

# **The Takeovers Panel Process**

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# CONTENTS

<b>THE FUNCTIONS OF THE PANEL</b> .....	2
<b>PANEL MEMBERS AND EXECUTIVE</b> .....	2
THE MEMBERS .....	2
THE EXECUTIVE .....	4
<b>CONSTITUTING A PANEL</b> .....	5
<b>THE APPLICATION</b> .....	6
<b>WHETHER TO PROCEED</b> .....	7
<b>THE BRIEF</b> .....	7
<b>TIME TO RESPOND</b> .....	7
<b>SUBMISSIONS - CONTENT AND PROCESS</b> .....	8
<b>CONFERENCES – WHEN, WHY AND POWERS</b> .....	8
<b>REPRESENTATION</b> .....	9
<b>CONFIDENTIALITY</b> .....	9
<b>POST-MORTEM</b> .....	10
PROCESS FAVOURS APPLICANTS .....	10
TRANSPARENCY .....	11
TIMING .....	11
NO DECLARATIONS.....	11
REPRESENTATIVE SPREAD.....	12
<b>REFERENCES</b> .....	12

## THE FUNCTIONS OF THE PANEL

The Panel's functions are:

- (a) giving civil remedies in relation to takeover bids (in place of the courts);
- (b) reviewing ASIC decisions under Chapter 6 (in place of the AAT); and
- (c) making rules to supplement and clarify Chapter 6.<sup>1</sup>

The old function of declaring certain *conduct* and *acquisitions* to be *unacceptable* (and making orders in relation to them) has been subsumed in the new function of giving civil relief during bids, on the ground that *unacceptable circumstances exist*.

Generally, a private party cannot bring court proceedings for civil relief in relation to a bid (including judicial review of ASIC and the Panel) until the end of the bid (section 659B). This was done to prevent tactical litigation. It has some odd consequences, such as preventing a bidder from having a bid validated under section 1325D, until the bid has closed.

Private parties can bring civil proceedings in relation to a bid after the bid closes. If the Panel has declined to make a declaration in relation to the bid, the only civil remedies available are money orders.

A public authority (and specifically ASIC) has standing to apply to a court for civil relief during a bid. The Panel has specific standing to apply to a court for orders enforcing its own orders and rules.<sup>2</sup>

## PANEL MEMBERS AND EXECUTIVE

### THE MEMBERS

The Panel consists of 25 part-time members appointed by the Governor-General for 5 year terms, of whom one is the President. They live in all of the mainland

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<sup>1</sup> To date no rules have been made, and there are no developed proposals to make any. One reason for this is that section 658C is a far narrower and less flexible source of power than ASIC's power to make class orders under section 655A. Another is that the scope of section 658C is uncertain, as any rule the Panel makes must be consistent with Chapter 6 and cannot override it, even incidentally. Therefore, a rule cannot exempt a person from the application of a provision in Chapter 6. In addition, there is some debate as to whether a rule can impose additional obligations to supplement the operation of the provisions of Chapter 6 without being inconsistent with the Corporations Law.

<sup>2</sup> The Panel has the power to make procedural rules to govern its processes pursuant to section 195 of the ASIC Act. Draft rules have been published on the Panel web site and are in the process of being refined, mainly in relation to document handling and publicity, in light of the Panel's experiences to date.

States. Their skills, qualifications and expertise are diverse. Currently, the Panel consists of:

- 1 barrister
- 1 legal academic
- 6 merchant bankers
- 7 solicitors
- 5 accountants
- 5 company directors and secretaries (who all have either legal or accounting backgrounds).

There are a few obvious gaps. There is no-one with current ASIC or ASX experience and no current or retired judges.

The duties of Panel members are intermittent. Their primary task is to be available to sit on a Panel. This tends to take over a large portion of their time for a week or more. Usually at short notice. Occasionally, they may sit on a committee which looks at policy development in a particular area. Three or four times a year, they attend a workshop conducted by the executive to inform all members about the recent work of the Panel, provide training, exchange ideas and so on.

<b>Name</b>	<b>Organisation</b>	<b>Location</b>
Mr Simon McKeon (President)	Macquarie Bank Limited	Melbourne
Ms Robyn Ahern	Various directorships	Perth
Ms Elizabeth Alexander AM	PricewaterhouseCoopers	Melbourne
Ms Annabelle Bennett SC	Sydney Bar	Sydney
Mr Michael Burgess	KPMG	Adelaide
Mr Denis Byrne	Denis Byrne & Associates	Brisbane
Mr Peter Cameron	Allen Allen & Hemsley	Sydney
Mr Brett Heading	McCullough Robertson	Brisbane
Ms Meredith Hellicar	Corrs Chambers Westgarth	Sydney
Ms Alice McCleary	Deloitte Touche Tohmatsu	Adelaide
Ms Maria Manning	Queensland Cotton	Brisbane
Ms Louise McBride	Deloitte Touche Tohmatsu	Sydney
Ms Marian Micalizzi	Consultant/directorships	Brisbane
Mr Simon Mordant	Caliburn Partnership	Sydney
Professor Ian Ramsay	The University of Melbourne	Melbourne
Ms Maxine Rich	Various directorships	Sydney
Ms Fiona Roche	Estates Development Co	Perth
Mr Trevor Rowe	Salomon Smith Barney	Sydney

Mr Jeremy Schultz	Finlaysons	Adelaide
Ms Jennifer Seabrook	Gresham Partners	Perth
Mr Leslie Taylor	Commonwealth Bank	Sydney
Mr Michael Tilley	Merrill Lynch	Melbourne
Ms Nerolie Withnall	Minter Ellison	Brisbane
Ms Karen Wood	Bonlac Foods Limited	Melbourne
Mr Peter Young	ABN-AMRO	Sydney

### **THE EXECUTIVE**

There are 4 staff in the executive. There is no mention made in the Corporations Law, the ASIC Act or the subordinate legislation of the Panel executive. The President and the Panel are not, for instance, given power to delegate any of their functions and powers. Accordingly, the executive does not perform any of the discretionary or adjudicative roles of the Panel.

The executive aim to provide all of the legal and policy advice and support the Panel requires generally and in relation to particular matters, although on occasion the Panel may brief counsel or brief out advice and appearances, depending on expertise and workload. The executive also provide information to market participants and other persons about the Panel and facilitate early inquiries about matters.

After the appointment of a Panel, the executive coordinates the proceedings, provides advice and support to the Panel and liaises with the parties on behalf of the Panel. The executive produce drafts of all documents issued by the Panel in connection with a matter including press releases, the brief and the reasons for decision, all of which are settled by the Panel members of the sitting Panel.

A large part of the role of the executive involves policy work and conducting workshops for members to keep them abreast of recent developments and cases. The Panel executive also receive a number of queries from takeover practitioners. While parties are encouraged to approach the executive to seek their advice regarding procedural aspects relating to proposed applications, it is not the role of the executive to give rulings interpreting the Corporations Law. Further, the executive can only consult with and counsel parties prior to the appointment of a sitting Panel of three members.

The executive make careful notes of discussions with advisers in the pre-application stages and inform advisers that anything they disclose to the Panel executive at this point will be communicated to the sitting Panel if an application eventuates.

<b>Name</b>	<b>Title</b>	<b>Organisation</b>
George Durbridge	Counsel	Dept of Treasury (ex-ASIC)
Nigel Morris	Director	Dept of Treasury (ex-ASIC)
Nicole Calleja	Legal secondee	Arthur Robinson & Hedderwicks (Jan 2000 – Jan 2001)
Darren MacKenzie	Legal secondee	Freehill Hollingdale & Page (Oct 2000 – May 2001)

## **CONSTITUTING A PANEL**

The first step in the process of constituting a Panel involves the executive making inquiries of the applicant regarding the legal and financial advisers, the auditors and any major financiers of the parties, where these are known to the applicant. We also ask potential members if they are aware of possible conflicts.

The substantive (or acting) President uses this information to select potential members who will not have a material conflict, who are available, and who between them have relevant qualifications and expertise.<sup>3</sup>

To ensure that the members of a sitting Panel are in fact free from any material conflict or bias which would prevent them from sitting, they must consider their personal and professional interests (pecuniary or otherwise) in relation to the matter and complete a declaration of interests.

The substantive President then considers the materiality of the interests declared. If the interest is immaterial or indirect and will not prevent the member from acting impartially in relation to the matter, the President will appoint the member, if not another member will be approached.

Parties are also provided with a copy of each member's declaration of interests and may raise any issues or objections that they have in relation to the appointment of any Panel member with the executive. These issues are communicated to the President, who makes the final decision. Parties have not objected to the appointment of any member since the CLERP amendments came into effect.<sup>4</sup>

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<sup>3</sup> The President appoints review Panels from the same pool of people, using the same process. That system may change in future, if there is scope to set aside some members as senior members, dedicated to review work. However, the legislation makes no provision for a separate class of senior members, like the Presidential members of the AAT. At present, none of the members has been appointed on the basis that they will specialise in reviews, even informally.

<sup>4</sup> That is, since recourse to the courts has ceased. Pre-CLERP challenges to the constitution of a Panel were *de rigueur*, eg *Precision Data Holdings Ltd v Wills, Adler and*

## THE APPLICATION

An application needs to deal with the circumstances to which it relates and any proposed declarations and orders in sufficient detail to make it clear that:

- (a) the Panel has jurisdiction to conduct the proceedings and make the declarations and orders;
- (b) there is a prospect of the Panel being satisfied on credible evidence of the existence of the facts alleged;
- (c) those facts are sensibly related to control of a company, an acquisition of a substantial interest in a company or a contravention of Chapter 6, 6A, 6B or 6C; and
- (d) the facts alleged are unacceptable within the meaning of section 657A (ie in the light of policy considerations mentioned in that section or otherwise relevant to the policy of Chapter 6).

The most effective applications bring these elements together and argue that relevant facts exist, that they constitute circumstances falling within one of the paragraphs of section 602 and that they relate to control of a company, or to the acquisition of a substantial interest in a company.

However, in most applications the legal issues tend to receive too much attention at the expense of factual and policy issues. Paragraph 657A(2)(b) of the Corporations Law provides that unacceptable circumstances may result from a contravention of Chapter 6, 6A, 6B or 6C. There are two elements here: the contravention and the unacceptable circumstances. It does not follow automatically from a finding that a section has been contravened that unacceptable circumstances resulted.

Applicants sometimes assume that the Panel cannot or should not take views on legal issues, particularly as provision has been made in section 659A of the Corporations Law so that the Panel may refer issues of law to the courts. On the contrary, the Panel generally resolves issues of law which arise from applications and proceedings, and does not refer them to the courts.

Finally it is not sufficient to set out pleadings in an application, on the basis that the evidence can be given at a conference. The decision whether to proceed may be taken on the application alone and there may be no conference, even if the Panel decides to conduct proceedings.<sup>5</sup>

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*Jooste* (1991) 173 CLR 167 and *CP Ventures Pty Ltd v Simon McKeon as President of the Corporations and Securities Panel* [1999] FCA 1272.

<sup>5</sup> There have been 20 applications made since 13 March 2000 and only 2 conferences have been held.

## WHETHER TO PROCEED

Regulation 20 of the ASIC Act Regulations demands that the sitting Panel consider the application and decide whether it will commence proceedings, but gives no guidance as to the exercise of this discretion. Generally, if it would be futile to undertake proceedings, the Panel can cut the process short at this point. Examples are where the relief sought is beyond power, where the relevant matter is being dealt with by a court or where the application discloses no ground for intervention.

Once a sitting Panel has decided whether or not to proceed with a matter it must inform ASIC and each company and person to whom the application relates. If it decides not to proceed, it must provide each of them with the reasons for the decision not to proceed (ASIC Regulations 20 and 21).

## THE BRIEF

Once the Panel decides to commence proceedings it must issue a document called a brief describing the matters to be examined in the proceedings and the matters to be addressed in submissions (ASIC Regulation 22).

The brief is drafted by the executive, and settled with Panel members before being sent to the parties. It is intended to assist the parties in deciding how to address the issues in their written submissions.<sup>6</sup> As the brief is issued at an early stage in the proceedings, it normally raises all of the issues in the application. If the Panel has time to review the application fully before issuing a brief, it may decide not to deal with some of issues set out in the application.

## TIME TO RESPOND

ASIC Regulation 13 requires the Panel to ensure that any proceedings it conducts are:

- (a) as **fair** and **reasonable**; and
  - (b) conducted with as **little formality**; and
  - (c) conducted in as **timely** a manner;
- as the requirements of ... [the legislation pertaining to the Panel] and a proper consideration of the matters before the Panel, permit...'

It is implicit in the policy of this regulation that the Panel may allow much shorter periods for responses to submissions, or limit the scope of submissions more narrowly than another body which does not have the same legislative time imperatives.

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<sup>6</sup> Panel Rule 10.1 provides that Panel proceedings are to be primarily determined on the basis of written submissions: see [www.takeovers.gov.au/Rules/rules.htm](http://www.takeovers.gov.au/Rules/rules.htm)

In general parties are given three days to respond to a brief which concerns an initial application for a declaration or order (other than an interim order); and one day to respond to a brief which concerns an application for an interim order, a request for a review of an ASIC or Panel decision, or a submission other than an initial application.

Less time is allowed for interim orders because they are typically urgent and therefore need to be dealt with quickly. In relation to requests for a review of an ASIC or Panel decision, much of the material will be able to be accessed immediately and additional submissions are often unnecessary, or if necessary can be very brief.

Similarly, in respect of submissions other than an initial application, the Panel (as required by ASIC subregulation 28(3) and in the interests of natural justice) allows each party a short period to make one submission in response to the facts and arguments raised in the other parties' submissions. The Panel may allow more or less time, however, depending upon the legal and commercial issues involved, the time at the Panel's disposal, difficulties in obtaining the necessary information and other relevant matters.

## **SUBMISSIONS - CONTENT AND PROCESS**

After submissions are received, they are reviewed by the Panel. At this stage the Panel may request that the executive go back to the parties and request additional information, documents or further submissions. Generally it is at this stage that it becomes apparent whether or not a conference will be necessary to resolve the dispute.

All the comments above regarding applications are also applicable to submissions. The most effective way to draft a submission in support of an application is to argue that the relevant facts exist, they constitute circumstances falling within one of the paragraphs of section 602 (or otherwise relevant to the policy of Chapter 6) and they relate to control of a company, or to the acquisition of a substantial interest in a company or a contravention of Chapter 6. To rebut an application, argue that one of those elements is missing, or that the Panel does not have jurisdiction.

Again, any evidence should be raised in the submissions not saved for a conference which may not eventuate.

## **CONFERENCES – WHEN, WHY AND POWERS**

The Panel may conduct a conference to clarify matters arising from the application, submissions or other documents, to resolve inconsistencies and otherwise to inform itself (ASIC Regulation 35). The conference is taken

to be part of the proceedings and ASIC subregulation 38(3) requires that a transcript must be made.

The Panel has significant powers at a conference, including the power to take evidence on oath, subpoena witnesses, examine witnesses or subpoena documents. However, ASIC subregulation 16(2) provides that the rules of evidence do not apply to Panel proceedings. Although the rules of evidence do not apply, the rules of procedural fairness do apply to the extent that they are not inconsistent with the legislation applicable to the Panel.

## **REPRESENTATION**

Parties may be accompanied and advised at a Panel conference by anyone. They may be represented by their commercial solicitors and financial advisers who have been involved in the transaction. In fact Panel Rule 11 specifies that oral and written submissions to the Panel can only be made by persons who have taken direct part in the relevant transactions.

A party may not be represented in Panel proceedings by a lawyer or other advocate without the leave of the Panel. Leave will typically be given only for specific purposes or where special skills are required, such as arguing point of law or examining a witness. While Rule 11 expressly includes the solicitors advising the parties it would not include barristers unless they have been advising the parties throughout the transaction and have taken direct part in the relevant transactions.

## **CONFIDENTIALITY**

The Panel has broad powers to control the dissemination of information amongst parties to a Panel proceeding (section 190 of the ASIC Act). The Panel is required to keep confidential information it obtains in the course of performing its functions (sections 127 & 186 of the ASIC Act). However, section 127 of the ASIC Act confers upon the Panel discretionary powers to disclose confidential information.

For natural justice reasons, all parties generally have access to all submissions and other papers submitted to the Panel and may be present throughout any conference. In order to comply with section 127 of the ASIC Act and to support maximum candour in disclosures and submissions, the Panel requires parties to undertake to respect the confidentiality of information disclosed in Panel proceedings.

The Panel may also restrict or prevent access to submissions or evidence given to the Panel by, for example, not allowing some parties to view certain documents or submissions, or only allowing their advisers to do so. This type of information is generally information which the relevant party would otherwise be under no legal (or continuous disclosure) obligation to

disclose and may include financial projections, minutes of board meetings, board presentations, or trade secrets or processes.

This can be useful in situations where, for example, there is a dispute regarding the disclosure of the intentions of a bidder. The Panel could ask for access to commercially sensitive information presented to the board of a bidder prior to the board resolving to proceed with a hostile takeover, in order to satisfy itself that the intentions of the bidder have been adequately disclosed. However, there will always be a risk that the party whose access to information is thus restricted will challenge the relevant decision of the Panel on the ground that they were denied procedural fairness.

## **POST-MORTEM**

The executive conduct feedback sessions with practitioners after a matter has concluded. Overall the feedback has been positive and criticism has been constructive.

Generally, parties are impressed with the Panel as an alternative to the courts, the timeliness of its decisions and the quality of its reasons. Parties have in most cases been satisfied with the outcomes achieved by the Panel. Even parties whose application has been rejected are generally content with the treatment of their application by the Panel.

Perhaps the most encouraging comment that has been made so far is that the new regime has fostered a perception amongst bidders and their advisers that dispatch of a bidder's statement is unlikely to be restrained, particularly if a party is willing to be reasonable and accommodate the key concerns of the target. This is seen as a huge improvement because in the past there was always a perceived risk that a judge (usually one lacking in takeovers experience) may make an arbitrary decision to restrain dispatch of the bidder's statement.

Parties' criticism has been directed at the process rather than the outcome and a number of sensible changes suggested by parties have been, to varying degrees, implemented.

## **PROCESS FAVOURS APPLICANTS**

A number of practitioners have suggested that the process is skewed in favour of the applicant because applicants control the timing of the application and by filing the application as late as possible cause significant hardship for the respondent. This advantage is amplified by the fact that applicants have two opportunities to put their case, first in the application and again in response to the brief. In response to this complaint, the Panel is beginning to direct questions in the brief to particular parties so that generally applicants are asked only to provide more evidence or expand on

factual details whereas the questions directed to the respondent are much more wide ranging. The Panel is also becoming increasingly wary of late applications.

### **TRANSPARENCY**

Some parties are uncomfortable with matters being dealt with “on the papers” and would like a conference to be held in every matter so that they can see the process and have an opportunity to ensure they are communicating their points to the Panel members effectively. The need for a conference will continue to be reviewed on the basis of the particular facts of each matter. The expense and logistics of conducting conferences will always be an issue for the Panel, especially since Panels are comprised of members in a number of different states and the parties and their advisers are similarly diversely situated. However, there are alternatives, such as video-conferencing that may enable conferences to be conducted more frequently.

### **TIMING**

Another common remark is that proceedings in some cases have been too fast, and parties consider that they have not had an adequate opportunity to respond to the issues identified in the brief or the other parties’ submissions. At this stage there are no plans to change Panel Rule 9.8 which sets out the time periods for responses.<sup>7</sup> However, the Panel will be carefully monitoring situations in which parties press for these time periods to be shortened (such as where there has been a late application).

### **NO DECLARATIONS**

Parties have observed that there have been no declarations of unacceptable circumstances since the new regime came into effect on 13 March 2000, and that this is not necessarily the wrong approach as the Panel just seems to be following the London model (ie extracting undertakings and using public censure in the reasons and press releases to shame parties who do not do what is expected of them).<sup>8</sup>

There is no evidence that the Panel’s tendency to accept undertakings rather than make declarations has led to negative perceptions about the Panel or a lowering of standards in relation to takeover documentation. However, it has arguably elevated the threshold for a declaration of unacceptable circumstances (which is not intended to apportion blame) back up to the level of unacceptable conduct or

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<sup>7</sup> That is, three days to respond to a brief regarding an application for a declaration or order and one day for a brief which concerns an application for an interim order, a request for a review of an ASIC or Panel decision, or a submission other than an initial application.

<sup>8</sup> The undertakings given to the Panel to date usually involve the dispatch of a supplementary statement containing additional information or withdrawing or correcting inaccurate information.

an unacceptable acquisition, which was the threshold under the previous regime and which did contain an element of opprobrium.

### **REPRESENTATIVE SPREAD**

Parties have also suggested that there ought to be a more representative spread of members (ie more solicitors and merchant bankers from Melbourne and Sydney).

### **REFERENCES**

The reasons for decisions, Panel rules, media releases, published policies and other materials are posted on the website at [www.takeovers.gov.au](http://www.takeovers.gov.au).