

27 October 2020

Allan Bulman
Director, Takeovers Panel
Level 16, 530 Collins Street
MELBOURNE VIC 3000

By email: takeovers@takeovers.gov.au

Dear Mr Bulman,

Remaking of Procedural Rules

This submission is made by the Corporations Committee (**Committee**) of the Business Law Section of the Law Council of Australia in response to the Takeovers Panel's (**Panel**) consultation paper in relation to the proposed new Takeovers Panel Procedural Rules 2020 (Cth) (**New Rules**).

1. GENERAL OBSERVATION

The Committee shares the Panel's view that the existing *Takeovers Panel Procedural Rules 2010* (Cth) (**Existing Rules**) are operating efficiently, effectively, and (for the most part) without significant issues.

Comments and recommendations on points of detail in the New Rules follow.

2. DEFINITIONS

2.1. *Interested Person*

Paragraph (a) of the definition of "*Interested Person*" is "*a person entitled to be heard by the Panel before it makes a decision sought by the application*".

- (a) The Committee queries the utility of that limb of the definition, and whether it adds anything meaningful to paragraphs (b) or (c).
- (b) The breadth of the definition invites the applicant to send the application far and wide in purported compliance with the rule, which is not appropriate.
- (c) To the extent that broad distribution may prompt parties with a marginal interest to seek to be involved – it may unnecessarily prolong or complicate proceedings, with little or no benefit.

Recommendation: that paragraph (a) of the definition of "*Interested Person*" be removed.

2.2. *Notice to Become a Party*

The proposed definition of 'Notice to Become a Party' in the Rules currently reads "means a notice in the form by which a person seeks to become a party". This appears incomplete.

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Recommendation: to add '*prescribed by the Panel*' after "form".

2.3. *Spill meeting*

Limb (a) of the definition of '*spill meeting*' does not specifically include a spill motion under the entity's constitution: "*a meeting of members at which a resolution will be moved to remove a director under section 203D of the Corporations Act or appoint a director in place of a director removed under that section*".

Recommendation: include a reference to a spill motion under the entity's constitution.

3. **APPLICATIONS UNDER S.675C**

An application for a declaration of unacceptable circumstances (Rule 12(1)) does not require the applicant to provide transparency in relation to other proceedings on foot or anticipated in another forum (for example, a court).

Recommendation: include a requirement to disclose if there are other proceedings on foot or anticipated in another forum.

4. **SEEKING TO BECOME A PARTY**

4.1. *Notice to Become a Party*

Rule 16(3) only indicates that the Panel will notify a person if the person's Notice to Become a Party is not accepted. While it is implicit – it should also notify a person where their Notice is accepted.

Recommendation: Rule 16(3) should have a notification for acceptance or rejection of a Notice to Become a Party.

4.2. *Interested person*

Rule 16(6) gives the Panel the ability to appoint or remove an interested person as a "party" to proceedings.

It is unclear whether, by virtue of its status as a party, this may allow every interested person to seek to review a Panel decision as a party to the proceedings. While the Panel Rules may not determine the interpretation of section 657EA(1), they may influence it.

As noted at paragraph 3.2(b) of the Guidelines, only parties to the proceedings or ASIC are able to apply for a review of a Panel decision. Query whether this right should be limited to original or central parties to the proceedings.

Recommendation: The Panel should clarify the ability of "interested persons" to seek review, and consider whether all participants should be on an equal footing as "parties".

5. **CONFIDENTIALITY**

Rule 18(4) obliges a person to ensure that each of its Representatives who receive confidential information complies with Rule 18(1).

This does not allow for the possibility that the person has taken reasonable endeavours to alert their Representatives of this information and requires compliance, but, for reasons outside of their control or for some other unusual reason, the Representative has not received this alert.

Recommendation: Consider whether reasonable endeavours to procure compliance should be sufficient.

6. PUBLICITY AND ANNOUNCEMENTS

Rule 19 concerns the undertakings required by a party in relation to publicity and media canvassing.

6.1. *Location of undertakings*

The Committee agrees with the Panel that these undertakings are better placed in the Rules, rather than in the form of Notice of Appearance annexed to the Existing Rules.

6.2. *Panel Announcements – receipt of application*

There is a preference for less detail to be included in initial announcements by the Panel, made when an application is received. This is particularly the case where matters asserted as facts may be disputed and prejudicial. The allegations in the application are picked up by the media, and the parties do not have the ability to respond to them. The applicant's framing of the issue is captured in the public narrative, irrespective of the merits of the application.

Alternatively – if details of assertions in the application are to be included, there should be a reasonable opportunity for other parties to comment on those before an initial media release is published.

This may properly be the subject of Guidelines, rather than the New Rules.

Recommendation: That the Panel:

- (a) clarify the circumstances in which it will publish a media release, having regard to its confidentiality obligations under section 186 of the *Australian Securities and Investments Commission Act 2001* (Cth); and
- (b) limit the content of any such media release, particularly the recitation of allegations that are not established facts.

6.3. *Canvassing stakeholders*

Committee members noted that they had observed incidents of parties to Panel proceedings approaching stakeholders of other parties, to canvass matters directly with stakeholders that would be restricted by the media canvassing rules.

Recommendation: While there should not be an impediment under Panel rules or orders to normal activist activities, or normal shareholder engagement, it should not be possible to directly approach stakeholders regarding matters that could not be canvassed in the media.

7. PANEL GUIDELINES

7.1. *Preliminary submissions*

The Guidelines do not currently advise to whom preliminary submissions should be sent.

Recommendation: clarify that a preliminary submission should be sent to each person who received the application and anyone else who has participated since then.

7.2. *How long does the Panel process take?*

The Guidelines at paragraphs 6(c) and 6(d) allow the Panel a period of 1 - 2 weeks and 2 - 4 weeks respectively, to make certain decisions.

Recommendation: timeframes are more clearly articulated as a number of business days.

8. OTHER OBSERVATIONS AND RECOMMENDATIONS

8.1. *Hyperlinking*

The Committee notes the restrictions on content of legislative instruments, and accepts the necessity of deleting Notes that are within the Existing Rules.

However hyperlinking a copy of the documents would make the Rules and Guidelines more user-friendly and significantly enhance the ease in which users can cross-reference across the two documents.

Recommendation: where the New Rules are published on the Panel website - hyperlinking should be introduced between the Rules and the Guidelines, to improve compliance and ease of use.

8.2. *Online Hearings vs written submissions*

There is a diversity of views within the Panel as to whether online hearings would be beneficial to the swift resolution of matters before the Panel.

Many members commented that written submissions have been effective for distilling and dealing the issues at the heart of the controversy, efficiently and without undue burden on Panel members.

However, given the broader usage in 2020 of virtual meeting platforms, the Committee acknowledges that there may be circumstances in which an online hearing would be an effective supplement to written submissions to address a particular issue.

Recommendation: that the Panel should have a discretion to require parties to attend an online hearing, where appropriate. However, this should not be the typical path adopted, and in the normal course, parties should be kept to the discipline of confined written submissions.

Committee representatives would be happy to discuss any of the matters raised, or provide further detail. If you have any questions – please contact Chair of the Committee, Shannon Finch (shannonfinch@jonesday.com or 0428 894 002) or Committee member, Rodd Levy (rodd.levy@hsf.com or 0417 053 177)

Yours faithfully,



Greg Rodgers
Chair, Business Law Section