



**Australian Government**

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**Takeovers Panel**

**Procedural Rules**

DRAFT

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### 1. Introduction

This document is dated [\*] 2009. It may be amended from time to time.

It sets out the Panel's rules on procedure (made under ASIC Act s195) and related guidance. It replaces the Panel's rules on procedure dated 18 June 2004 (as updated in March 2005) and Guidance Note 8 on Matter Procedures (fourth issue dated 18 December 2007).

These rules supplement any procedural or other requirements in Part 6.10 of the Corporations Act, regulation 6.10.01 of the Corporations Regulations, Part 10 of the ASIC Act and Part 3 of the ASIC Regulations.

The notes below a rule may assist in the interpretation of the rule. They also explain how the Panel's procedure works in the usual case, but is not binding. The procedure in a particular case may be different depending on the situation. The "Origin" references are to the Panel's former rules on procedure dated 18 June 2004 (as updated in March 2005).

An interpretation section is at the end of this document.

In the online version of this document, cross-references are hyperlinked where possible. The Panel accepts no responsibility for the accuracy of information on a website not its own.

A person considering making an application is welcome to contact the executive to discuss the application, timing issues and any other matters that might be of concern. The executive will offer as much assistance as it reasonably can, but cannot bind the Panel.

#### *Contact details*

Panel website	<a href="http://www.takeovers.gov.au">www.takeovers.gov.au</a>
Panel email	<a href="mailto:takeovers@takeovers.gov.au">takeovers@takeovers.gov.au</a>
Panel telephone	03 9655 3500

A copy of any application should also be provided to ASIC at [AsicTakeoverMatters@asic.gov.au](mailto:AsicTakeoverMatters@asic.gov.au)

#### 1.1. Objectives of the rules

1.1.1. The objectives of the rules are to promote:

- a) procedural fairness
- b) timely and cost-effective completion of proceedings
- c) obtaining the best available information and

d) not unnecessarily delaying commercial transactions.

Origin: r 1.2

Reference: ASIC Act s195 and ASIC Reg 13 & 16

Note: 1 Given the objectives, the Panel will prefer to:

- a) act on written submissions and evidence
- b) conduct proceedings in private (where parties are subject to confidentiality obligations)
- c) give all parties access to all material before it in a proceeding and
- d) keep time limits as short as is reasonable. (Origin: r 1.3)

### 1.2. Application of the rules

1.2.1. The Panel:

- a) has control over the entire conduct of the proceeding and
- b) may give directions from time to time concerning the conduct of the proceeding, including application of these rules.

Origin: r 9.1 & 9.2

Reference: ASIC Reg 16(1)

Note: 1 A party may request in writing that the Panel give a direction. The request should set out the direction which the party wants the Panel to consider and its submissions in support of the request. (Origin: r 9.5)

1.2.2. The rules apply to each application and proceeding, except to the extent the Panel directs otherwise. If a direction by the Panel is inconsistent with a rule, the direction prevails to the extent of the inconsistency. The Panel or the President may excuse any failure by a person to comply with a rule.

Origin: r 1.5 & 1.6

Reference: ASIC Act s195

1.2.3. A party must comply with any direction of the Panel, and must liaise and cooperate with each other party in good faith for the purposes of complying with any direction.

Reference: ASIC Reg 16(1)

## 2. All Documents

### 2.1. Form

2.1.1. Any document intended for the Panel must:

- a) be in writing
- b) be in a form (if any) required by the Panel
- c) include any content required by the rules

- d) be succinct, on point and avoid repetition (including of previously submitted material)
- e) avoid the use of legalistic jargon and emotive language and
- f) be accompanied by any relevant material (unless already provided to the Panel).

Origin: r 4.1 and GN 8.62

- Note: 1 Applications or submissions which are unnecessarily lengthy or complex are strongly discouraged by the Panel. (Origin: GN 8.62)
- 2 If a document does not comply with this rule, the President or Panel may require that the party provide a further document that does comply. The Panel will treat the original document as received but may not consider it if it directs a further document be provided.
  - 3 Documents should refer to past submissions or cross-references in other parts of the document, not repeat the submissions.
  - 4 A party may provide the Panel with an index of relevant ASX announcements, which the Panel can look up for itself.
  - 5 A party may keep the Panel up to date during the proceedings with relevant announcements it makes (Origin: r 5.9)
  - 6 Submissions should identify clearly what matters of fact or policy are in dispute (Origin: r 4.4)

## 2.2. Provision to Panel and others

- 2.2.1. A document is provided to the Panel or President when it is received by the executive.

Origin: r 2.2, 6.1 & 6.2

- Note: 1 Documents to be provided to the Panel are to be sent by email to [takeovers@takeovers.gov.au](mailto:takeovers@takeovers.gov.au) or by mail to Level 10, 63 Exhibition Street, Melbourne, Vic, 3000, Australia. The Panel uses email as its primary method of communication during proceedings and expects parties to do likewise. A single email must not be larger than 8 megabytes in total. Individual attachments to the email must not be larger than 3 megabytes and must be in Word format where available. If a person is unable to send a document by email, or to do so would cause significant expense, the person may send the document by post. If a document is sent by post, the executive should be contacted to identify the document posted and advise when it is expected to be received. (Origin: r 6.4 and GN 8.39 & 8.60)
- 2 A document received by the executive on a day that is not a Business Day or after 6.00pm (Melbourne time) may not be considered or actioned by the Panel until the following Business Day. (Origin: r 6.7)

- 2.2.2. An application must be provided to ASIC and any person identified in the application as a potentially interested person.

Note: 1 An application may be provided to any other person subsequently identified as a potentially interested person (Origin: r 3.1(b))

2.2.3. Any other document provided to the Panel must be provided to ASIC and each other party to a proceeding.

Origin: r 2.2, 6.1 & 8.1

- Note:
- 1 This rule does not apply to notice given or a document provided to the Panel under rule 5.1.1, unless the President directs otherwise.
  - 2 Documents provided to other parties by email must be in Word or PDF format. It should be clear on the face of the email to whom it has been sent (i.e. there should be no “blind copies”). (Origin: r 6.3 and GN 8.60) In exceptional circumstances, the Panel may allow documents to be lodged only with it, which the Panel will then forward to the other parties once all submissions have been received (for example, if time zone differences might result in an unfair tactical advantage to a party).
  - 3 A party providing a document to another person must inform the executive as soon as possible if it appears that the other person has not received the document. (Origin: r 6.6)
  - 4 An application seeking review of a Panel decision under Corporations Act s657EA must be sent to ASIC and each other party to the proceeding in which the decision was made. (Origin: r 2.4)
  - 5 An application seeking review of an ASIC decision under Corporations Act s656A must be sent to ASIC. As well, as may be applicable, the application should also be sent to the entity to which the decision relates or would have related and each other party who, to the knowledge of the applicant, made submissions to ASIC in relation to that decision. (Origin: r 2.5) ASIC may not have invited submissions and, for reasons of confidentiality, it may not be necessary to consult other parties. If the Panel decides to invite submissions, it will raise the matter with the parties.
  - 6 The Panel may direct a party to provide information or a document to any person who is not a party but who has been invited to become a party or invited to make a submission. The Panel may require the person to provide a confidentiality undertaking before the information or document is given to the person. (Origin: r 3.4 & 8.3, and GN 8.32)
  - 7 The Panel may agree to a redacted document. See rule 2.3.1
  - 8 ASIC Act s190 allows the Panel to restrict publication of submissions or evidence.

2.2.4. A person required to provide a document, or who has accepted an invitation to make a submission, must do so by the date and time specified by the Panel or President.

Origin: r 9.6

Reference: ASIC Reg 16(1)(e), 28(1), 30(3) & 34

- Note:
- 1 If a document is provided after the time specified, the Panel or President may decide not to consider it. (Origin: note to r 9.6)
  - 2 A person who anticipates that the date and time specified by the Panel or President does not give them sufficient time to respond should advise the executive as soon as possible. The Panel or President may not consider a request for an extension unless the party explains why additional time is required and provides an estimate of the additional time required. The

Panel or President normally decides whether to grant the extension without consulting any other person.

### 2.3. Withholding information or documents

2.3.1. A request to the Panel for a direction to withhold information from a party (for confidentiality or other reasons) must:

- a) be made before the information is provided to the Panel
- b) explain why the information needs to be withheld and
- c) include everything necessary for the Panel to consider:
  - i) any effect on procedural fairness and
  - ii) any adverse effect to the party of providing the information.

Origin: r 8.2

Reference: ASIC Act s190 & 195(4)

- Note:
- 1 The request must be provided to all other parties. It does not need to include any of the information that the party proposes to withhold.
  - 2 Given the need for procedural fairness, a request under this rule will only be accepted in exceptional cases. However, if accepted, the Panel may direct that information is:
    - a) withheld from a party and its legal representatives
    - b) provided to a party's legal representatives only, and be withheld by them from the party itself or
    - c) subject to other measures specified by the Panel to mitigate adverse effects of providing the information. (Origin: r 8.4)
  - 3 If a party's request to redact a document (for confidentiality or other reasons) is refused, the party must decide whether it is prepared to submit the complete document. If it is not, the party may consider whether it should withdraw from the proceeding. If the party is the applicant it would require the Panel's consent to withdraw its application, which may be more readily given in these circumstances.

2.3.2. A party that wishes to claim client legal privilege over advice given in a document (and that wishes to withhold that document or part of it) must identify:

- a) the circumstances in which the advice was given and
- b) the subject matter or question(s) to which the advice was directed.

Note: 1 If a party is concerned that compliance with this rule may involve a waiver of the privilege, details of the concern should be discussed with the executive. It is insufficient to simply claim that the advice is privileged.

### 2.4. Draft documents from Panel

- 2.4.1. Any document provided by the Panel (including the executive) to a person for comment or which is marked as a draft is a confidential and incomplete document that is subject to change.

## 3. Application

### 3.1. Form

- 3.1.1. An application does not need to be in a particular form or follow the structure of the pro-forma Application, but must:
- a) ensure that all the content required in the pro-forma Application (see Form - Annexure B) is included in the application. This is not required in the case of an application for review of a Panel decision
  - b) include a Notice of Appearance in the prescribed form and
  - c) not exceed 10 A4 pages in 12 point for the details of the application.

Origin: r 2.1 and GN 8.22

Reference: Corporations Act s657C and ASIC Reg 19

Note: 1 The page limit does not include procedural information such as the Notice of Appearance or background information on the applicant and potentially interested persons. The page limit includes attachments that contain submissions.

2 An applicant should contact the executive if it is likely to exceed the page limit. A request to exceed the page limit must explain why the additional pages are necessary.

3 If the page limit is exceeded, the President or Panel may require the applicant to provide an alternative document that complies with this rule.

4 A potential applicant should contact the executive as soon as it is likely to provide an application, and advise the executive of the persons and advisors involved (so far as known).

5 An applicant should also contact the executive as soon as possible after it sends an application to confirm that it has been received by the executive. (Origin: GN 8.10)

6 The Panel encourages parties to resolve issues by negotiation. However applicants should not delay unreasonably in making an application. Note also the 2 month time limit under s657C. (Origin: GN 8.86-8.88)

7 A fee is payable on an application to the Panel. As at the date of this document, the fee under the *Corporations (Fees) Regulations 2001 (Cth)* Sch 1, item 271 is A\$2010. Applicants should post a cheque in favour of 'The Department of Treasury' to the executive at Level 10, 63 Exhibition Street, Melbourne VIC 3000, Australia. If the executive does not receive the cheque within 3 Business Days of receipt of the application, the executive may seek an undertaking that the cheque will be posted. (Origin: GN 8.9)

8 A party (including the applicant) may make an additional application. The additional application may include a request that the President appoint the same Panel as appointed to consider the initial application and that the

Panel direct the applications be considered in the same proceeding. The Panel may also of its own volition direct that some or all of the applications be considered in the same proceeding. The Panel may not give such a direction if it considers that it would be inconvenient or inappropriate to do so. For example, if the additional application canvases significant new factual material or would unreasonably delay consideration of the preceding application. (Origin: r 2.6 and GN 8.42 & 8.43)

- 9 On receiving an application (other than an application to review an ASIC decision), the Panel prepares a media release which states that an application has been received and provides an outline of the issues. This media release is generally not provided in draft to the applicant or any other person for comment. It will normally not be necessary for parties to make a separate media release (although listed parties remain subject to their continuous disclosure obligations). (Origin: GN 8.11)

### 3.2. Review of ASIC decision

- 3.2.1. A review of a decision of ASIC is a *de novo* consideration on the merits, having regard to the information available at the time of the review.

Reference: Corporations Act s656A. GN 2 on Reviewing Decisions

Note: 1 A *de novo* review means the Panel will consider afresh the circumstances in the application being reviewed and any new circumstances raised (which may have arisen subsequent to the initial decision), and make its own findings and decisions.

- 3.2.2. An application for review of an ASIC decision must explain how the applicant's interests are affected by the decision and, to the extent available, include a copy of:

- a) the application to ASIC
- b) any relevant submissions received by ASIC
- c) any instrument granted by ASIC and
- d) any notice of the decision and any statement of grounds or reasons for the decision provided by ASIC.

Origin: r 5.2

Reference: Corporations Act s656A and ASIC Reg 16(1)(d)

### 3.3. Review of Panel decision

- 3.3.1. A review of a decision of the Panel is a *de novo* consideration on the merits, having regard to the information available at the time of the review.

Reference: Corporations Act s657EA. GN 2 on Reviewing Decisions

Note: 1 An application for review of a Panel decision must be given to the Panel no later than 2 Business Days after the date on which that decision was made.

Reference: Corporations Reg 6.10.01. Rules 2.2.1, 7.1.1

- 2 A *de novo* review means the review Panel will consider afresh the circumstances in the application being reviewed and any new circumstances raised (which may have arisen subsequent to the initial decision), and make its own findings and decisions.
- 3 It is open to a review Panel to decide not to conduct proceedings in relation to a review application if it agrees with the decision of the initial Panel (and the form of any declaration or final orders) and the reasons for that decision, and considers that it would not come to a different decision.
- 4 The initial Panel seeks to issue its draft reasons promptly although it may not have done so within the 2 Business Day deadline for a review application. While the review is a *de novo* consideration, the Panel recognises that it is helpful to have the initial Panel's reasons. It may be, therefore, that the review Panel will conduct the review in such a way that the parties and the review Panel will have access to the draft reasons of the initial Panel in formulating the issues to be considered and in making submissions in relation to them. (Origin: GN 8.84 & 8.85)

3.3.2. Consent of the President for a review of a Panel decision is required in all cases other than when a declaration is made. A request for the President's consent must:

- a) be addressed to the President
- b) identify the relevant decision and
- c) contain enough information to allow a proper consideration of the effects of the decision and the reasons for review.

Origin: r 4.3

Reference: Corporations Act s657EA(2)

Note: 1 The request may be included in the application for review of the Panel decision.

### 3.4. Withdrawal

3.4.1. An applicant may only withdraw its application with the consent of:

- a) the Panel or
- b) if the request for consent to withdraw is made before the appointment of a Panel, the President.

Origin: r 14.1 & 14.2

Note: 1 If the dispute is resolved, the Panel or President will generally give consent to withdraw. However, consent may be refused if there is reason to suspect that unacceptable circumstances will occur or continue to occur. (Origin: note to r 14.3)

## 4. Parties

### 4.1. Interested persons

4.1.1. A person who would like to become a party must provide the Panel with a Notice of Appearance. A person does not become a party until the Notice of Appearance is accepted by the Panel.

Origin: r 3.2 & 3.3, and GN 8.22 & 8.23

- Note: 1 A person who would like to become a party after becoming aware of an application should not delay in providing a Notice of Appearance (see Form – Annexure A to these rules).
- 2 Any delay in providing a Notice of Appearance may delay consideration of the application. Accordingly, any unreasonable delay may mean that the Notice of Appearance is not accepted. (Origin: r 3.2 and GN 8.23)
- 3 The Panel may decide not to take a document or submission into account unless the person providing it has given a Notice of Appearance. A Notice of Appearance includes undertakings in relation to confidentiality and media canvassing. The requirement for a Notice of Appearance does not apply to ASIC. (Origin: GN 8.25).

Reference: r 6.1.1

- 4 When giving a Notice of Appearance, a person not identified in an application as potentially interested who wishes to become a party, should explain why they may be materially affected.
- 5 Persons identified in the application as interested will receive material for 2 Business Days after the date of the application. This allows them time to file a Notice of Appearance (if desired).
- 6 The Panel may invite a person to become a party if it appears that the person's interests may be materially affected or the person is likely to be able to assist the Panel. To become a party, the person will still have to provide a Notice of Appearance. (Origin: r 3.4 and GN 8.23)
- 6 The Panel may invite submissions from a person without requiring the person to become a party (Origin: r 3.4)

Reference: ASIC Reg 24

- 7 The Panel will notify a person if the Notice of Appearance is not accepted.

4.1.2. The Panel may withdraw its acceptance of a party's Notice of Appearance if in the Panel's opinion:

- a) the person is no longer potentially interested in the matter or
- b) it is otherwise appropriate to do so.

### 4.2. Undertakings in Notice of Appearance

4.2.1. Each director and officer of, and adviser to, a person providing a Notice of Appearance is bound by the undertakings given by the person in the Notice of Appearance.

Reference: ASIC Act s200 & 201A

### 4.3. Legal representation

- 4.3.1. A party that wishes to be legally represented by anyone other than its commercial lawyers must explain why when requesting consent.

Reference: ASIC Act s194

- Note: 1 A party must request the consent of the Panel if it wants to be legally represented in a proceeding. The form of request is set out in the Notice of Appearance. However, there is no requirement that a party be legally represented and a party may make submissions directly to the Panel. (Origin: GN 8.33 & 8.35)
- 2 If a party is to be legally represented, the Panel prefers it to be by the commercial lawyers who have been advising it in the transaction the subject of the application. The Panel generally will not accept representation by litigation lawyers or counsel unless it can be demonstrated that they have been directly involved in the transaction. (Origin: GN 8.34)
- 3 If a party seeks consent to be represented by lawyers different to those who have advised it on the transaction (even from the same firm), it should explain why. (Origin: r 11.1 & 11.2 and GN 8.34)

## 5. Sitting Panel

### 5.1. Conflict of interest

- 5.1.1. A party must notify the Panel as soon as possible after it becomes aware of an interest of a Panel member that:
- could conflict with the proper performance or exercise of that member's functions or powers in the proceeding and
  - it believes, on reasonable grounds, is not immaterial or indirect and will prevent the member from acting impartially in relation to the matter.

The notification must describe the interest and explain why both paragraphs (a) and (b) are met.

- 5.1.2. Rule 2.2.3 does not apply to a party who gives notice of a conflict, unless the President directs otherwise.

Reference: ASIC Act s184 & 185. GN 11 on Conflicts of Interest.

- Note: 1 If a party fails to comply (or unreasonably delays in complying) with this rule, the party may be taken to have waived its right to take issue with the interest.
- 2 Notification is equally important if the interest is one which may favour a party.
- 3 Guidance Note 11 says that:

- The President will appoint a Panel as soon as possible following receipt of an application. If the President has an interest, an Acting President will fulfil the role of President and appoint the Panel. (Origin: GN 8.12)
  - The President will consider the composition of a potential Panel on the basis of known interests notified by any party and the member themselves. (Origin: GN 8.13)
- 4 A Panel will consist of three Panel members, with one appointed as the sitting President and another as the sitting Deputy President. Generally, the Panel aims to ensure a mix of expertise for each Panel including a lawyer, an investment banker or other corporate adviser and, if possible, a member with particular skills directly relevant to the issues raised. (Origin: GN 8.14)
  - 5 The Panel provides parties with a Declaration of Interests which includes the identity of each member of the Panel, their backgrounds and any interest or connection that the members may have with a party or adviser. Any interests of the executive are also disclosed. (Origin: GN 8.16)
  - 6 In addition to considering the Declaration of Interests, it is recommended that each party undertake any public searches that it thinks may identify any other interest that may give rise to a concern. 7 If the President believes that an interest is immaterial or indirect and will not prevent the member from acting impartially, he or she can decide that no change to the composition is required. (Origin: GN 8.17)

## 6. Sourcing information

### 6.1. Preliminary submissions

- 6.1.1. A party may make preliminary submissions concerning whether the Panel should conduct proceedings in relation to an application, but must not make rebuttal submissions to a preliminary submission. An applicant must not make preliminary submissions.

Origin: note 5 to r 2.7, & r 9.10 and GN 8.46

Reference: ASIC Act s188 and ASIC Reg 20(a)

Note: 1 The Panel may accept a submission from a person that is not a party. This includes accepting a preliminary submission. Generally the Panel will accept a submission from a person not a party if it appears that the person's interests may be materially affected by the proceeding or the person is likely to be able to assist the Panel. (Origin: r 3.4 and GN 8.23)

Reference: ASIC Reg 16(1)(g), 23 & 24

- 2 As soon as practicable after an application is received, a Panel is constituted and it convenes to decide whether to conduct proceedings. As part of making this decision, the Panel will consider:
  - a) whether the Panel has jurisdiction
  - b) whether the claims would give rise to unacceptable circumstances if established
  - c) the strength of the preliminary evidence

- d) the remedies available
  - e) whether the circumstances are the subject of court proceedings
  - f) whether the application is out of time and, if not, whether it is timely and
  - g) whether the application is trivial, frivolous or vexatious. (Origin: GN 8.41 & 8.45)
- 3 Preliminary submissions should be brief (generally no more than 2 pages). They should be directed to whether the Panel should conduct proceedings having regard to the above considerations. If appropriate, they should propose any undertakings that the party is willing to give which may remedy some or all of the concerns in the application. They might also identify any additional facts the Panel should take into account when deciding whether to conduct proceedings.
  - 4 Rebuttals to preliminary submissions, from the applicant or any other party, are not permitted. (Origin: GN 8.47)
  - 5 Preliminary submissions may be made on a review application in accordance with this rule.

## 6.2. Submissions

### 6.2.1. Submissions in response to a brief do not need to be in a particular form other than to comply with any directions in the brief.

Reference: ASIC Reg 20(b), 22(1), 25, 28 & 30

Note: 1 The Panel is required to act fairly under ASIC Reg 16.

- 2 A brief is provided to parties as soon as practicable after the Panel decides to conduct proceedings. The brief sets out the key issues or questions that the Panel requires be addressed, invites the parties to make submissions on those issues or questions, and sets out the timetable for parties to make submissions and rebuttal submissions. A sample brief is available on the Panel's website. (Origin: GN 8.48 & 8.49)
- 3 The Panel may issue one or more supplementary briefs at any stage of the proceeding. (Origin: r 9.11 & GN 8.48)
- 4 If a party would like to address any other issue or question not raised in the brief (either for that party or generally), it should be clearly identified as additional.
- 5 Parties are usually provided with 2 Business Days from receipt of a brief to provide submissions and 1 Business Day from receipt of submissions to provide rebuttal submissions. However, shorter or longer times may be allowed. If a submission is provided after the time specified by the Panel, the issue may be decided without it. (Origin: GN 8.50)
- 6 The brief may invite parties to provide a statement of what is agreed between them, which may include any policy considerations and matters of fact and law not in dispute. (Origin: r 5.1)
- 7 Given ASIC Act s199, the Panel expects a person who does not have personal knowledge of a matter included in a submission to have made appropriate inquiries that the matter is true and not misleading.

Reference: rule 1.2.3.

### 6.3. Evidence

- 6.3.1. The Panel is not bound by the rules of evidence and may act on any logically probative material from any source.

Origin: r 7

Reference: ASIC Act s192 & 199 and ASIC Reg 16(2)

Note: 1 The Panel may inform itself of any publicly available information, including information published by parties or other persons under the Corporations Act, or the rules of ASX or another securities exchange.

- 2 A party may provide statements and documents to support any matter raised in an application or in submissions. The Panel may summons a person to give evidence or to produce specified documents, on application to do so by a party (see Note 7), or without any application to do so.
- 3 It is an offence if a person gives, in a written submission to the Panel for the purposes of a proceeding, information or evidence that is false or misleading in a material particular, unless it is proved that the person, when giving the information or evidence, believed on reasonable grounds that it was true and not misleading.

Reference: ASIC Act s199.

- 4 Evidence may be provided to the Panel in the form of oral testimony (if a conference is held) or a document that is signed and includes statements to the effect that:
  - a) the person is aware of the offence and its particulars in ASIC Act s199 (see note above)
  - b) there are no material omissions from the statement and
  - c) any attachments are true copies of the originals.
- 5 Sworn evidence may be provided to the Panel in the form of a statutory declaration or affidavit that has been declared, sworn or affirmed in accordance with the law of the place where it is made.
- 6 A declaration, affidavit or statement may be sent to parties and the Panel electronically (as a scanned copy of the original). The Panel may request that the original be provided.
- 7 A party may request the Panel to issue a summons to a witness. The request should set out the matters to be dealt with in the witness' evidence. The Panel may direct the proposed witness to answer specific questions in writing before appearing before the Panel.

### 6.4. Conferences

- 6.4.1. The Panel may hold a conference (for all or part of a proceeding):
- a) at the request of a party or
  - b) of its own volition.

Origin: r 10

Reference: ASIC Act s192 & 199 and ASIC Reg 16(1)

Note: 1 A Panel will consider convening a conference if it thinks that it will expedite proceedings or if it requires a better understanding of evidence,

issues or arguments. If it proposes a conference, the Panel will provide written notice to the parties.

- 2 A conference may be held in person, by video, by audio or by any combination of communication facilities.
- 3 A party requesting a conference should indicate the issues to be addressed, the persons to attend, the reasons why a conference is desirable and the estimated time it would take. (Origin: r10.1)

### 6.4.2. A conference is held subject to any directions the Panel gives.

Origin: r 10.3

Reference: ASIC Act s192 & 199 and ASIC Reg 16(1)(c)

Note: 1 The Panel may, for example, direct what evidence will be taken in a conference and may specify time periods for parties to address the conference. (Origin r 10.4 and 10.5)

## 7. Decision

### 7.1. Date of Decision

#### 7.1.1. A decision of the Panel is made on the date it is communicated to the parties in final form.

Reference: Corporations Act s657A(6) and ASIC Reg 21

Note: 1 The Panel will normally first provide parties with a proposed decision it is minded to make (which may include a draft of a declaration and supplementary brief on orders or draft of final orders). The proposed decision will normally include a list of factors which the Panel considered important to its decision. Those factors should not be taken as the Panel's reasons for its decision. Parties should not treat this as a decision in final form (see also rule 2.4.1). The Panel does this to seek comments on the form of the declaration and any final orders. Comments should be limited to questions of fact or unfair prejudice. It is not an opportunity to seek to re-argue the merits. Generally, rebuttals on comments will not be taken into account. Parties may also use this as a final opportunity to offer an undertaking in lieu of any proposed final orders.

- 2 The Panel is generally willing to consider undertakings to resolve a matter, although the Panel may make a declaration but not final orders when it accepts an undertaking. Undertakings should deal with all issues in the proceeding which might otherwise have been dealt with in final orders. (Reference: ASIC Act s201A)
- 3 In some cases, before providing parties with a proposed decision, the Panel may provide parties with proposed findings it is considering making. The Panel does this to seek comments on possible findings before they are made. Parties should also not treat these as findings or a decision in final form (see also rule 2.4.1).
- 4 The decision in final form will normally be accompanied by a signed copy of the declaration and final orders as applicable.
- 5 Reasons are provided to parties separately after the decision. The exception to this is where the decision is not to conduct proceedings. The reasons for that decision are provided at the same time as the decision, as required by ASIC Reg 21(2). (Origin: GN 8.72 & 8.77)

- 6 After the decision in final form is communicated, the Panel will announce the decision in a media release published on its website and ASX's companies announcement platform (if relevant). Beforehand, parties are normally provided with a draft of the media release for any comments on issues of factual accuracy and unfair prejudice. Any Panel media release also does not constitute the Panel's reasons. (Origin: GN 8.78 & 8.79)
- 7 Before the Panel's reasons are published, parties are normally provided with a draft for any comments on issues of factual accuracy and unfair prejudice.
- 8 Parties should be careful not to selectively use or quote statements from a decision, reasons or media release in a way which might mislead a reader who has not read them in full. (Origin: GN 8.74 & 8.81)

## 8. Orders

### 8.1. Application for orders

- 8.1.1. A party that applies for an interim or final order (or to vary an existing interim or final order) must give the application to ASIC, each other party and each person who would, to the applicant's knowledge, be materially affected by the proposed order or variation.

Origin: r 9.9

Reference: Corporations Act s657D & 657E, ASIC Reg 21 and GN 4 on Remedies - General

- Note:
- 1 In determining whether to make an interim order, the Panel or President will take into consideration any delay by the applicant in making its application.
  - 2 The usual minimum time in which the Panel or President can deal with an application for an interim order is 1 Business Day. If less time is provided, the applicant should explain why it could not have applied earlier.
  - 3 The Panel or President may make an interim order without seeking submissions from or consulting any other person. To support the making of an interim order, the applicant must address the impact of the proposed interim order and the need to protect the status quo while the Panel considers the application. The applicant should also demonstrate that the impact of the interim order being sought would be minimal or would not be unfair to any of the interested persons or the market. (Origin: GN 8.54)
  - 4 If an interim order is requested in an application and it is not urgent, an initial brief may be sent to parties requesting submissions and rebuttal submissions on that aspect of the application. Tight times may be imposed on parties if the interim order request requires more urgent resolution. Alternatively, an interim order that operates for a very short time might be made to allow the Panel or President to obtain more information. (Origin: GN 8.53 & 8.75)
  - 5 The Panel or President may allow a person who may be affected by the proposed interim order the opportunity to provide an undertaking in lieu of the interim order. (Origin: GN 8.55)
  - 6 The Panel may make any interim or final orders it thinks appropriate, even if they are not sought in the application or in any submissions.

- 7 If the Panel proposes to make final orders it will normally provide parties with an opportunity to make submissions on the final orders it proposes to make. Parties are usually provided with 2 Business Days from receipt of a brief on final orders to provide submissions and 1 Business Day from receipt of submissions to provide rebuttal submissions. However, shorter or longer times may be allowed. If a submission is provided after the time specified by the Panel, the Panel may decide the issue without it: see ASIC Reg 28(1).

## 9. Court referrals

### 9.1. Referral by Panel to Court

- 9.1.1. A request that the Panel refer a question of law arising in a proceeding to the Court must:
  - a) be accompanied by a draft of a case stated
  - b) explain how the decision of the Court is relevant to a decision of the Panel in the proceeding and
  - c) include an undertaking by the requesting party in favour of the Panel to pay or reimburse on demand all costs of the Panel in the matter on a solicitor and own client basis.

Origin: r 9.8

Reference: Corporations Act s659A

Note: 1 A case stated is a statement of the question of law that the Court is to answer and any facts relevant to the Court's consideration of that question.

## 10. Miscellaneous

### 10.1. Role of executive

- 10.1.1. The executive does not bind the Panel.

Note: 1 The executive is the point of contact for the parties. The executive acts with the authority of the President or Panel in the conduct of Panel business and when liaising with parties. Generally speaking, parties and the President or a Panel do not communicate directly. This helps maintain procedural fairness. (Origin: GN 8.1 & GN 8.38)

- 2 The executive manages the administration of matters on behalf of the President and Panel, including (when appropriate) informing parties of the status of the consideration of the application. The executive advises the President or Panel (as applicable) in relation to parties' submissions, questions of law and issues of policy where appropriate. Specifically, the executive:
  - a) assists the President to identify a Panel for a matter
  - b) assists Panel members with conflict checks
  - c) conducts research for the Panel

- d) prepares draft documents for the Panel (for example, correspondence, media releases, brief, declaration, interim and final orders and reasons for decision) and
  - e) if requested, advises and assists the President or Panel in the performance or exercise of their functions or powers. (Origin: GN 8.3, 8.4 & 8.40)
- 3 The executive does not make decisions on the merits of an application (as this is the function of a Panel) and does not filter submissions, although it may (in addition to the submission) provide a summary or advice for a Panel. (Origin: GN 8.4, 8.5, 8.7 & 8.38)
  - 4 The executive also liaises with market participants on current and prospective takeovers and other control transactions and policy issues to provide a perspective on the Panel's Guidance Notes and decisions. The executive may give market participants or parties its views on the Panel's likely view in relation to any real or hypothetical circumstances. (Origin: GN 8.6 & 8.7)

### 10.2. Definitions and interpretation

10.2.1. The rules are to be interpreted:

- a) according to their spirit
- b) by looking beyond form to substance and
- c) in a way that best promotes the objectives in rule 1.1.1.

10.2.2. In these rules, the following expressions have their corresponding meaning, unless indicated otherwise:

Expression	Meaning
application	an application: <ul style="list-style-type: none"> <li>a) under Corporations Act s657C</li> <li>b) for a review of a Panel decision under Corporations Act s657EA or</li> <li>c) for a review of an ASIC decision under Corporations Act s656A</li> </ul>
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001 (Cth)</i>
ASIC Regulations	<i>Australian Securities and Investments Commission Regulations 2001 (Cth)</i>
ASX	Australian Securities Exchange
Business Day	a day that is not a Saturday, Sunday or public holiday in Melbourne, Australia

Expression	Meaning
Corporations Act	<i>Corporations Act 2001 (Cth)</i>
Corporations Regulations	<i>Corporations Regulations 2001 (Cth)</i>
declaration	declaration of unacceptable circumstances made under Corporations Act s657A
executive	any or all of the staff of the Commonwealth Department of Treasury, and secondees, working in offices of the Panel
final orders	orders made under Corporations Act s657D
GN	Panel Guidance Note
GN 8	Superseded GN 8 on Matter Procedures (Fourth Issue dated 18 December 2007)
interim orders	orders made under Corporations Act s657E
Notice of Appearance	a notice of appearance in the form in Annexure A (which is also available on the Panel's website)
Panel	sitting Panel appointed under ASIC Act s184 to consider an application
party	<ul style="list-style-type: none"> <li>a) an applicant (whose Notice of Appearance is incorporated in its application or separately filed)</li> <li>b) ASIC and</li> <li>c) any person who provides a Notice of Appearance which is accepted by the Panel</li> </ul>
President	President of the Panel appointed under ASIC Act s173 or an Acting President appointed under ASIC Act s182
pro-forma Application	the pro-forma application in the form in Annexure B (which is also available on Panel's website)
rules	Panel's rules on procedure made under ASIC Act s195

Annexure A - Notice of Appearance

NOTICE OF APPEARANCE

Proposed party: [\*name of proposed party]

In this proceeding, the proposed party:

1. seeks to be a party and requests that the Panel accept this Notice of Appearance [and]
2. gives the following contact details and undertakings [and]
3. *Optional:* seeks to be legally represented and requests the Panel's consent to be represented by [\*name of legal adviser]].

**CONTACT DETAILS** (for up to 4 individuals)

Name and position:

Office address:

Direct office telephone number:

Office fax number:

Mobile number:

Email address:

**UNDERTAKINGS**

The proposed party undertakes to the Panel under section 201A of the *Australian Securities and Investments Commissions Act 2001* (Cth) and to each party to the matter from time to time that it and its directors, officers and advisers will not:

- A. use or disclose any confidential information provided to it in the proceeding. This undertaking is not limited by time. However, this undertaking does not apply to confidential information:
  - used in the proceeding itself as permitted under the Panel's rules or
  - disclosed as required by law or the rules of a listing exchange.
- B. directly or indirectly cause, participate in or assist the canvassing in any media of any issue that is before (or likely to be before) the Panel in this proceeding. This undertaking applies:
  - until the Panel publishes its reasons for decision and
  - if an application is made to vary any final order, from the time the proposed party becomes aware of the application until it is determined by the Panel.

However, this undertaking does not apply to statements that, without discussing merits, identify the parties or the subject matter of the proceeding or the broad nature of the unacceptable circumstances alleged or the orders sought.

The proposed party also undertakes to instruct each of its directors, officers and advisers to comply with the preceding undertakings.

Dated:

Signed on behalf of the proposed party by:

\_\_\_\_\_  
[full name and position of signatory]

A person authorised to bind the proposed party

Annexure B – Application to the Takeovers Panel

**SECTION 657C(2)**

**APPLICATION TO THE TAKEOVERS PANEL**

**Date:** *Insert date of application*

**Applicant:** *Insert name of applicant*

**In relation to the affairs of:** *Insert company*

**Other parties:** *Identify the other parties*

**1. Overview of Application**

Aspect	Summary
Decision sought	<i>Insert decision or declaration sought (e.g. unacceptable circumstances)</i>
Declaration basis	<i>Insert section relied on (e.g. s657A(2)(a))</i>
Circumstances	<i>1. Insert in a few sentences a summary of relevant circumstances 2. Identify whether the circumstances are continuing 3. State when the circumstances first occurred.</i>
Effect of circumstances on control/ substantial interest/ 602 principles	<i>Identify the effect of the circumstances</i>
What (if any) contravention of chapters 6-6C?	<i>If none identified, write NA or delete box</i>
Interim order(s) sought	<i>Insert interim orders sought. If none, write NA or delete box</i>
Final order(s) sought	<i>1. Insert final orders sought 2. Identify how the requested orders protect rights or interests (s657D(2)(a)) or ensure the takeover bid proceeds as it should have (s657D(2)(b)).</i>

**2. DETAILS OF APPLICATION (KEEP TO 10 PAGES)**

**2.1. BACKGROUND**

*Insert all relevant matters of fact, so far as they are known to the applicant  
If possible, include a diagram of the corporate/ shareholding relationships.*

**2.2. CHRONOLOGY**

*Insert chronology of key events*

Date	Event

**2.3. SUBMISSIONS**

*Set out separately each claim and the submission to support it. Include the policy considerations, submissions on law or the exercise of discretion relevant to the claim.*

**2.3.1. Issue 1:** *(eg, misleading information regarding funding of bid)*

*Detail first claim and submissions*

**2.3.2. Issue 2:** *(eg, misleading information regarding value of the bid)*

*Detail second claim and submissions*

**3. ORDERS**

*Set out separately each order sought and the submission to support it. Include the policy considerations, and unfair prejudice submissions relevant to the order.*

**4. PROCEDURAL**

**4.1. FEES**

*Insert statement that fee has been forwarded or provide undertaking to pay fee.*

**4.2. LEAVE TO BE LEGALLY REPRESENTED**

*If applicable, insert request for the Panel to grant leave to be legally represented by the party's commercial solicitors.*

**4.3. INFORMATION ABOUT THE APPLICANT**

Applicant	
Principal Shareholders	
Directors	
Controllers	
Legal advisers	
Financial advisers	
Auditors	
Principal financiers	
Name of any person with whom, or on whose behalf, the applicant is acting in	

Applicant	
relation to the application or the matters described in it.	

*State which paragraph of section 657C(2) applies. If s657C(2)(d), state the nature and extent of the interest affected.*

**4.4. INFORMATION ABOUT POTENTIALLY INTERESTED PARTIES**

	Potentially interested party*	Potentially interested party*
Principal Shareholders		
Directors		
Controllers		
Legal advisers		
Financial advisers		
Auditors		
Principal financiers		

*\*Identify each person (other than ASIC) known to the applicant whose interests would be materially affected by the making of the decision or declaration or the granting of the orders.*

**4.5. SERVICE ON OTHER PARTIES**

*Confirm that the other parties have been, or will be, given a copy of this application (Note must include ASIC)*

**4.6. OUT OF TIME**

*(If need a determination by the Panel under s657C(3)(b – otherwise delete) If necessary, state why it is desirable to commence proceedings more than two months after the circumstances first occurred (e.g., whether the circumstances were concealed or otherwise unknown to the applicant and what, if any, adverse effect the circumstances have had or would have)*

**4.7. NOTICE OF APPEARANCE AND UNDERTAKING**

*Complete Annexure A of these Procedural Rules.*

**5. ANNEXURES**

*Insert list of documents annexed to the application. Include any documents that the Rules require to accompany the application (see also Rule 5).*

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Annexure	Description
1	
2	
3	

Signed: \_\_\_\_\_

Name and authority: \_\_\_\_\_

DRAFT