

## **GUIDANCE NOTE 4: REMEDIES AND ENFORCEMENT**

### **Overview**

The Panel's principal remedy is the declaration of unacceptable circumstances. If it makes such a declaration, it can also make final orders to protect the rights or interests of affected persons or to ensure that a bid proceeds as if unacceptable circumstances had not occurred. The Panel may also make interim orders.

In addition, the Panel may, and in some cases must, publish its reasons. It may also reprimand parties or their advisers, either publicly or privately.

Generally, when using a remedy, the Panel will try to get a bid back on track, deal with any misinformation or omission and reverse any damage suffered by investors or the market. The Panel also seeks to set standards of corporate behaviour in its area of responsibility.

The Panel's role is not to assess the commercial merits of any bid -- that is for the shareholders. However, the Panel must ensure that shareholders have sufficient time and information to make an informed decision with respect to a proposal.

Nor is it the Panel's role to punish, however, the Panel may order a remedy even if it has a collateral deleterious effect on a person whose conduct was part of the unacceptable circumstances. It may also order remedies that make clear who it regards as being responsible for the unacceptable circumstances that it has found.

The power to make interim orders does not require the making of a declaration of unacceptable circumstances. Interim orders have the same effect as final orders but only operate for a maximum of two months and cease when the Panel proceedings are finished.

In relation to the Panel's power to make costs orders, see Guidance Note 9 "Costs" and in relation to the orders that the Panel may make to correct defective takeover documents, see Guidance Note 16 "Correction of Takeover Documents".

## Remedies available to the Panel

- 4.1 This Guidance Note discusses the types of remedies available to the Takeovers Panel (**Panel**). In particular it provides guidance on the types of remedies the Panel will use and the circumstances in which remedies will be enforced.
- 4.2 The primary remedies available to the Panel are declarations of unacceptable circumstances and orders. It can make final orders under subsection 657D(2) of the Corporations Act 2001 (Cth) (**Corporations Act**)<sup>1</sup> only if it has made a declaration of unacceptable circumstances. It can make interim orders under section 657E without having made a declaration of unacceptable circumstances.
- 4.3 The Panel may make any order to:
- (a) protect rights or interests of affected persons; or
  - (b) ensure a bid proceeds as if unacceptable circumstances had not occurred.
- 4.4 In particular, the Panel may make remedial orders as defined in section 9, ancillary and consequential orders and orders as to parties' costs.
- 4.5 The Panel considers that it is able by its orders to affect property interests and existing legal rights and obligations, if to do so would protect the rights or interests of persons affected by unacceptable circumstances and it is not satisfied that to do so would cause unfair prejudice to any person.<sup>2</sup> The Panel also considers that this restriction in subsection 657D(1) only applies where, having given the relevant people an opportunity to make submissions, the sitting Panel is positively satisfied by submissions and evidence before it both that a proposed order prejudices an identified person or group of persons and that it is unfair in the circumstances for that person or group to suffer that prejudice. This may involve a consideration of the prejudices that others may suffer from other potential orders.<sup>3</sup>
- 4.6 One limitation on the Panel's power to make orders is that it does not allow the Panel to order a person to do something contrary to law.<sup>4</sup> Accordingly, a

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

<sup>2</sup> See [4.16] and for example, *Pinnacle VRB Ltd (No. 11)* [2001] ATP 23 and *AMP Shopping Centre Trust (No. 2)* [2003] ATP 24 at [51]-[66], 45 ACSR 524.

<sup>3</sup> In this regard, the Panel takes a similar approach to that of the Court when considering "unfair prejudice": see, for example, *Flinders Diamonds Ltd v Tiger International Resources Ltd* [2004] SASC 119 at [63]-[79] and the cases cited therein.

<sup>4</sup> In this regard, the Panel's orders operate in a similar way to those of the Court under section 1325; see, *ASC v Bank Leumi Le-Israel (Switzerland) & Ors* (1996) 14 ACLC 1576 at 1588-9. To the extent that

Panel order does not operate in the same manner as an exemption or modification granted by ASIC under section 655A. As part of their commentary on proposed orders, parties should advert to any such issues, in which case the Panel may recast the order to avoid that issue or make the order conditional on the grant of suitable relief by the Australian Securities and Investments Commission (ASIC) under section 655A.<sup>5</sup>

- 4.7 Whether or not the Panel makes a declaration of unacceptable circumstances or any orders, it may:
- (a) issue a statement of reasons or other policy document; or
  - (b) publicly or privately reprimand parties or advisers.

### Declarations of unacceptable circumstances

- 4.8 The Panel can declare that specified circumstances in relation to the affairs of a company are unacceptable. A declaration serves both to convey the Panel's view that, and how, the relevant facts fall short of the standards applicable in takeover matters and to open the way for final orders to deal with the unacceptable circumstances.<sup>6</sup>
- 4.9 A declaration records a finding by the Panel that the policy of Chapter 6 is not being given effect in relation to a takeover or other acquisition of a substantial interest in a company or listed scheme. That may happen because Chapter 6 is breached or avoided. It may also happen for reasons which involve no misconduct, such as where Chapter 6 produces anomalous results in a particular case, or its intended operation is frustrated for some other reason.<sup>7</sup>

### Types of orders and undertakings

- 4.10 In deciding what, if any, orders to make in a particular case, the Panel will consider whether making an order would promote the objectives set out in section 602 of the Corporations Act and whether it would be contrary to the public interest.
- 4.11 Generally when using a remedy the Panel will be seeking to achieve one or more of the following outcomes:

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the comments by the Panel in *Pinnacle VRB 11* at [41] can be read to suggest otherwise, the Panel does not support such a reading.

<sup>5</sup> Note the comments of the Review Panel in *Pinnacle VRB 11* at [47]-[48].

<sup>6</sup> The Panel has in some instances made a declaration of unacceptable circumstances but made no orders: see, for example, *BreakFree Limited 04* [2003] ATP 39 and *BreakFree Limited 04(R)* [2003] ATP 42.

<sup>7</sup> Refer to Guidance Note 1 "Unacceptable Circumstances".

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- (a) protecting the rights and interests of persons affected by the unacceptable circumstances;
- (b) getting a bid back on track;
- (c) correcting any misinformation or omission and reversing any mischief to investors (including compensation) or the market;<sup>8</sup> and
- (d) establishing benchmarks and standards of corporate behaviour.

**Getting the bid back on track**

4.12 The Panel's objective is not to assess the commercial merits of a bid or other proposal, such as approval of an acquisition of shares: that is a matter for the shareholders of the relevant company. Rather it is the role of the Panel to ensure that the proposal is put to the shareholders in such a way that the shareholders have sufficient time and information to make an informed decision as to whether or not to accept or allow the proposal. Therefore, the desired outcome will often be to get a proposal back on track (that is, to where it would have been if not for the unacceptable circumstances) in order to allow the shareholders to assess the merits of the proposal.

**Protecting disadvantaged parties and collateral damage**

4.13 Where a declaration of unacceptable circumstances has been made, the primary aim of the Panel will be to restore any disadvantaged parties to the position they would have been in had unacceptable circumstances not occurred. The Panel has a broad range of remedial powers that are designed to enable the Panel to carry out this aim. These include orders cancelling contracts, freezing transfers of, and rights attached to, securities, and forcing a party to dispose of securities. The Panel has arranged in some cases for rights to withdraw acceptances to be offered, either by ensuring that a bid attracts the operation of section 650E or by a bidder separately offering that right.<sup>9</sup>

4.14 The Panel will always give careful consideration to whether the chosen remedy is adequate in all the circumstances and proportionate to the mischief. For example, an order that was appropriate at the commencement of a matter may be entirely inappropriate just days later because, in the meantime, the market has moved, or third persons have acted in reliance on the *status quo*.

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<sup>8</sup> Refer to Guidance Note 16 "Correction of Takeover Documents" which deals specifically with this issue.

<sup>9</sup> For example, *Goodman Fielder Limited* [2003] ATP 1, 44 ACSR 254 and *Mildura Co-operative Fruit Company Limited* [2004] ATP 5.

**Remedies and Enforcement**

- 4.15 Although orders may adversely affect some parties, it is not the role of the Panel to punish parties. The Panel may feel justified in pursuing the most effective remedy for a disadvantaged party, however, even if the remedy has a collateral deleterious effect on a person:
- (a) whose actions, omissions, statements or inactivity contributed or led to the unacceptable circumstances;
  - (b) who would normally have borne a corresponding cost, in the absence of unacceptable circumstances;
  - (c) who benefits from the unacceptable circumstances; or
  - (d) whose role includes protecting the interests harmed by the unacceptable circumstances.
- 4.16 The Panel may not make an order if it is satisfied that the order will unfairly prejudice any person. In finalising its orders, the Panel will invite comments from parties on orders which the Panel propose to make, particularly where a proposed order is likely to have a collateral deleterious effect on a party whose conduct constituted part of the unacceptable circumstances. If there are identified persons or groups who may be affected, the Panel may seek their comment on the proposed order even if they are not parties. This may be done specifically by inviting them to become a party<sup>10</sup> or to make a submission without becoming a party (in which case the invitation may be made by media release and not by direct correspondence).<sup>11</sup>

**Interim orders**

- 4.17 Interim orders may be made in the absence of a declaration of unacceptable circumstances or even of an application for such a declaration. Interim orders can be to the same effect as final orders, but can operate for no longer than two months and cease to operate when relevant proceedings are determined. Such orders can be made to prevent unacceptable circumstances from happening, continuing or getting worse, while proceedings are conducted in relation to them. They may also be made to ensure that the Panel's power to fashion the most appropriate remedy in the circumstances is not forestalled by intervening events.
- 4.18 Before making an interim order, the Panel must consider whether the risk that unacceptable circumstances will occur, continue or worsen in the absence of an order outweighs the adverse effects of the order on the person to whom it is directed and the market. That will obviously depend on the strength of the evidence, on what particular circumstances are apprehended,

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<sup>10</sup> See also *AMP Shopping Centre Trust 02*.

<sup>11</sup> Under ASIC Regulations 23 and 24 and refer to *BreakFree 04(R)*.

on whether they can be overcome by final relief and on the availability of alternative remedies such as undertakings.

- 4.19 In general, the Panel will not hold up a transaction by interim relief, unless mischief will occur if it proceeds which cannot be reversed by final orders or if reversal would be a more complex operation than requiring certain conduct (or non-conduct) during the Panel's proceedings.<sup>12</sup> For instance, if it is alleged that a bidder's statement omits some of the information which it is required to contain, but the statement does not appear to be misleading, it will usually be preferable to allow it to be dispatched pending a final decision. If the Panel makes a final order that the bidder issue a supplementary statement, it may also order the bidder to give offerees an opportunity to withdraw acceptances.

### Costs orders

- 4.20 On costs orders see Guidance Note 9 "Costs Orders"

### Undertakings

- 4.21 Matters before the Panel may be resolved by undertakings under section 201A of the Australian Securities and Investments Commission Act 2001 (Cth) (**ASIC Act**). Since an agreed resolution of a matter is likely to be more flexible, quicker and surer than making and enforcing orders, the public interest is generally better served by accepting undertakings than by pursuing equivalent remedies by declaration and orders (*interest reipublicae ut sit finis litium*). Accordingly, where the Panel accepts an undertaking from a party which deals with all issues in the proceeding and the undertaking is performed, it will not normally make any declaration or order against that party.
- 4.22 Accordingly, an undertaking needs to deal with all issues in the proceeding: if the Panel makes no declaration, it can make no orders under section 657D. In some cases, a Panel may accept an undertaking but still make a declaration of unacceptable circumstances where it considers, for example, that it must send clear signals of disapprobation concerning particular conduct.<sup>13</sup> The undertaking will generally be published and the Panel may publish reasons for its decision, for guidance in future matters.
- 4.23 The Panel seeks to make the drafting of undertakings as simple and direct as possible and relies on certain provisions being necessarily implied into undertakings that are proffered to it. The first relates to conditions contained in the undertaking: the Panel considers that, unless clearly displaced by

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<sup>12</sup> Refer to *Village Roadshow Limited* [2004] ATP 04.

<sup>13</sup> As occurred in *Trysoft Corporation Limited* [2003] ATP 26 and *Mildura Co-operative Fruit Company Limited*.

express words, the person offering an undertaking will be under an obligation to use its best endeavours to fulfil (including by fulfilling any conditions which are within its power to fulfil) any conditions to which the undertaking is expressed to be subject.<sup>14</sup> The second is that the person offering the undertaking will “do all such things as are necessary on his part to enable the other party to have the benefit of the contract”.<sup>15</sup> In applying this, the Panel considers that the “other party” intended to have the benefit includes not just the Panel, but also all the parties to the relevant proceedings and all persons whose rights and interests would have otherwise been affected by the relevant circumstances. Finally, the Panel considers that, consistently with these implied terms and with the timing of takeover bids generally, there is implied in undertakings an obligation on those offering them to do the acts undertaken at the times specified in the undertakings, or if no time is specified, as soon as practicable.

### **Other outcomes**

- 4.24 To encourage acceptable conduct or ‘best practice’ by market participants, the Panel will seek to establish benchmarks by publishing guidance, making public announcements and pursuing a range of other options, which may include reflections on the conduct of particular matters.
- 4.25 The Panel’s functions extend beyond resolving disputes between parties to setting general benchmarks for the conduct of takeovers matters. This is explicit in the rule-making function under section 658C. It is implicit in the dispute resolution function, which depends on a retrospective determination that unacceptable circumstances exist (or are impending) in a particular case. Because this is an undefined concept, in the absence of published precedents and policies, this function could become regulation by ambush.

### **Reasons and reproaches**

- 4.26 If it makes a declaration or order, the Panel must give the parties in the relevant matter a statement of reasons for its decision (subsections 657A(6) and 657D(4)) and gazette the declaration and order (if any) (subsections 657A(5) and 657D(4)). The statement of reasons given to the parties may be the vehicle for reflections on the conduct of a bid, including any necessary reprimands addressed to the parties or their advisers. While the Panel has no formal powers to deal with advisers and intermediaries as such, it needs to obtain their compliance and support. The Panel considers that in most cases the advisers (legal and financial) to the commercial parties to takeover transactions have greater familiarity (than their clients) both with the technical, procedural, strategic and tactical aspects of these transactions and with the requirements and objectives of the Panel. Accordingly, it expects

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<sup>14</sup> *Hospital Products Ltd v United States Surgical Corporation* (1984) 55 ALR 417 at 428-431 (Gibbs CJ).

<sup>15</sup> *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 26 ALR 567.

such advisers to take all reasonable steps to ensure that parties for whom it is acting comply with the Corporations Act, the ASX Listing and Market Rules, the Guidance Notes of the Panel, the Policy Statements and Practice Notes and other guidance documents of ASIC and, if there are Panel proceedings, the ASIC Act and the Panel's Procedural Rules, including (without limitation) Rules 8.5 and 12 concerning confidentiality and media canvassing. In relation to those specific Rules, the Panel notes that parties give undertakings under section 201A of the ASIC Act in relation to compliance with those Rules not only by themselves but also by their advisers and considers that it is accordingly an obligation of those advisers to their client not to act in a manner that would lead to a breach of their client's undertaking.

4.27 Where, in the course of a proceeding before it, the Panel considers that there may have been a contravention of any of the sources of takeover regulation mentioned in [4.26] (including the media canvassing rule or the confidentiality rule), it may use its powers under the ASIC Act or the Corporations Act to determine who has been responsible for, or involved in, the contravention. Following an investigation it may do one or more of the following:

- (a) privately admonish any person it considers to have been responsible or involved and report the Panel's findings to the senior officers of any organisation by whom that person may be employed or of which that person may be a director or principal;
- (b) issue a media release concerning its findings on the contravention, which may include a public statement of which individuals or organisations it considers to have been responsible for, or involved in, the contravention;
- (c) include findings of the kind mentioned in paragraph (b) in its reasons for decision, so that those findings become prima facie evidence as provided in section 658B; and
- (d) draw a finding made by the Panel to the attention of any professional disciplinary body to which any relevant person is subject (including, in the case of holders of Australian financial services licences and their representatives, ASIC and in the case of lawyers, the relevant Law Society, Institute or Association).

4.28 Since the fact of the decision will be public and since reasons for the decision may better inform the market and be useful as a precedent, the Panel will usually publish reasons for making a declaration or order. While private reprimands will usually be omitted from the published reasons, the reasons will need to say why the circumstances of a bid were unacceptable, which

may in turn involve a conclusion that certain conduct contravened the applicable rules and guidance.

- 4.29 The Panel will generally publish reasons for a decision not to make a declaration or orders. This is appropriate when the existence of proceedings is public knowledge, in the interests of an informed market and the reputations of people are or may be affected by the proceedings. A statement may indicate that the Panel was satisfied that the relevant circumstances were acceptable, that the Panel accepted an undertaking or remedial action, or that the Panel did not find sufficient evidence to make a declaration or orders.
- 4.30 The Panel may also publish its reasons for a decision to accept an undertaking or to take no action. Like reasons for making declarations and orders, they relate to a public event and they may be of use to inform the market and as a precedent. Published reasons may need to include reflections on whether conduct complied with the Corporations Act and whether the circumstances of a bid were unacceptable, or would have been unacceptable in the absence of remedial action and undertakings.
- 4.31 Published reasons are not a vehicle for recriminations or speculation unsupported by evidence.
- 4.32 The Panel has wide immunities in making this sort of comment, despite the possible effects on people's reputations and businesses. Of course, the Panel's comment must be fair, based on credible information and proportionate to the events and the Panel must give the person a chance to defend their conduct.<sup>16</sup>

### **Enforcing orders and undertakings**

- 4.33 Under section 657G, if a person contravenes or proposes to contravene a Panel order, the Court may make any orders it considers appropriate to secure compliance with the Panel's order. The President of the Panel can apply to the Court for such orders, as can ASIC, a party or a person to whom the order relates. Similarly, under section 201A of the ASIC Act, the Court can order specific performance of an undertaking, or compensation.

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### **Publication History**

First Issue	28 February 2001
Reformatted	17 September 2003
Second Issue	12 July 2004

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<sup>16</sup> It is to enable parties to provide this comment to the Panel that the Panel generally gives the parties a confidential draft of its reasons and an opportunity to make submissions thereon, before releasing its reasons to the public. Refer to *Annetts v McCann* (1990) 170 CLR 596.