



**Australian Government**

**Takeovers Panel**

# MEMO

---

**Date:** 8 December 2023

**To:** Parliamentary Joint Committee on Corporations and Financial Services

**From:** Takeovers Panel

**SUBJECT: RESPONSE TO QUESTION ON NOTICE**

---

**Question: When you have long-term investors who look at mining leases and track particular mineral deposits, they have to go out and look for investors who are going to help them realise that asset. They do have a pretty good sense of the underlying value of that asset and they've convinced an investor to then come on board. Are there issues in how takeovers might undermine that interest as it gets converted from something prospective to development?**

1. The committee's question refers to the risk that minority shareholders in mining companies may be disadvantaged by the conduct of a majority shareholder in takeovers. This risk can be minimised by regulations and the enforcement of those regulations. The Panel executive is not in a position to comment on enforcement, but the following is an overview of the regulatory framework that is in place. If you require further information, more detail or clarification of anything, please let us know.
2. The Panel Executive understands that:
  - (a) Australia's corporate law is generally considered to be more protective of small shareholders than that of many comparable jurisdictions and
  - (b) Australia's takeovers regulation is generally considered to be protective of shareholders.
3. Prior to the development of modern takeovers regulation, shareholders were highly exposed to coercive takeovers substantially undervaluing their companies where the market had materially inadequate information. Takeovers regulation sought to address that in each of the UK, US and Australia, in the mid-twentieth century. In Australia, the requirements sought to require equal treatment of shareholders and give them enough information and time to decide whether to accept a takeover. Those aims continue to be key

purposes of Australian takeovers regulation (now set out in s602).<sup>1</sup> In the absence of a controlling shareholder, takeover bids may benefit shareholders by providing a means to hold poorly performing boards accountable, and/or by allowing shareholders to exit at a premium to the market price.

4. Requirements that seek to ensure shareholders (and the market) have sufficient information about a company include:
  - (a) Chapter 2M regarding financial information, periodic reporting, and auditing, together with Chapter 4 of the ASX Listing Rules (LR) (and also LR Chapter 5 and the JORC Code in the case of mining entities, oil and gas entities, and other entities reporting on mining and oil and gas activities)
  - (b) Chapter 6CA, LR Chapter 3, and ASX Guidance Note 8 requiring continuous disclosure (in terms generally considered more onerous, in some respects at least, than those of many comparable jurisdictions)
  - (c) Additional disclosure requirements in Chapters 2J, 2L, 6D etc and the LRs in respect of various kinds of capital management, and
  - (d) Prohibitions against misleading and deceptive statements eg ss670A, 670B, 1041H, 1041I, 1308 and 1309.
  
5. Requirements (in addition to directors' duties) that seek to ensure companies are managed for the benefit of all shareholders, not just controlling shareholders, include:
  - (a) Part 7.10 Div 3 prohibiting insider trading (preventing controllers with price sensitive information which is not generally available from trading)
  - (b) Chapter 2F eg Part 2F.1 allowing a court to make a broad range of orders if controllers cause the company to act contrary to the interests of shareholders as a whole, or in a manner that is oppressive, unfairly prejudicial to, or discriminatory against, a shareholder
  - (c) Section 195 preventing directors with a material personal interest in a matter being present or voting when the relevant matter is considered by the board
  - (d) Chapter 2E requiring independent shareholder approval for the company to give a financial benefit to a related party unless it is on arm's length terms or falls within limited exceptions and
  - (e) LR Chapter 10, which regulates transactions between a listed entity and persons in a position to influence the entity, including by requiring

---

<sup>1</sup> All statutory references are to the *Corporations Act 2001* (Cth) unless otherwise indicated

independent shareholder approval for related party benefits regarding a substantial asset, even where the terms are arm's length.

6. During a takeover bid, additional protections apply, including:
  - (a) Section 623(1) prohibits a bidder giving a benefit (not offered to all shareholders) to induce a shareholder to accept a takeover or dispose of their shares
  - (b) Section 636(1) requires the bidder to include specified information in its bidder's statement which may go beyond that required to be disclosed under the requirements mentioned above eg: details of the bidder's intentions regarding specified matters (s636(1)(c)), benefits offered/ given in the previous 4 months to induce acceptance/ disposal (s636(1)(i)), and other information material to a shareholder's decision whether to accept the bid (s636(1)(m) – which prevails over exceptions to continuous disclosure in LR 3.1A)
  - (c) Section 638 requires that the target's statement include all information shareholders and their professional advisers reasonably require to make an informed assessment of whether to accept the bid and
  - (d) Section 640 requires the target's statement to include an independent expert's report where the bidder has voting power of 30% or more in the target.
7. Shareholders can make applications to the Takeovers Panel to remedy any unacceptable circumstances that they consider arise by the actions of a majority shareholder (see ss602, 657A and 657D). The Panel has recently republished its guidance in relation to insider participation (see [Guidance Note 19: Insider Participation in Control Transactions](#)), which deals with (among other things) how target companies should manage conflicts with insiders in takeovers bids (which often includes majority shareholders). The Panel has made declarations of unacceptable circumstances and orders in response to applications made by minority shareholders in mining companies in matters including [Yancoal Australia Limited \[2014\] ATP 4](#), [Strategic Minerals Corporations NL \[2018\] ATP 2](#) and [Energy Resources of Australia Limited \[2019\] ATP 5](#).
8. It is up to each shareholder to decide whether to accept a takeover bid. However, where a person acquires 90% of the shares, they can generally compulsorily acquire the remaining shares either:
  - (a) following a takeover bid, if the bidder also acquires at least 75% of the shares offered to be acquired under the bid (under Chapter 6A.1) or
  - (b) under the general compulsory acquisition power in Chapter 6A.2, which requires the shareholder with over 90% to provide minority shareholders

with (among other things) a report from an expert selected from nominations provided by ASIC.

9. Compulsory acquisition under either the powers in Chapters 6A.1 and 6A.2 is subject to powers of the Court to order otherwise (under Chapter 6A.1, where any shareholder applies to the Court, and under Chapter 6A.2, where holders of 10% of the shares to be compulsorily acquired object).
10. Schemes can also transfer shares to an acquirer against the will of the holder of the shares. The interests of shareholders in that case are protected by requirements including:
  - (a) ASIC must be given a reasonable opportunity to examine the scheme booklet and may decline to give a “no objection” statement to the Court
  - (b) As is the case with a bid under s640 (see paragraph 6(d) above), an independent expert’s report is required if the acquirer under the scheme has over 30% in the target (see clauses 8303 and 8306 of Part 3 of Schedule 8 of the Corporations Regulations) and
  - (c) The scheme must be approved by shareholder vote (including by 75% of votes cast being in favour) and by the Court.