



Australian Government

Takeovers Panel

Takeovers Panel Procedural Rules 2020

The Takeovers Panel makes the following Rules.

Dated 3 December 2020

Alex Cartel
President
Takeovers Panel

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Part 1 Preliminary

1 Name

These Rules are the *Takeovers Panel Procedural Rules 2020*.

2 Commencement

These Rules commence on 1 April 2021.

3 Authority

These Rules are made under section 195 of the ASIC Act.

4 Repeal

- (1) The *Procedural Rules to be followed in Panel Proceedings (made on 12 April 2010) (F2010L00948)* are repealed.
- (2) The repeal of the *Procedural Rules to be followed in Panel Proceedings (made on 12 April 2010) (F2010L00948)* by this section does not affect the continuing operation of those rules to an application made to the Takeovers Panel before these Rules take effect.

5 Definitions

In these Rules:

application means an application:

- (a) under section 657C of the Corporations Act for a declaration of unacceptable circumstances or an order
- (b) under section 657EA of the Corporations Act for a review of a Panel decision or
- (c) under section 656A of the Corporations Act for a review of an ASIC decision.

ASIC means the Australian Securities and Investments Commission.

ASIC Act means the *Australian Securities and Investments Commission Act 2001* (Cth).

ASIC Regulations means the *Australian Securities and Investments Commission Regulations 2001* (Cth).

ASX means the Australian Securities Exchange.

case stated means a statement of the question of law that the Court is asked to answer and any facts relevant to the Court's consideration of that question.

Corporations Act means the *Corporations Act 2001* (Cth).

Corporations Regulations means the *Corporations Regulations 2001* (Cth).

Court has the meaning given in section 58AA of the Corporations Act.

declaration means a declaration of unacceptable circumstances made under section 657A of the Corporations Act.

Executive means any or all of the staff of the Commonwealth Department of Treasury, and secondees, working for the Takeovers Panel.

final orders means orders made under section 657D of the Corporations Act.

guidelines means the guidelines to these Rules as published by the Takeovers Panel from time to time.

interested person includes:

- (a) a person entitled to be heard by the Panel before it makes a decision sought by the application
- (b) a person to whom a proposed declaration relates or
- (c) a person to whom a proposed order would be directed.

interim orders means orders made under section 657E of the Corporations Act.

matter means a particular matter in which the Panel performs or exercises its functions or powers.

Notice to Become a Party means a notice in the form approved by the Panel by which a person seeks to become a party.

Note: The form of Notice to Become a Party is available on the Takeovers Panel's website (<https://www.takeovers.gov.au/>).

orders means final orders or interim orders.

Panel means the sitting Panel constituted under section 184 of the ASIC Act in relation to a matter.

party means, in relation to proceedings:

- (a) an applicant
- (b) ASIC
- (c) any person who provides a Notice to Become a Party which is accepted by the Panel
- (d) any person deemed to be a party by the Panel under Rule 16(6) and
- (e) any person who is a party within the meaning of section 657EA(1)(a) of the Corporations Act.

President means the substantive President of the Takeovers Panel appointed under section 173 of the ASIC Act and includes, where relevant, an Acting President appointed under section 182 of the ASIC Act.

proceedings means the proceedings commenced upon receipt by the Executive of an application in accordance with Rule 10(2).

Related Bodies Corporate has the meaning given in section 50 of the Corporations Act.

Representatives means the directors, officers, employees, agents, contractors, service providers and advisers of a person or party (as the context requires) or its Related Bodies Corporate, and any other person acting on behalf of the person or party.

Takeovers Panel means the Panel established under section 171 of the *Australian Securities and Investments Commission Act 1989* (Cth) and continued in existence by section 261 of the ASIC Act.

Part 2 Overview

6 Objectives

- (1) The objectives of these Rules are to promote:
 - (a) timely and cost-effective completion of matters before the Panel
 - (b) not unnecessarily delaying commercial transactions
 - (c) procedural fairness and
 - (d) obtaining the best available information.
- (2) Given the objectives of these Rules, the Panel:
 - (a) generally makes decisions on written submissions and materials
 - (b) prefers to conduct proceedings in private
 - (c) prefers to give all parties access to all material before it in proceedings and
 - (d) keeps time limits as short as is reasonable and consistent with procedural fairness.
- (3) These Rules are to be interpreted:
 - (a) according to their spirit
 - (b) by looking beyond form to substance and
 - (c) in a way that best promotes the objectives in Rule 6(1).

7 Application of Rules

- (1) These Rules apply in proceedings of the Takeovers Panel unless the Panel as constituted in relation to a particular matter determines or directs otherwise.
- (2) The Panel:
 - (a) has control over the entire proceedings and
 - (b) may give directions from time to time concerning the proceedings, including the application of these Rules.

Note: The Panel has the power to make directions under regulation 16(1) of the ASIC Regulations.
- (3) If a direction by the Panel is inconsistent with a Rule, the direction prevails to the extent of the inconsistency. The Panel (or before the Panel has been appointed, the President) may excuse any failure by a person to comply with a Rule.
- (4) A party must comply with any direction of the Panel and, where necessary, cooperate with other parties in good faith for the purposes of complying with any direction.
- (5) A party may request in writing that the Panel give a direction.

8 Guidelines to Rules

From time to time the Takeovers Panel may publish guidelines to assist parties and advisers to understand and apply these Rules.

Note: Any guidelines are available on the Takeovers Panel's website (<https://www.takeovers.gov.au/>).

Part 3 Documents

9 Form

- (1) Any document intended for the Panel must:
 - (a) be in writing
 - (b) be in a form (if any) required by the Panel
 - (c) include any content required by these Rules
 - (d) be succinct, on point and avoid repetition (including of previously submitted material)
 - (e) be expressed simply and clearly
 - (f) be accompanied by any relevant material including any market announcements or documents lodged with ASIC that are referred to in the document (unless already provided to the Panel) and
 - (g) identify the matter, the party, the person providing the document and the type of document (e.g., submissions on brief).
- (2) If a document does not comply with this Rule or is otherwise inaccessible, the Panel (or before the Panel is appointed, the President) may direct that a further document be provided before being considered.

10 Provision of documents

- (1) All documents in proceedings must be provided to the Executive. The Executive will provide documents to the Panel or the President as applicable.
- (2) A document is provided to the Panel when it is received by the Executive.

Note: Further detail regarding the provision of documents (including the lodgement of applications) is set out in the guidelines.
- (3) An application under section 657C of the Corporations Act for a declaration of unacceptable circumstances or an order 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.
- (4) An application under section 657EA of the Corporations Act seeking review of a decision of the Panel must be provided by the applicant to ASIC and each party to the proceedings in which the decision was made.
- (5) An application under section 656A of the Corporations Act seeking review of a decision of ASIC must be provided by the applicant to ASIC, the entity to which the decision relates or would have related and each other party who, to the knowledge of the applicant, made submissions to ASIC in relation to that decision.
- (6) Any other document (including a Notice to Become a Party, any submission or request) in connection with proceedings must be provided to ASIC and each other party to the proceedings, except as provided in Rule 11 and Rule 27(3).

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- (7) A party providing a document to another person should inform the Executive as soon as possible if it appears that the other person has not received the document.
 - (8) A person required to provide a document, or who has accepted an invitation to make a submission, must do so by the time specified by the Panel (or before the Panel is appointed, the President).
 - (9) The Panel (or before the Panel is appointed, the President) may consider a request for an extension of time to provide a document or make a submission. The person seeking the extension should:
 - (a) make the request as soon as possible after anticipating that the time specified by the Panel (or before the Panel is appointed, the President) does not give them sufficient time to respond
 - (b) explain why additional time is required and
 - (c) provide an estimate of the additional time required.

11 Withholding information or documents

- (1) A person may request the Panel (or before the Panel is appointed, the President) to withhold information from a party (for confidentiality or other reasons). The person making the request should:
 - (a) make the request before the information is provided to the Panel or the President (as relevant)
 - (b) explain why the information needs to be withheld and
 - (c) include everything necessary for the Panel or the President (as relevant) to consider:
 - (i) any effect on procedural fairness and
 - (ii) any adverse effect to the person of providing the information.
- (2) A party that wishes to claim client legal privilege over advice given in a document (and that wishes to withhold that document or part of it) should identify:
 - (a) the holder of the privilege
 - (b) the circumstances in which the advice was given and
 - (c) the subject matter or question(s) to which the advice was directed.
- (3) A party that wishes to inquire whether an undertaking under section 201A of the ASIC Act might satisfy the Panel may contact the Executive if it wishes to provide a draft undertaking confidentially before circulating the draft to all parties.

Part 4 Applications

12 Application under section 657C

- (1) An application under section 657C of the Corporations Act for a declaration of unacceptable circumstances or an order does not need to be in a particular form but must (except as provided in Rule 12(2)):
 - (a) identify the company whose affairs are affected by the circumstances
 - (b) set out the relevant circumstances and the key reasons as to why those circumstances are alleged to be unacceptable
 - (c) state when the circumstances first arose (or where a precise date is unknown, a time period in which the circumstances first arose)
 - (d) provide details of any proceedings threatened or commenced in another forum which are directly or indirectly related to the circumstances
 - (e) state the interim orders or final orders sought
 - (f) identify interested persons
 - (g) where submissions to support the application are included, the submissions should not exceed 10 A4 pages in minimum 10 point font and
 - (h) be accompanied by a Notice to Become a Party (except where the applicant is ASIC).
- (2) A request under section 657D(3) of the Corporations Act for a variation, revocation or suspension of a final order or an application under section 657E(1)(b) of the Corporations Act for an interim order does not need to comply with Rules 12(1)(a) through (d) but must explain what is sought by the applicant and set out the submissions to support it.
- (3) If an application under section 657C of the Corporations Act does not comply with Rule 12(1), the Panel (or before the Panel is appointed, the President) may direct that an amended application be provided before being considered.

13 Application for review of ASIC decision

- (1) An application under section 656A of the Corporations Act for review of an ASIC decision must:
 - (a) explain how the applicant's interests are affected by the decision and, to the extent available, include a copy of:
 - (i) the application to ASIC
 - (ii) any relevant submissions received by ASIC
 - (iii) any instrument granted by ASIC and
 - (iv) any notice of the decision and any statement of grounds or reasons for the decision provided by ASIC
 - (b) where submissions to support the application are included, the submissions should not exceed 10 A4 pages in minimum 10 point font and

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- (c) be accompanied by a Notice to Become a Party.
 - (2) A review of a decision of ASIC is a *de novo* consideration on the merits, having regard to the information available at the time of the review.
 - (3) As soon as practicable after receipt of an application for review of an ASIC decision, ASIC must give the Panel and each party a statement of its findings of fact and reasons for its decision.
 - (4) If an application under section 656A of the Corporations Act does not comply with Rule 13(1), the Panel (or before the Panel is appointed, the President) may direct that an amended application be provided before being considered.

14 Application for review of Panel decision

- (1) An application under section 657EA of the Corporations Act for a review of a Panel decision does not need to be in a particular form, but must:
 - (a) identify the relevant decision of the Panel to which the review application relates
 - (b) where submissions to support the application are included, the submissions should not exceed 10 A4 pages in minimum 10 point font and
 - (c) be accompanied by a Notice to Become a Party (except where the applicant is ASIC).
- (2) A review of a decision of the Panel is a *de novo* consideration on the merits, having regard to the information available at the time of the review.
- (3) If the consent of the President for a review of a Panel decision is required under section 657EA(2) of the Corporations Act, the request must:
 - (a) be addressed to the President
 - (b) identify the relevant decision and
 - (c) contain enough information to allow a proper consideration of the effects of the decision and the reasons for review.

Note: Regulation 6.10.01 of the Corporations Regulations provides that an application for review of a decision of the Panel must not be made later than 2 business days after the day on which the decision was made.

- (4) If an application under section 657EA of the Corporations Act does not comply with Rule 14(1), the Panel (or before the Panel is appointed, the President) may direct that an amended application be provided before being considered.

15 Withdrawal of an application

An applicant may only withdraw its application with the consent of:

- (a) the Panel or
- (b) if the request for consent to withdraw is made before the appointment of a Panel, the President.

Part 5 Parties

16 Seeking to become a party

- (1) A person who would like to become a party to proceedings must provide the Panel with a Notice to Become a Party in which the person undertakes to comply with Rule 18 and Rule 19. This Rule does not apply to ASIC.
- (2) A person not identified in an application as an interested person who wishes to become a party to the proceedings should, when submitting a Notice to Become a Party, explain why they may be a potentially interested person or why they may be able to assist the Panel.
- (3) Unless otherwise determined by the Panel, a person does not become a party to proceedings until that person's Notice to Become a Party is accepted by the Panel.
- (4) The Panel will notify a person if the person's Notice to Become a Party is not accepted.
- (5) The Panel may withdraw its acceptance of a party's Notice to Become a Party if in the Panel's opinion:
 - (a) the person is not or is no longer an interested person in the matter
 - (b) the person is not a proper or necessary party to the proceedings or
 - (c) it is otherwise appropriate to do so.
- (6) The Panel may inform a person that the person is a party to proceedings if the Panel considers the person is an interested person and the person participates in the proceedings, notwithstanding that the person has not provided the Panel with a Notice to Become a Party. The Panel may subsequently inform the person that they are no longer deemed to be a party to proceedings if in the Panel's opinion:
 - (a) the person is not or is no longer an interested person in the matter
 - (b) the person is not a proper or necessary party to the proceedings or
 - (c) it is otherwise appropriate to do so.

17 Seeking legal representation

- (1) The form of request for the Panel's consent under section 194 of the ASIC Act to be legally represented in proceedings is set out in the Notice to Become a Party.
- (2) A party that wishes to be legally represented other than by its commercial lawyers should state that and explain why when requesting consent.

Part 6 Confidentiality and Publicity

18 Confidentiality

- (1) A person (whether or not a party) must not use or disclose any confidential information provided to it in proceedings, except:
 - (a) in the proceedings itself as permitted under these Rules or
 - (b) as required by law or the rules of a securities exchange.
- (2) Any communication from, and any document provided by, the Panel (or before the Panel is appointed, the President) is confidential information (including a communication or document provided for comment or which is marked as a draft) unless or until the Panel publishes such information.
- (3) A person may disclose confidential information to its Representatives to the extent that the relevant Representative needs that information for the purposes of the proceedings as permitted under these Rules.
- (4) A person provided with confidential information in proceedings must ensure that each of its Representatives who receives such information complies with Rule 18(1).
- (5) This Rule 18 does not apply to ASIC.

19 Publicity

- (1) A party must not directly or indirectly cause, participate in or assist the canvassing in any media of any issue that is before (or likely to be before) the Panel in proceedings:
 - (a) until the proceedings are determined or the time limit within which an application under section 657EA of the Corporations Act may be made for review of a Panel decision has expired, whichever is longer and
 - (b) if a request is made, or proposed to be made, to vary, revoke or suspend any final orders, from the time the person becomes aware of the request or proposed request until it is determined by the Panel.

For the purposes of Rule 19, *media* refers to a means of communication through which the subject information reaches or influences people widely, including (but not limited to): radio, television, newspapers, magazines, letters, the internet, emails, social media and online platforms.

- (2) Rule 19(1) does not apply to statements that, without discussing merits:
 - (a) identify the parties or the subject matter of the application or the broad nature of the unacceptable circumstances alleged or the orders sought or
 - (b) describe any decision of the proceedings,to the extent such matters have been disclosed publicly by the Panel.

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- (3) From the relevant time period in Rule 19(1)(a) or (b) until the Panel publishes its reasons for decision, a party must not directly or indirectly cause a decision of the Panel to be misrepresented in any media.
 - (4) A party must ensure that each of its Representatives complies with this Rule 19.
 - (5) This Rule 19 does not apply to ASIC.

Part 7 Material before the Panel

20 Preliminary submissions

- (1) A party may make preliminary submissions concerning whether the Panel should conduct proceedings in relation to an application, but is not entitled to make rebuttal submissions to a preliminary submission unless the Panel agrees to accept such submissions.
- (2) An applicant must not make preliminary submissions.
- (3) The Panel may accept preliminary submissions from a person that is not a party.

21 Submissions

- (1) Submissions in response to a brief issued by the Panel do not need to be in a particular form other than to comply with Rule 9 and any directions in the brief.
- (2) Submissions in response to any other requests by the Panel do not need to be in a particular form other than to comply with Rule 9 and any directions given by the Panel.

22 Evidence

- (1) The Panel is not bound by the rules of evidence and may act on any logically probative material.
- (2) A person who does not have personal knowledge of a matter included in a submission must make appropriate inquiries that the matter is true and not misleading.
- (3) A party may provide statements and documents to support any matter raised in an application or in submissions.
- (4) A party may request the Panel to issue a summons to a witness. The request should set out the matters to be dealt with in the witness's evidence. The Panel may direct the proposed witness to answer specific questions in writing before appearing before the Panel.

Note: The Panel may summons a person to give evidence or to produce specified documents under section 192 of the ASIC Act.

23 Conferences

- (1) The Panel may hold a conference (for all or part of the proceedings):
 - (a) at the request of a party or
 - (b) of its own volition.
- (2) A party requesting a conference should indicate the issues to be addressed, the persons to attend, the reasons why a conference is desirable and the estimated time it would take.

(3) A conference is held subject to any directions the Panel gives.

Part 8 Decision

24 Date of decision

A decision of the Panel is made on the date it is communicated to the parties in final form.

Part 9 Court referrals

25 Referral by Panel to Court

A party may request that the Panel refers a question of law arising in proceedings to the Court. A request should:

- (a) be accompanied by a draft of a case stated
- (b) explain how the question of law is relevant to a decision of the Panel in the proceedings and
- (c) indicate whether the requesting party is willing to give an undertaking in favour of the Panel to pay or reimburse on demand all costs of the Panel in the matter on a solicitor and own client basis.

26 Referral by Court to Takeovers Panel

A referral by a Court to the Takeovers Panel under section 657EB of the Corporations Act shall be conducted in the same manner as an application for review of a decision of the Panel under section 657EA of the Corporations Act, unless the Court directs otherwise.

Part 10 Panel and Executive

27 Conflict of interest

- (1) A party must notify the Executive as soon as possible after it becomes aware of an interest of a member of the Panel that:
 - (a) could conflict with the proper performance or exercise of that member's functions or powers in relation to a matter and
 - (b) it believes, on reasonable grounds, is not immaterial or indirect and will prevent the member from acting impartially in relation to the matter.
- (2) The notification must describe the interest and explain why both paragraphs (a) and (b) of Rule 27(1) are met.
- (3) Rule 10(6) does not apply to a party who gives notice of a conflict, unless the President directs otherwise.

28 Role of Executive

- (1) The Executive does not bind the Panel unless the context indicates otherwise.
- (2) The Executive is the point of contact for parties and other interested persons with the President or the Panel and, subject to Rule 28(1), acts with the authority of the President or the Panel in the conduct of the Panel's business.