

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION
AND
THE CORPORATIONS AND SECURITIES PANEL

AUGUST 2001

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1. Parties to Memorandum

1.1 This Memorandum of Understanding is between the Australian Securities and Investments Commission (ASIC) and the Corporations and Securities Panel (Panel).

2. Purpose

2.1 ASIC and the Panel recognise that mutual co-operation between them is desirable to discharge their respective functions.

2.2 ASIC and the Panel agree to cooperate and assist each other in relation to:

- the exercise of their respective functions;

- information sharing; and
- policy formation.

2.3 To promote co-operation between ASIC and the Panel, this agreement also sets out processes to be undertaken in relation to:

- the review of ASIC's decisions by the Panel under s656A¹; and
- an application by ASIC and other parties to the Panel under s657C.

3. ASIC

3.1 ASIC is established by the Australian Securities and Investments Commission Act 1989 (ASIC Act). ASIC is a regulatory and law enforcement agency charged with promoting market integrity and consumer protection across the financial services sector. In relation to Chapters 6 and 6C ASIC has the power, inter alia, to:

- make exemptions and modifications under ss655A and 673;
- make applications to the Panel under ss657C, 657D and 657E;
- investigate contraventions of Chapter 6 and 6C;
- refer contraventions of Chapter 6 and 6C to the Commonwealth Director of Public Prosecutions; and
- make applications to the Court under ss657G, 1324 and 1325A.

4. The Panel

4.1 The Panel is also established by the ASIC Act. The Panel is the main forum for resolving takeovers matters during the bid period. The Panel has the power to:

- review ASIC's decisions under s655A;
- review ASIC's decisions under s673 in relation to securities of the target of a takeover bid during the bid period;
- make a declaration of unacceptable circumstances under s657A;
- make orders under s657D and interim orders under s657E; and
- make rules under s658C.

5. Information Sharing

5.1 Under ss127(3), 127(4) and 186 of the ASIC Act, ASIC and the Panel may disclose information to each other which has been given in confidence, or which they have acquired in connection with the performance of their powers under a national scheme law. Either party may disclose information to the other in compliance with s127, and the confidentiality provisions will then

¹ Unless otherwise stated, all references to section numbers, Divisions, Parts and Chapters are made in relation to the Corporations Law.

apply to the receiving party. It will generally not be necessary or desirable to impose specific conditions on the other party, other than by advising of any conditions imposed by any original provider under s127(1).

- 5.2 Where the documents do not adequately identify any confidentiality restrictions placed by the original provider of the information the party providing the documents will advise the other of those restrictions at the time it provides the information.
- 5.3 This agreement does not cover access by the Panel to the ASIC databases "ASCOT" or "DOCIMAGE". This information is publicly available on a commercial basis.

6. Unsolicited advice

- 6.1 ASIC and the Panel recognise that in the course of carrying out their functions, they will come into possession of information which would, if provided to the other, be likely to assist the other in carrying out its functions.
- 6.2 ASIC and the Panel agree, subject to s127 of the ASIC Act, to use their best endeavours to notify the other party, with due regard to the urgency of doing so, of the existence of any information of a kind referred to above, notwithstanding that it may not have received a request from the other party for such information.

7. Consultation generally

- 7.1 ASIC and the Panel will attempt to provide reasonable time for consideration by the other party of any document or proposed action. They will provide a clear timetable of their intended action. In urgent cases that time may be short. If the timetable appears too short for the notified party, the principal contact will discuss the timetable with the other's principal contact. But neither party is bound to alter the timetable which appears most appropriate to their regulatory responsibilities.

8. Policy Development Processes

- 8.1 Any policy developed by either ASIC or the Panel in relation to the takeovers provisions is likely to be of material interest to, and will affect the operations of, the other party. ASIC and the Panel agree that they will use maximum endeavours to ensure that the other party has good notice of early policy developments, and proper opportunities for consultation in relation to their policy developments. However, the policy of each party is their own responsibility and is not to be fettered by this agreement.
- 8.2 ASIC and the Panel will normally provide draft copies of policy documents to the other's principal contact prior to public release allowing a reasonable time for response wherever possible.
- 8.3 ASIC and the Panel will generally provide any substantive comments before, or during the normal public consultation process, rather than any later

consultation which will generally relate to coordination and technical requirements.

- 8.4 Where ASIC and the Panel consider implementing a policy which is directly contrary to the submissions of the other, the principal contacts for each party will endeavour to meet to discuss the views of each party in relation to the policy. The purpose of such a meeting is to ensure that each party understands the other party's position.
- 8.5 The Panel will seek to apply ASIC policy when reviewing ASIC's decisions unless there is cogent reason to depart from that policy. The Panel will seek to advise ASIC in advance of making any such decision and give its reasons, for example why it considers the policy is not applicable to the circumstances.

9. Unacceptable Circumstances Applications to the Panel

- 9.1 The Panel must give ASIC an opportunity to make submissions before the Panel makes a declaration of unacceptable circumstances or an order following such a declaration. The Panel's procedural rules also require that ASIC receive notice of possible decisions by requiring that parties serve ASIC with a copy of each application or submission.
- 9.2 ASIC may make submissions in any proceedings, without becoming a party, if the submissions are not about the merits of the matter (e.g. they are about legislative history or policy). If ASIC wishes to lead evidence or support a particular outcome, it should generally become a party to the proceedings. The parties note that to date it has been ASIC's practice to become a party to most proceedings.
- 9.3 If an application appears to the Panel to raise specific, material, policy or interpretation issues it will raise them with the parties to the application and with ASIC, if ASIC has chosen not become a party. The Panel will give ASIC an opportunity to make any submissions on those issues.

10. Review of ASIC Decisions

- 10.1 The Panel's policy and procedures for reviewing ASIC decisions are set out in the Panel's Policy 3 "Reviewing Decisions".
- 10.2 The Panel's procedural rules require an applicant to give ASIC a copy of an application for review at the same time as the Panel. The rules also set out the documents that the Panel requires from different parties.
- 10.3 The Panel's benchmark for reviewing ASIC decisions is 2 business days from time of lodgement of a competent application. ASIC will use its best endeavours to assist the Panel in meeting that time frame.
- 10.4 To assist in meeting the time frame ASIC will endeavour to provide the Panel within 1 business day of receiving a copy of the application copies of any of the following documents that are not attached to the application for review:
- the original application and any supplementary material provided to ASIC by the applicant;

- any third party responses received in respect of the application;
 - a document which identifies the relevant ASIC Policy (if any) and summary of the reasons why the policy does or does not apply to the application; and
 - the decision of ASIC.
- 10.5 Where ASIC has no established policy or the matter involves a potential substantial departure from existing policy ASIC will endeavour to provide a more detailed statement of reasons but the parties acknowledge that this will take additional time.
- 10.6 If ASIC is unable to deliver its documents within 1 business day of receiving a copy of the application, it will advise the Panel and discuss a time frame for delivery.
- 10.7 The Panel will generally decide applications for review of ASIC decisions on written submissions. Where the Panel accedes to a request from an applicant or ASIC for a conference, or decides that it wishes to convene one, it will follow the procedures set out in its procedural rules.
- 10.8 If an application appears to the Panel to raise specific, material policy or interpretative issues it will raise them with ASIC and the parties to the application. ASIC's level of participation in individual applications, after supplying documents, is within ASIC's discretion.
- 10.9 The Panel understands that it is undesirable to pre-empt an application before ASIC when it may be called to review that decision. Therefore the Panel agrees that it and its Executive will generally refrain from discussing an application, proposed application or possible application to ASIC under s655A or s673 with the applicant or third parties until ASIC has determined that application.
- 10.10 Where the Panel or its Executive receive a complaint from an applicant or third party that there has been a delay in determining an application under s655A or s673, the Panel will generally discuss the reasons for the delay in determining the application with ASIC. ASIC may decide, upon discussing the matter with the Panel, to refuse the application (ASIC Policy Statement 51 at paragraph 20 provides that if there is insufficient time for ASIC to consider an application it may decide to refuse the application).

11. Referral under Regulation 18

- 11.1 If the Panel makes a referral to ASIC under ASIC Regulation 18, it will provide ASIC with information at its disposal for ASIC to consider the basis for making an application to the Panel, and any reasons the Panel has for believing the matter should be referred to it. The Panel or its Executive will facilitate ASIC's understanding of the issues and reasons for the referral if requested.

12. Litigation

12.1 Section 659B of the Law is intended to minimise court proceedings in relation to a takeover bid during the course of the bid. However, in some cases, ASIC or the Panel may consider that it should initiate court proceedings during the course of a bid. The following are examples of court action ASIC or the Panel may take during the takeover period:

- Action relating to contraventions of Part 7.11, Divisions 2 and 2A.
- Applications for validation of a takeover bid or documents under section 1325D.
- Action where the Panel cannot give orders of the type ASIC seeks.
- Action where compliance with a Panel order by the affected party is doubtful.
- Actions where there are inconsistent interpretations of the Law and a definitive outcome is required.

12.2 Initiating court proceedings by either party may have a material effect on the regulatory role of the other. ASIC and the Panel are committed to keeping each other informed of litigation issues to the maximum extent possible. As far as practicable, they will advise each other whenever they are seriously considering initiating court proceedings during a takeover. The parties recognise that frequently there will be limitations on the scope and content of the information which they might properly provide to the other, but within those constraints, they will be as frank as possible.

13. Liaison between ASIC and the Panel

13.1 To promote co-operation between the agencies, regular liaison meetings will be held between ASIC and the Panel. These meetings should occur at least every six months. These meetings will be between the principal contacts for ASIC and the Panel and other members and staff from the two organisations where necessary.

14. Disputes

14.1 Where there is a conflict over any matter related to issues in this agreement, the parties will seek to resolve the issue by negotiation between the principal contacts. If these negotiations fail, the matters will be referred to the Chairman of ASIC and the President of the Panel.

15. Amendment and termination

15.1 ASIC and the Panel will keep the operation of this agreement under continuous review and will consult with the other with a view to improving its operation and resolving any matters which may arise. The parties agree that this agreement may be amended at any time.

15.2 ASIC or the Panel must give written notice to the other of its intention to terminate this agreement. The agreement will terminate 30 days after the date

upon which the notice was given.

16. Service and Lodgement

- 16.1 If ASIC or the Panel serves or lodges documents with the other, they will advise the contact person of the other body by telephone that the documents are about to be served or lodged.
- 16.2 Wherever possible, if a party serves or lodges a hard copy of a document with the other it will also provide an electronic copy of the document.
- 16.3 To the maximum extent possible, the parties will accept electronic lodgement or service, either by facsimile or by email.
- 16.4 ASIC will serve or lodge documents with the Panel, through the Panel's Executive offices:

For hard copy documents

Level 47, Nauru House
80 Collins Street
Melbourne

For facsimile copy documents

Tel +61 3 9655 3511

For email documents

nigel.morris@takeovers.gov.au

- 16.5 The Panel will serve or lodge documents with ASIC, by giving them to ASIC's Director (Corporate Finance) or the senior officer from time to time responsible for the area:

For hard copy documents

Level 13, CGU Tower
485 LaTrobe Street
Melbourne

For facsimile copy documents

Tel +61 3 9280 3699

For email documents

richard.cockburn@asic.gov.au

17. Contacts

- 17.1 The principal contacts for the Panel are:
Director, Mr Nigel Morris.
Counsel, Mr George Durbridge.
- 17.2 The principal contact for ASIC is Mr Richard Cockburn. ASIC will at its discretion provide the principal contacts for the Panel with a list of other

principal contacts for ASIC.

- 17.3 Contact on all material matters will be initiated between principal contacts. The principal contacts will ensure that they are aware of all ongoing matters between the parties and they will manage and monitor information flows between the parties.
- 17.4 The principal contacts will maintain ongoing communication to maintain effective, timely and good communications and relations between the Panel and ASIC.

18. Execution

Signed for and on behalf of ASIC

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Mr David Knott
Chairman

Date/...../.....

Signed for and on behalf of the Corporations and Securities Panel

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Mr Simon McKeon
Panel President

Date/...../.....