

# **Memorandum of Understanding**

**between**

**the Australian Securities and  
Investments Commission**

**and**

**the Executive of the Takeovers Panel**

27 March 2017

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## 1. Parties to memorandum

- 1.1 This memorandum of understanding is between the Australian Securities and Investments Commission (**ASIC**) and the executive (**Panel Executive**) of the Takeovers Panel (**Panel**).
- 1.2 In this memorandum, where the Panel Executive agrees to act in a certain way, or acknowledge or recognise certain matters in accordance with the terms below, the Panel Executive will use reasonable endeavours to ensure that the Panel will have regard to this memorandum, however it is accepted by ASIC and the Panel Executive that the Panel Executive cannot bind the Panel to act in that way, or acknowledge or recognise those matters.

## 2. Purpose and scope of memorandum

- 2.1 ASIC and the Panel Executive recognise that:
  - ASIC and the Panel each perform separate but complementary roles in connection with the regulation of takeovers and other control transactions in Australia;
  - mutual co-operation between ASIC and the Panel Executive is desirable provided it is consistent with the proper performance of the respective functions of ASIC and the Panel; and
  - different levels of co-operation and assistance may be appropriate for different functions.
- 2.2 This memorandum of understanding does not create any legally binding obligations. The liaison, cooperation and other information sharing arrangements contemplated in this memorandum of understanding are subject to all applicable laws and regulations, including those governing the exchange of confidential, protected, or personal information.

## 3. Role of ASIC

- 3.1 ASIC is a regulatory agency charged, amongst other things, with promoting the confident and informed participation of investors and consumers in the financial system through the administration and enforcement of the *Corporations Act 2001* (**Act**), including the takeover provisions in Chapter 6 of the Act.
- 3.2 ASIC's regulatory role in the administration and conduct of takeover bids and other control transactions includes:
  - the day to day review and monitoring of disclosures and conduct to ensure compliance with both the legal requirements of the Act and the purposes underlying Chapter 6 set out in s602 of the Act;

- modifying or providing exemptions from the requirements of the Act, both in relation to individual cases and more generally, in order to facilitate transactions while maintaining investor protections consistent with the Act's objectives;
- issuing guidance outlining ASIC's approach in administering, and exercising its discretions under, the Act;
- where appropriate, taking regulatory or enforcement action to protect the interests of investors and ensure the requirements and objectives of the Act are observed; and
- providing advice to government about legislative changes that may be needed to overcome issues ASIC encounters in the course of performing or exercising its powers.

3.3 ASIC also has broader regulatory functions under the Act which are relevant to its regulatory oversight of control transactions—including its role in supervising conduct and disclosure in financial markets and ensuring compliance with the requirements applicable to fundraisings, buybacks and capital reductions.

## **4. Role of the Takeovers Panel**

4.1 The Panel is a specialist dispute resolution body. It is constituted by members chosen on account of their qualifications, knowledge or experience in respect of fields including business, law, administration of companies and financial markets. The Panel's members are assisted by the Panel Executive in carrying out their functions.

4.2 The Panel is able to consider disputes relating to circumstances that appear to the Panel to be unacceptable having regard to matters including:

- the effect on the control of, or acquisition of a substantial interest in, a regulated entity;
- the purposes set out in s602; or
- contravention of the provisions of Chapters 6 to 6C.

The Panel is the main forum for resolving disputes about a takeover bid until the end of the bid period.

4.3 The Panel's role includes:

- determining applications seeking a declaration of unacceptable circumstances (or the review of a Panel decision on such an application); and
- determining applications for the review of decisions by ASIC under s655A or decisions by ASIC under s673 where those decisions relate to securities of the target of a takeover bid during the bid period.

4.4 The Panel issues guidance outlining the Panel's approach to the exercise of its functions and powers.

## **5. Information sharing and unsolicited assistance**

- 5.1 Subject to any applicable statutory or other limitations and obligations of confidentiality (including under s127 and s186 of the ASIC Act), privacy and procedural fairness, ASIC and the Panel Executive will share (whether voluntarily or in response to a request) relevant information that they consider may assist ASIC or the Panel in the performance of their functions or the discharge of their duties.

## **6. Policy development**

- 6.1 ASIC and the Panel Executive recognise ASIC and the Panel will frequently need to refer to, or apply, the policies or guidance of the other in performance of their respective functions and exercise of their respective powers. The Panel Executive also acknowledges ASIC's particular interest, as both a regulatory body and a recurring participant, in the accessibility and procedures of the Panel.
- 6.2 ASIC and the Panel Executive acknowledge that it is desirable that the policies of both ASIC and the Panel promote a clear and consistent regulatory framework for control transactions.
- 6.3 ASIC and the Panel Executive will discuss any issues encountered in applying existing policies and processes and agree to liaise regularly on potential policy development initiatives or proposed amendments to rules, procedures policies or guidance.
- 6.4 Where either ASIC or the Panel Executive consider that new policy relating to the takeover provisions may be warranted but that the relevant matters of concern may be most appropriately addressed by the issue of new or amended policy of either ASIC or the Panel, the principal contacts will discuss the proposal and possible options.
- 6.5 ASIC and the Panel Executive will endeavour to provide the other party with early notice of any proposals to develop or issue relevant guidance or procedures and proper opportunities for consultation, throughout the process.

## **7. Regular liaison**

- 7.1 To promote co-operation between ASIC and the Panel, regular liaison meetings will be held between ASIC and the Panel Executive. These meetings should occur at least every three months and will be attended by the principal contacts for ASIC and the Panel Executive and, where desirable, other members and staff.

## **8. Applications to the Panel**

- 8.1 When an application is made to the Panel under s657C, the circumstances to which the application relates may involve matters of interest or concern to ASIC on account of its regulatory responsibilities with respect to the administration and enforcement of

both Chapter 6 and other provisions of the Act (including for example, the continuous disclosure or insider trading provisions).

- 8.2 The Panel Executive acknowledges that ASIC may consider it appropriate to make its own enquiries with respect to matters the subject of an application under s657C and may raise similar or additional matters with any person while the application is under consideration by the Panel.
- 8.3 From time to time ASIC may be requested to consider exercising its powers under s655A or s673—including in relation to matters relevant to an application being considered by the Panel. In particular ASIC may be requested to exercise its powers for the purpose of:
  - enabling a transaction the subject of the Panel application to proceed; or
  - facilitating an agreed resolution of the dispute between the parties to the Panel application.
- 8.4 The Panel Executive acknowledges, when considering communications and actions taken in the course of any Panel application in such circumstances, the need to be mindful of ASIC's processes and the fact that the Panel may be called to review any decision by ASIC.

## **9. Referrals to ASIC**

- 9.1 Under regulation 18 of the ASIC Regulations, the Panel may refer a matter to ASIC for ASIC to consider with a view to making an application to the Panel.
- 9.2 The Panel Executive may also refer a matter that it considers may be of interest or concern to ASIC. A matter that is so referred to ASIC may be relevant to ASIC's regulatory oversight of a particular control transaction and/or ASIC's broader regulatory functions.
- 9.3 The Panel Executive will consult with ASIC regarding referrals from either the Panel or the Panel Executive where consultation is consistent with the proper performance of the Panel's powers in the circumstances. The Panel Executive is particularly mindful of ASIC's interest in being consulted in relation to such referrals.
- 9.4 The Panel Executive acknowledges that for legal or operational reasons ASIC's ability to provide information regarding the action it has taken, or is taking, in response to a referral may be limited.

## **10. Disputes**

- 10.1 Where there is a dispute over any matter related to issues in this memorandum, the parties will seek to resolve the issue by negotiation between the principal contacts. If these negotiations are unsuccessful, the matters will be referred to a Commissioner or the Chairperson of ASIC and the President of the Panel.

## 11. Amendment and termination

- 11.1. This memorandum supersedes the Memorandum of Understanding between ASIC and the Panel dated 20 August 2001.
- 11.2. This memorandum may be amended by agreement in writing between the parties, or terminated by either of them, at any time upon written notice to the other party.

## 12. Contacts

- 12.1. The principal contacts for the Panel Executive are the Director and Counsel or any other senior representative nominated by them.
- 12.2. The principal contacts for ASIC are the Senior Executive Leader(s) with responsibility for takeovers, or any senior representative nominated by them.
- 12.3. ASIC and the Panel Executive may nominate additional or alternative principal contacts.
- 12.4. The principal contacts from time to time will ensure that they are aware of all ongoing matters between the parties and they will manage and monitor information flows between the parties.
- 12.5. The principal contacts will maintain ongoing communication to maintain effective, timely and good communications and relations between the Panel and ASIC.


## 13. Execution

Signed for and on behalf of the Australian Securities and Investments Commission

  
.....  
Mr John Price  
Commissioner

Date: 27/3/17

Signed for and on behalf of the Takeovers Panel Executive

  
.....  
Mr Allan Bulman  
Director

Date: 27/3/17