



Australian Government

Takeovers Panel

Guidance Note 2 – Reviewing Decisions

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Background

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)¹ 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 decision² 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

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.

¹ All references are to the *Corporations Act* unless otherwise indicated

² “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.³ 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.⁴ 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.⁵

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.⁶ 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.⁷ The Panel, as a specialist review body, may have more scope to review the underlying policy, but persuasive reasons 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

³ Section 656A(3)

⁴ Section 656B(2)

⁵ Section 656B(4)

⁶ 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

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

- (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."*⁸
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.⁹
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 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,¹⁰ it is not

⁸ [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

⁹ See Rule 3.2.2

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

grounds for coming to a different conclusion because the Panel proceeding rectifies the procedural irregularity.¹¹

18. The review application should identify relevant facts that may have changed¹² 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

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.
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.¹³

Powers of the review Panel

25. 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.¹⁴ It may also affirm the decision. It may not remit the matter back to the initial Panel.

Leave to apply for review

26. The consent of the President¹⁵ is required for a review unless the initial Panel made a declaration or orders.¹⁶ Consent is therefore required if, for example, the Panel declines to conduct proceedings or accepts

¹¹ *National Can Industries Limited 01(R)* [2003] ATP 40 at [43]

¹² 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

¹³ Section 657EA(1)

¹⁴ Section 657EA(4)

¹⁵ The Panel considers this to mean the President of the Panel, not the sitting President.

¹⁶ Section 657EA(2)

undertakings and does not make a declaration. If consent is necessary, the application for review should include the request for consent.¹⁷

27. 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,¹⁸ for example pending the conclusion of the initial Panel's proceedings.

Factors taken into account

28. 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 Panel¹⁹
 - (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.
29. 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

30. The Panel's *Procedural Rules* set out the documents which an applicant needs to lodge.²⁰ They must specify the decision and the grounds for review.²¹
31. An application for review must be made within 2 business days of the initial Panel's decision.²² In this time the detailed written reasons of

¹⁷ See Rule 3.3.2

¹⁸ ASIC Regulation 16(1). For example, if the review application was made to meet the two-day time limit for review in s657EA(3) and Corporations Regulation 6.10.01

¹⁹ See, for example, *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]

²⁰ See Rule 3

²¹ If consent is required, see Rule 3.3.2

²² Corporations Regulation 6.10.01. The Panel considers a decision as made when it is communicated to the parties

the initial Panel may not be available, although a short form of the key reasons will normally have been provided with the decision.

32. 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).
33. 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.
34. Parties *do not* need to repeat submissions made to the initial Panel.
35. 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

36. The Court may refer to the Panel for review:
 - (a) a decision of the Panel or
 - (b) an application concerning unacceptable circumstances.²³
37. 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.

Fee for review

38. The application fee is set out in item 27I of the Corporations (Fees) Regulations.²⁴
39. An application should be accompanied by the fee²⁵ or contain an undertaking to pay it.

²³ Section 657EB

²⁴ \$2,225.00 at the date of this Guidance Note

²⁵ Cheques should be made payable to the "Department of Treasury"

Publication History

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