [2022] ATP 16 at [156]–[158]

³¹ ~~IFS Construction Services Limited [2012] ATP 15 at [79]~~

¹¹⁸ IFS Construction Services Limited [2012] ATP 15 at [79]

¹¹⁹ In Montu Group Pty Ltd [2024] ATP 25 at [83], the Panel, having made a declaration of unacceptable circumstances and accepted undertakings in lieu of orders, advised parties that it did not presently consider it necessary to make any orders, but reserved the right to do so (including as to costs) pending performance of undertakings to its satisfaction

¹²⁰ See rules 18 and 19 of the Takeovers Panel Procedural Rules 2020

³² ~~Section 201A of the ASIC Act~~

~~31.~~¹²¹ An undertaking may be offered, for example, to persuade a Panel to consider a particular issue or pursue a line of inquiry during proceedings, or to persuade a President to consent to the making of a review application under section 657EA(2).¹²² ~~An undertaking may be offered, for example:~~

~~(a) to persuade a Panel to conduct proceedings or grant an interim order where it has otherwise formed a preliminary view that it will not do so³³ or~~

~~(b) to persuade a review Panel to conduct proceedings.~~

~~32.~~ Such an undertaking would be to pay the costs of the other parties in the event that the ~~application (review) fails. In the case of a review, it might extend to the costs of other parties on the initial application and on review.~~ issue or inquiry is considered by the Panel to be frivolous or vexatious or not relevant to the proceedings or the review application fails.

Amount of costs

~~33. The scale is usually the Federal Court scale of fees on a party-party basis, but it may be higher, including full indemnity costs.~~

~~34.~~ The Panel will make its own determination of what costs to award a party based on its assessment of information provided by the party.¹²³ Any claim for costs should set out and justify the amount which the party claims.¹²⁴

~~35. 34.~~ In general, costs orders or costs undertakings are limited to the costs actually, necessarily, properly determining costs the Panel may have regard to the Federal Court scale of fees on costs as between party and party, namely those costs that have been fairly and reasonably incurred by the party in the course conduct of the proceedings.³⁴ They may include costs of legal and other advisers and of directors, and¹²⁵ In matters where it is warranted, the Panel may award costs in favour of a party having regard to the Federal Court scale of fees on costs on

¹²¹ Section 201A of the ASIC Act

¹²² Taipan Resources NL 11 [2001] ATP 16 at [98]–[99]

³³ ~~Taipan Resources NL 11 [2001] ATP 16 at [98]–[99]~~

¹²³ In appropriate cases, the Panel may appoint an independent cost consultant to assess costs: see e.g. Thorn Group Limited 01 & 02 [2020] ATP 29

¹²⁴ Realestate.com.au Ltd [2001] ATP 1 at [80]. Parties seeking costs may be asked to produce to the Panel and other parties copies of relevant invoices evidencing costs incurred and should keep this in mind during the course of proceedings

³⁴ ~~Skywest Limited 04 [2004] ATP 26 at [93]. In Realestate.com.au Limited [2001] ATP 1 the Panel suggested that cost claims needed to set out and justify the amount claimed~~

¹²⁵ See definition of “costs as between party and party” in Schedule 1 of the Federal Court Rules 2011

an indemnity basis¹²⁶ or make a costs order against the directors of a party¹²⁷ or their legal advisers.¹²⁸

36. Costs orders may extend to the costs incurred in recovering costs.

Procedural issues regarding costs orders

37. 35. The Panel will generally ~~include a procedure for assessing and paying costs when making~~ only make a costs order. ~~Undertakings should also address this.~~ in favour of an unrepresented party in relation to the application fee and disbursements.¹²⁹

38. Where a party has unreasonably delayed part of the proceedings only, the Panel may (in appropriate cases) consider limiting a costs order by reference to costs incurred for that period.¹³⁰

~~36. An example of costs order terms is Attachment A.~~

~~37. The confidentiality undertaking in relation to Panel proceedings applies to the whole of the proceedings. It therefore applies to the production of documents to an independent cost consultant for assessment.~~

Undertakings

39. 38. Matters before the Panel may be resolved by undertakings under section 201A of the ASIC Act ~~2001 (Cth).~~

40. 39. The Panel encourages parties to resolve matters wherever possible and welcomes any offer by a party to remedy potential unacceptable circumstances. An agreed resolution, such as by undertakings, can be more flexible and quicker than orders. It may also obviate the need for the Panel to make a declaration. A party may offer an undertaking to resolve the matter at any point in the Panel's process. However, the timing of the offer is a relevant factor that the Panel considers when exercising its discretion whether to accept an undertaking in lieu of a declaration or orders.³⁵¹³¹

¹²⁶ Defined in Schedule 1 of the Federal Court Rules 2011 as meaning “costs as a complete indemnity against the costs incurred by the party in the proceeding, provided that they do not include any amount shown by the party liable to pay them to have been incurred unreasonably in the interests of the party incurring them”

¹²⁷ *Merlin Diamonds Limited* [2016] ATP 18 at [154]–[155]; *Molopo Energy Limited* 12R [2018] ATP 19 at [30]–[37] and (in relation to bearing the costs of preparing an independent expert's report) *Nex Metals Explorations Ltd* 02 [2021] ATP 16 at [95]

¹²⁸ Noting that the Courts will only exercise their jurisdiction to award costs against a legal adviser “with care and discretion and only in clear cases”, see *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at [92]

¹²⁹ See *Cachia v Hanes* (1994) 179 CLR 403. For examples of where the Panel awarded costs in favour of an unrepresented party, see *Condor Blanco Mines Limited* [2016] ATP 8 and *Strategic Minerals Corporation NL* [2018] ATP 2

¹³⁰ See *Minemakers Limited* [2012] ATP 8 at [71]–[76]

³⁵¹³¹ For example, the Panel considered the approaching deadline to make a declaration under ~~s657B~~ section 657B, as well as the time required to address satisfactorily the Panel's disclosure concerns, as relevant factors in declining to accept an undertaking in lieu of a declaration in *Brisbane*

41. ~~40.~~ The Panel considers that the public interest is generally served by accepting an undertaking that addresses unacceptable circumstances to the Panel's satisfaction.³⁶ The Accepting an undertaking may render it unnecessary for the Panel may not then need to make a declaration or orders, although it. However, the Panel may still consider it appropriate to make a declaration if it in such situations (for example, where the Panel wants to send the market a signal).³⁷¹³²
42. The Panel may be less willing to accept an undertaking from a party who has been uncooperative or has unnecessarily delayed proceedings.¹³³
43. ~~41.~~ An undertaking should be as simple and direct as possible. The Panel may favour a final order over an undertaking if the drafting of any undertaking may become overly complex, noting that the Panel cannot unilaterally vary an undertaking.¹³⁴
44. ~~42. If not addressed,~~ The Panel will expect provisions to the following provisions will be implied into an effect in any undertaking offered:
- (a) that the person offering it will do all that is necessary to secure performance of it and to enable persons whose rights and interests are affected by the circumstances to have the benefit of it³⁸¹³⁵ and
 - (b) ~~it~~ the undertaking will be fulfilled as soon as practicable.
45. ~~43.~~ In the event of non-compliance with an undertaking, the Panel may apply to the Court for an order directing the person to comply.³⁹¹³⁶ This includes the undertakings relating to confidentiality and publicity given by a party in a notice to become a party.¹³⁷ The Court can make any order including that a person comply with the undertaking or pay compensation.

Other outcomes

46. ~~44.~~ The Panel's functions extend beyond resolving disputes. This is explicit from the rule-making power under section 658C, which gives

Markets Limited [2016] ATP 3 at [108]–[111]. If the Panel is minded to make a declaration of unacceptable circumstances, it may provide the relevant parties with a short time to provide an undertaking to resolve issues as a way of resolving the matter promptly. See also paragraph 9¹¹ above

³⁶ ~~Similar to the maxim "It concerns the State that lawsuits be not protracted"~~

³⁷¹³² *Summit Resources Limited* [2007] ATP 9; *Mildura Co-operative Fruit Company Limited* [2004] ATP 5 at [96]; *Montu Group Pty Ltd* [2024] ATP 25 at [66]; *Alara Resources Limited* [2025] ATP 1 at [94]

¹³³ *Montu Group Pty Ltd* [2024] ATP 25 at [82]

¹³⁴ *Southern Cross Media Group Limited 02R & 03R* [2023] ATP 15 at [67]–[94]

³⁸¹³⁵ *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) ~~26 ALR~~ 567¹⁴⁴ CLR 596

³⁹¹³⁶ Section 201A(3) of the ASIC Act

¹³⁷ See rules 12(1)(h), 16(1) and 18 and 19 of the *Takeovers Panel Procedural Rules 2020*

the Panel power to establish standards. The Panel also publishes guidance, media announcements and reasons.

Reasons

- ⁴⁷~~45~~. If the Panel ~~decides not to conduct proceedings,~~⁴⁰ or makes a declaration⁴¹~~138~~ or orders,⁴²~~139~~ it must give the parties a statement of reasons for its decision, although these may not address all the submissions made. The Panel also gives reasons when it decides not to conduct proceedings. The Panel may also give reasons when it accepts an undertaking or takes no action. The President may give reasons when consenting or declining to consent to a review of a Panel decision.⁴³~~140~~
- ⁴⁸~~46~~. The Panel will normally publish its reasons.⁴⁴~~141~~ It generally gives parties ~~a confidential draft of~~ its reasons initially on a confidential basis and an opportunity to make submissions on ~~issues of fact or unfair prejudice.~~ non-substantive corrections to the Panel's reasons, including any proposed redactions of unnecessary material which adversely affects an individual or is unfairly prejudicial.
49. Reasons may include reflections on the actions of a person or a reprimand of a person. The person should ~~not~~ be ~~unaware~~aware of the risk of an adverse finding.⁴⁵~~142~~ The Panel has wide immunities for comments it might make,⁴⁶~~143~~ but of course must be fair, proportionate and base its comments on credible information.

Advisers

- ⁵⁰~~47~~. In most cases advisers are more familiar than their clients with the technical, procedural, strategic and tactical aspects of takeovers and objectives of the Panel. The Panel has no formal powers to deal with advisers, but expects advisers to take all reasonable steps to ensure their clients comply with the law, ASIC policies, stock market rules and Panel policies (and, if there is an application, with the Panel's Takeovers Panel Procedural Rules for Proceedings 2020).⁴⁷~~144~~

⁴⁰ ~~ASIC regulation 21(2)(e)~~

⁴¹~~138~~ Section 657A(6)

⁴²~~139~~ Section 657D(4)

⁴³~~140~~ Section 657EA(2). The reasons for consent may be incorporated into the sitting Panel's reasons. The President has published separate reasons for declining to consent ~~in~~: see e.g. *Austral Coal Limited 03R [2005] ATP 15*, *Careers Australia Group Limited 03R [2015] ATP 2* and *Austral Coal Limited 03R [2005] Invest Blue Pty Ltd (Consent to Review) [2025] ATP 456*

⁴⁴~~141~~ Including the reasons of any member dissenting from the majority, see *Pasminco Limited (Administrators Appointed) [2002] ATP 6* ~~and~~ *Touch Holdings Limited [2013] ATP 3* and Finders Resources Limited 03R [2018] ATP 11. Findings of fact in an order or reasons for an order are *prima facie* evidence of the fact: ~~s658B~~ section 658B

⁴⁵~~142~~ *Annetts v McCann* (1990) 170 CLR 596

⁴⁶~~143~~ Section 197 of the ASIC Act

⁴⁷~~144~~ Note that a party's undertaking concerning confidentiality and media canvassing under section 201A of the ASIC Act is given on behalf of its advisers as well. The Panel considers that it is

51. [Section 194 of the ASIC Act provides that “\[a\] party to Takeovers Panel proceedings may be legally represented in the proceedings only with the leave of the Takeovers Panel”. The Panel may refuse or withdraw consent if the Panel is concerned about the conduct of a party’s proposed legal advisers or the proposed legal advisers have a conflict.](#)¹⁴⁵

52. ~~48.~~ Advisers may be referred to (and even criticised) in the reasons for decision.

Other actions

53. ~~49.~~ The Panel may take other actions as well. These include:

- (a) privately admonishing a person
- (b) reporting its findings to ASIC,⁴⁸¹⁴⁶ or a person’s ‘employer’, or a person’s professional organisation or
- (c) including its findings in a media release.

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Related material

[GN 1: Unacceptable circumstances](#)

accordingly an obligation of the advisers not to act in a way that would lead to a breach of its client’s undertaking

¹⁴⁵ [DRA Global Limited \[2022\] ATP 16 at \[128\]–\[130\]; Avalon Minerals Limited \[2013\] ATP 11 at \[130\]–\[146\]](#)

⁴⁸¹⁴⁶ ASIC [Regulations](#), regulation 18

[GN 2: Reviewing Decisions](#)

GN 5: Specific remedies - Information deficiencies

DRAFT

~~Attachment A: Example of costs order terms~~

~~A costs order may include the following terms:~~

- ~~1. Within 10 business days of the date of the order, each payee (ie, a party in whose favour the costs order is made) must provide the payer (ie, the party against whom the costs order was made) with a bill of their costs actually, necessarily, properly and reasonably incurred in the course of the proceedings.~~
- ~~2. The bill must be itemised in sufficient detail for the payer to make an assessment of whether it will agree to pay it.~~
- ~~3. Within 5 business days of receipt of the bill, the payer must tell the Panel and the payee whether it will pay the bill.~~
- ~~4. If the payer does not object, it must pay the costs within 10 business days of receipt of the bill.~~
- ~~5. If the payer objects:~~
 - ~~(a) the Panel will appoint an independent cost consultant to assess the costs and~~
 - ~~(b) if required by the Panel, the payee must provide a bill of costs in taxable form and make its file available to the cost consultant.~~
- ~~6. Within 10 business days of the assessment:~~
 - ~~(a) the assessed costs must be paid by the payer and~~
 - ~~(b) the consultant's costs must be paid:~~
 - ~~(i) by the payee, if the cost consultant reduced the costs by 10% or more or~~
 - ~~(ii) otherwise, by payer.~~
- ~~7. The Panel may, on application, make a further order for payment of interest if a person fails to meet the deadlines in these costs orders.~~