



AUSTRALIAN
SENATE

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

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14 April 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

CC: committeescrutiny@treasury.gov.au; chris.reside@treasury.gov.au


Dear Treasurer,

Takeovers Panel Procedural Rules 2020 [F2021L00131]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters.

Adequacy of explanatory materials

Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument.

The instrument provides the procedural rules to be followed by the Takeovers Panel in proceedings.

In the committee's view, the explanatory statement to the instrument is too general and brief to sufficiently explain the operation of the instrument. The lack of detail in the clause-by-clause analysis makes it particularly difficult for the committee to undertake its routine scrutiny of the instrument and has heightened the scrutiny concerns identified by the committee below. In addition, the statement of compatibility with human rights fails to identify that any rights may be engaged under the instrument, which, in the committee's view, is not an accurate representation of the instrument's measures which may impact on or limit common law rights in relation to trials.

The committee generally expects explanatory statements to fully explain the purpose and operation of each section of the relevant instrument. This accords with the requirements of paragraph 15J(2)(b) of the *Legislation Act 2003*, as well as the more general expectation that an explanatory statement will be sufficiently comprehensive as to assist with the interpretation of the law.

The committee would therefore appreciate your advice as to whether the explanatory statement to the instrument could be amended to include further information as to the purpose and operation of each section of the instrument, including the specific information identified in relevant sections of this correspondence.

Clarity of drafting

Scope of administrative powers

Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting is defective or unclear. In addition, Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes where instruments confer discretionary powers or functions on a person.

Subsection 7(4)

Subsection 7(4) of the instrument provides that 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. However, there is no guidance on the face of the instrument nor in the explanatory statement as to what may constitute cooperating with other parties in good faith, nor what the consequences may be for failing to do so or who has the discretion to determine whether parties have acted in good faith.

Subsection 10(3)

Subsection 10(3) of the instrument provides that an application under section 657C of the *Corporations Act 2001* for a declaration of unacceptable circumstances or an order must be provided by the applicant to the Australian Securities and Investments Commission (ASIC) and, using the applicant's reasonable endeavours, any person identified in the application as an interested person. However, there is no guidance on the face of the instrument nor in the explanatory statement as to what may constitute reasonable endeavours, nor what the consequences may be for failing to do so or who has the discretion to determine whether parties have made reasonable endeavours.

The committee is typically concerned with instruments which are not drafted clearly to the extent that this affects the meaning or interpretation of the instrument. Instruments and their explanatory statements should be clear and intelligible to all persons interested in or affected by them, not only those with particular knowledge or expertise. Key terms should be clearly defined to remove any potential confusion or misunderstanding.

The committee would therefore appreciate your advice as to:

- **what may constitute cooperating with other parties in good faith, the consequences for failing to do so, and who is empowered to determine whether parties have acted in good faith under subsection 7(4);**
- **whether subsection 7(4) of the instrument can be redrafted to provide greater clarity as to its operation, purpose and meaning (or, at a minimum, further clarifying detail can be set out in the explanatory statement);**
- **what may constitute reasonable endeavours, the consequences for failing to do so, and who is empowered to determine whether parties have made reasonable endeavours under subsection 10(3); and**
- **whether subsection 10(3) of the instrument can be redrafted to provide greater clarity as to its operation, purpose and meaning (or, at a minimum, further clarifying detail can be set out in the explanatory statement).**

Personal rights and liberties—procedural fairness (section 11)

Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including whether the instrument abrogates procedural fairness.

Subsection 11(1) of the instrument provides that a person may request the Panel to withhold information from a party for confidentiality or other reasons. Paragraph 11(1)(c) provides that the person making the request should include all of the information necessary for the Panel to consider any adverse effect to the person in providing the information to it.

The common law right to procedural fairness is underpinned by the fair hearing rule and the rule against bias. The fair hearing rule requires a person who may be adversely affected by a decision to be given an adequate opportunity to put their case before the decision is made.

The committee is concerned that section 11 of the instrument may limit procedural fairness for parties to the proceedings. As drafted, while certain information should be provided to the Panel, there does not appear to be any criteria as to what would constitute an acceptable reason for an application under section 11 to be granted. It is therefore unclear whether the Panel is required to consider any matters raised in relation to procedural fairness by the party making the application when deciding whether information will be withheld.

Further, the instrument does not provide for the party seeking to withhold information to include everything necessary for the Panel to consider any adverse effect of withholding the information on the party from which the information is being withheld. In this regard, it appears that procedural fairness considerations would only be considered for the party making the application to withhold information and not any parties affected by such withholding. The instrument also fails to specify whether the party from whom information is withheld will have an opportunity to present their case as to why such information should be disclosed to them. It is also unclear from the provisions whether parties from whom information is being withheld would be aware that the withholding has occurred.

Where an instrument limits or denies the right to procedural fairness, the committee expects the explanatory statement to provide a comprehensive justification for the relevant exclusion or limitation. The committee notes that the explanatory statement does not provide any further clarification or explanation of these provisions, which prevents the committee from properly scrutinising their effect.

In light of the above, the committee would appreciate your advice as to:

- **whether the Panel is required to consider whether withholding information will abrogate the rights of any party to procedural fairness in making a decision to withhold such information;**
- **whether a party from whom information is withheld will have an opportunity to present their case against the decision of the Panel to withhold information; and**
- **whether subsection 11(1) of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.**

Personal rights and liberties—legal professional privilege

Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including whether the instrument abrogates the right to legal professional privilege.

Subsection 11(2) provides that a party wishing to claim legal professional privilege over advice given in a document and who wishes to withhold the document or part of it should identify the holder of the privilege, the circumstances in which the advice was given, and the subject matter or questions to which the advice was directed.

The implication of subsection 11(2) appears to be that legal professional privilege only applies when an application has been made and granted. The instrument does not set out the circumstances in which a decision would be made to either grant or deny such an application for legal professional privilege including the factors that would be taken into account by the decision maker, nor who would make this decision.

The committee's view is that legal professional privilege is an important common law right which should only be abrogated in exceptional circumstances. As such, a sound justification should be provided for any provision that seeks to limit this fundamental right. The committee notes that no such justification is provided in the explanatory statement.

In light of the above, the committee requests your advice as to:

- **why it is considered necessary and appropriate for subsection 11(2) of the instrument to limit legal professional privilege;**
- **what factors will be considered by the Panel in deciding whether to grant an application for legal professional privilege; and**
- **whether subsection 11(2) of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.**

Scope of administrative power—insufficiently defined power (section 15)

Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes where instruments confer discretionary powers or functions which are insufficiently defined.

Section 15 provides that an applicant may only withdraw its application with the consent of the Panel.

The committee considers that instruments that confer discretionary powers on a person or body should set out the factors which must be considered in exercising the discretion. The explanatory statement should also address the purpose and scope of the discretion and why it is necessary. The committee also expects the explanatory statement to explain the nature and source of any relevant limitations and safeguards, including whether they are contained in law or policy.

The explanatory statement does not address why it is necessary for a party to obtain consent from the Panel to withdraw an application that they themselves have made. In addition, neither the instrument nor the explanatory statement explains what factors will be considered by the Panel when deciding to consent to the withdrawal of an application. The lack of explanation in the

explanatory statement prevents the committee from properly scrutinising the purpose, scope and effect of section 15.

In light of the above, the committee would appreciate your advice as to:

- **why it is considered necessary and appropriate for section 15 of the instrument to require the Panel to consent to a request from the applicant to withdraw their application;**
- **what factors may be considered by the Panel in determining whether to consent to an application made under section 15; and**
- **whether section 15 of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.**

Scope of administrative power—insufficiently defined power (section 16)

Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes where instruments confer discretionary powers or functions which are insufficiently defined.

Subsection 16(1) of the instrument provides that a party may apply to the Panel to become a party to proceedings, with the exception of ASIC who does not need to apply. Subsection 16(5) provides that the Panel may withdraw its acceptance for a party to become party to proceedings if, in the Panel's opinion, the person is not or no longer an interested party, is not a proper or necessary party to the proceedings, or it is otherwise appropriate to do so.

The committee considers that instruments that confer discretionary powers on a person or body should set out the factors which must be considered in exercising the discretion. The explanatory statement should also address the purpose and scope of the discretion and why it is necessary. The committee also expects the explanatory statement to explain the nature and source of any relevant limitations and safeguards, including whether they are contained in law or policy.

Neither the instrument nor the explanatory statement explains what factors will be considered by the Panel when deciding to accept a person as party to proceedings. The lack of explanation in the explanatory statement prevents the committee from properly scrutinising the purpose, scope, and effect of section 16.

In light of the above, the committee would appreciate your advice as to:

- **what factors may be considered by the Panel in determining whether to consent to an application made under section 16 by a person to become party to proceedings; and**
- **whether section 16 of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.**

Privacy

Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including the right to privacy.

Section 18 of the instrument sets out confidentiality requirements which provide that parties must not disclose specified confidential information except as permitted under the instrument, or within the proceedings as permitted under the instrument, or as required by law or the rules of a securities exchange. Subsection 18(5) provides that the confidentiality requirements of section 18 do not apply to ASIC.

The committee's view is that provisions which enable the collection, use or disclosure of personal information may trespass on an individual's right to privacy, and should generally be included in primary legislation, rather than delegated legislation. Where an instrument nevertheless contains such provisions, the committee expects that the explanatory statement should explain the nature and scope of the provisions. The explanatory statement should also address the nature and extent of the information that may be disclosed and the persons or entities to whom disclosure is permitted. The committee also expects the explanatory statement to justify why the provisions are necessary and appropriate, and what safeguards are in place to protect this personal information, and whether these safeguards are in law or policy. Explanatory statements should also indicate whether the safeguards in the *Privacy Act 1988* apply.

In this regard, the explanatory statement does not explain why it is necessary for ASIC to be excluded from the confidentiality requirements in section 18, and what limitations or safeguards apply in relation to ASIC's use, collection and disclosure of confidential information.

In light of the above, we would appreciate your advice as to:

- **the nature, scope and extent of personal information that may be collected, used or disclosed by ASIC under the instrument;**
- **who, or which entities, can this information be disclosed to; and**
- **whether any statutory safeguards apply to protect this personal information, including whether the *Privacy Act 1988* applies.**

Freedom of expression

Clarity of drafting

Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties. This may include where instruments prevent freedom of expression. In addition, Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting is defective or unclear.

Subsection 19(1) provides that parties must not directly or indirectly cause, participate in or assist the canvassing in any media of any issue that is before, or is likely to be before the Panel in proceeding, within certain circumstances. Subsection 19(5) provides that this requirement does not apply to ASIC.

It appears that subsection 19(1) may have the effect of limiting the freedom of expression of parties to the proceedings, by preventing them from causing issues that are before the Panel from being discussed in the media. It is unclear why ASIC is however not similarly restricted. The explanatory statement does not justify why it is necessary and appropriate for this limitation to be placed on all parties but not ASIC, nor does it identify who may decide whether a party has breached section 19. In addition, neither the instrument nor the explanatory statement provides guidance on what may constitute 'indirectly' causing, participating or assisting the canvassing of such issues in the media, nor what the penalties or consequences may be for failing to meet the requirements in section 19.

In light of the above, we would appreciate your advice as to:

- **why it is considered necessary and appropriate for section 19 to provide that parties to proceedings, with the exception of ASIC, must not directly or indirectly cause, participate in or assist the canvassing in any media of any issue that is before, or is likely to be before the panel in proceeding, within certain circumstances;**
- **what may constitute 'indirectly' causing, participating or assisting the canvassing of such issues in the media; and**
- **what the penalties or consequences may be for failing to meet the requirements in section 19.**

Personal rights and liberties—procedural fairness (section 20)

Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including whether the instrument abrogates procedural fairness.

Subsection 20(1) provides that parties can make preliminary submissions to the Panel about whether the Panel should conduct proceedings in relation to an application, but parties cannot make rebuttal submissions to preliminary submissions unless so approved by the Panel. Subsection 20(2) provides that an applicant must not make preliminary submissions, and subsection 20(3) provides that the Panel may accept preliminary submissions from persons not party to the proceedings.

The common law right to procedural fairness is underpinned by the fair hearing rule and the rule against bias. The fair hearing rule requires a person who may be adversely affected by a decision to be given an adequate opportunity to put their case before the decision is made.

The committee is concerned that section 20 of the instrument may limit procedural fairness for parties to the proceedings. It is unclear why rebuttals to preliminary submissions are not permitted, and it is also unclear why the applicant cannot make preliminary submissions. It is particularly concerning to the committee that subsection 20(3) provides that the Panel may accept preliminary submissions from any person who is not party to the proceedings, without specifying the factors or grounds upon which the Panel will decide whether to accept such a submission. Section 20 does not appear to require the Panel to consider whether the person is connected to the proceedings on foot.

Where an instrument limits or denies the right to procedural fairness, the committee expects the explanatory statement to provide a comprehensive justification for the relevant exclusion or limitation. The committee notes that the explanatory statement does provide any further clarification or explanation of these provisions, which prevents the committee from properly scrutinising their effect. In addition, the explanatory statement fails to justify why any person or party to the proceedings except the applicant can make preliminary submissions.

In light of the above, the committee would appreciate your advice as to:

- **whether the Panel is required to consider the rights of any party to procedural fairness in making a decision under section 20;**
- **why it is considered necessary and appropriate for subsection 20(3) to provide that any person not party to the proceedings may make preliminary submissions with Panel**

approval, noting that the parties have no opportunity to rebut these submissions as per subsection 20(1); and

- whether section 20 of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **28 April 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-000920

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation regarding the Takeovers Panel Procedural Rules 2020.

In that letter, the Committee requested my advice about:

- the adequacy of explanatory materials;
- the clarity of drafting;
- personal rights and liberties issues;
- insufficiently defined powers;
- privacy issues; and
- freedom of expression issues.

Given the number of matters, I have provided my response in the Annexure to this letter.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

28 / 4 /2021

Introduction

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 **new Rules or instrument**) 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.

On 2 October 2020, the Panel released the exposure draft of the new Rules for public comment. The Panel received 3 submissions in response. All respondents generally shared the Panel's view that the Panel's previous Rules¹ (which were in operation at the time of consultation) were operating effectively and efficiently and were broadly supportive of the form of the new Rules and accompanying Procedural Guidelines. One respondent commented that the new Rules and Procedural Guidelines "*will further assist parties and ASIC in understanding how Panel proceedings are conducted and the relevant expectations for those involved*". In light of the submissions that the previous Rules were operating effectively and efficiently, the Panel considered that it was appropriate for the previous Rules to be remade without any significant changes in the form of the new Rules.

The Panel also recently conducted a survey of stakeholders in 2020. 91% of stakeholders surveyed were either very satisfied or somewhat satisfied with the Panel, with stakeholders also highly satisfied with the Panel's effectiveness with proceedings, the Panel's processes and the Panel's operational delivery.²

Adequacy of explanatory materials

The Committee has requested the Treasurer's advice as to whether the explanatory statement to the instrument could be amended to include further information as to the purpose and operation of each section of the instrument, including the specific information identified in relevant sections of this correspondence.

The Panel undertakes to amend the explanatory statement as soon as possible to include further information as to the purpose and operation of each section of the instrument, including to address the Committee's comments. The Panel does not consider it necessary to amend the instrument given that the ASIC Act, the ASIC Regulations and procedural fairness all prevail over the instrument. Section 7 of the instrument also allows a sitting Panel to vary the procedures where appropriate in the light of the requirements and objectives of the ASIC Act and the ASIC Regulations and the requirements of procedural fairness in particular circumstances.

¹ *Procedural Rules to be followed in Panel Proceedings (made on 12 April 2010) (F2010L00948)*

² The results of the Panel's 2020 stakeholder survey conducted by Ipsos are available on the Panel's website (<https://www.takeovers.gov.au/>)

Clarity of drafting

Scope of administrative powers

The Committee has requested the Treasurer's advice as to:

- **what may constitute cooperating with other parties in good faith, the consequences for failing to do so, and who is empowered to determine whether parties have acted in good faith under subsection 7(4);**
- **whether subsection 7(4) of the instrument can be redrafted to provide greater clarity as to its operation, purpose and meaning (or, at a minimum, further clarifying detail can be set out in the explanatory statement);**
- **what may constitute reasonable endeavours, the consequences for failing to do so, and who is empowered to determine whether parties have made reasonable endeavours under subsection 10(3); and**
- **whether subsection 10(3) of the instrument can be redrafted to provide greater clarity as to its operation, purpose and meaning (or, at a minimum, further clarifying detail can be set out in the explanatory statement).**

Where parties need to cooperate to comply with a direction, subsection 7(4) is intended to require that they act as if they had agreed to negotiate in good faith to achieve that purpose. Most parties before the Panel should be aware of the case law interpreting such requirements, making codification in the rules unnecessary. Generally speaking, the case law considers good faith to involve elements of fairness, honesty, reasonableness, not undermining the contractual objective, not acting arbitrarily or capriciously and having regard to the interests of the other parties (without having to subordinate one's own interests to the interests of the other parties).³

The sitting Panel would determine whether a party has acted in accordance with subsection 7(4). There is no specific sanction for failing to comply with a Panel direction, but a breach may be taken into account by the sitting Panel in determining how it conducts proceedings and may have procedural consequences.

The Panel undertakes to amend the explanatory statement as soon as possible to provide further clarifying detail in relation to subsection 7(4).

If an applicant fails to provide the application to a person identified as an interested person as required by subsection 10(3), the Panel may 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 2001* (**Corporations Act**). It follows that it is likely to be in the interests of the applicant to use reasonable endeavours to provide the application to identified interested persons (for example, by searching publicly available information for contact details and attempting to provide the application to the interested person based on known contact details). It is possible that the reasonableness of the applicant's endeavours may be relevant to whether the Panel should allow late service, notwithstanding the Panel's obligation to ensure that the proceedings are "as timely" as proper consideration and the law permit (subsections 6(1) and 6(2) and regulations 13 and 16(2) of the ASIC Regulations). If so, that would be a matter for the sitting Panel to determine, subject to the supervisory jurisdiction of the courts.

³ See eg *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] FCA 903, *Commonwealth Bank of Australia v Barker* [2014] HCA 32, *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50

The Panel undertakes to amend the explanatory statement as soon as possible to provide further clarifying detail in relation to subsection 10(3).

Personal rights and liberties—procedural fairness (section 11)

The Committee has requested the Treasurer's advice as to:

- **whether the Panel is required to consider whether withholding information will abrogate the rights of any party to procedural fairness in making a decision to withhold such information;**
- **whether a party from whom information is withheld will have an opportunity to present their case against the decision of the Panel to withhold information; and**
- **whether subsection 11(1) of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.**

The instrument cannot limit or affect the application of the rules of procedural fairness to the Panel. The Panel's power to make procedural rules in subsection 195(1) of the ASIC Act is expressly subject to a requirement that the rules of procedural fairness apply to the extent that they are not inconsistent with the ASIC Act and the ASIC Regulations.

Except in exceptional cases, all material considered by the Panel must first be copied to ASIC and all parties (as required by subsection 10(6)). In some cases, however, there may be a difficult tension between disclosure and confidentiality or the public interest (see eg *VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88). Subsection 11(1) provides a procedure to accommodate these cases. Where a request is made under subsection 11(1) the tension between disclosure and confidentiality may be resolved in various ways, including waiver by parties of their right to receive the information or disclosure only of the substance of the information to all parties and the Panel.

Procedural fairness may require that a party from whom information is withheld must be heard on a decision by the Panel to allow that. If so, the Panel will give them that opportunity.

The instrument is intended to ensure that the Panel can conduct its proceedings in accordance with procedural fairness, rather than to describe what that involves. The content of procedural fairness depends on what practical fairness requires in all the circumstances, which is difficult to describe in a useful way in the context of the instrument.

The Panel undertakes to amend the explanatory statement as soon as possible to provide further clarifying detail in relation to subsection 11(1).

Personal rights and liberties—legal professional privilege

The Committee has requested the Treasurer's advice as to:

- **why it is considered necessary and appropriate for subsection 11(2) of the instrument to limit legal professional privilege;**
- **what factors will be considered by the Panel in deciding whether to grant an application for legal professional privilege; and**
- **whether subsection 11(2) of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.**

Subsection 11(2) is not intended to limit legal professional privilege but rather to provide a procedure whereby it can be claimed consistently with the requirements of procedural fairness. The procedure in subsection 11(2) is consistent with the process for claiming legal professional privilege as set out in the case law (see eg *AWB v Cole (No 5)* (2006) 155 FCR 30 at [44], *Kennedy v Wallace* (2004) 142 FCR 185 at [12]-[21], *NCA v S* (1991) 29 FCR 203 at 211).

Subsection 11(2) provides an exception to subsection 10(6) that allows privileged material to be withheld, but requires that other parties are made aware that privileged material is being withheld. This ensures that other parties have the opportunity to test whether privilege has been properly claimed (for example, by requesting the Panel to refer a question of law to the Court under section 659A of the Corporations Act). The Panel does not exercise judicial power and could not decide conclusively whether privilege has been properly claimed. If it were necessary for the Panel to reach a view (albeit inconclusive) on that question, it would need to consider and apply the relevant law.

The Panel undertakes to amend the explanatory statement as soon as possible to provide further clarifying detail in relation to subsection 11(2).

Scope of administrative power—insufficiently defined power (section 15)

The Committee has requested the Treasurer's advice as to:

- **why it is considered necessary and appropriate for section 15 of the instrument to require the Panel to consent to a request from the applicant to withdraw their application;**
- **what factors may be considered by the Panel in determining whether to consent to an application made under section 15; and**
- **whether section 15 of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.**

Section 15 provides a process that ensures that ASIC, all parties and the market are informed in a coordinated and timely manner consistent with section 602 of the Corporations Act when an application is to be withdrawn.

If the dispute is resolved the Panel will generally give consent to withdraw. However, consent may be delayed or refused in rare cases, for example, where ASIC or another party wishes to seek an

interim order and/or make their own application to ensure that unacceptable circumstances uncovered in the proceedings can be properly considered.

The Panel undertakes to amend the explanatory statement as soon as possible to provide further clarifying detail in relation to section 15.

Scope of administrative power—insufficiently defined power (section 16)

The Committee has requested the Treasurer's advice as to:

- **what factors may be considered by the Panel in determining whether to consent to an application made under section 16 by a person to become party to proceedings; and**
- **whether section 16 of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.**

If a person seeking to become a party is an interested person then the person will generally be accepted as a party to proceedings. This is because an interested person is a person that is entitled to be heard by the Panel before it makes a decision or a person to whom a proposed declaration relates or a proposed order would be directed. As noted above in relation to section 10(3), the person's participation in proceedings is preferable due to the requirements of procedural fairness and/or sections 657A(4)(a) or 657D(1)(a) of the Corporations Act.

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 (subsection 16(2)). 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.

The Panel undertakes to amend the explanatory statement as soon as possible to provide further clarifying detail in relation to section 16.

Privacy (section 18)

The Committee has requested the Treasurer's advice as to:

- **the nature, scope and extent of personal information that may be collected, used or disclosed by ASIC under the instrument;**
- **who, or which entities, can this information be disclosed to; and**
- **whether any statutory safeguards apply to protect this personal information, including whether the Privacy Act 1988 applies.**

The Panel is required to seek submissions from ASIC when considering applications (see for example sections 657A(4)(c) and 657D(1)(c) of the Corporations Act and regulation 22(1)(a)(i) of

the ASIC Regulations). Personal information may be collected by ASIC when they receive submissions from parties.

ASIC is subject to detailed confidentiality provisions in section 127 of the ASIC Act, which includes information received in Panel proceedings. ASIC is exempted from section 18 to avoid inconsistency with its obligations under section 127 of the ASIC Act. These provisions in section 127 of the ASIC Act are also applied to the Panel under section 186 of the ASIC Act. One of the purposes of section 18 is to ensure that the Panel complies with section 186 of the ASIC Act.

ASIC and the Panel, as Australian Government Agencies, are also required to comply with the *Privacy Act 1988 (Privacy Act)*. Personal information obtained by ASIC in Panel proceedings is protected through the operation of section 127 of the ASIC Act and the Privacy Act.

The Panel undertakes to amend the explanatory statement as soon as possible to provide further clarifying detail in relation to section 18.

Freedom of expression

Clarity of drafting (section 19)

The Committee has requested the Treasurer's advice as to:

- **why it is considered necessary and appropriate for section 19 to provide that parties to proceedings, with the exception of ASIC, must not directly or indirectly cause, participate in or assist the canvassing in any media of any issue that is before, or is likely to be before the panel in proceeding, within certain circumstances;**
- **what may constitute 'indirectly' causing, participating or assisting the canvassing of such issues in the media; and**
- **what the penalties or consequences may be for failing to meet the requirements in section 19.**

Consistent with the Panel's duty to act "in as timely a manner" as the legislation and a proper consideration of matters permits (subsections 6(1) and 6(2) and regulations 13 and 16(2) of the ASIC Regulations), Panel proceedings are generally conducted in private. This has enabled the Panel, among other things, to resolve disputes quickly and efficiently, as parties can more readily prepare submissions within short deadlines because there is less need for attention to how they may be used and portrayed in the media. The Panel's surveys (including in its most recent survey results from 2020) have indicated strong support for this approach by stakeholders.

Indirect media canvassing occurs where a party arranges for a supportive party or adviser to canvass and seek media coverage of arguments or claims. In the context of large takeovers, given what is at stake, the aim of this media canvassing may be to advance the desired outcome for the takeovers, regardless of what that means for the proceedings before the Panel. Accordingly, without section 19, there would be an incentive for market participants to make applications and delay proceedings for publicity purposes, which would be contrary to the purpose of the Panel to resolve disputes "*as quickly and efficiently as possible by a specialist body largely comprised of takeover experts, so that the outcome of the bid can be resolved by the target shareholders on the basis of its commercial merits*" (see Corporate Law Economic Reform Program Bill 1998, Explanatory Memorandum at [7.3]).

Section 19's application is only temporary. In effect, after Panel proceedings have concluded, parties are free to discuss any issues arising from the matter with the media.

There are no specific penalties for breaching section 19 beyond the procedural consequences that may result from breach of the rules. However, the Panel has sometimes criticised parties in its reasons for breach of the media canvassing rules.

ASIC is 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 any 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).

The Panel undertakes to amend the explanatory statement as soon as possible to provide further clarifying detail in relation to section 19.

Personal rights and liberties—procedural fairness (section 20)

The Committee has requested the Treasurer's advice as to:

- **whether the Panel is required to consider the rights of any party to procedural fairness in making a decision under section 20;**
- **why it is considered necessary and appropriate for subsection 20(3) to provide that any person not party to the proceedings may make preliminary submissions with Panel approval, noting that the parties have no opportunity to rebut these submissions as per subsection 20(1); and**
- **whether section 20 of the instrument and the relevant sections of the explanatory statement can be redrafted to provide greater clarity as to the section's operation, purpose and meaning.**

Section 20 does not limit or reduce the Panel's obligation to observe procedural fairness. The Panel's power to make procedural rules in subsection 195(1) of the ASIC Act is expressly subject to a requirement that the rules of procedural fairness apply to the extent that they are not inconsistent with the ASIC Act and ASIC Regulations. It is doubtful whether the Panel has power to attempt to codify the requirements of procedural fairness in the instrument and unlikely that it would be helpful to do so.

Section 20 describes the process that the Panel usually follows. Sitting Panels can and do vary that process under subsections 7(1) or (3) where appropriate, including to accept "out of process" rebuttals to preliminary submissions where practical fairness requires that in the circumstances. In doing so, the Panel will also have regard to its duty under regulations 13 and 16(2) of the ASIC Regulations – which prevails to the extent it is inconsistent with procedural fairness (subsection 195(4) of the ASIC Act) – to act "in as timely a manner" as the law and a proper consideration permit.

It is considered necessary to provide that the Panel may accept preliminary submissions from a person that is not a party because:

- such persons may not have had time to decide whether to seek to become a party and
- the Panel is not confined to an adversarial/judicial model and the ASIC Regulations contemplate that it may invite and receive submissions from non-parties (regulations 23-25 of the ASIC Regulations).

Factors the Panel considers in deciding whether to accept preliminary submissions from a person who is not a party include whether the submissions are relevant (or provide relevant probative material) and whether the person would be entitled to become a party.

The Panel undertakes to amend the explanatory statement as soon as possible to provide further clarifying detail in relation to section 20.



AUSTRALIAN
SENATE

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

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13 May 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

CC: committeescrutiny@treasury.gov.au; Chris.Reside@treasury.gov.au

Dear Treasurer,

Takeovers Panel Procedural Rules 2020 [F2021L00131]

Thank you for your response of 28 April 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 12 May 2021. Based on your further advice about the scrutiny issues raised by the committee, the committee has concluded its examination of the instrument.

The committee welcomes your undertaking to amend the explanatory statement to include this further information, including further information about the scope of administrative powers under the instrument, procedural fairness, legal professional privilege, privacy and clarity of drafting. This undertaking has been listed in Appendix C of *Delegated Legislation Monitor 7 of 2021*.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation