

## **REPLACEMENT EXPLANATORY STATEMENT**

### **Issued by authority of the Takeovers Panel**

*Australian Securities and Investments Commission Act 2001*

*Takeovers Panel Procedural Rules 2020*

Section 195 of the *Australian Securities and Investments Commission Act 2001* (the **ASIC Act**) provides that the Takeovers Panel may determine the procedural rules to be followed in Panel proceedings subject to the requirements of:

- Part 10 Division 3 of the ASIC Act
- the *Australian Securities and Investments Commission Regulations 2001* (the **ASIC Regulations**) and
- the rules of procedural fairness, to the extent that they are not inconsistent with the ASIC Act or the ASIC Regulations.

The *Takeovers Panel Procedural Rules 2020* (the **Rules**) set out the procedures the Panel adopts in the exercise of its functions and powers in accordance with the ASIC Act, the ASIC Regulations and procedural fairness. The Rules do not confer any powers on the Panel beyond those conferred by the ASIC Act and the ASIC Regulations.

The purpose of the Rules is to remake and improve the operation of the *Procedural Rules to be followed in Panel Proceedings (made on 12 April 2010) (F2010L00948)* (the **Sunsetting Rules**) before they sunset. Under the *Legislation Act 2003*, instruments such as the Sunsetting Rules automatically cease to have effect, or ‘sunset’ after 10 years, unless further action is taken to extend their operation, such as remaking the instrument.

The Sunsetting Rules were originally due to sunset on 1 October 2020. However, a six month deferral was granted under the *Coronavirus Economic Response Package (Deferral of Sunsetting—Treasury Portfolio Instruments) Determination 2020 (F2020L00895)* on 8 July 2020. The Sunsetting Rules are now due to sunset on 1 April 2021.

As with the Sunsetting Rules, the Rules set out the procedure to be followed in Panel proceedings. The objectives of the Rules are to promote timely and cost-effective completion of matters before the Panel, not unnecessarily delaying commercial transactions, procedural fairness and obtaining the best available information.

The Rules apply unless the Panel as constituted in relation to a particular matter determines or directs otherwise.

The Rules remake and simplify the Sunsetting Rules by removing the ‘guidance’ (which currently appears as notes under the Sunsetting Rules) from the ‘rules’ themselves. The ‘guidance’ has been incorporated into a separate Procedural Guidelines document which the Takeovers Panel plans to release when the Rules become effective. The Rules also improve the Sunsetting Rules by simplifying language and restructuring provisions for ease of navigation. These changes do not affect the substantive meaning or operation of the provisions.

On 2 October 2020, the Takeovers Panel released the exposure draft of the Rules for public comment. The exposure draft was published on the Takeovers Panel’s website ([www.takeovers.gov.au](http://www.takeovers.gov.au)) and comments from interested persons were sought by 23 October 2020.

The Takeovers Panel received 3 submissions in response. Consistent with the Takeovers Panel's published policy on responding to submissions, the Takeovers Panel has prepared a Public Consultation Response Statement which sets out the Takeovers Panel's response to the public consultation process and its conclusions on the main comments received from respondents. A copy of this paper will be available on the Takeovers Panel's website.

In addition to the formal consultation on the Rules, parties are always invited to discuss a completed matter with the Panel Executive and a Panel member who was not involved in the matter to discuss the conduct of the proceedings and Panel processes. Feedback received in these meetings helps the Panel develop its processes and has been considered in remaking the Rules.

Details of the Rules are set out in [Attachment A](#).

The Rules are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Rules commence on 1 April 2021.

### **Regulation impact assessment**

Prior to the making of the Rules and in accordance with the Office of Best Practice Regulation's Guidance Note on sunseting instruments, the Takeovers Panel self-assessed that the Sunseting Rules were operating effectively and efficiently, and therefore a Regulation Impact Statement was not required. This assessment was informed by the public consultation on the exposure draft Rules.

### **Statement of compatibility with human rights**

A statement of Compatibility with Human Rights is set out in [Attachment B](#).

**Details of the Takeovers Panel Procedural Rules 2020**

**Part 1 – Preliminary**

Rule 1 provides that the title of the instrument is the *Takeovers Panel Procedural Rules 2020* (the **Rules**).

Rule 2 provides for the Rules to commence on 1 April 2021.

Rule 3 provides that the Rules are made under the *Australian Securities and Investments Act 2001*.

Rule 4 provides that the *Procedural Rules to be followed in Panel Proceedings (made on 12 April 2010) (F2010L00948)* (the **Previous Rules**) are repealed but continue to apply to an application made to the Panel before the Rules come into effect.

Rule 5 sets out the definitions which apply to the Rules.

**Part 2 – Overview**

Rule 6 sets out the objectives of the Rules, which is consistent with regulation 13 of the ASIC Regulations in relation to the objects of Panel procedures.

Rule 7 provides that the Panel has control over the entire proceedings and that the Rules apply unless the Panel as constituted in relation to a particular matter determines or directs otherwise. Rule 7(4) requires parties (in similar terms to Previous Rule 1.2.3) to cooperate, where necessary, with other parties in good faith for the purposes of complying with a Panel direction. If this applies, parties should act as if they had agreed to negotiate in good faith to achieve that purpose.

Rule 8 provides that from time to time the Panel may publish guidelines to assist parties and advisers to understand and apply the Rules.

**Part 3 – Documents**

Rule 9 sets out the requirements regarding the form of documents intended for the Panel.

Rule 10 sets out details of the persons to whom documents in proceedings must be provided. Previous Rule 2.2.2 provided that an application must be provided to ASIC and any person identified in the application as a potentially interested person. This has been replaced by Rule 10 which in Rule 10(3) provides that an application under section 657C of the *Corporations Act 2001* (**Corporations Act**) must be provided by the applicant to ASIC and, using the applicant's reasonable endeavours, any person identified in the application as an interested person. It is in the interests of the applicant to use reasonable endeavours to provide the application to identified interested persons, as the Panel may otherwise be unable to make the declaration or orders requested due to the requirements of procedural fairness and/or sections 657A(4)(a) or 657D(1)(a) of the Corporations Act.

Rule 11 sets out when information or documents may be withheld from a party. Generally, all material provided to the Panel must be given to ASIC and all parties (Rule 10(6)).

Rule 11(1) provides that a person wishing to withhold information from a party (for confidentiality or other reasons) should make that request before providing the

information. This allows the Panel to consider whether and how a request to withhold information or documents can occur consistently with the requirements of procedural fairness.

Rule 11(2) requires a party claiming client legal privilege to provide certain information so that other parties and the Panel are made aware that material said to be privileged is being withheld.

#### Part 4 – Applications

Rules 12 to 14 set out the requirements for making a valid application to the Panel. Specifically:

- Rule 12 sets out the requirements for making an application under section 657C of the Corporations Act for a declaration of unacceptable circumstances or an order.
- Rule 13 sets out the requirements for making an application under section 656A of the Corporations Act for review of an ASIC decision.
- Rule 14 sets out the requirements for making an application under section 657EA of the Corporations Act for review of a Panel decision.

Rule 15 sets out the process for having an application withdrawn. This requires the applicant to seek the consent of the Panel (or before the Panel is appointed, the President) to withdraw the application. If the dispute is resolved the Panel will generally give consent to withdraw.

#### Part 5 – Parties

Rule 16 sets out how a person can become a party to proceedings (including by providing a Notice to Become a Party to the Panel). Rule 16(2) provides that a person not identified in an application as an interested person who wishes to become a party to the proceedings should explain why they may be a potentially interested person or why they may be able to assist the Panel.

The factors the Panel will consider in deciding to accept as a party a person who is not an interested person will depend on the circumstances but may include whether the person has relevant information or can provide probative material that is different from other parties or whether the person would have standing to make an application in relation to the matter. The Panel may also have regard to the time at which the request to become a party has been made (the Panel is more likely to consider accepting the person as a party if the request is made in the early stages of the proceedings). The Panel would also consider submissions from the parties to the proceedings in relation to the request including any concerns raised about the participation of the person making the request.

Rule 17 sets out the requirements relating to legal representation in Panel proceedings. The consent of the Panel is required under section 194 of the ASIC Act before a party can be legally represented in Panel proceedings.

#### Part 6 – Confidentiality and Publicity

This part sets out the Panel's rules to protect confidential information disclosed in the course of Panel proceedings and to prevent issues before the Panel being publicly debated during the course of Panel proceedings. These rules assist the Panel to, among other things, resolve disputes as quickly and efficiently as possible (consistent with the Panel's duty to act "in as timely a manner" as the legislation and a proper

consideration of matters permits) (Rule 6 and regulations 13 and 16(2) of the ASIC Regulations).

Rule 18 sets out an obligation not to use or disclose any confidential information provided to a person in proceedings. ASIC is subject to detailed confidentiality provisions in section 127 of the ASIC Act, which includes information received in Panel proceedings. Therefore, ASIC is exempted from the requirements regarding confidential information in Rule 18 to avoid inconsistency with its obligations under section 127 of the ASIC Act. These provisions in section 127 are also applied to the Panel under section 186 of the ASIC Act. One of the purposes of Rule 18 is to ensure that the Panel complies with section 186 of the ASIC Act.

Rule 19 sets out an obligation on parties not to canvass in any media any issue that is before the Panel until the proceedings are determined or the time period to review the Panel's decision has expired (whichever is longer). ASIC is also exempted from the media canvassing rules to avoid inconsistency with ASIC's statutory obligations, noting that section 657H of the Corporations Act allows ASIC to publish a "*report, statement or notice*" in relation to an application it has made to the Panel. It is not expected that ASIC would engage in conduct contrary to the media canvassing rules unless ASIC considered that was required in the proper performance of its statutory duties (for example, in taking action in relation to matters connected with those before the Panel).

#### Part 7 – Material before the Panel

Rule 20 provides that a party (other than the applicant) may make preliminary submissions about whether the Panel should conduct proceedings in relation to an application. A party is not entitled to make rebuttal submissions to a preliminary submission unless the Panel agrees to accept such submissions. The Panel may also accept preliminary submissions from a person that is not a party.

It is open to parties and non-parties to request, under Rule 7, that the Panel (or before the Panel is appointed, the President) receive an "out of process" submission outside the process described in the Rules. Depending on the nature of the submission, the Panel or the President (as relevant) may seek submissions from other parties as to whether the Panel or President (as relevant) should receive the out of process submission (including rebuttal submissions to a preliminary submission or a preliminary submission from a non-party).

Rule 21 provides that submissions in response to a brief issued by the Panel or any other requests by the Panel do not need to be in a particular form, other than to comply with the requirements regarding the form of documents as set out in Rule 9 and any directions given by the Panel.

Rule 22 details material upon which the Panel can act. Rule 22(1) provides that the Panel is not bound by the rules of evidence and may act on any logically probative material. Rule 22(4) provides that a party may request the Panel to issue a summons to a person to appear before the Panel to give evidence. The Panel has the power to summons a person to give evidence or to produce specified documents under section 192 of the ASIC Act.

Rule 23 sets out that the Panel may conduct a conference at the request of a party (or of its own volition) and what information a party should provide in its request. Panel proceedings are generally determined on written submissions. However, the Panel has the power to conduct a conference (for all or part of the Panel proceedings) under

regulations 35 to 41 of the ASIC Regulations. A Panel may consider convening a conference to clarify matters arising from documents, resolve inconsistent statements or otherwise assist the Panel to inform itself.

#### Part 8 – Decision

Rule 24 specifies the date of a decision of the Panel.

#### Part 9 – Court referrals

Rule 25 provides that a party may request that the Panel refer a question of law to the Court. The Rule also sets out the requirements of that request.

Rule 26 sets out the procedures for conducting a referral by the Court to the Panel of a decision of the Panel.

#### Part 10 – Panel and Executive

Rule 27 sets out procedures in relation to a potential conflict of interest of a member of the Panel.

Rule 28 sets out the role of the Panel Executive.

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

**Takeovers Panel Procedural Rules 2020**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Legislative Instrument**

The Legislative Instrument sets out the procedures the Panel adopts in the exercise of its functions and powers in accordance with the *Australian Securities and Investments Commission Act 2001* (the **ASIC Act**), the *Australian Securities and Investments Commission Regulations 2001* (the **ASIC Regulations**) and procedural fairness. The Legislative Instrument does not confer any powers on the Panel beyond those conferred by the ASIC Act and the ASIC Regulations.

The objectives of the Legislative Instrument are to promote timely and cost-effective completion of matters before the Panel, not unnecessarily delaying commercial transactions, procedural fairness and obtaining the best available information.

**Human rights implications**

This Legislative Instrument does not engage any of the applicable rights or freedoms.

**Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.