Australian Government

Takeovers Panel

PUBLIC CONSULTATION RESPONSE STATEMENT

Guidance Note 4 – Remedies General

Introduction

On 15 December 2025, the Takeovers Panel released a Consultation Paper seeking public comments on proposed amendments to Guidance Note 4: Remedies General.

Comments on the Consultation Paper were due by 2 March 2026. The Panel received one submission in response from the Law Council.[1] (**Annexure A**). The Panel thanks the Law Council for its comments. Consistent with the Panel's published policy on responding to submissions, this statement sets out the Panel's response to the public consultation.

Attached are copies of the final revised Guidance Note 4, in clean (**Annexure B**[2]), in mark-up (**Annexure C**) to show the changes from the draft circulated with the Consultation Paper (**Consultation Draft**) and in mark-up (**Annexure D**) to show the changes from the previous version of the guidance note.

Material comments received and Panel's conclusions

Limitations on the Panel's ability to make costs orders against an applicant

Comments

The Law Council submitted that in its view, the Panel's power to decline to conduct proceedings is not an adequate substitute to address the limitations on the Panel's ability to make costs orders against an applicant, noting that in its experience, the power does not deter unmeritorious applications.

The Law Council submitted that it is often the case that respondents can incur significant costs in responding to an application (for example, in preparing preliminary submissions or multiple rounds of submission and rebuttal responses). It considers the current system *"inherently unfair"* to respondents, submitting that *"applicants may take the view that they have 'nothing to lose' by making an application—particularly if the applicant is self-represented and does not engage the assistance of third-party advisers, and thus does not incur any significant costs by making an application (other than the relatively modest application fee itself)."* Accordingly, the Law Council recommended that the revised Guidance Note expressly acknowledge that respondents can be put to great expense by applicants.

Panel Response

While the Panel recognises that successful respondents can be put to expense by applicants and have no ability to recoup costs where the Panel declines to conduct proceedings, the Panel did not consider it necessary for the revised Guidance Note to expressly acknowledge this.

However, given the limitations on respondents in recouping their costs in such situations, the Panel wishes to emphasise that legal advisers should bear in mind the extent of their time

[1] The Corporations Law Committee of the Business Law Section of the Law Council of Australia

[2] All references to paragraph numbers are to paragraphs in the final revised Guidance Note 4 (Annexure B) unless otherwise specified

and resources spent on preparing submissions, particularly in the preliminary stages of proceedings where the Panel has not decided whether to conduct proceedings. The Panel expects legal advisers acting for respondents to assess the strength of an applicant's case and minimise the cost in making preliminary submissions (which should be brief and generally no more than 2 pages[3]), particularly in relation to clearly unmeritorious applications.

The Federal Court's scale of fees

Comments

The Consultation Paper asked for submissions on the usefulness of the revised guidance under the heading 'Amount of costs' (see paragraphs 34-38) and in what circumstances (if any) the Panel should have regard to the Federal Court scale of fees on costs. In response, the Law Council noted that *"the Federal Court scale of fees on costs is essentially a 'one size fits all' scale"* and that it *"reflects a materially different regime in which the range of procedure for resolving a dispute is not as agile or expeditious as a Panel proceeding."* The Law Council recommended that the revised Guidance Note acknowledge that the use of that scale of costs would not, in many cases before the Panel, result in a successful party receiving a fair level of cost reimbursement and that accordingly, it is not an appropriate scale to use in all cases.

Panel Response

The Panel has added some broader language to the end of paragraph 36, which reads: *"In appropriate cases, the Panel may decide to make costs orders that substantively cover a party's entire legal costs."*

The Panel did not consider it necessary to add any further remarks to the revised guidance regarding the appropriateness of using the Federal Court's scale of fees on costs in determining party's costs, noting that the guidance already acknowledges that the Federal Court's scale of fees on costs is applied at the Panel's discretion (see paragraphs 34-35) and does not limit how costs are to be determined.

Costs of external advisers

Comments

The Consultation Paper asked whether the revised guidance should stipulate that costs orders may include costs of legal *"and other advisors and of directors"*.[4] The Law Council agreed that, in appropriate cases, costs orders may include costs of external legal and other external advisors. In relation to directors, it submitted that it would be helpful for the Panel to provide guidance on the types of costs which are contemplated, expressing that *"[t]he Committee would expect that this would, in appropriate cases, generally be limited to the costs of external legal and other external advisors incurred personally by directors (e.g. if they were parties to the proceedings)."*

Panel Response

The Panel has amended paragraph 36 to clarify that costs orders may include the costs of external legal and other external advisers and of directors. This reflects the drafting of the previous guidance note, which the Panel still considers to be appropriate guidance. The Panel did not consider it necessary to provide guidance on the types of costs contemplated here, noting that if directors are parties to the proceedings, then their ability to recoup costs is the same as for other parties to the proceedings.

[3] Takeovers Panel Procedural Guidelines, paragraph 4.5(c)
[4] Which is the position reflected in paragraph 34 of the previous guidance note

Undertakings offered to avoid declaration and orders

Comments

The Law Council submitted that the revised Guidance Note should raise the possibility that, in appropriate cases, if a party only offers up an undertaking at the last minute to avoid a declaration of unacceptable circumstances and potential orders being made against it, the Panel should consider whether it is appropriate to require the undertaking to include an obligation to pay the other party's costs.

Panel Response

The Panel broadly agreed with the submission. The Panel did not consider that the question of whether an obligation to pay the other party's costs should be imposed should necessarily be tied to the timing of the undertaking being offered (i.e. *"at the last minute"*). While the timing of offering the undertaking is relevant, the Panel's focus in deciding whether to impose a costs obligation as part of the undertaking is on whether the undertaking was offered to avoid a declaration and potential orders. Accordingly, the Panel has amended footnote 60 of the Consultation Draft[5] to include the following additional words: *"[i]n appropriate cases, if an undertaking is offered by a party to avoid a declaration of unacceptable circumstances and potential orders being made against it, the Panel will consider whether it is appropriate to require the undertaking to include an obligation to pay the other party's costs".*

Frivolous or vexatious applications

Comments

The Law Council submitted that the revised Guidance Note should allude to the possibility that it is open to the Panel to make a declaration of unacceptable circumstances where a person makes an application that is frivolous or vexatious, which could then allow the Panel to make costs orders against that party.

Panel Response

The Panel did not consider it appropriate for the revised Guidance Note to address this possibility, noting that it would be difficult to establish a legislative basis to make such a declaration under section 657A(2).[6]

Other actions the Panel may take

Comments

The Law Council considered that some of the guidance under the heading 'Other actions the Panel may take' (see paragraph 53) may benefit from further refinement and clarification. In particular:

- in respect of sub-paragraph (a), the Law Council submitted that *"it is unclear what is meant by the Panel "privately admonishing" a person: in particular, by clarifying who might undertake such an admonishment (the sitting Panel, the President or the Executive), at what stage it might occur, and what status or consequences it carries. Absent clarification, this language risks being perceived as extending beyond the Panel's remedial role."*
- in respect of sub-paragraph (b), the Law Council questioned whether it was appropriate for the Panel to report its findings to a person's employer or professional organisation. The Law Council submitted that *"[s]uch reporting may have significant reputational and professional consequences, despite the Panel having no formal disciplinary jurisdiction*

[5] The footnote appears as footnote 61 in the final revised Guidance Note 4

[6] All references to sections are to sections in the *Corporations Act 2001* (Cth) unless otherwise specified

over advisers, and may go beyond established regulatory pathways. Consideration should be given to either confining this provision to ASIC referrals, or making clear that any reporting to employers or professional bodies would be exceptional and subject to clear proportionality and fairness considerations."

Panel Response

The Panel has amended paragraph 53(a) to clarify what is meant by the Panel *"privately admonishing a person"*. In particular, by clarifying that the admonishment is generally undertaken by the President or the president of a sitting Panel, and that the admonishment can occur at any stage of the proceedings.

The Panel agreed that reporting of the Panel's findings should generally be limited to ASIC referrals and has amended paragraph 53(b) accordingly. However, the Panel notes that paragraph 53 is not an exhaustive list of other actions the Panel could take, and therefore the Panel will still retain the ability to report its findings to a person's employer or professional organisation if it considers it appropriate to do so in the circumstances.

Other comments

Comments

The Law Council was supportive of:

- the Panel and Treasury discussing the possibility of law reform to give the Panel the power to make costs orders against unsuccessful applicants and
- broader consultation on what should constitute a valid Panel application for the purposes of Rule 12 of the Panel's Procedural Rules. For example, in novel cases (or cases which are at the margin of the Panel's jurisdiction), or in cases where another regulator is already considering a matter (e.g. a Court or FIRB), the Law Council considered there should be an obligation on the applicant to include (in its application) a detailed explanation as to why the Panel is an appropriate forum.

The Law Council otherwise noted that it was *"generally comfortable with the adjustments to the tone of the Revised Guidance Note and the stance the Panel has taken on the guidance on orders and costs orders"*.

Panel Response

The Panel notes the submissions of the Law Council and will consider whether broader consultation in respect of the matters mentioned above is warranted at a future time.

Other changes

The Panel has also made non-substantive changes to the Consultation Draft to clarify the intention of the Panel, including:

- to clarify at paragraph 27(a) that the Panel does not have the power to order costs to a successful respondent, even if it declines to conduct proceedings or because the application is frivolous or vexatious (under section 658A(1)(a)) and
- to amend paragraph 37 to better reflect the principle in *Cachia v Hanes*,[7] which provides that self-represented litigants generally cannot be compensated for their own time spent in litigation. The Panel considered that the drafting in the Consultation Draft (which states that *"[t]he Panel will generally only make a costs order in favour of an unrepresented party in relation to the application fee and disbursements"*) may have

[7] (1994) 179 CLR 403

been interpreted as limiting the types of costs that an unrepresented party can recoup in Panel proceedings, which is not the Panel's intention.

8 July 2026

Annexure A - Submissions

Law Council OF AUSTRALIA

Business Law Section

13 March 2026

Takeovers Panel
Level 16 530 Collins Street
Melbourne VIC 3000

By email: takeovers@takeovers.gov.au

Dear Sir/Madam,

Guidance Note 4—Remedies General

1. On 15 December 2025, the Takeovers Panel (**Takeovers Panel** or **Panel**) published a consultation paper inviting comments on its draft revised 'Guidance Note 4—Remedies General' (**Revised Guidance Note**). This submission has been prepared by the Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) in response to that consultation paper.

2. Unless otherwise stated, all references to paragraph and footnote numbers in this submission are references to the paragraph and footnote numbers in the Revised Guidance Note.

Response to specific questions

Question 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)?

3. The Committee is generally comfortable with the adjustments to the tone of the Revised Guidance Note and the stance the Panel has taken on the guidance on orders and costs orders.

Question 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)?

4. Yes, the Committee agrees with the expansion of the list of circumstances in paragraph 31 in which costs may be awarded against a party, and does not consider any amendments or additions should be made to this list.

Question 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?

5. The Committee notes that the Federal Court scale of fees on costs is essentially a 'one size fits all' scale. Further, the Committee notes that it reflects a materially different regime in which the range of procedure for resolving a dispute is not as agile or expeditious as a Panel proceeding. The Committee recommends that the Guidance Note acknowledges that the use of that scale of costs would not, in many cases before the Panel, result in a successful party receiving a fair level of cost reimbursement and that, accordingly, it is not an appropriate scale to use in all cases.

Question 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.

6. The Panel's power to decline to conduct proceedings is not, in the Committee's view, an adequate substitute to address the limitations on the Panel's ability to make cost orders against an applicant. In the Committee's experience, this power does not deter unmeritorious applications.

7. It is often the case that a respondent to a Panel application will incur significant costs either in (a) preparing preliminary submissions in response to an unmeritorious application when seeking to have the Panel decline to conduct proceedings and/or (b) preparing submissions and rebuttal submissions (sometimes in multiple rounds) in response to an unmeritorious application.

8. In this regard, the Committee notes (and agrees with) the following pertinent concerns expressed by the President of the Panel in the Takeovers Panel's 2024–2025 annual report (at pages 3–4):

> *Several matters received this year were at the boundaries of the Panel's jurisdiction. For example, the Panel was asked to consider issues relating to share placements (Emu NL, Mayfield Childcare Limited, FBR Ltd), proposed delistings (Vmoto Limited, Pact Group Holdings Ltd 02 & 03), and allegations concerning a proprietary limited company and whether it had fewer than 50 members (Invest Blue Pty Ltd). In a number of these matters, it appeared that there may have been a misunderstanding as to the Panel's remit. In addition, some applications raised issues which were either concurrently before the court or may have been more appropriately ventilated in court. The Panel's main power to deal with applications which raise issues outside its remit is to decline to conduct proceedings. Where appropriate, it may direct that an amended application be provided before being considered. The Panel is also considering whether further guidance is needed in relation to its jurisdiction (for example, by way of an amendment to Guidance Note 1: Unacceptable Circumstances).*
> *I encourage applicants to consider seeking legal advice prior to submitting an application. As observed by the Panel in Pinnacle VRB Ltd 08 back in 2001, the Panel is intended to be a first-rate commercial Panel, not a second-rate court.*

9. In this regard, the Committee notes that, even in scenarios where it was inappropriate for an applicant to make an application in the Takeovers Panel, respondents can still incur very significant costs in responding to such applications.

10. The Committee notes that the current system (under which costs cannot be awarded against an unsuccessful applicant) is inherently unfair to respondents. The system is such that applicants may take the view that they have 'nothing to lose' by making an application—particularly if the applicant is self-represented and does not engage the assistance of third-party advisers, and thus does not incur any significant costs by making an application (other than the relatively modest application fee itself). The Committee recommends that the Guidance Note expressly acknowledges that respondents can be put to great expense by applicants.

11. The Committee further recommends that the Panel discusses with Treasury the possibility of law reform to give the Panel the power to make cost orders against unsuccessful applicants to address this inherent unfairness in the system.

12. See our further comments in response to question 10 regarding the limitations on the Panel's ability to make costs orders.

Question 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.

13. Yes, the Committee agrees with the change to the examples of circumstances in which the Panel may accept undertakings to pay costs.

Question 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.

14. Yes, the Committee agrees with this approach. Cost orders should generally only cover third party out of pocket expenses incurred. See the Committee's response to question 7.

Question 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.

15. The Committee agrees that, in appropriate cases, costs orders may include costs of external legal and other external advisors. In relation to directors, it would be helpful for the Panel to provide guidance on what types of costs are contemplated here. The Committee would expect that this would, in appropriate cases, generally be limited to the costs of external legal and other external advisors incurred personally by directors (e.g. if they were parties to the proceedings).

Question 8

How useful is the revised guidance provided under the heading 'Undertakings'?

16. The Committee considers this to be helpful revised guidance.

Question 9

Do you have any comments on the approach to citing case examples in GN 4 (see footnote 1)?

17. The Committee considers that citing case examples is always very helpful. This is a useful and succinct way of communicating the Panel's general approach to a particular topic (without being prescriptive or exhaustive). Readers of the guidance note will know that the guidance note only speaks as at a point in time and that case law can change over time, but the possibility of changes in case law is not a reason to exclude case examples.

Question 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.

18. As currently drafted, paragraph 27(a) (which has not materially changed in the Revised Guidance Note) expressly notes the Panel cannot order costs to a successful respondent where it declines to conduct proceedings, even if the application is frivolous or vexatious. The Panel may wish to consider whether this "even if the application is frivolous or vexatious" wording is required here. Further to the Committee's comments in response to question 4, the Committee considers that if a person were to make an application which is frivolous or vexatious, it would be open to the Panel (on an application by the respondent or ASIC) to make a declaration that the bringing of the application itself constitutes unacceptable circumstances, and could make costs orders against that party. The Committee considers that it would be helpful to allude to this possibility in the Revised Guidance Note.

19. As currently drafted, paragraph 27(b) (which has also not changed in the Revised Guidance Note), states that the Panel cannot order costs if it finds unacceptable circumstances, but makes no declaration because it accepts an undertaking to remedy the circumstances. The Revised Guidance Note should raise the possibility that, in appropriate cases, if a party only offers up an undertaking at the last minute to avoid a declaration of unacceptable circumstances and potential orders against it, the Panel will consider whether it is appropriate to require the undertaking to include an obligation to pay the other party's costs.

20. The Committee also considers that paragraph 53(a) (which has also not changed in the Revised Guidance Note) may benefit from further refinement and clarification. In particular, it is unclear what is meant by the Panel "privately admonishing" a person: in particular, by clarifying who might undertake such an admonishment (the sitting Panel, the President or the Executive), at what stage it might occur, and what status or consequences it carries. Absent clarification, this language risks being perceived as extending beyond the Panel's remedial role.

21. The Committee also questions whether paragraph 53(b) should extend to include reporting findings to a person's employer or professional organisation. Such reporting may have significant reputational and professional consequences, despite the Panel having no formal disciplinary jurisdiction over advisers, and may go beyond established regulatory pathways. Consideration should be given to either confining this provision to ASIC referrals, or making clear that any reporting to employers or professional bodies would be exceptional and subject to clear proportionality and fairness considerations.

Question 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?

22. The Committee would support a broader consultation on what should constitute a valid Panel application.

23. For example—and picking up on the President's comments (see paragraph 8 above)—in novel cases (or cases which are at the margin of the Panel's jurisdiction), or in cases where another regulator is already considering a matter (e.g. a Court or FIRB), there should be an obligation on the applicant to include (in its application) a detailed explanation as to why the Panel is an appropriate forum.

Yours sincerely

Adrian Varrasso
Chair, Business Law Section

Annexure B – Guidance Note 4 (Final)

Australian Government

Takeovers Panel

Guidance Note 4 - Remedies General

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

[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]

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 657E[3]), 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 President[4] 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 market[6]

   (b) the strength of the evidence

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[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]

(c) whether the circumstances can be adequately remedied by final relief alone and

(d) the availability of alternative measures, such as undertakings.

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]

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[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. 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]

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 securities[17] 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 proposal[19] or establishing rights to withdraw acceptances.

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[12] Section 657A(5)

[13] Section 657A(6)

[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

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] and ancillary or consequential orders that it thinks appropriate.

19. The Panel may not make an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C.[22]

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 interests[24] 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

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[20] See section 657D(1)

[21] Defined in section 9

[22] Section 657D(2)

[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]

party[26] or by allowing them to make a submission without becoming a party (the invitation may be by media release[27] 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 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

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[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]

[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]

(d) ASIC.[30]

25. Orders are published in the Government Gazette.[31] 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.[32] 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.[33] It cannot order costs:

    (a) to a successful respondent, even if it declines to conduct proceedings or because the application is frivolous or vexatious under section 658A(1)(a)

    (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

    (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.[34]

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

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[30] Section 657D(4)

[31] Section 657D(4)

[32] Section 657G

[33] 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

[34] For example, the directors or legal advisers of a party, see paragraph 35

(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.[35]

31. Costs may be awarded against any party[36] if it:

(a) presented a case that was not arguable, made misleading or unsubstantiated assertions,[37] was unnecessarily hostile, raised extraneous matters or defended circumstances that were clearly unacceptable[38]

(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),[39] abused the process[40] or unreasonably refused to negotiate[41]

(c) unreasonably delayed in becoming a party and providing relevant material[42]

(d) sought an unmeritorious review[43] or put material before a review Panel that it failed to put before the initial Panel

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[35] 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]

[36] Or a non-party that has participated in proceedings

[37] Includes reckless or deliberate misquoting of source documents

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

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

[40] 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

[41] Including refusing a reasonable compromise during negotiations

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

[43] *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

(e) wasted time or elongated proceedings on a particular issue[44] (partial costs referable to the additional expenses may be appropriate in this case)

(f) submitted material that was materially inaccurate[45]

(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 proceedings[46] or

(h) failed to comply with a direction under regulation 16(1) of the ASIC Regulations, a Panel order,[47] an undertaking to the Panel[48] or the Panel's Procedural Rules including those concerning confidentiality and media canvassing[49] (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.[50] 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).[51] 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.

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

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

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

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

[48] 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

[49] See rules 18 and 19 of the *Takeovers Panel Procedural Rules 2020*

[50] Section 201A of the ASIC Act

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

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.[52] Any claim for costs should set out and justify the amount which the party claims.[53]

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.[54] 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 basis[55] or make a costs order against the directors of a party[56] or their legal advisers.[57]

36. Costs orders may, in appropriate cases, include the costs of external legal and other external advisers and of directors, and extend to the costs incurred in recovering costs. In appropriate cases, the Panel may decide to make costs orders that substantively covers a party's entire legal costs.

37. Generally, the Panel will not make a costs order in favour of an unrepresented party in relation to their own time spent in the proceedings.[58]

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52 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

53 *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

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

55 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"*

56 *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]

57 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]

58 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

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.[59]

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.[60] 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.[61]

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).[62]

42. The Panel may be less willing to accept an undertaking from a party who has been uncooperative or has unnecessarily delayed proceedings.[63]

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

[60] 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.

[61] 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]. In appropriate cases, if an undertaking is offered by a party to avoid a declaration of unacceptable circumstances and potential orders being made against it, the Panel will consider whether it is appropriate to require the undertaking to include an obligation to pay the other party's costs. See also paragraph 11 above

[62] *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]

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

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.[64]

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 it[65] 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.[66] This includes the undertakings relating to confidentiality and publicity given by a party in a notice to become a party.[67] The Court can make any order including that a person comply with the undertaking or pay compensation.

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 declaration[68] or orders,[69] 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

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

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

[66] Section 201A(3) of the ASIC Act

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

[68] Section 657A(6)

[69] Section 657D(4)

give reasons when consenting or declining to consent to a review of a Panel decision.[70]

48. The Panel will normally publish its reasons.[71] 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.[72] The Panel has wide immunities for comments it might make,[73] 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 and Panel policies (and, if there is an application, with the *Takeovers Panel Procedural Rules 2020*).[74]

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.[75]

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70 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

71 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

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

73 Section 197 of the ASIC Act

74 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

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

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) issuing its findings in a media release
    - (b) privately admonishing a person. This is generally undertaken by the President or the president of a sitting Panel and can occur at any stage of the proceedings or
    - (c) reporting its findings to ASIC.[76]

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Related material

GN 1: Unacceptable circumstances

GN 2: Reviewing Decisions

GN 5: Specific remedies - Information deficiencies

[76] ASIC Regulations, regulation 18

Annexure C – Guidance Note 4 (Compare against Consultation Draft)

Australian Government

Takeovers Panel

~~CONSULTATION DRAFT~~

Guidance Note 4 - Remedies General

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

[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]

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 657E[3]), 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 President[4] 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 market[6]

   (b) the strength of the evidence

[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]

(c) whether the circumstances can be adequately remedied by final relief alone and

(d) the availability of alternative measures, such as undertakings.

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]

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[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. 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]

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 securities[17] 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 proposal[19] or establishing rights to withdraw acceptances.

[12] Section 657A(5)

[13] Section 657A(6)

[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

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] and ancillary or consequential orders~~, and costs orders~~ that it thinks appropriate.

19. The Panel may not make an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C.[22]

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 interests[24] 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

[20] See section 657D(1)

[21] Defined in section 9

[22] Section 657D(2)

[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]

party[26] or by allowing them to make a submission without becoming a party (the invitation may be by media release[27] 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 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

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[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]

[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]

(d) ASIC.[30]

25. Orders are published in the Government Gazette.[~~30~~31] 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~~32] 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~~33] It cannot order costs:

    (a) to a successful respondent, even if it declines to conduct proceedings or because the application is frivolous or vexatious under section 658A(1)(a)

    (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

    (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~~34]

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

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[30] Section 657D(4)

[~~30~~31] Section 657D(4)

[~~31~~32] Section 657G

[~~32~~33] 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

[~~33~~34] For example, the directors or legal advisers of a party, see paragraph 35

(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~~35]

31. Costs may be awarded against any party[36] if it:

(a) presented a case that was not arguable, made misleading or unsubstantiated assertions,[~~35~~37] was unnecessarily hostile, raised extraneous matters or defended circumstances that were clearly unacceptable[~~36~~38]

(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~~39] abused the process[~~38~~40] or unreasonably refused to negotiate[~~39~~41]

(c) unreasonably delayed in becoming a party and providing relevant material[~~40~~42]

(d) sought an unmeritorious review[~~41~~43] or put material before a review Panel that it failed to put before the initial Panel

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[~~34~~35] 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]

[36] Or a non-party that has participated in proceedings

[~~35~~37] Includes reckless or deliberate misquoting of source documents

[~~36~~38] *DRA Global Limited* [2022] ATP 16 at [155]–[159]

[~~37~~39] *Thorn Group Limited 01 & 02* [2020] ATP 29 at [199]–[202]

[~~38~~40] 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~~41] Including refusing a reasonable compromise during negotiations

[~~40~~42] *AMP Shopping Centre Trust 01* [2003] ATP 21 at [117]

[~~41~~43] *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

(e) wasted time or elongated proceedings on a particular issue[~~42~~44] (partial costs referable to the additional expenses may be appropriate in this case)

(f) submitted material that was materially inaccurate[~~43~~45]

(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 proceedings[~~44~~46] or

(h) failed to comply with a direction under regulation 16(1) of the ASIC Regulations, a Panel order,[~~45~~47] an undertaking to the Panel[~~46~~48] or the Panel's Procedural Rules including those concerning confidentiality and media canvassing[~~47~~49] (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~~50] 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~~51] 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.

[~~42~~44] For example, by providing multiple drafts of inadequate additional disclosure (*Minemakers Limited* [2012] ATP 8 at [73]–[76])

[~~43~~45] Parties should check the accuracy of the submissions or material they provide, particularly if generated by artificial intelligence

[~~44~~46] *DRA Global Limited* [2022] ATP 16 at [156]–[158]

[~~45~~47] *IFS Construction Services Limited* [2012] ATP 15 at [79]

[~~46~~48] 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~~49] See rules 18 and 19 of the *Takeovers Panel Procedural Rules 2020*

[~~48~~50] Section 201A of the ASIC Act

[~~49~~51] *Taipan Resources NL 11* [2001] ATP 16 at [98]–[99]

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~~52] Any claim for costs should set out and justify the amount which the party claims.[~~51~~53]

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~~54] 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 basis[~~53~~55] or make a costs order against the directors of a party[~~54~~56] or their legal advisers.[~~55~~57]

36. Costs orders may, in appropriate cases, include the costs of external legal and other external advisers and of directors, and extend to the costs incurred in recovering costs. In appropriate cases, the Panel may decide to make costs orders that substantively covers a party's entire legal costs.

37. ~~The~~Generally, the Panel will ~~generally only~~not make a costs order in favour of an unrepresented party in relation to ~~the application fee and disbursements.~~[~~56~~]their own time spent in the proceedings.[58]

[~~50~~52] 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

[~~51~~53] *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~~54] See definition of "*costs as between party and party*" in Schedule 1 of the Federal Court Rules 2011

[~~53~~55] 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~~56] *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~~57] 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~~

[58] 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

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]~~[59]

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.[60] 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.~~[58]~~[61]

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]~~[62]

~~[57]~~[59] See *Minemakers Limited* [2012] ATP 8 at [71]–[76]

[60] 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.

~~[58]~~[61] 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~~In appropriate cases, if an undertaking is offered by a party to avoid 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~~ and potential orders being made against it, the Panel will consider whether it is appropriate to require the undertaking to include an obligation to pay the other party's costs. See also paragraph 11 above

~~[59]~~[62] *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]

42. The Panel may be less willing to accept an undertaking from a party who has been uncooperative or has unnecessarily delayed proceedings.[~~60~~63]

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~~64]

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 it[~~62~~65] 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~~66] This includes the undertakings relating to confidentiality and publicity given by a party in a notice to become a party.[~~64~~67] The Court can make any order including that a person comply with the undertaking or pay compensation.

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 declaration[~~65~~68] or orders,[~~66~~69] 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

~~60~~63 *Montu Group Pty Ltd* [2024] ATP 25 at [82]

~~61~~64 *Southern Cross Media Group Limited 02R & 03R* [2023] ATP 15 at [67]–[94]

~~62~~65 *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596

~~63~~66 Section 201A(3) of the ASIC Act

~~64~~67 See rules 12(1)(h), 16(1) and 18 and 19 of the *Takeovers Panel Procedural Rules 2020*

~~65~~68 Section 657A(6)

~~66~~69 Section 657D(4)

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~~70]

48. The Panel will normally publish its reasons.[~~68~~71] 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~~72] The Panel has wide immunities for comments it might make,[~~70~~73] 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 and Panel policies (and, if there is an application, with the *Takeovers Panel Procedural Rules 2020*).[~~71~~74]

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~~75]

[~~67~~70] 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~~71] 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~~72] *Annetts v McCann* (1990) 170 CLR 596

[~~70~~73] Section 197 of the ASIC Act

[~~71~~74] 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~~75] *DRA Global Limited* [2022] ATP 16 at [128]–[130]; *Avalon Minerals Limited* [2013] ATP 11 at [130]–[146]

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) issuing its findings in a media release

    (b) ~~(a)~~ privately admonishing a person. This is generally undertaken by the President or the president of a sitting Panel and can occur at any stage of the proceedings or

    ~~(b) reporting its findings to ASIC,[73] or a person's 'employer', or a person's professional organisation or~~

    (c) ~~including~~reporting its findings ~~in a media release.~~to ASIC.[76]

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Related material

GN 1: Unacceptable circumstances

GN 2: Reviewing Decisions

GN 5: Specific remedies - Information deficiencies

~~[73] ASIC Regulations, regulation 18~~

[76] ASIC Regulations, regulation 18

Annexure D – Guidance Note 4 (Compare against Previous Guidance Note)

Australian Government

Takeovers Panel

Guidance Note 4 - Remedies General

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.[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

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[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]

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 657E[3]), 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 President[4] may make interim orders.[3] ~~These~~ [5] 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.[4] In addition, a declaration, orders or other statement (eg,~~

[3] 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)~~

[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)

~~[3] Section 657E~~

[5] 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*~~

~~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.

~~*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~~

~~[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~~

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:

   (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 market[6]

   (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.~~[9]~~[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

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[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]

~~[9]~~[7] See ~~eg,~~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

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]

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]

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[10] Section 657A(4)

[11] See paragraph 40 below

[12] Section 657A(5)

[13] Section 657A(6)

[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

forcing the disposal of securities[17] 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 proposal[19] 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. ~~14.~~ The Panel may make any final order that meets the description in paragraph ~~2~~14 above. This includes remedial orders,~~[10]~~[21] and ancillary or consequential orders~~, and costs orders~~ that it thinks appropriate.

19. The Panel may not make an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C.[22]

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)).~~[11]~~[23] 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

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[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)

~~[10]~~[21] Defined in section 9

[22] Section 657D(2)

~~[11]~~[23] See *Attorney-General (Cth) v Alinta* Ltd [2008] HCA 2 ~~esp~~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

(b) that affects property interests~~[12]~~[24] or existing legal rights and obligations.~~[13]~~[25]

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 party~~[14]~~[26] or by allowing them to make a submission without becoming a party (~~in this case~~ the invitation may be by media release ~~and not~~ [27] or direct correspondence)~~[15]~~

(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~~[16]~~~~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*"[29] and

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~~12~~24 *AMP Shopping Centre Trust 02* [2003] ATP 24 at [38]–[41]

~~13~~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]

~~14~~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]

~~15 ASIC 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]

~~16 See footnote 4~~

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]

(d) consider that the proposed order protects rights or ensures that the bid proceeds as it should have (see paragraph ~~2~~14 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.[30]

25. ~~20.~~ Orders are published in the Government Gazette.[~~17~~31] 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 Court for an order to secure compliance.[~~18~~32] 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 securities[20] and establishing rights to withdraw acceptances.[21]~~

[30] Section 657D(4)

[~~17~~31] Section 657D(4)

[~~18~~32] 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*~~

~~**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 proposal[22]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

27. ~~25.~~ The Panel only has power to order costs of parties if it has made a declaration.[~~23~~33] It cannot order costs:

(a) to a successful respondent, even if it declines to conduct proceedings or because ~~they are~~the application is frivolous or vexatious under section 658A(1)(a)

(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

(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.[34]

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:

~~*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~~

[~~23~~33] 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* [~~2012~~2015] ATP ~~15~~4 and ~~*Northern Iron*~~*Thorn Group Limited* ~~[2014~~*01 & 02* [2020] ATP ~~11~~29

[34] For example, the directors or legal advisers of a party, see paragraph 35

(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.~~[24]~~[35]

31. ~~29.~~ Costs may be awarded against ~~a~~any party[36] if it:

(a) presented a case that was not arguable ~~or made~~, made misleading or unsubstantiated assertions~~[25]~~,[37] was unnecessarily hostile, raised extraneous matters or defended circumstances that were clearly unacceptable[38]

(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 requested to do so),[39] abused the process~~[27]~~[40] or unreasonably refused to negotiate~~[28]~~[41]

(c) unreasonably delayed in becoming a party and providing relevant material[42]

~~[24]~~[35] For ~~an example of a case~~examples of cases presented without reasonable merit see ~~*Northern Iron*~~*Condor Blanco Mines* *Limited* [~~2014~~2016] ATP ~~11 at [64~~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]]

[36] Or a non-party that has participated in proceedings

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

[37] Includes reckless or deliberate misquoting of source documents

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

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

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

~~[27]~~[40] 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

~~[28]~~[41] Including refusing a reasonable compromise during negotiations

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

(d) ~~(c)~~ sought an unmeritorious review~~[29]~~[43] 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~~~~[30]~~[44] (partial costs referable to the additional expenses may be appropriate in this case) ~~or~~

(f) submitted material that was materially inaccurate[45]

(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 proceedings[46] or

(h) ~~(e)~~ failed to comply with a direction under ~~ASIC~~ regulation 16(1) ~~or~~of the ASIC Regulations, a Panel order~~[31]~~,[47] an undertaking to the Panel[48] or the Panel's Procedural Rules including those concerning confidentiality and media canvassing[49] (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]~~[50]

~~31.~~ 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

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~~29~~43 *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

~~30~~44 For example, by providing multiple drafts of inadequate additional disclosure~~,~~ (*Minemakers Limited* [2012] ATP 8 at [73]–[76])

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

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

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

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

48 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

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

~~32 Section 201A of the ASIC Act~~

50 Section 201A of the ASIC Act

to persuade a President to consent to the making of a review application under section 657EA(2).[51] ~~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 so[33] 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.[52] Any claim for costs should set out and justify the amount which the party claims.[53]

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~~ [54] 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

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

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

[52] 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

[53] *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~~

[54] See definition of *"costs as between party and party"* in Schedule 1 of the Federal Court Rules 2011

costs on an indemnity basis[55] or make a costs order against the directors of a party[56] or their legal advisers.[57]

36. Costs orders may, in appropriate cases, include the costs of external legal and other external advisers and of directors, and extend to the costs incurred in recovering costs. In appropriate cases, the Panel may decide to make costs orders that substantively covers a party's entire legal costs.

~~**Procedural issues regarding costs orders**~~

37. ~~35. The~~Generally, the Panel will ~~generally include a procedure for assessing and paying costs when making~~not make a costs order~~.~~ ~~Undertakings should also address this.~~ in favour of an unrepresented party in relation to their own time spent in the proceedings.[58]

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.[59]

~~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

[55] 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"*

[56] *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]

[57] 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]

[58] 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

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

the Panel to make a declaration.[60] 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.~~[35]~~[61]

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).~~[37]~~[62]

42. The Panel may be less willing to accept an undertaking from a party who has been uncooperative or has unnecessarily delayed proceedings.[63]

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.[64]

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

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[60] 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.

~~[35]~~[61] 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 Markets Limited* [2016] ATP 3 at [108]–[111]. In appropriate cases, if an undertaking is offered by a party to avoid a declaration of unacceptable circumstances and potential orders being made against it, the Panel will consider whether it is appropriate to require the undertaking to include an obligation to pay the other party's costs. See also paragraph ~~9~~11 above

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

~~[37]~~[62] *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]

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

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

interests are affected by the circumstances to have the benefit of it~~[38]~~[65] 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.~~[39]~~[66] This includes the undertakings relating to confidentiality and publicity given by a party in a notice to become a party.[67] 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 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 declaration~~[41]~~[68] or orders,~~[42]~~[69] 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]~~[70]

48. ~~46.~~ The Panel will normally publish its reasons.~~[44]~~[71] It generally gives parties ~~a confidential draft of~~ its reasons initially on a confidential basis

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~~[38]~~[65] *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) ~~26 ALR 567~~144 CLR 596

~~[39]~~[66] Section 201A(3) of the ASIC Act

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

~~[40] ASIC regulation 21(2)(c)~~

~~[41]~~[68] Section 657A(6)

~~[42]~~[69] Section 657D(4)

~~[43]~~[70] 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 ~~15~~6

~~[44]~~[71] 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* 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]~~[72] The Panel has wide immunities for comments it might make,~~[46]~~[73] 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]~~[74]

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.[75]

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) issuing its findings in a media release

   (b) ~~(a)~~ privately admonishing a person. This is generally undertaken by the President or the president of a sitting Panel and can occur at any stage of the proceedings or

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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]~~[72] *Annetts v McCann* (1990) 170 CLR 596

~~[46]~~[73] Section 197 of the ASIC Act

~~[47]~~[74] 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

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

(c) ~~(b)~~ reporting its findings to ASIC~~,[48] or a person's 'employer', or a person's professional organisation or~~.[76]

~~(c) including its findings in a media release.~~

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Related material

GN 1: Unacceptable circumstances

GN 2: Reviewing Decisions

GN 5: Specific remedies - Information deficiencies

~~[48] ASIC regulation 18~~

[76] ASIC Regulations, regulation 18

~~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.~~