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.

Telephone +61 2 6246 3788 • *Email* mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612 • Level 1, MODE3, 24 Lonsdale Street, Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

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