

QoN016-02: Procedures for the use of information gathering powers

What procedures or guidelines are in place to ensure that information-gathering powers are used effectively, efficiently, and with due regard to individual rights?

Answer

Introduction

The relevant procedures/guidelines are in the Panel's Procedural Rules (dated 1 June 2010), which can be found at the Procedural Rules tab on the Panel's website (**Current Procedural Rules**). On 19 February 2021, the Panel registered revised Procedural Rules on the Federal Register of Legislation, to have effect from 1 April 2021 (**Revised Procedural Rules**). The Panel has also finalised Procedural Guidelines to accompany the Revised Procedural Rules (**Procedural Guidelines**), which will also come into effect on 1 April 2021. The Revised Procedural Rules and the Procedural Guidelines can be found in the "Remaking of Procedural Rules – Public Consultation Response Statement" at the Consultation tab on the Panel's website.

The discussion below highlights the most important aspects of the abovementioned rules and guidelines that "ensure that information-gathering powers are used effectively, efficiently, and with due regard to individual rights".

We note that as part of the Panel's public consultation process on the Revised Procedural Rules (which took place over the period 2 to 23 October 2020), comments were sought from the public on (among other things) the effectiveness and efficiency of the Current Procedural Rules. The Panel received submissions from three respondents. All respondents were generally of the view that the Current Procedural Rules are operating effectively and efficiently and did not raise any concerns regarding the Panel's information gathering powers.

The Revised Procedural Rules retain the procedures and guidelines regarding the Panel's information gathering powers in substantively the same form as the Current Procedural Rules.

Protections for parties providing information voluntarily

In relation to nearly all matters, parties are willing to provide documentation voluntarily, usually in response to a Panel brief under regulation 22 of the *ASIC Regulations 2001* (Cth). In part this is because parties are required to provide confidentiality undertakings in relation to material they receive in Panel proceedings, which provides protection to parties providing information voluntarily.¹ The Panel recently received an additional undertaking from a party not to use information obtained during Panel proceedings in a separate Court case, after the Panel had retained solicitors and counsel and was ready to commence legal proceedings if the party had not provided the undertaking voluntarily.²

¹ See Rule 4.1.1 and Annexure A of the Procedural Rules. The Revised Procedural Rules will impose a requirement on a person (whether or not a party) not to disclose any confidential information provided to it in Panel proceedings (unless an exception applies – see Rule 18 of the Revised Procedural Rules). These confidentiality requirements also ensure that the Panel complies with its confidentiality obligations in section 186 of the *ASIC Act 2001* (Cth)

² See Panel media release TP20/81, "Keybridge Capital Limited 04, 05 & 06 – Panel Enforces Confidentiality Undertaking"

Requests from parties to withhold information from other parties and legal professional privilege

The Current Procedural Rules provide guidance in relation to requests from parties to withhold information from other parties³ and how to claim legal professional privilege.⁴

Conferences

Rule 6.4 of the Current Procedural Rules⁵ provides the following guidelines in relation to Panel conferences:

6.4.1. The Panel may hold a conference (for all or part of a proceeding):

- (a) at the request of a party or*
- (b) of its own volition.*

Origin: r 10

Reference: ASIC Act s192 & 199 and ASIC Reg 16(1)

Note 1: A Panel may consider convening a conference if it thinks that it will expedite proceedings or if it requires a better understanding of evidence, issues or arguments. If it proposes a conference, the Panel will provide written notice to the parties.

Note 2: A conference may be held in person, by video, by audio or by any combination of communication facilities.

Note 3: 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. (Origin: r 10.1)

6.4.2. A conference is held subject to any directions the Panel gives.

Origin: r 10.3

Reference: ASIC Act s192 & 199 and ASIC Reg 16(1)(c)

Note 1: The Panel may, for example, direct what evidence will be taken in a conference and may specify time periods for parties to address the conference. (Origin r 10.4 and 10.5)

General guidance in relation to evidence

Rule 6.3.1 of the Current Procedural Rules⁶ provides the following guidelines in relation to evidence:

The Panel is not bound by the rules of evidence and may act on any logically probative material from any source.

³ Rule 2.3.1. See also Rule 11(1) of the Revised Procedural Rules and paragraph 10.8 of the Procedural Guidelines

⁴ Rule 2.3.2. See also Rule 11(2) of the Revised Procedural Rules.

⁵ See also Rule 23 of the Revised Procedural Rules and paragraph 5.7 of the Procedural Guidelines

⁶ See also Rule 22 of the Revised Procedural Rules and paragraph 5.4 of the Procedural Guidelines

Origin: r 7

Reference: ASIC Act s192 & 199 and ASIC Reg 16(2)

Note 1: The Panel may inform itself of any publicly available information, including information published by parties or other persons under the Corporations Act, or the rules of ASX or another securities exchange.

Note 2: A party may provide statements and documents to support any matter raised in an application or in submissions. The Panel may summons a person to give evidence or to produce specified documents on application to do so by a party (see Note 7), or without any application to do so.

Note 3: It is an offence if a person gives, in a written submission to the Panel for the purposes of a proceeding, information or evidence that is false or misleading in a material particular, unless it is proved that the person, when giving the information or evidence, believed on reasonable grounds that it was true and not misleading.

Reference: ASIC Act s199

Note 4: Evidence may be provided to the Panel in the form of oral testimony (if a conference is held) or a document that is signed and includes statements to the effect that:

- a. the person is aware of the offence and its particulars in ASIC Act s199 (see note above)*
- b. there are no material omissions from the statement and*
- c. any attachments are true copies of the originals.*

Note 5: Sworn evidence may be provided to the Panel in the form of a statutory declaration or affidavit that has been declared, sworn or affirmed in accordance with the law of the place where it is made.

Note 6: A declaration, affidavit or statement may be sent to parties and the Panel electronically (as a scanned copy of the original). The Panel may request that the original be provided.

Note 7: 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' evidence. The Panel may direct the proposed witness to answer specific questions in writing before appearing before the Panel.