



**Australian Government**

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**Takeovers Panel**

## **Consultation Paper**

**Rewrite of:**

**Procedural Rules**

**1 October 2009**

## Introduction

1. The Panel invites comments on the draft Procedural Rules attached. The time for comments is open until **26 October 2009**.
2. Comments or queries can be directed to:

<p>Allan Bulman Director, Takeovers Panel Email: <a href="mailto:takeovers@takeovers.gov.au">takeovers@takeovers.gov.au</a></p>
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3. Note that it is Panel policy that submissions may be made public unless the respondent requests confidentiality.
4. The Panel will consider all comments and reserves the right to make changes to the draft Procedural Rules in response to comments or otherwise.

## Background

5. The draft Procedural Rules are a rewrite of existing Takeovers Panel's Rules for Proceedings dated 18 June 2004 (updated March 2005) and Guidance Note 8. This draft has sought to identify 'rules' and 'guidance' with the aim of simplified drafting and keeping only essential rules with everything else as guidance. The guidance has been incorporated into the notes to the rules. We have also incorporated related legislative references.
6. If the new Procedural Rules are adopted, GN 8 will be withdrawn.

## Issues

7. While comments are sought generally, particular attention is directed to the following issues:

### Logic of new rules

8. Are the new rules easy to find and in a logical order?
9. Are any of the new rules unclear?
10. Are there any existing rules that we should not have deleted, or areas not currently addressed that should be considered for inclusion?

### Update of practices

11. It has been some years since there was a general review of the Panel's Rules for Proceedings. The Panel invites comments on aspects of the rules and guidance that may need updating to accommodate current Panel or market practice.

### Substantive changes from the existing rules

12. A ten page limit has been inserted on applications (new rule 3.1.1(c)). The Panel's experience is that most applications can be dealt with effectively within this limit. If it needs to be exceeded the party can contact the Panel executive to discuss.
13. Rules requiring the provision of ASX and other public announcements to the Panel (existing rules 5.4-5.7) have been deleted. Relevant announcements will be included in any event under new rule 2.1.1(e). The Panel is able to look up ASX announcements if given an index.
14. The two Business Day deadline for Notices of Appearance (existing rule 3.3) has been deleted. The Panel's view is that such a deadline is not always practicable.
15. The need for Panel consent to withdraw as a party (existing rule 14), other than for the applicant (new rule 3.4.1) has been deleted. It serves no purpose to keep a party involved when it does not want to be involved in the matter. Should the Panel persist with the rule regarding applicants?
16. The rules requiring ASIC to provide reasons for its decision (within 2 business days) where an ASIC decision being is reviewed (existing rule 5.3) have been deleted. This is because the review is a de novo hearing (new rule 3.2.1) and ASIC's practice is to provide reasons in any event as soon as practicable.
17. The rules relating to undertakings in lieu of orders (existing rules 8.3A & 13) have been deleted. The Panel is able to deal with requests for confidential approaches and procedural fairness concerns on a case by case basis.
18. The rules relating to confidentiality and media undertakings have been moved from the rules (existing rules 8 & 12) into the Notice Appearance which is incorporated as Annexure A to the draft rules. The Panel is of the view that there is no need for duplication in both the rules and Notice of Appearance. Any discretion regarding use of material from a proceeding can be dealt with under ASIC Act s190.
19. The media undertaking has been extended so that it is re-enlivened to cover any application to vary the orders.
20. ASIC is no longer required to lodge a Notice of Appearance. It will always be a party to proceedings, whether or not it actively participates. The Panel's view is that this position will provide clarity as to ASIC's status to both ASIC and parties.
21. New rule 4.2.1 extends the undertakings to advisers, which is slightly different to the existing form, although existing rule 8.5 purports to extend confidentiality obligations to any person in receipt of confidential information.

22. The Panel is considering inserting a Note to rule 2.3.2

“The Panel may decline to allow the claim of privilege. *Corporations and Securities Panel v Bristle Investments Pty Limited* (1999) 152 FLR 462 decided that the privilege does not apply to the production, inspection and use of documents (or evidence) required under a direction (ASIC Reg 16) or summons (ASIC Act s192). In *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 the High Court did allow a claim of legal professional privilege in respect of s155 of the *Trade Practices Act 1974* (Cth).”

Has *Daniels Corporation International Pty Ltd v ACCC* changed the law as stated in *Corporations and Securities Panel v Bristle Investments Pty Limited* regarding Panel proceedings?

### Attachments

Draft Procedural Rules