

GUIDANCE NOTE 2: REVIEWING DECISIONS

Overview

The Panel has power to review decisions by ASIC under section 655A of the Corporations Act and decisions of the Panel in relation to applications made under section 657A. A decision on review of a decision at first instance of ASIC or the Panel cannot itself be reviewed by another Panel.

In relation to ASIC decisions, the Panel may affirm the decision, vary it, set it aside and may make a decision in substitution or send the matter back to ASIC for reconsideration. In reviewing an ASIC decision, the Panel will decide for itself what the relevant facts may be and will then consider any ASIC policy which is applicable, whether or not ASIC applied that policy. It will consider whether the policy is valid and whether there is any reason why it should not be applied. The Panel will pay regard particularly to policy statements which are developed after substantial processes of examination and discussion, bearing in mind the desirability of consistency in decision-making. However, as the Panel is a specialist review body and has its own rule-making power, it may have more scope than other review bodies to review the underlying policy relied on by ASIC in individual cases, particularly if policy is novel or untried.

In relation to review of Panel decisions, the review Panel may vary, set aside or substitute decisions (or indeed affirm them). Although it is possible for a party to seek review of an interim decision or some other decision of a sitting Panel before the sitting Panel has finally disposed of a matter, the Panel generally prefers initial proceedings to have been completed before review commences as a review panel is intended to operate on the same timing and in the same informal manner as any sitting Panel and to provide a review of the merits of the decision thereby obviating the need for judicial review.

What this Guidance Note is about

- 2.1 This Guidance Note discusses the review of decisions by the Takeovers Panel (**Panel**). In particular it provides guidance to market participants on:
- (a) Panel review of decisions of the Australian Securities and Investments Commission (**ASIC**);
 - (b) internal review of decisions of the Panel; and
 - (c) fees.

Review of ASIC decisions

Our policy

- 2.2 Pursuant to section 656A of the Corporations Act 2001 (Cth) (**Corporations Act**)¹, the Panel can review decisions² of ASIC made at any time under section 655A, and decisions made during a bid under section 673. This function was previously performed by the Administrative Appeals Tribunal (**AAT**). The rules regarding the review of decisions are well established and are set out below.

Powers of the Panel

- 2.3 For the purpose of reviewing an ASIC decision, the Panel may exercise all the powers and discretions conferred on ASIC by Chapters 6 and 6C.
- 2.4 In accordance with subsection 656A(3), the Panel may:
- (a) affirm the decision; or
 - (b) vary the decision; or
 - (c) set aside the decision and:
 - (i) make a decision in substitution for the decision under review; or
 - (ii) remit the matter for reconsideration by ASIC in accordance with any direction or recommendations of the Panel.

Under section 656B, the Panel may stay an ASIC decision and may make ex parte orders in urgent cases.

¹ In this Guidance Note, statutory references are to the Corporations Act, unless it is otherwise indicated.

² The word “decision” in this document has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.

Grounds for an application for review

- 2.5 Any person whose interests are affected by a relevant decision, and not just the person who sought it, may apply for review of the decision. The basis on which the Panel will review a decision is set out below, and the grounds for an application for review should address those matters. Of course, an applicant may also submit that ASIC's decision making process was flawed under administrative law, but that is not enough of itself for the Panel to vary an ASIC decision or make a decision in substitution.³ An applicant must make a case that the Panel should substitute a different decision, or give a direction which will lead to ASIC making a fresh decision in a different way.

Information which may be taken into account

- 2.6 The documents which an applicant needs to lodge with the Panel when requesting a review of an ASIC decision are set out in Rule 5 of the Takeovers Panel Rules for Proceedings (the **Rules**).
- 2.7 Given that an ASIC decision may be stayed and the short turnaround time that the Panel is directed to achieve under the legislation, it is essential that all parties make available at short notice persons with the necessary decision-making powers.
- 2.8 In general, most of the material needed to review an ASIC decision should be contained in the application to ASIC, any other submissions received by ASIC and ASIC's conclusions on the application. Accordingly, the application for review need consist only of submissions as to the relative merits of positions that have already been well articulated in the accompanying original documents, particularly ASIC's reasons.
- 2.9 An applicant may submit further material, particularly where relevant facts have changed or are in dispute.⁴ However, every effort should be made to keep submissions and supporting material focussed and to comply with any deadlines, to allow the Panel to achieve its objective of completing the review within two business days of receiving all the material it needs. If large or numerous documents must be submitted, as background or to provide context, summaries or references to critical material should be provided with them.

Policy which will be applied

- 2.10 Once the relevant documents and submissions from the parties are received, the Panel will decide for itself what are the relevant facts. Those facts may

³ In *National Can Industries Limited 01(R)* [2003] ATP 40 at [43], the review Panel stated that a denial of procedural fairness may be relevant to the review Panel's decision under ASIC Regulation 20 whether to commence proceedings but ceases to be relevant thereafter.

⁴ As, for example, in *Prudential Investment Company of Australia Limited* [2003] ATP 36, especially [33] and [54]- [62].

differ from those found by ASIC, whether because new information is available, or because the Panel makes a different assessment of the information available to ASIC.

- 2.11 The Panel will then consider any ASIC policy which appears to be applicable to the facts, whether or not ASIC applied that policy in making its decision. It will first make its own assessment regarding whether the policy is valid, and whether there is any reason why it should not be applied in the present matter. There will need to be very persuasive reasons before the Panel will reject established ASIC policy as invalid, even if the policy does not reflect the preferred position of the Panel. This is particularly true where the policy has been arrived at and published after public consultation.⁵
- 2.12 If the Panel affirms that the policy is valid then it must consider how to apply that policy in the case before it, on the facts as found by the Panel. If the Panel comes to the same conclusions as ASIC on what policy to apply and how to apply it, then the decision will stand.⁶ Otherwise, the Panel may vary the decision, set it aside and substitute its own decision, or remit the matter for reconsideration by ASIC, with directions as to the policy to be applied.
- 2.13 If the Panel decides to set aside or vary an ASIC decision, its first preference will be to decide the matter itself, applying relevant ASIC policy to the facts found by the Panel.⁷ If ASIC policy does not cover the matter, the Panel will decide the matter in accordance with the legislative policy of Chapter 6 and its own policies and rules.⁸ If, however, additional facts need to be found, the Panel may refer the matter back to ASIC, with a direction as to the policy to be applied.
- 2.14 If the matter shows up the need for policy development which may need research or public consultation, the Panel will resolve the matter in light of its particular facts, setting as narrow a precedent as possible, and invite ASIC to undertake the necessary policy development. In general, the Panel will take the course that causes least uncertainty in the market, with a preference for minor variations of ASIC decisions or remitting matters back to ASIC.

Underlying principles

- 2.15 This approach to reviewing decisions follows the practice laid down for the AAT by Brennan J in *Re Drake and Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577:

⁵ See, for example, *Taipan Resources NL (No 6)* [2000] ATP 15 at [3], 36 ACSR 716, 19 ACLC 797; *Pinnacle VRB Ltd (No 3)* [2001] ATP 2 at [3], 37 ACSR 346, 19 ACLC 605; *Prudential Investment Company* at [37]-[53].

⁶ As in *Taipan (No 6)*, *Pinnacle (No 3)* and *BreakFree Ltd (No 2)* [2003] ATP 30.

⁷ As in *Prudential Investment Company*.

⁸ As in *Pasminco Ltd (Administrators Appt)* [2002] ATP 6, 41 ACSR 511, 20 ACLC 782.

“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.”

With the exception of the last sentence, that practice and the reasons for adopting it are fully applicable to ASIC decisions. It has been applied repeatedly, and affirmed by the Federal Court. It has been recently restated by B J McMahon DP in *Re Allstate Explorations NL* [1999] AATA 1019.⁹ In that case, McMahon DP noted it was a well settled principle that in reviewing decisions of ASIC the AAT should “pay regard particularly to policy statements which are developed after substantial processes of examination and discussion”, but that the discretion of the AAT should not be “fettered by a slavish application of policy”, because the merits of every case must be considered.

- 2.16 The rationale behind this approach to the application of policy was stated by McMahon DP to be based on “overriding considerations of public policy which dictate that ... policy should be given considerable respect if for no other reason than to achieve a desirable consistency in decision making.”
- 2.17 However, the Panel, as a specialist review body, with policy and rule-making powers of its own in the takeover area may have somewhat greater scope than the AAT in reviewing the basis of the underlying policy relied upon by ASIC in individual cases, particularly if the policy is novel or untried.

Review of Panel decisions

Powers of the Review Panel

- 2.18 Under section 657EA, the Panel can review a decision of the Panel on an application for a declaration under section 657A, or for an order under section 657D or 657E (though not a decision on the review of a decision by ASIC). An application for review may be made by any party to the proceedings at first instance, or by ASIC.¹⁰
- 2.19 The Panel is constituted for the purposes of the review (a **review Panel**) by three members appointed by the President. A review Panel has the same

⁹ This case was upheld on appeal to the Federal Court on 11 February 2000, see *Sabatina Pty Ltd v Allstate Exploration NL* [2000] FCA 92.

¹⁰ Subsection 657EA(3) and Corporations Regulation 6.10.01 requires the application for review to be made within two business days of the making of the decision.

powers to make a declaration or order as the Panel which considered the matter at first instance (the **initial Panel**) had when considering an application under section 657C. Under subsection 657EA(4), the review Panel may:

- (a) vary the decision; or
- (b) set aside the decision; or
- (c) set aside the decision and substitute a new decision.

Of course the review Panel may also affirm the decision under review. However, it may not remit the matter back to the initial Panel.¹¹

Leave to apply for review

- 2.20 A person does not need leave to apply for review of a decision whether to make a declaration of unacceptable circumstances under section 657A, or a decision whether to make an order under section 657D or section 657E. In all other cases, subsection 657EA(2) provides that a person may only apply for review with the consent of the President of the Panel.¹²
- 2.21 The Panel's strong preference is for matters before an initial Panel to be decided on their merits without unnecessary interruptions. Accordingly, an application for leave to apply for review of a decision in unfinished proceedings should be based on the likelihood of unacceptable circumstances occurring because the decision is allowed to stand while the proceedings are completed.

Information which may be taken into account

- 2.22 The documents which an applicant needs to lodge with the review Panel when applying for a review of a Panel decision are set out in Rule 4, and include a written application specifying the decision, the grounds for review, and any supporting documentation such as evidence and submissions.
- 2.23 Where matters have already been set out in papers before the initial Panel, it is sufficient to refer to those papers. Fresh information and submissions should be kept brief, and should be accompanied by a precis or index.
- 2.24 The process of internal review closely resembles the process of reviewing ASIC decisions, as set out above. Review panels have made it clear that review proceedings are *de novo* reconsideration on the merits of the facts as

¹¹ A review Panel may stay its proceedings under ASIC Regulation 16(1) pending the conclusion of the initial Panel's consideration of a matter where an application for review has been made during the initial Panel's proceedings (which may be required by reason of subsection 657EA(3)).

¹² Rule 2.1 provides that the application for review must request this consent, where it is required.

they stand at the time the review Panel makes its decision and are not limited to the facts found by the initial Panel.¹³

2.25 Where a party has indicated that it might lodge an application for review of a decision under section 657EA, the Panel is conscious that there can be difficulties in issuing full reasons within the 2 business day limit prescribed for the purpose of subsection 657EA(3) by Regulation 6.10.01 of the Corporations Regulations 2001 (Cth). Accordingly, to allow the applicant access to the arguments supporting the decision to allow them to frame arguments in the review application, the Panel will:

- (i) accompany its decision with a media release outlining its reasons; or
- (ii) issue to parties an outline of its reasons in a separate document within one day of its decision; or
- (iii) allow the applicant to submit an application within the prescribed time on the basis that it can be refreshed (or withdrawn) when the draft reasons are issued to the parties.

In any event, the Panel will attempt to issue its draft reasons promptly in these circumstances and conduct the proceedings in such a way that the parties and the review Panel will have access to those draft reasons in formulating the issues to be considered and in making submissions in relation to them.

Underlying principles

2.26 The underlying principle of review of Panel decisions is to ensure that parties to a matter will not be affected by a manifestly incorrect decision, and that initial Panel members are aware that their decisions must be made according to proper procedures or risk being overturned.

2.27 The review Panel is the legislature's alternative to other forms of administrative review and is intended to operate in the same timely and informal manner as any sitting Panel. Specifically, the review Panel is intended to render judicial review unnecessary by providing a review of the decision on the merits.

Judicial Review

2.28 Under section 657EB, the Court may refer to the Panel for review a decision of the Panel or an application concerning unacceptable circumstances. The review has the same scope as if an application had been made under section 657EA. This provision indicates that the policy of the legislation is that a decision should undergo merits review before being judicially reviewed.

¹³ See for example, *Email Limited (No 2)* [2000] ATP 4 at [4] and *National Can Industries 01(R)* at [21].

Fees

- 2.29 The fee for an application is set out in item 271 of the Corporations (Fees) Regulations. The application should be accompanied by a fee or contain an undertaking to pay a fee. Cheques should be made payable to the “Department of Treasury” and given to the Panel Executive.

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