



## Australian Government

### Takeovers Panel

## Guidance Note 2 – Reviewing Decisions

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### Background

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1. This guidance note has been prepared to assist market participants understand the Panel’s approach to reviews of:
  - (a) ASIC decisions under s656A of the Corporations Act 2001 (Cth)<sup>1</sup> and
  - (b) Panel decisions under s657EA.
2. The discussion is illustrative only and nothing in the note binds the Panel in a particular case.
3. The Panel’s power to review a decision<sup>2</sup> is complete after one review. A review of an ASIC decision or a review of the decision of an initial Panel cannot be further reviewed by another Panel.

### Reviewing ASIC decisions

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4. With effect from 13 March 2000, the Corporations Act was amended to give the review of ASIC decisions to the Panel. The function was previously performed by the Administrative Appeals Tribunal.

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<sup>1</sup> All references are to the *Corporations Act* unless otherwise indicated

<sup>2</sup> “Decision” has the same meaning as in the *Administrative Appeals Tribunal Act 1975*

5. The ASIC decisions that may be reviewed by the Panel are decisions regarding exemptions or modifications of:
  - (a) Chapter 6 (takeovers) or
  - (b) Chapter 6C (substantial holdings and tracing notices) in relation to the securities of a target during the bid period.
6. Any person whose interests are affected, not just the person who applied to ASIC, may apply for review of an ASIC decision.

### Powers of the Panel

7. The Panel may exercise all the powers and discretions of ASIC under Chapters 6 and 6C.<sup>3</sup> It must affirm, vary or set aside ASIC's decision. If the Panel sets ASIC's decision aside, it must make a decision in substitution or remit the matter to ASIC for reconsideration in accordance with any direction or recommendation it gives.
8. The Panel may stay an ASIC decision.<sup>4</sup> Otherwise the decision operates, even though an application for review has been made.
9. The Panel may also make ex parte orders in urgent cases.<sup>5</sup>

### Factors taken into account

10. The Panel's approach to reviewing an ASIC decision is guided by the following considerations:
  - (a) review proceedings are a *de novo* consideration on the merits
  - (b) the relevant ASIC policy and whether it was applied.<sup>6</sup> If the Panel comes to the same conclusions as ASIC on what policy to apply and how to apply it, then normally ASIC's decision would be affirmed
  - (c) whether there is any reason why ASIC's policy should not be applied.<sup>7</sup> The Panel, as a specialist review body, may have more scope to review the underlying policy, but persuasive reasons

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<sup>3</sup> Section 656A(3)

<sup>4</sup> Section 656B(2)

<sup>5</sup> Section 656B(4)

<sup>6</sup> In *Taipan Resources NL (No 6)* [2000] ATP 15 and *Pinnacle VRB Ltd (No 3)* [2001] ATP 2 the Panel said that if ASIC has applied a consistent policy the Panel should follow it but would make its own assessment of the facts. *BreakFree Ltd (No 2)* [2003] ATP 30 is an example. See also *Cape Lambert MinSec Pty Ltd* [2009] ATP 12, *Lion-Asia Resources Pte Ltd* [2009] ATP 25 and *Leighton Holdings Limited 01, 02 and 03* [2010] ATP 13

<sup>7</sup> See, for example, *Prudential Investment Company of Australia Limited* [2003] ATP 36

would be needed not to apply established ASIC policy (particularly if arrived at after public consultation)

- (d) the legislative policy of Chapters 6 or 6C
  - (e) the Panel's own policies and rules and
  - (f) the desirability of consistency and certainty in decision-making.
11. This approach follows the practice laid down for the AAT by Brennan J in *Re Drake and Minister for Immigration and Ethnic Affairs*:
- "When the Tribunal is reviewing the exercise of a discretionary power reposed in a Minister, and the Minister has adopted a general policy to guide him in the exercise of the power, the Tribunal will ordinarily apply that policy in reviewing the decision, unless the policy is unlawful or unless its application tends to produce an unjust decision in the circumstances of the particular case. When the policy would normally be applied, an argument against the policy itself or against its application in the particular case will be considered, but cogent reasons will have to be shown against its application, especially if the policy is shown to have been exposed to Parliamentary scrutiny."*<sup>8</sup>
12. The Panel will decide the relevant facts for itself. They may differ from those found by ASIC because of new information or the Panel's different assessment.
13. If the Panel decides that an ASIC decision should be set aside or varied, its preference will be to decide the matter itself. If additional facts are needed, the Panel may refer the matter back to ASIC with a direction as to the policy to be applied.
14. If the review shows up a need for policy development involving further research or public consultation, the Panel will decide the review on its facts setting the narrowest precedent possible. The Panel may separately invite ASIC to undertake the policy development.

### The application for review

15. The Panel's *Procedural Rules* set out the documents which an applicant needs to lodge.<sup>9</sup>
16. In general, the material needed to review an ASIC decision should be contained in the application to ASIC, other submissions received by ASIC and ASIC's decision (and reasons if any). However, the review application should state the reasons why the Panel should substitute a

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<sup>8</sup> [1979] AATA 179. See also *Re Allstate Explorations NL* [1999] AATA 1019, upheld on appeal: *Sabatina Pty Ltd v Allstate Exploration NL* [2000] FCA 92

<sup>9</sup> See Rule 3.2.2

different decision (or give a direction that will lead to ASIC making a fresh decision in a different way).

17. While a procedural irregularity with ASIC's decision-making may support a decision by the Panel to conduct proceedings,<sup>10</sup> it is not grounds for coming to a different conclusion because the Panel proceeding rectifies the procedural irregularity.<sup>11</sup>
18. The review application should identify relevant facts that may have changed<sup>12</sup> or are in dispute.
19. Lengthy or voluminous documentation should be summarised or cross-referenced to the relevant parts.
20. Generally, the Panel will issue a media release stating that it received an application to review an ASIC decision if (or when) the need for the relief is not commercially sensitive.

### Reviewing Panel decisions

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21. A review Panel can review the decision of an initial Panel under s657A concerning a declaration of unacceptable circumstances or interim or final orders.<sup>13</sup>
22. A review Panel decides on the merits of the matter applying similar timing and informal procedures to an initial Panel.
23. A review Panel is constituted by three members appointed by the President.
24. An application for review may be made by a party to the proceedings before the initial Panel or ASIC.<sup>14</sup>
25. A party must make an application for review no later than two business days after the date on which the decision was made.<sup>15</sup> The

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<sup>10</sup> The Panel has the power to decide whether it will conduct proceedings. See ASIC regulation 20

<sup>11</sup> *National Can Industries Limited 01(R)* [2003] ATP 40 at [43] and *Australian Pipeline Trust 01* [2006] ATP 27 at [39]-[42]

<sup>12</sup> In *Prudential Investment Company* [2003] ATP 36 at [33] the Panel was critical of the applicant putting information before the Panel that could have been put before ASIC

<sup>13</sup> See section 657EA

<sup>14</sup> Section 657EA(1)

<sup>15</sup> Section 657EA(3) and Corporations Regulation 6.10.01. The Panel takes the view that the application for review must be received by the Panel before the end of the second business day after the date of the decision (ie, before midnight, Melbourne time, on the second day). It may not be considered or actioned until the next day: Rule 2.2.1. note 2

Panel's decision is made on the date that it is communicated to the parties in final form.<sup>16</sup>

### Powers of the review Panel

26. A review Panel has the same powers to make a declaration or orders as the initial Panel and may vary, set aside or substitute decisions.<sup>17</sup> It may also affirm the decision.<sup>18</sup> It may not remit the matter back to the initial Panel.

### Leave to apply for review

27. The consent of the President<sup>19</sup> is required for a review unless the initial Panel made a declaration or orders.<sup>20</sup> Consent is therefore required if, for example, the Panel declines to conduct proceedings or accepts undertakings and does not make a declaration.
28. If consent is necessary, the application for review should include the request for consent and set out enough information for the President to consider the effects of the initial Panel's decision and the reasons for review.<sup>21</sup> Consent of the President should be requested in sufficient time to be granted before the 2 business day time period expires.<sup>22</sup>
29. The President's approach to consenting to a review is guided by the following considerations:<sup>23</sup>
- (a) that it is a policy underpinning s657EA(2) that there should be a prompt conclusion to Panel proceedings

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<sup>16</sup> Rule 7.1.1, see *Gondwana Resources Limited 02R* [2014] ATP 18 at [12] - [14]

<sup>17</sup> Section 657EA(4)

<sup>18</sup> A review Panel can decline to conduct proceedings and allow the initial Panel's decision to stand (including a decision to make a declaration and orders), see *GoldLink IncomePlus Limited 04R* [2009] ATP 3 at [8]-[15]

<sup>19</sup> The Panel considers this to mean the President of the Panel, not the sitting President.

<sup>20</sup> Section 657EA(2). If the Panel made a declaration but no orders (see *Summit Resources Limited* [2007] ATP 9), consent is not required to review the making of the declaration but is to review the decision not to make orders. It may be necessary for an applicant to seek consent if the initial Panel made a declaration but the review application submits that the declaration should have extended to other circumstances, see *Gondwana Resources Limited 02R* [2014] ATP 18 at [30]

<sup>21</sup> See Rule 3.3.2

<sup>22</sup> If the President grants consent after the 2 business day time limit for a review application, the review application may be out of time

<sup>23</sup> See *Careers Australia Group Limited 03R* [2015] ATP 2 at [11]-[12]

- (b) whether there was any potential error in the sitting Panel's decision and
  - (c) whether there is any other basis for granting consent, for example, if there is new evidence,<sup>24</sup> the importance of the dispute, whether there would be material prejudice to any party by consenting or by withholding consent, and the merits of the sitting Panel's decision.
30. It is the Panel's preference for matters before an initial Panel to be completed without interruptions. Therefore, if a review is sought regarding a decision in unfinished proceedings, the request for consent will need to establish why unacceptable circumstances are likely because the decision is allowed to stand while the proceedings are completed. A review Panel may suspend or defer its proceedings,<sup>25</sup> for example pending the conclusion of the initial Panel's proceedings.

### Factors taken into account

31. The Panel's approach to reviewing an initial Panel's decision is guided by the following considerations:
- (a) review proceedings are a *de novo* consideration on the merits
  - (b) the review is based on the facts at the time of the review, and is not limited to the facts found by the initial Panel<sup>26</sup>
  - (c) review proceedings ensure that parties are not affected by a manifestly incorrect decision and
  - (d) review proceedings help ensure that decisions are made according to proper procedures.
32. The review procedure is the legislature's alternative to other forms of administrative review and is intended to render judicial review unnecessary by providing a review of a decision on the merits.

### The application for review

33. The Panel's *Procedural Rules* set out the documents which an applicant needs to lodge.<sup>27</sup> They must specify the decision and the grounds for review.<sup>28</sup>

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<sup>24</sup> Review proceedings are hearings *de novo*

<sup>25</sup> ASIC Regulation 16(1). For example, if the review application was made to meet the two-business day time limit for review in s657EA(3) and Corporations Regulation 6.10.01

<sup>26</sup> See, for example, *Bentley Capital Limited 01R* [2011] ATP 13 at [24], *Gosford Quarry Holdings Limited 01R* [2008] ATP 13 at [18], *Rinker Group Limited 02R* [2007] ATP 19 at [28], *National Can Industries 01(R)* [2003] ATP 40 at [21]

34. An application for review must be made within 2 business days after the date of the initial Panel's decision.<sup>29</sup> In this time the detailed written reasons of the initial Panel may not be available, although a short form of the key reasons will normally have been provided with the decision.
35. The review Panel will be provided with:
  - (a) all the material before the initial Panel and the Panel's decision. In general, the material needed to review an initial Panel's decision should be contained in the initial application, submissions and the Panel's decision, and
  - (b) the detailed reasons of the initial Panel (when available).
36. While detailed reasons are perhaps not necessary, since the review is a *de novo* consideration of the merits, the Panel recognises that they may assist with new arguments. The initial Panel will attempt to issue its draft detailed reasons promptly. If they become available during the review, the review Panel will allow parties an opportunity, if they wish, to make any new arguments based on those draft reasons. Otherwise, the applicant should restrict its arguments to any new matters not before the initial Panel.
37. Parties *do not* need to repeat submissions made to the initial Panel.
38. Generally, upon receipt of an application to review a Panel decision the Panel will issue a media release stating that it has received the application.

### Judicial referral to the Panel

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39. The Court may refer to the Panel for review:
  - (a) a decision of the Panel or
  - (b) an application concerning unacceptable circumstances.<sup>30</sup>
40. The review has the same scope as an application under section 657EA. This indicates a legislative policy that a decision should undergo merits review before being judicially reviewed.

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<sup>27</sup> See Rule 3

<sup>28</sup> If consent is required, see Rule 3.3.2

<sup>29</sup> Corporations Regulation 6.10.01. The Panel considers a decision as made when it is communicated to the parties in final form: Rule 7.1.1

<sup>30</sup> Section 657EB

## Fee for review

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41. The application fee is set out in item 27I of the Corporations (Fees) Regulations.<sup>31</sup>
42. An application should be accompanied by the fee<sup>32</sup> or contain an undertaking to pay it. In the case of an application also seeking consent of the President, an undertaking to pay the fee if the review proceeds is preferable.

## Publication History

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First Issue	19 July 2000
Reformatted	17 September 2003
Second Issue	12 July 2004
Third issue	1 October 2008
Fourth issue	2 April 2014
Fifth issue	27 May 2015

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<sup>31</sup> \$2,290 at the date of this Guidance Note

<sup>32</sup> Cheques should be made payable to the "Department of Treasury"