

## **GUIDANCE NOTE 8: MATTER PROCEDURES**

### **Overview**

This Guidance Note has been prepared by the Panel Executive to assist market participants and advisers in understanding internal Panel processes where it has received an application.

This document is not intended to provide an inflexible or exhaustive description of Panel processes – each matter will have particular nuances that require the Panel members, parties and Panel Executive to act and respond accordingly. Rather, the intention is to provide market participants and advisers with an overview of typical Panel proceedings.

The Panel is required, under Regulation 16(2)(c) of the ASIC Regulations, to ensure that it acts:

- (a) as fairly and reasonably; and
- (b) with as little formality; and
- (c) having regard to the time available before the decision must be made, in as timely manner,

as the requirements of the ASIC Regulations, the corporations legislation, and a proper consideration of the matters before the Panel, permit.

The Panel takes this requirement of fairness, timeliness and informality very seriously. It believes that it is central to the Panel's role and acceptance in the market.

This Guidance Note sets out how the Panel proposes to implement this requirement.

## OUTLINE OF PROCESS OF A PANEL MATTER

### Panel Executive

- 8.1 The Panel Executive (**Executive**) acts as the liaison and interface between parties to Takeovers Panel (**Panel**) proceedings and the sitting Panel members for that matter.
- 8.2 The Executive is staffed by the Director, Counsel, Legal Secondees (taken on 8 to 12 month secondment from Australian law firms), an Office Manager and an Executive Assistant.
- 8.3 The Executive's role is to manage matters on behalf of the Panel and to advise the Panel in relation to parties' submissions and questions of law and policy where appropriate. The Executive is the primary point of contact for parties and the Director, Counsel and Legal Secondees make themselves available to parties to discuss progress of the matter. The requirements of procedural fairness (natural justice) prevent Panel members informally discussing issues relating to a matter with parties.
- 8.4 The Executive does not make decisions on the merits of an application in Panel proceedings. This is the function of the sitting Panel and is not delegated to the Executive. The Executive assists the President in identifying a sitting Panel in relation to an application and assists Panel members with conflict checks and disclosure of relevant information to parties. The Director and Counsel (together with Legal Secondees) assist, advise, brief and conduct research on behalf of, the Panel members. They also prepare draft documents (correspondence with the parties, media releases, briefs and reasons for decision) for review by the sitting Panel and conduct post matter reviews.
- 8.5 The Executive provides all submissions and other communications received from parties to the sitting Panel members – the Executive does not filter the information which goes to the members.

### Role of Executive outside current applications

- 8.6 The Executive also liaises with market practitioners, discussing current and prospective takeovers and policy issues in order to provide a real time perspective on the Panel's Guidance Notes and decisions as they may apply to current or prospective takeovers.
- 8.7 However, the members of the Executive are not delegates of the Panel and, therefore, do not perform any of its discretionary or adjudicative roles. In other words, the Executive does not make decisions in Panel proceedings regarding the merits of an application or circumstances – those decisions are made by a sitting Panel. Advice which the Executive may give to market practitioners or parties as to its assessment of any real or hypothetical circumstances, is only the Executive's best estimate and is not binding on the Panel in general or on any

sitting Panel. The Executive routinely prefaces any discussions with market practitioners with such a disclaimer.

### Receipt of application

- 8.8 The Panel deals with the majority of applications it receives within approximately two weeks of receiving the application. The timing for considering and completing a matter depends upon such factors as the issues raised by the matter, their complexity, time pressures surrounding a bid or transaction and availability of Panel members. The Executive will generally update parties regularly as to the progress of the sitting Panel's deliberations and likely timetable for resolving the matter.
- 8.9 When a party submits an application to the Panel they must pay a fee set under the Corporations (Fees) Regulations 2001 (Cth), Schedule 1, item 27I. The cheque for payment of the fee should be made payable to "Department of Treasury". The application will be allocated to a case officer (one of the Panel's Legal Secondees) and copies given to the Director and Counsel.
- 8.10 The Panel strongly recommends that applicants contact the Executive by telephone after lodging the application to confirm that the application has been received by the Executive. Also, parties may wish to contact the Executive ahead of lodging their application in order to notify the Executive that an application should be expected.

### Initial media release

- 8.11 On receiving an application, the Executive drafts a media release (if a sitting Panel has been appointed in relation to the application, it will generally approve the media release prior to publication). The media release usually states that an application has been received, provides an outline of the issues in contention and notes that the substantive President is convening a sitting Panel to consider the matter (if relevant). The media release will generally not comment upon the merits of the application. In light of this media release and the Takeovers Panel Rules for Proceedings (**Procedural Rules**) (especially Rules 8 and 12 relating respectively to confidentiality and media canvassing), it will normally not be necessary for parties who are listed to make a separate release to the stock market concerning the making of the application (although those parties remain subject to their obligations to make releases to the stock market throughout Panel proceedings).

### Selection and appointment of a sitting Panel

- 8.12 The substantive President must first ensure that he/she is free from any conflict that would prevent him/her from appointing a sitting Panel. If the substantive President cannot appoint a sitting Panel, one of the members nominated to be appointed Acting President will fulfil the role of President.

- 8.13 The President will consider the composition of a potential sitting Panel on the basis of known interests notified by the members (section 185(1) of the *Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act)*).
- 8.14 The substantive President will then invite three Panel members to form a sitting Panel, with one as the sitting President and one as the sitting Deputy President (section 184 of the ASIC Act). Generally, the Panel aims to ensure a mix of expertise for each sitting Panel including a lawyer, an investment banker or other corporate adviser and, if possible, a member with particular skills relevant to the matter.

### Conflicts

- 8.15 To assist the selection of sitting Panel members (by identifying potential conflicts of interest), parties are asked to provide (as relevant) - the names of the directors, advisers (including legal, financial and accounting/audit), relevant or major shareholders, related bodies corporate (including ultimate parent company or controller) and details of interests in which the party has a substantial holding.
- 8.16 The case officer liaises with the members to obtain information as to any potential conflicts of interest that may exist. The case officer sends interested parties a declaration of interests which is a letter advising of any relevant interest or connection a sitting member has with a party and its advisers together with a brief background on each of the sitting members. Any interests held by members of the Executive are also disclosed in this letter.
- 8.17 The purpose of the declaration of interests is to provide parties with the opportunity early in the process to raise an objection to a sitting member if they believe that member may be conflicted from sitting on the Panel. If this occurs, the Executive will discuss the objection with the substantive President who may determine to vary the make-up of the sitting Panel (sections 185(2) and 184(4) of the ASIC Act) or that the interest will not prevent that member from sitting (section 185(1A)).
- 8.18 The Panel's Guidance Note on Conflicts of Interests sets out more information on the process of appointing sitting Panel members (see [GN 11 Conflict of Interests](#)).

### Parties

- 8.19 Applicants are required to identify potential parties (i.e. persons whose interests may be affected by the application) in their application, to the extent known to the applicant, and to serve a copy of the application on those interested parties (refer to Procedural Rule 2.1). The Australian Securities and Investments Commission (ASIC) is always invited to become a party (refer to Regulation 22(1) of the *Australia Securities and Investments Commission Regulations 2001 (Cth) (ASIC Regulations)*) and must be copied with the

application (ASIC Regulation 21). Other interested parties may include the target/bidder, rival bidders, financiers, target shareholders and the ASX Limited (ASX).

8.20 A summary of the key obligations of parties at each stage in the proceedings is set out in Appendix 1.

### Process letter

8.21 As soon as possible after receipt of an application, the case officer sends a process letter to interested parties (**Process Letter**, see Appendix 2). That letter sets out basic information about the application and the process for an interested person to become a party to the proceedings. It also informs recipients of the steps that the Panel will take in considering the matter (eg. whether interim orders are/have been considered and that an opportunity will be given to make submissions and rebuttal submissions), a protocol for communicating with the Executive during proceedings, and explains the confidentiality and media canvassing obligations of parties during proceedings.

### Notice of appearance required from parties

8.22 If a person wishes to become a party to proceedings, which allows them to make submissions to the Panel and to be copied in to all correspondence in the proceedings, they must lodge a notice of appearance with the Executive within 2 days of service of the application or Process Letter. The Notice of Appearance is set out as an attachment to the Process Letter (see also the Procedural Rules). The applicant's Notice of Appearance should be included in or accompany the application.

8.23 The Panel will decide whether or not to accept a Notice of Appearance from a person. The Panel will advise a person if it declines to accept a Notice of Appearance from that person. The Panel encourages all persons who have interests that might be materially affected by the Proceedings, and who may wish to become parties, to seek to become parties as early as possible. If such a person fails to do so, they may lose their opportunity to object on the basis of such interests. Further, delay in becoming a party may delay proceedings and cause additional costs for the other parties, or reduce the opportunity for them to make submissions (the Panel may take this into account in determining if a costs order is appropriate).

8.24 The Notice of Appearance (see attachment to Process Letter and the Procedural Rules) contains a confidentiality undertaking which parties, other than ASIC, must complete (**Confidentiality Undertaking**). ASIC's confidentiality obligations are codified in section 127 of the ASIC Act. The Notice also contains undertakings, including that parties will not, and will cause their advisers not to, induce or facilitate canvassing in the media of issues that are, or are likely to be, before a sitting Panel (**Media Undertaking**).

8.25 A party's Notice of Appearance must have been received before that party's submissions will be accepted or correspondence from other parties is copied to that party.

### **Undertakings**

8.26 In giving a Confidentiality Undertaking the party agrees not to:

- (a) use or disclose any confidential information disclosed to it by the Panel or another party otherwise than in accordance with the Procedural Rules and applicable law; or
- (b) publish any submissions or evidence made or given to, or any matters contained in documents lodged with, the Panel in contravention of any direction given by the Panel,

at any time during or after the end of the proceedings.

8.27 In giving a Media Undertaking the party agrees not to cause, facilitate or authorise the publication of any report of the proceedings without the consent of the Panel, other than a statement that mentions (without arguing the merits of the case) any or all of the following, but no other, matters:

- (a) that the proceedings have been initiated;
- (b) the parties to the proceedings;
- (c) the matter to which the proceedings relates; and
- (d) the broad nature of the unacceptable circumstances alleged and the orders being sought.

A party's obligations under a Media Undertaking fall away at the end of the proceedings.

8.28 The Panel strongly disapproves of any attempt by a party to use publicity to:

- (a) influence a decision of the Panel or a member of the Panel; or
- (b) detract from the authority of the Panel,

by means other than submissions made to the Panel in proceedings. The Panel will take strong exception to any attempts to argue, or debate in the media, issues which are before the Panel.

8.29 In order to minimise partisan publicity and adverse effects before issues have been determined, the Panel drafts its media releases to be as neutral as the circumstances allow while informing the market of the nature of the proceedings and expects parties to exercise the same restraint. Parties may quote or cite documents published by the Panel but only where the proper sense of the document is retained in the party's use of the Panel's words.

8.30 Parties must be aware that letters and other communications between the Panel and a party are confidential, unless the Panel has published them outside the

proceedings (e.g. on its website), or has expressly consented to the form and context in which a communication is used.

- 8.31 For more details see the Procedural Rules 8 and 12, which relate to confidentiality and publicity.

### **Submissions from other interested persons**

- 8.32 The Panel has discretion under ASIC Regulation 24 to consider submissions from non-parties. Parties will be advised if the sitting Panel decides to consider such submissions.

### **Legal representation**

- 8.33 Legal representation is only permitted with the consent of the sitting Panel (section 194 of the ASIC Act). Accordingly, parties who wish to be legally represented in the Proceeding must apply to the Panel for consent.
- 8.34 Procedural Rule 11 states that the Panel prefers parties to be represented by their commercial solicitors who have taken part in the relevant transactions. Occasionally a party will request leave to be represented by a litigation lawyer and/or counsel. This rule does not restrict a party's capacity to be advised and assisted in the preparation of submissions by its chosen lawyers. The Panel's policy is generally not to allow counsel to represent parties at conferences but a sitting Panel may exercise its discretion and allow counsel to attend to address specific legal issues if it considers it desirable.
- 8.35 There is no requirement for legal representation and parties may, if they wish, make their submissions directly to the Panel.

### **Communications between the Executive, parties and the sitting Panel**

- 8.36 To assist with communications, the Panel requests that each party provide the names and contact details of those persons on whom documents can be served and who should be copied in on documents in the proceedings. Such details should include e-mail addresses and mobile phone numbers (useful where timeframes are tight or communication may be required over a weekend). These details should be sent to each other party and the Executive as soon as possible. Parties should remain aware that increasing the number of persons on the circulation list increases the risk that a party's Confidentiality Undertaking or Media Undertaking will be breached. The Panel therefore suggests each party nominate no more than four people.
- 8.37 After hours and on weekends, the Panel's telephone diverts to the Panel's Director.
- 8.38 To ensure procedural fairness to all parties, unless a conference is held, the parties do not communicate directly with Panel members. The case officer is responsible for the dissemination of submissions and other relevant

documentation between the Executive and the sitting Panel. It is important, in order to afford due procedural fairness, that parties ensure all correspondence to the Panel is copied to all other parties as well as to the appropriate contacts within the Executive.

- 8.39 All submissions and other correspondence received from parties are sent by the case officer to the sitting Panel members as soon as practicable after they are received.<sup>1</sup> Email is the Panel's preferred communication method.
- 8.40 The Executive seeks to inform parties in advance, as far as possible, of the progress of the sitting Panel's consideration of a matter, deadlines and any other information or developments relevant to the proceedings.

### **Panel meetings**

- 8.41 Almost all meetings of the sitting Panel members occur by teleconference. The case officer liaises with the sitting Panel members to determine their availability to meet during the course of proceedings. The sitting Panel generally meets shortly after an application is received (to decide whether to conduct proceedings, and if so, to settle a brief) and once both submissions and rebuttal submissions have been received. Usually it is necessary for the sitting Panel to meet on more occasions, depending on how the proceedings develop and the complexity of the issues being considered.

### **Additional applications**

- 8.42 Where the Panel has received an application, a party (including the applicant) may, in certain circumstances, make an additional application requesting the Panel to expand the proceedings conducted as a result of the original application.
- 8.43 The Panel may refuse a request to expand the Proceedings if it considers that it would not be convenient or appropriate to do so.

### **Deciding to conduct proceedings and jurisdictional issues**

- 8.44 The sitting Panel's first decision is whether or not to conduct proceedings in relation to a matter (ASIC Regulation 20).
- 8.45 Factors to be considered include:
- (a) whether the Panel has jurisdiction to consider the matter;
  - (b) whether the accusations would give rise to unacceptable circumstances if proven;

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<sup>1</sup> Virtually the only exception is a submission which contains information which the relevant party asks the Panel to consider without revealing it to all other parties. A sitting Panel will not receive information on those terms without first considering the requirements of procedural fairness.

- (c) the strength of the evidence presented concerning the allegations;
- (d) what remedies might be available to the Panel to address the alleged unacceptable circumstances;
- (e) whether the same or similar facts and remedies are the subject of a court proceeding involving the same or similar parties;
- (f) whether the application is within time; and
- (g) whether the application appears to be frivolous or vexatious.

8.46 The Panel may, in certain circumstances, accept a request by a party other than the applicant for that party to present to the Panel a short written statement setting out, for example, additional relevant factual matters, conduct that it proposes to undertake in response to the issues raised in the application and any reason why the party believes that the Panel should not commence proceedings (see Note 5 to Procedural Rule 2.7).

8.47 The Panel does not usually allow the other parties to respond to such a written statement before it decides whether to commence proceedings, but if the Panel decides to conduct proceedings, these matters will be taken into account in the Panel's preparation of a brief and may be the subject of comment in submissions by parties in response to that brief.

### The brief

8.48 If the sitting Panel decides to conduct proceedings, it must then issue a brief to the parties (ASIC Regulation 20). The brief determines the scope of the proceedings. It may be issued in one or more parts, depending on the manner in which the sitting Panel considers that the proceeding will be most efficiently conducted or to deal with issues as they arise.

8.49 The brief sets out the key issues the Panel wishes to be addressed, invites the parties to make submissions on those issues, and sets out the timetable for parties to make those submissions and rebuttals. In some cases, the Panel will provide a document setting out the Panel's views in relation to the evidence before it so far in the proceedings. These are not final decisions (and are not for use or republication without the Panel's consent).

8.50 Unless there are special circumstances (eg. urgency of the matter, complexity of the issues involved or time zone differences), parties are provided with **2 business days** from receipt of the brief to lodge submissions and **1 business day** from receipt of submissions to lodge rebuttal submissions. However, parties have the opportunity to make submissions to the Panel as to the timetable for submissions and resolution of the proceedings.

8.51 If the application is for a declaration under section 657A of the Corporations Act 2001 (Cth) (**Corporations Act**), the brief will request parties to provide submissions as to the grounds upon which the Panel might consider unacceptable circumstances to have arisen as set out in subsection 657A(2)

(having regard to the Eggleston Principles set out in section 602 and the other matters mentioned in subsection 657A(3)).

- 8.52 In more complex matters, or where it is desirable for facts to be determined before questions of policy or applicable law are the subject of a brief or submissions, the Panel may issue a part of a brief in order to refine the relevant issues or to determine relevant facts before considering which legal or policy issues are raised by the application.

### **Interim orders**

- 8.53 If an interim order is requested in the application, an initial brief may be sent to parties requesting submissions and rebuttals on that aspect of the application only. Tight time frames may be imposed on parties in such circumstances if the question of whether to grant interim orders requires urgent resolution.
- 8.54 The Panel or the sitting President may make interim orders *ex parte*. However, in such circumstances the applicant would need to satisfy a much higher threshold for the Panel to consider exercising such powers. The applicant would need to demonstrate some urgency for the interim orders to be made, that they would have minimal, or not unfair, impact on other parties and the market, and that they were needed to protect the *status quo* while the Panel considers the application.
- 8.55 Depending on the circumstances, after considering the parties' submissions, the sitting Panel may allow an affected party the opportunity to provide undertakings to the Panel in lieu of interim orders being made.

### **Submissions, rebuttals and other documents**

- 8.56 Parties must provide the Panel with any documents in their possession that are material and relevant to their submissions and rebuttals together with any other relevant background information. It is not necessary for parties to provide copies of documents which have already been provided to the Panel (unless specifically requested by the Panel)<sup>2</sup>.
- 8.57 Whenever a party lodges a relevant document with the ASX, it must send a copy to the Panel and to the other parties at the same time (so far as practicable). See Procedural Rule 5 (especially Procedural Rules 5.4 to 5.10), for documents that particular kinds of parties are to give to the Executive (and each other party).

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<sup>2</sup> Where documents have already been provided to the Panel, parties referring to those documents should note the date and author of the document and indicate how and when it was previously provided.

- 8.58 Parties must send their submissions (and other correspondence to the Panel) to all other parties who have filed a Notice of Appearance as well as to the case officer, Director, Counsel and Executive Assistant.
- 8.59 All documents lodged with the Panel Executive in proceedings must be served on each party to the proceedings at the same time (so far as practicable) as they are lodged with the Panel Executive. All parties (and the Panel Executive) should be copied on the email.
- 8.60 The Panel prefers to use email as its primary mode of communication during Panel proceedings and expects parties to do likewise. It should be clear on the face of the email that it has been sent to the Panel and all parties at the same time (i.e. other parties should not be “blind copied”).
- 8.61 Submissions may be made on relevant facts, law, policy and discretionary considerations and should address the issues and questions raised in the brief.
- 8.62 Parties’ submissions should be as brief as possible and should avoid use of emotive language. Lengthy, legalistic submissions are strongly discouraged if the submissions can be adequately expressed in more concise and straightforward terms.
- 8.63 All submissions and rebuttals must include the matter reference in the header of each page. Further details are provided in Appendix 1, 3.6 and 3.7.
- 8.64 Depending on the nature of the issues in question and the time available, the Executive may provide the sitting Panel members with a summary and comparison of the submissions received and/or a paper setting out the key issues arising from the application which the members should consider and address in reaching their decision. In some cases, there may be a period of 1 or 2 days (and occasionally longer) where, after lodging rebuttal submissions, parties may not hear from the Executive. During this period, the sitting Panel will usually be considering the submissions and issues relevant to the respective arguments in order to formulate its decision. The Executive will endeavour to keep the parties informed of progress.

### **Conferences**

- 8.65 The Panel may determine to hold a conference where, for example, the issues or policy in question are complex and lend themselves to oral examination or where time is critical and a conference may assist the Panel with speedy resolution of the matter.
- 8.66 However, the Panel will not usually decide whether a conference is necessary until after receiving and reviewing submissions from the parties regarding issues in the brief. During the course of proceedings, parties may submit a request for a conference, which the sitting Panel will consider.

- 8.67 The sitting Panel has a discretion whether to meet parties face to face, by video or audio conference, or by any combination of methods of communication determined by the Panel.
- 8.68 If the Panel considers that it may be appropriate or desirable to deal with all or some specific parts of a proceeding by convening a conference, it will set out additional details concerning the conference and the matters it proposes to raise at the conference in a notice to parties.
- 8.69 The sitting President chairs the conference and Panel members may direct questions to particular parties. Conferences are kept as informal as possible. Transcripts are taken of conferences and copies made available to parties for a proportion of the transcription costs.

### Decisions

- 8.70 The sitting Panel will convene to discuss the submissions and rebuttals (and any evidence elicited in conference) with the Executive. The Panel's Counsel may advise the sitting Panel as to any questions of legal interpretation and application. The sitting Panel will then make a decision. Alternatively, the sitting Panel may decide that it requires further evidence from parties, and may issue a supplementary brief, or it may engage an independent expert to advise it on particular issues.
- 8.71 If a declaration of unacceptable circumstances is made, a copy of the declaration is generally signed by the President of the sitting Panel. The declaration is made at the time of the Panel's decision rather than on signing of the paper copy.
- 8.72 Parties will be notified by a confidential letter or email (**Decision Letter/Email**) as soon as possible after the sitting Panel has reached a decision. Any discussion of the decision provided to the parties in the Decision Letter/Email does not constitute the Panel's reasons for decision, as required to be published under section 657A(6) (see below for a discussion of the Panel's processes concerning its reasons for decision).
- 8.73 In some cases, the Panel will provide a document setting out the Panel's thoughts in relation to the evidence before it so far in the proceedings. These are not final decisions and are not for use or republication without the Panel's consent to the form and context of their use.
- 8.74 In relation to the Panel's final decisions and reasons as published by the Panel, these documents are drafted to be read in their entirety. Parties should be careful not to selectively use or quote these documents in a way which might mislead a reader who has not read the document in full.

### Interim Orders and Final Orders

- 8.75 Where the Panel proposes to make final orders in proceedings, and usually where it proposes to make interim orders<sup>3</sup>, it will provide parties with an opportunity to make submissions to the Panel as to whether or not such orders should be made and if made, in what terms. The time permitted for parties to put such submissions varies, but will typically be no longer than 24 hours. Usually a copy of draft orders which the Panel is proposing to make will accompany the request for parties' submissions. In some cases this opportunity will be given in the initial brief and in other cases in a separate (later) document.
- 8.76 All declarations and final orders made by the Panel are published in the Government Gazette. The orders are considered "made" at the time of the Panel's decision to make those orders, rather than on signing of the paper copy.

### Reasons and publication of the Panel's decision

- 8.77 The Panel will normally provide its Decision Letter/Email before providing its reasons for the decision.
- 8.78 After the Panel has made its decision, and given the Decision Letter/Email to parties, the Executive will prepare a draft media release to announce the Panel's decision to the market and also prepare draft reasons for review and comment by the sitting Panel. The media release will largely be based upon the Decision Letter/Email, but may contain some elaboration for the benefit of market participants reading it who do not have the familiarity with the facts of the proceedings that parties will have.
- 8.79 The Panel will normally provide a copy of its draft media release to parties prior to publication for comment on issues of fact or unfair prejudice and to allow parties to prepare to respond to any media queries following the publication of the Panel's media release.
- 8.80 The sequence of events will depend on the circumstances of the particular proceedings, whether orders are made etc. For example:
- (a) if the Panel declines to make a declaration of unacceptable circumstances, it may publish a media release as soon as it makes the decision, or may delay publication until any undertakings have been given or completed; or
  - (b) if the Panel decides to make a declaration of unacceptable circumstances, it may publish a media release soon after it makes the decision, or may wait until it has settled any consequential orders and publish its decision on orders at the same time.

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<sup>3</sup> Ex parte interim orders are an exception – see paragraph 8.54.

- 8.81 Any media release published by the Panel does not constitute the Panel's reasons for decision as required to be published under section 657A(6).
- 8.82 The Executive aims to have reasons ready for distribution in draft form to parties within 10 business days of the Panel reaching a decision on a matter. However, reasons for a decision may take longer to settle depending on such things as workload of the Panel (particularly if there are a series of applications in relation to a particular bid being considered contemporaneously), complexity of the issues, availability of members and urgency with which reasons are required by parties.
- 8.83 Once the reasons have been settled by the sitting Panel, the Executive circulates them to parties on a confidential basis for comment solely on factual accuracy and matters of unfair prejudice before they are published. The Panel will publish a media release when the reasons are released on its website. The Panel's final reasons are published by the Panel, and the reasons and accompanying media release are drafted to be read in their entirety. Parties should be careful not to use or quote these documents selectively in a way which might mislead a reader who has not read the document in full.

### **Review applications**

- 8.84 A party may lodge an application for review of a decision under section 657EA. The Panel is conscious that parties are required to request a review within 2 business days of the original decision being made (prescribed for the purpose of subsection 657EA(3) by Regulation 6.10.01 of the Corporations Regulations 2001 (Cth)) which is highly likely to be before reasons have been issued by the Panel. Accordingly, to allow the applicant to frame arguments in the review application, the Panel will:
- (a) issue to parties an outline of its reasons in its Decision Letter/Email; or
  - (b) 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.
- 8.85 In any event, the Panel will normally 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.

### **Reviews of ASIC decisions**

- 8.86 On review of ASIC decisions, see Guidance Note 2 "Reviewing Decisions".

### Matter reviews

- 8.87 The Panel's policy is to review each matter which has come before it and to improve its processes based on the experience of parties and their advisers.
- 8.88 The Executive offers each party and its advisers the opportunity to participate in a post matter review with the Executive once proceedings are completed. This will involve the completion of a questionnaire concerning the Panel and Executive processes, conferences, briefs, deadlines, decisions and orders, reasons, composition of the sitting Panel, confidentiality, interaction with ASIC and ASX, timeliness of communication from the Executive to parties and availability of information. They are offered the opportunity of a discussion with the Executive on these matters as well.
- 8.89 The Executive uses feedback it receives to:
- (a) brief Panel members at their group meetings; and
  - (b) prepare a list of suggestions/issues to follow-up.
- 8.90 This may include suggested changes to the Panel's process or even changes to the Panel's legislative powers.

### Freedom of information

- 8.91 The Panel is subject to the *Freedom of Information Act 1982* (Cth) and parties should note that documents, including submissions, relating to Panel proceedings may be the subject of requests for access in accordance with that Act.

For more information please contact the Executive:

Takeovers Panel  
Level 47, 80 Collins Street  
Melbourne Vic 3000  
Tel 03 9655 3500  
Fax 03 9655 3511  
takeovers@takeovers.gov.au  
[www.takeovers.gov.au](http://www.takeovers.gov.au)

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### APPENDIX 1 - KEY OBLIGATIONS

The Table below sets out a party's key obligations at each stage of the Proceeding if the Panel decides to conduct a proceeding.

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| <b>1.</b> | <b>Immediate obligations to be complied with from the time of receiving (or giving) a copy of an application (even before the Panel decides to conduct proceedings). These obligations are ongoing.</b>  |
| 1.1       | • Provide the Panel with a Notice of Appearance if you wish to become a party to the proceedings (to be done within 2 business days of receiving the application)  |
| 1.2       | • To the extent applicable, provide the Panel with the names of your directors, advisers (including legal, financial and accounting/audit), relevant/major shareholders, related bodies corporate (including your ultimate parent company or controller) and details of your interests in relevant companies in which you have a substantial holding |
| 1.3       | • Let the Panel know if there are any persons who may be affected by the decisions or orders sought in the Application (and who do not appear to have a copy of it)  |
| 1.4       | • Comply with the Confidentiality Undertaking and Media Undertaking given by you in your Notice of Appearance  |
| 1.5       | • Become familiar with and comply with the Procedural Rules  |
| 1.6       | • Tell the Executive and the other parties the names and contact details (including email addresses) of no more than 4 people on whom documents relating to the proceedings are to be served on your behalf  |
| 1.7       | • Give the Executive and each of the parties the documents required by Procedural Rule 5   |
| 1.8       | • If you lodge a document with ASX as a bidder, target or substantial shareholder, provide a copy to the Panel and each of the parties at the same time (so far as practicable) (see paragraph 57)   |
| 1.9       | • Apply for consent to be legally represented in the proceedings, if you wish to be represented  |
| 1.10      | • Advise the Panel of any issues of conflict concerning the sitting Panel.   |

- 1.1 • Tell the Panel if you will have difficulty:  
1
- communicating via email; or
  - receiving (large) attachments by email

|           |   |
|-----------|---|
| <b>2.</b> | <b>Upon receiving a brief</b>   |
| 2.1       | <ul style="list-style-type: none"> <li>• Inform the Panel, as soon as possible, if you need more time to respond and give the Panel (and each of the parties) reasons why you need additional time, and an estimate of how much additional time you need</li> </ul>   |
| <b>3.</b> | <b>When making submissions and rebuttals or providing documents to the Panel</b>  |
| 3.1       | <ul style="list-style-type: none"> <li>• Give all submissions and rebuttals to the Panel (and each party) within the timeframes set by the Panel</li> <li>• It should be clear on the face of the email that it has been sent to the Panel and all parties at the same time (i.e. other recipients should not be “blind copied”)</li> </ul> |
| 3.2       | <ul style="list-style-type: none"> <li>• Provide any documents in your possession that are material and relevant to your submissions and rebuttals together with any other relevant background information (except to the extent they have already been provided, unless specifically requested by the Panel)</li> </ul>                    |
| 3.3       | <ul style="list-style-type: none"> <li>• Use the approved cover sheet for all submissions and rebuttals (the form of the cover sheet is set out as an attachment to the Process Letter)</li> </ul>  |
| 3.4       | <ul style="list-style-type: none"> <li>• Provide your submissions and rebuttal submissions in a format which <b>Microsoft Word</b> can open</li> </ul>  |
| 3.5       | <ul style="list-style-type: none"> <li>• Insert the following into a header on each page of the submissions or rebuttals: <ul style="list-style-type: none"> <li>• <i>[Insert name of target]</i></li> <li>• Rebuttals/Submissions (as appropriate) by <i>[Insert name of party]</i></li> </ul> </li> </ul>                                 |
| 3.6       | <ul style="list-style-type: none"> <li>• Insert the following into a footer on each page of the submissions or rebuttals: <ul style="list-style-type: none"> <li>• Date (to be typed manually – <b>do not use automatic update field</b>)</li> <li>• Page [x] of [y]</li> </ul> </li> </ul>   |
| 3.7       | <ul style="list-style-type: none"> <li>• Be succinct and do not use legalistic or emotive language</li> </ul>   |
| 3.8       | <ul style="list-style-type: none"> <li>• Do not send email attachments larger than 8MB in total, or individual documents larger than 3 MB</li> </ul>  |
| 3.9       | <ul style="list-style-type: none"> <li>• Do not send the Panel confidential material unless you have obtained the Panel’s prior written consent.</li> <li>• Otherwise the document may be given to all parties</li> </ul>   |

|  |   |
|--|---|
| <b>4. If you receive correspondence from the Panel during the proceeding</b> |   |
| 4.1  | <ul style="list-style-type: none"><li>• Do not use or publish Panel correspondence (including draft or proposed decisions) without the Panel's consent</li></ul>  |
| <b>5. After the proceeding has finished</b>                                  |   |
| 5.1  | <ul style="list-style-type: none"><li>• Keep confidential any confidential information given to you during the Proceeding (which includes all correspondence you receive from the Panel) except to the extent that the information has ceased to be confidential (eg has been publicly announced by the Panel)</li></ul>  |
| 5.2  | <ul style="list-style-type: none"><li>• In accordance with Procedural Rule 12.2, if you wish to make or publish a statement commenting on, or including material from the Panel's decision (or the Panel's media release announcing the decision) and/or submissions you have made the statement must:<ul style="list-style-type: none"><li>• accurately represent the Panel's decision; and</li><li>• not falsely or inaccurately state or imply that the Panel has made any assessment of the merits of any proposal or person.</li></ul></li></ul> |

**Appendix 2 - Process Letter**

[Insert date]  
File: [ ]/2006

[Insert name of party]  
Care of [Insert name of adviser (if relevant)]

**By Email:**  
[Insert relevant email addresses]

Dear Sirs and Mesdames

**[Matter Name] - Process Letter**

1. The Takeovers Panel (the Panel) has received an application (the Application) from [Applicants Name] (the Applicant) under section [ ] of the Corporations Act 2001 (Cth) (the Act) dated [ ] in relation to the affairs of [Target]. The Applicant has applied to the Panel for a [declaration of unacceptable circumstances / and interim / and final orders / review of ASIC's decision under section 656A].
2. This letter describes:
  - (a) how you may become a party to the proceedings (the **Proceedings**) before the Panel (if you choose to do so and if the sitting Panel decides to conduct proceedings);
  - (b) the steps that the Panel will take in considering the issues arising in the Proceedings; and
  - (c) the protocol for communicating with the Panel Executive and other parties during the Proceedings.

**Important details**

- (a) The Panel Executive contact in this matter is [insert name], [insert phone]<sup>4</sup>.
- (b) The Panel [comprises [insert names] / has not yet been appointed]. [The President of the Panel will shortly appoint a sitting Panel of 3 members to consider this matter. We will provide you with the names of, and a brief background in relation to, each of the members when they have been appointed.]
- (c) The Panel [has/has not] decided to commence proceedings in relation to this matter. [Once a sitting Panel has been appointed, it will decide on whether or not to conduct proceedings.]
- (d) Documents lodged with the Panel Executive must be addressed to:

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<sup>4</sup> After hours and on weekends, the Panel's telephones divert to Mr Nigel Morris's mobile telephone if you need to contact the Panel urgently.

**[Case officer] - [email]**

**Rebecca Whitehead** - rebecca.whitehead@takeovers.gov.au

**Nigel Morris** – nigel.morris@takeovers.gov.au

**Alan Shaw** – alan.shaw@takeovers.gov.au

### **What to do now**

- (a) Let us know if you have not received a copy of the Application.
- (b) Provide us with details of other persons who may be affected by the decisions or orders sought in the Application (and who do not appear to have a copy of it).
- (c) Provide the Panel Executive with a Notice of Appearance (see paragraph 10).
- (d) Provide the names and contact details of no more than four people on whom Panel documents can be served (see paragraph 30).

### **Preliminary**

- 3. Procedural requirements applicable to Panel proceedings (with which you should become familiar) are found in:
  - (a) Part 6.10 of the Corporations Act 2001 (Cth) (Act) and regulation 6.10.01 of the Corporations Regulations 2001 (Cth);
  - (b) Part 10 of the Australian Securities and Investments Commission Act 2001 (ASIC Act) and Part 3 of the Australian Securities and Investments Commission Regulations 2001 (Cth) (ASIC Regulations);
  - (c) Takeovers Panel Rules for Proceedings (Rules); and
  - (d) Guidance Note 8 – Matter Procedures (GN08).
- 4. GN08 explains the nature and processes of Panel proceedings, it also contains a table summarising your key obligations. If you are not familiar with Panel proceedings please carefully review GN08.
- 5. The Panel is required to ensure that it conducts its proceedings:
  - (a) as fairly and reasonably;
  - (b) with as little formality; and
  - (c) having regard to the time available before the decision must be made, in as timely a manner,

as the requirements of the ASIC Regulations, the corporations legislation, and a proper consideration of the matters before the Panel permit.
- 6. The Panel takes this requirement of fairness, timeliness and informality very seriously.

*Appointment of sitting Panel*

7. To assist the Panel members to carry out the necessary conflict assessments please provide us with the following details (if not already supplied or if incorrect in the Application):
  - (a) the names of your directors, advisers (including legal, financial and accounting/audit), relevant/major shareholders, related bodies corporate (including your ultimate parent company or controller); and
  - (b) your interests in relevant companies in which you have a substantial holding (as defined in the Act).
8. If you consider that any of the sitting Panel members may have interests which are such that they may not be able to perform their duties properly, please advise the Panel Executive as soon as possible. If you fail to do so you may be taken to have waived any right to object on the basis of such interests.

*Becoming a party*

9. The Panel will only accept submissions from you (including if you are the Applicant) if you become a party to these proceedings (Proceedings), (or if your submissions are expressly accepted by the Panel under ASIC Regulation 24).
10. If you wish to become a party, you must comply with the requirements of this letter and lodge a Notice of Appearance (annexed to this letter). You should do this as soon as possible (and in any event no later than 2 business days after you receive the Application). Delay in becoming a party may delay Proceedings and cause additional costs for other parties (the Panel may take this into account in determining if a costs order is appropriate).

**Confidentiality Undertaking and Media Undertaking**

11. By giving a Notice of Appearance, you will also be giving:
  - (a) a confidentiality undertaking (Confidentiality Undertaking) not to:
    - (i) use or disclose any confidential information disclosed to you by the Panel or another party otherwise than in accordance with the Rules and applicable law; or
    - (ii) publish any submissions or evidence made or given to, or any matters contained in documents lodged with, the Panel in contravention of any direction given by the Panel,at any time during or after the end of the Proceedings, and
  - (b) an undertaking not to induce or facilitate the canvassing in the media of issues that are, or are likely to be, before the Panel (Media Undertaking). This limits you from causing or authorising the publication of any report of the Proceedings without the consent of the Panel, other than a statement that mentions (without arguing the merits of the case) any or all of the following, but no other matters:
    - (i) that the Proceedings have been initiated;

- (ii) the parties to the Proceedings;
- (iii) the matter to which the Proceedings relates; and
- (iv) the broad nature of the unacceptable circumstances alleged and the orders being sought.

Obligations under a Media Undertaking (but not the Confidentiality Undertaking) fall away at the end of the Proceedings.

### **Freedom of information**

12. The Panel is subject to the Freedom of Information Act 1982 (Cth). Accordingly, it is possible that documents, including submissions, relating to Panel proceedings may be the subject of requests for access in accordance with that Act.

### **Preliminary statements relevant to decision to conduct proceedings**

13. If you are not the Applicant, and you wish to present a short written statement to the Panel for it to consider in making its decision whether to conduct proceedings, see Note 5 to Rule 2.7 of the Rules.
14. The Panel will not normally give the Applicant or other parties an opportunity to respond to such a statement before deciding whether to conduct proceedings. If the Panel does conduct proceedings, the content of the statement may be the subject of comment in submissions by parties in response to the Panel's brief to parties.

#### *The Brief*

15. If the Panel decides to conduct proceedings, it will issue a brief to each party setting out:
- (a) a description of the circumstances to be examined;
  - (b) the issues to be addressed in submissions;
  - (c) the timetable for submissions and rebuttals; and
  - (d) the form that submissions must take (see GN08 paras 8.56-8.64).
16. The Panel may issue one or more separate briefs:
- (a) in respect of interim, or final, orders (if sought); or
  - (b) to refine issues or determine relevant facts either before or after the primary brief has been given to parties.

#### *Submissions*

17. The Panel will give:
- (a) ASIC, parties and persons to whom a proposed declaration relates; and
  - (b) persons to whom a proposed final order relates;

an opportunity to make submissions on the relevant facts, law, policy and discretionary considerations.

18. There may be limitations on the time that the Panel can allow for submissions to be made where the time available for the Panel to take action is short (for example, in cases where urgent orders are sought). In some cases it may be necessary to make urgent interim orders without receiving submissions from affected persons, in which case, such persons may subsequently be given an opportunity to make submissions as to whether such orders should be maintained.
19. Note that:
  - (a) the Panel will generally treat a company as capable of representing the interests of its shareholders; and
  - (b) time limits imposed by the Panel must be complied with (see GN08 para 8.50).
20. Submissions should be as brief as possible and should avoid use of emotive language. Lengthy and heavily legalistic submissions are strongly discouraged in circumstances where the submissions can be adequately expressed in more concise and straightforward terms.
21. Parties should note that under section 199 of the ASIC Act it is an offence to give false or misleading information in submissions to the Panel.
22. Parties should provide the Panel with any documents in their possession that are material and relevant to their submissions and rebuttal submissions, together with any other relevant background information (except where such information has already been provided to the Panel by another party). If a party is uncertain whether to provide documents or information to the Panel, this should be discussed with the Panel Executive.
23. Whenever you lodge a relevant document with ASX, please send a copy to the Panel and to the other parties at the same time (so far as practicable) as it is lodged with ASX. The documents that particular kinds of parties are to give to the Panel Executive (and each other party) are set out in Rule 5, especially Rules 5.2 to 5.10.
24. It is not necessary for parties to provide copies of documents which have already been provided to the Panel unless specifically requested by the Panel. Where documents have already been provided to the Panel, parties referring to those documents should note the date and author of the document and indicate how and when it was previously provided.

### **Confidential submissions**

25. If you wish to make a confidential submission to the Panel, please see Rules 8.2 to 8.5. Acceptance of confidential submissions will be a rare exception, and you should not send such a submission unless you have first received the Panel's consent to do so.

**Electronic documents**

26. The Panel uses email as its primary mode of communication during Panel proceedings and expects parties to do likewise (please let us know if this will be a problem for you). It is your responsibility to ensure that documents sent by email are reasonably capable of receipt by all parties (including the Panel).
27. Submissions and rebuttal submissions should be provided in a format which Microsoft Word can open. If parties provide submissions and rebuttal submissions in PDF format, a copy in a format which Microsoft Word can open must also be provided.
28. Please avoid email attachments larger than 8MB in total. If documents are larger than 3MB individually, please break them into smaller files or send only the relevant pages, if appropriate.
29. Please let us know if you will have difficulty receiving large attachments by email.

**Lodging submissions**

30. All documents lodged with the Panel Executive in proceedings must be served on each party to the Proceedings at the same time (so far as practicable) as they are lodged with the Panel Executive. All parties (and the Panel Executive) should be copied on the email. It should be clear on the face of the email that it has been sent to the Panel and all parties at the same time (ie such recipients should not be "blind copied").
31. To ensure that all parties can comply with paragraph 30, please provide the names and contact details (including email addresses and mobile phone numbers, for after-hours contact) of those persons on whom documents can be served. To minimise the risk of confidential information being leaked or misused, we suggest no more than four people for each party.

Yours faithfully

PANEL EXECUTIVE  
03 9655 3500

NOTICE OF APPEARANCE<sup>5</sup>

[INSERT THE NAME OF THE PARTY] ('the Company') notifies the Takeovers Panel and the parties to this matter that it will be a party to the matter.

[OPTIONAL] The Company will be advised in the matter and seeks the Panel's consent under section 194 of the Australian Securities and Commissions Act 2001 (Cth) to be represented by [NAME THE COMPANY'S SOLICITORS OR OTHER ADVISORS] in the proceedings before the Takeovers Panel. Documents can be served on the Company by sending them to:

Courier:

Postal:

DX:

Email:

Fax:

Telephone:

Contact:

[PROVIDE AN ADDRESS OF EACH KIND FOR THE COMPANY OR ITS ADVISORS. AN EMAIL ADDRESS IS ESSENTIAL]

The Company undertakes to the Panel and the other parties that the Company and its advisors will not:

- (a) use or disclose any confidential information disclosed to it by the Panel or another party otherwise than in accordance with the procedural rules governing Panel proceedings and applicable law; or
- (b) publish any submissions or evidence made or given to, or any matters contained in documents lodged with, the Panel in contravention of any direction given by the Panel.**

The Company also undertakes to the Panel and the other parties that, consistent with the intent of the introduction to Rule 12 of the Panel's Rules for Proceedings, the Company and its advisors will not induce or facilitate the canvassing in the media of issues that are, or are likely to be, before a sitting Panel.

Dated:

Signed on behalf of the Company by [GIVE NAME AND AUTHORITY TO BIND THE COMPANY]

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<sup>5</sup> Notes: This form should be adapted to the party's circumstances. An email address and the undertaking for confidentiality are essential.

ASIC is not required to provide the undertaking for confidentiality. ASIC's confidentiality obligations are codified in s127 of the ASIC Act.

It is an offence punishable by imprisonment for a person to contravene a direction restricting the publication of submissions or evidence made or given to, or of matters contained in documents lodged with, the Panel without reasonable excuse.

# TAKEOVERS PANEL

[Date]

IN THE MATTER OF [NAME OF TARGET]  
([PANEL MATTER REFERENCE])

Proceeding No: [ ]

## *REBUTTAL\* SUBMISSIONS*

By

[NAME OF PARTY]

## *PANEL BRIEF*

Of [date]

Lodged by:

[Name]  
[Address]  
[Address]  
Contact: [Name(s)]  
Tel: [Number(s)]  
Fax: [Number(s)]  
E-mail: [Address(es)]

\* Delete if appropriate