Reform of the Takeovers Panel

Corporations Amendment (Takeovers) Bill

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3 November 2006

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Section 1

Introduction and Summary

1. Introduction and Summary

- We have looked at the proposed reforms of the Takeovers Panel
- We conclude that:
  - The reforms proposed are flawed
  - The reforms proposed do not rectify the profound problems with the Panel
  - The Panel needs to be the subject of a proper review

1. Introduction and Summary (cont)

- In this presentation, we will
  - Review the *Glencore* and *Alinta* cases – *Glencore* is supposed to be the reason for the proposed changes
  - Review the draft legislation
  - Discuss the defects that we consider affect the Panel
  - Outline our proposal for review of the Panel

Section 2

The *Glencore* and *Alinta* decisions -

What they do and don't say

2. What *Glencore* says

- In *Glencore 1*, Glencore sought High Court review of the decision of the Review Panel in Austral Coal 02R and the case was remitted to Emmett J of the Federal Court – this path was required because there was still a bid on foot (s659B)
- Emmett J held that the Panel:
  - is only entitled to assess the unacceptability of circumstances if it identifies real ***effects*** of those circumstances
  - is not entitled to declare circumstances to be unacceptable merely because it speculates that the circumstances ***could*** or ***may*** have had effects and the Panel thinks if those were the effects they would be unacceptable

  and remitted the matter to the Panel

2. What *Glencore* says (cont.)

- *Glencore 2* sought review of the decision of the remitter panel – the bid had finished, so the review went straight to the Federal Court
- Emmett J again held that the Panel had made jurisdictional errors:
  - The rights of Glencore under cash-only swap agreements were not a "substantial interest" – must be at least a relevant interest in shares of person or their associates and the **Panel** had expressly ruled that there was no relevant interest or association
  - The Panel had not identified any real effects of the failure by Glencore to inform the market of its swap position on the one clear acquisition of a substantial interest – the Centennial takeover bid
  - The Panel did not identify the rights or interests that were affected by the circumstances nor how the orders protected those rights or interests
- This time the matter was not sent back to the Panel

2. What *Alinta* says

- *Alinta* concerned acquisitions by Alinta of 10% of the units in Australian Pipeline Trust while the AGL/Alinta schemes were being approved
- Emmett J found that the Panel had made an error in finding that there was a contravention of s 606 (the takeover threshold provision)
- However, independently, the Panel had found that there were unacceptable effects of the acquisitions
- Emmett J found that there was no basis for judicial intervention in these findings. They were based on real effects on which the Panel made findings (which were available on the evidence)
- It appears that both Alinta and APT are appealing Emmett J.'s decision. A Full Court will accordingly be shortly considering many of the issues which are alleged to be deficiencies in the Panel's legislation

2. What *Glencore* doesn't say

- The Panel can't use its own expertise to find the effects of circumstances or whether they are unacceptable
  - actually says that they just have to find the real effects, not how they are to go about doing that
  - In *Alinta* Emmett J specifically found that if the Panel had evidence before it to reach a conclusion, it was entitled to apply its expertise to that evidence in reaching a finding
- The Panel can't look to highly probable future effects
  - nothing at all about this –all circumstances and their effects had occurred in the past
  - In *Alinta* Emmett J found that it was appropriate for the Panel to consider and make findings about the effect in the near future in considering the effect on "potential control".

2. What *Glencore* doesn't say (cont.)

- The Panel can't enforce the "spirit of the laws"
  - Nothing in the legislation about this
  - Parliament told the Panel to look at what the effect is – this is an appropriate direction for a body that is supposed to be about real world people making pragmatic decisions about real problems
  - What does enforcing the "spirit of the laws" mean anyway? It is simply an invitation for a public body which can affect private rights to define its own jurisdiction as it feels like it

Section 3

The proposed reforms

3. The proposed reforms

- If the concern is that cash-only swaps (and other derivatives) should be disclosed during takeovers, even though they don't confer relevant interests, then that should be directly proposed as a change to the substantial shareholding disclosure provisions
  - Policy of this kind should not be left to administrative bodies but should be done directly by Parliament or at least by regulation
  - To leave policy settings of this importance to administrators leaves the community in a state of uncertainty as to their obligations
  - To achieve this by an unfocussed expansion of the Panel's jurisdiction is to apply a patch which is much larger than the supposed hole – any amendment should be focussed on the substantive deficiency

3. The proposed reforms (cont)

- The proposed definition of substantial interest

  an interest in a company… may be a ***substantial interest*** even if it is not constituted by one or more of the following:

  (a) a relevant interest in securities in the company

  (b) a legal or equitable interest in securities in the company;

  (c) a power or right in relation to:

  (i) the company; or

  (ii) securities in the company.

  – This is not a definition but a non-definition
  – It substantially increases uncertainty and means that even if Parliament has made a decision on what should or should not be regulated, the Panel can ignore that policy setting
    - for example, Parliament has said in section 609 that there are things that don't cause it any problems and so they are not to be treated as relevant interests (eg nominee holdings, etc), why should they be allowed to found a risk of unacceptable circumstances declarations
  – It is vague and invites the Panel to invent its own jurisdiction

3. The proposed reforms (cont)

- Introduction of the formula “the Panel is satisfied”:
  - If this means that the Panel must make a decision logically, based on probative material and using its expertise, then it adds nothing to what the law already allows and requires of an administrative decision-maker – this is confirmed by *Alinta*
  - If it means that the Panel can be illogical, and can rely on its own speculative imagination instead of making findings of fact taking account of their experience and specialist knowledge in the area, then it means that there is a substantial increase in uncertainty

3. The proposed reforms (cont)

- Past, present and likely future effects:
  - Nothing in *Glencore 1 & 2* says anything about this issue – it was all about the past
  - In fact, if the Panel had said that we find that the likely effect of "X" was "Y", then Emmett J indicated in *Glencore* that this would be satisfactory
  - This point was specifically made by Emmett J in *Alinta*
  - The is probably unnecessary but there is probably no harm in it and it is sensible to allow the Panel to act before harm is caused by taking account of likely future effects of current circumstances

3. The proposed reforms (cont)

- New para 657A(2)(b)

  The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances…

  (b) are otherwise unacceptable (whether in relation to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have in relation to the company or another company or in relation to securities of the company or another company) having regard to the purposes of this Chapter set out in section 602

- This has several flaws:
  - It assumes that section 602 states the purposes of the takeovers code (Chapters 6 – 6C) exhaustively – in fact the takeovers code contains many provisions which are compromises between the different policies in section 602 and also between those policies and other policies
    - For example, as the Panel itself has recognised, the exceptions from the takeover rules in relation to capital raising have no foundation in the purposes of section 602 but are a recognition by Parliament that the takeovers code must on occasions give way to other policies such as those allowing for the raising of funds for commercial enterprises

3. The proposed reforms (cont)

- Section 602 is an “objects” clause: it assists in working out the intent of Parliament, if not absolutely clear from the specific legislative provisions – as such, it is an **auxiliary** provision.
- This amendment would make s.602 an **paramount** provision so that if a person complies with a particular provision of the law **and** the policy embodied in that provision but offends the Panel’s views of section 602, then the Panel can make all sorts of Draconian orders, including taking away property
- This amendment would allow the Panel to ride roughshod over the other policy settings that have been embodied in the rest of the takeovers code
- Section 602(a) is particularly problematic, especially in the way in which the Panel has construed it. It sets as a goal an “efficient, competitive and informed market”
  - The Panel seems to take the view that if the market is not the “most competitive”, “most efficient” and “perfectly informed” then there is a failure to comply with this policy

3. The proposed reforms (cont)

- The words in parentheses appear to lack the words “or not” after “whether”, entitling the Panel to proceed without making any determination as to the effect, or even despite its determination as to the effect, of the circumstances
- It appears, depending on what the words in parentheses actually mean, that circumstances can be declared unacceptable even if they have no effect and, even then, the Panel will be entitled to make a wide range of orders
- The provision is either meaningless or unnecessary or, if it has meaning, is inappropriate because it:
  - undermines certainty in takeovers,
  - exposes persons to penalty in circumstances where Parliament has identified what conduct is lawful and accords with policy and
  - has an inappropriate “hair trigger”

3. The proposed reforms (cont)

- The proposed change to para 657D(1)(a) would mean that the Panel does not have to give an opportunity to be heard to a person who believes they will be unfairly prejudiced by a Panel order **unless** the proposed order be **directed** to that person
- Depending on the exact circumstances of a particular case, this might allow the Panel, by a drafting its orders so as to be directed to someone different (being someone who is not already a party) could avoid the requirement to hear from the person who ordinarily exercise would be expected to be the person prejudiced
  - For example, the order could be directed to a nominee holder and the Panel could make the order without hearing from the beneficiary or giving them an opportunity to be heard

Section 4

What really is wrong with the Takeovers Panel?

4. What really is wrong?

- Each of us spoke publicly of our concerns at the ANU colloquium on Corporate Governance and Access to Corporate Information held on 9 July 2006.
- In opening the Colloquium, Tony Hartnell said:

  "The Takeovers Panel's performance has been the most disappointing change to corporate and securities law in Australia in my professional career."
- Jeremy Kriewaldt's paper to the Colloquium is attached. It sets out his views of the Panel's shortcomings.

4. What really is wrong? (cont)

- It was supposed to give greater consistency in decision-making than the Supreme and Federal Courts, but the Panel has actually been quite inconsistent and has had to reverse itself several times
  - Partly where the Panel has failed to explain the basis **in policy** for its decisions except in the vaguest terms, so apparently similar facts have given rise to divergent decisions
  - The Panel has to be prepared to make clear and detailed statements as to what it believes policy is, to enable people to accommodate their conduct to that policy
  - The idiosyncratic view of the Panel on the "efficient, competitive and informed market" provides it with an almost unfettered and uncontrollable discretion – this makes it almost impossible to conduct a takeover with any certainty
  - The Panel is not as good at the law as it would like to think it is – many of the panel members are capable of getting to the right legal answer, but they can't be expected to do so relying only on the parties' written submissions, the assistance of the executive which is the result of their part-time involvement

4. What really is wrong? (cont)

- The Panel has conceived of itself as being an “anti-avoidance” agency. There is an element of this in its charter but its primary focus, since the courts are often not allowed to be involved, is resolution of disputes between parties (see s659AA)
  - The Panel’s procedures give the parties very little role in defining the issues that they see as being the real dispute or presenting their case and do not allow parties to address the Panel directly (rather than in writing through the executive)
  - This is a failure to recognise that it is a dispute between the parties that needs to be resolved - Panel cases should not be opportunities for the Panel members to push their own barrows
  - If parties run the case more and the matter is heard in public with proper interaction between the parties and the Panel members, it is more likely that the dispute between the parties will be the focus and will be resolved

4. What really is wrong? (cont)

- The Panel's procedures do not lead to an effective gathering of relevant information
  - This often means that the Panel members are forced to attempt to draw inferences from very scanty material
  - On occasions this has led to glaring factual errors being made, with sitting Panels relying on personal views of what should, could have or might occur, rather than on considered determinations of what has been, is or is likely to be the fact
  - One reason for this defect is that the Panel's proceedings are not public, if they were (or could easily become) public this would encourage better information gathering

4. What really is wrong? (cont)

- The Panel's performance has actually encouraged tactical Panel litigation
  - In the 10 years to 2000, the number of takeovers cases reported in the leading company law reports was 66
    - 9 were Panel cases or appeals from NCSC/Panel unacceptability findings and 7 that were appeals to higher courts
  - In the 6.5 years of the Panel's reconstituted existence, it has averaged over 30 cases **per year**
  - Tactical court litigation has been replaced by tactical Panel applications
  - There is more tactical Panel litigation because
    - It is cheap without a costs penalty for an unsuccessful litigant and no requirement for an undertaking as to damages
    - There is a chance to get an unexpected decision
    - It is private, so you cut off the oxygen of publicity for other parties

Section 5

What should be done?

5. What should be done?

- The Panel should be subject to a proper independent external review
  - The government promised one after 2 years
  - The Panel's own review hasn't been released as that the date of this submission
  - Such a review could also take account properly of any further development of these issues arising from the Full Federal Court's consideration of the appeal in *Alinta*

- Allow parties to choose between going to Court for breaches of the law or the Panel for unacceptable circumstances – except if the matter concerns adequacy of disclosure of information in a takeover document (where the Panel should be the only forum)
  - it is the parties' dispute and Court is often where they want to be
  - the Panel is not as proficient in ruling on breaches of the law as the Courts (who also have better evidence gathering techniques)
  - reference of points of law to the Court by the Panel is not an efficient way for the parties' dispute to get before the Court

5. What should be done? (cont.)

- Restore the centrality of the “effects” concept, but give the Panel more guidance as to what makes effects unacceptable
- Remove the head of power for breach of law – this should go to the court
- Allow Panel decisions to be subject to ADJR even if a bid is on foot – the existence of review rights usually leads to better decisions
  - The effect of the *Glencore* decisions can be seen in *Alinta,* where the Panel got its act together and addressed the issues that Parliament gave it

5. What should be done? (cont.)

- Panel proceedings should be more run by parties and parties should always have the right to require an actual hearing before the sitting members
- Panel proceedings should be more public
- The Panel members should be fewer in number and be people
  - who are widely respected as real takeovers experts
  - whose views are generally accepted in the takeovers community
  - who stand above day-to-day takeover matters
- The President at least, and perhaps some other Panel members, should be full-time
- The Panel and its members should be subject to annual review by a joint committee with Treasury and market associations represented

Biographies

ANTHONY GEOFFREY HARTNELL, AM

Legal Practice

- A Founding Partner - Atanaskovic Hartnell, January 1994 to date
- Formerly a Partner of Allen Allen & Hemsley, July 1980 – June 1990 & January 1993 - December 1993
- Deputy Secretary, Department of Business & Consumer Affairs 1976-1979
- Senior Assistant Secretary, Australian Attorney-Generals Department, 1974-1975

Other Experience

- Chairman, Australian Securities Commission 1989-1992 (Inaugural)
- Chairman, National Companies & Securities Commission 1990-1991
- Member, Companies & Securities Advisory Committee 1990-1992
- Member, Trade Development Council 1987-89
- Director, Australian Film Finance Corporation Pty Ltd 1988-1990
- Special Legal Adviser, Australian Government Inquiry into Telecommunications 1985
- Member, Trade Practices Act Review Committee 1976 (Swanson Committee)
- Visting Professor of Law, University of Newcastle 1996
- Visiting lecturer, Sydney University Law School, LLM course
- Chief Legal Counsel - Bankers Trust Australia Group 1997
- Member, Australian Law Reform Commission Advisory Committee on the Adversarial System of Litigation
- Contributes to Butterworths Corporations Law Service

Public Companies

Chairman of**:**

- Chiquita Brands South Pacific Limited
- Television & Media Services Limited

Other Directorships

- Trinity Limited
- CEC Group Limited
- ANU Endowment for Excellence

Major Areas of Specialisation

- Corporate and Commercial Law, particularly covering corporate financing, takeovers, trade practices, collective investments and regulatory issues

University Qualifications

- BEc (ANU), LLB (Hons)(ANU), LLM (Highest Hons) (Geo. Washington Uni)

Honours

- Order of Australia (AM)

Disclosures

- Holds shares in a number of ASX listed entities including AGL Infrastructure and AGL Energy (formerly AGL and Alinta)

Biographies

JEREMY MARTIN KRIEWALDT

Legal Practice

- Partner - Atanaskovic Hartnell, September 2004 to date

- Formerly a Partner of Blake Dawson Waldron,
  - » Sydney - July 1990 – October 1997
  - » London - October 1997 – April 2000
  - » Sydney - April 2000 – March 2003
  - » Formerly an employee of Blake Dawson Waldron and Dawson Waldron, 1986-1990

Other Experience

- Counsel, Takeovers Panel (Acting) 2003 – 2004
- Research Assistant to Professor RP Austin, Sydney University Faculty of Law 1985
- co-author *Magarey's Buying and Selling Businesses and Companies* 3rd ed (forthcoming)
- co-author *Australian Encyclopedia of Forms and Precedents*, Sale of Business title
- country news editor for *International Company and Commercial Law Review*
- member, Corporations Committee of the Law Council of Australia
- member, Mergers and Acquisitions Commission of the Union Internationale des Avocats

Major Areas of Specialisation

- Corporate and Commercial Law, particularly covering capital raising, takeovers, corporate governance, foreign investment, new investment instruments and derivatives, including collective investments and regulatory issues

University Qualifications

- BA (Hons) (Sydney), LLM (Hons)(Sydney)

Disclosures

- Acted for Glencore International AG in the *Glencore* cases

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THE FIRST SIX YEARS OF THE RECONSTITUTED TAKEOVERS PANEL – AN ASSESSMENT*

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"The Panel will be a test of the goodwill of the business community in Australia in taking some responsibility for its own actions"

Introduction

With these words, the then Minister for Financial Services and Regulation, Mr Joe Hockey MP challenged the business community of Australia to support the Takeovers Panel.[1] The Panel includes this challenge on the front page of its web site. But this kind of support, once given or earned, is only able to be maintained or enhanced by performance.

This paper considers whether the Takeovers Panel, since its re-constitution by the *Corporate Law Economic Reform Program Act 1999* (**CLERP Act**) has fulfilled the expectations of it as expressed by the Government, which were the basis for the Government's challenge to the business community, and, if so, the extent to which it has fulfilled those expectations.

One preliminary matter which should be dealt with quickly is how this paper is relevant to today's topic, "Corporate Accountability & Public Access to Corporate Information". Takeovers have an effect on both access to corporate information and corporate accountability.

As regards access to information, takeovers are an occasion on which full information is provided to shareholders and, as a consequence, the market generally. This is first because that disclosure is mandated by takeover legislation, in particular, by the removal of the carve-out for confidentiality that applies in relation to continuous disclosure outside takeover periods. Second, because, unlike other occasions for disclosure (either under continuous disclosure or prospectus obligations), the bidder is an interested contradictor able to challenge the accuracy and adequacy of information provided.

As regards corporate accountability, the possibility of a hostile takeover is one of the disciplines which enhances corporate accountability. It is a direct appeal to shareholders to vote with their feet and make a decision about whether or not the target company has been properly managed. Because it

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* Paper presented at the Hartnell Colloquium on Corporate Accountability and Public Access to Corporate Information, Centre for Commercial Law, Australian National University, 7 July 2006. The paper has been revised in light of the discussion of it at the colloquium, for which the author is grateful. The paper's deficiencies remain the author's responsibility.

§ Formerly, Partner, Blake Dawson Waldron (1990-2003) and Acting Counsel, Takeovers Panel (2003-4). readers should note that the author was one of the lawyers at Atanaskovic Hartnell who advised Glencore International AG in the matters relating to Austral Coal Limited in 2005 which are discussed in this paper.

1 *Hansard*, *House of Representatives*, 3 June 1999 p 5972

puts the decision into every shareholder's hands by a document to which they can respond directly, and does not involve the general meeting, it is a method of obtaining corporate control that particularly empowers shareholders and reduces the powers of the incumbent management.

Each of these aspects relies on the takeover process being properly regulated and the disputes that necessarily arise from the contrary views of the bidder and target management being properly and efficiently resolved so that both the element of enhanced corporate information and the element of corporate accountability is enhanced. An excessive approach to completeness of information, without taking a realistic approach to the utility of that information or its comprehensibility, could be used to derail takeovers. If this occurs, their effectiveness as a means for enhancing corporate accountability would be reduced. Accordingly, whether the Takeovers Panel is operating in accordance with the expectations with which it was introduced has a real relationship to both access to corporate information and corporate accountability.

Statements of the Government's expectations of the Panel are found in:

- the CLERP Proposal for Reform Paper Number 4 concerning Takeovers (**CLERP Paper**)
- Mr Hockey's second reading speech introducing the CLERP Bill (**2RS**)[2]
- the Explanatory Memorandum to the CLERP Bill tabled by Mr Hockey (**EM**)
- the Report of the Parliamentary Joint Committee on Corporations and Securities into the CLERP Bill
- the Government's supplementary Explanatory Memorandum in relation to amendments to the CLERP Bill moved by it.

Those expectations in part appear from the criticism made by the Government of then existing dispute resolution through the Federal and State and Territory Supreme Courts. Although those criticisms were generally expressed as negative factors justifying reform, they contained within them the corollary that the reform proposed would remedy, or at least would not be affected by, those deficiencies. With one exception, I have sought to express all the Government's expectations in a positive way, even if they are actually derived from a criticism of the previous regime.

This paper concludes that the primary criticism made by the Government of the previous regime was in fact not properly a criticism of the previous dispute resolution process but a rather of the substantive procedure for takeovers and the content of takeover documents which the Government was also remedying by the same legislation. Viewed in this light, the principal criticism of the courts before the CLERP Act was substantially unfounded.

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2 *Hansard*, *House of Representatives*, 3 December 199 p 1284

In relation to the other expectations expressed by the Government, the paper concludes that a combination of a failure by the Government to adhere to its stated program and the subsequent performance by the Panel of its responsibilities under Part 6.10 of the *Corporations Act 2001* (and of the *Corporations Law* until July 2001)[3] means that there has been a mixed-bag of fulfilment - some expectations have not been fulfilled at all; some have been fulfilled in part (sometimes only in a very modest part) while others have been fully or substantially fulfilled.

Necessarily this paper is critical.

Lest it be thought to be unfairly so, it should be noted that many of the Panel's decisions have achieved substantive justice and its guidance has usually been timely. However, the issue is whether the Panel has been an improvement over the courts, which also provided substantive justice on a timely basis. Thus deficiencies in performance which might be small may also be quite important in this assessment.

The principal criticism of the Courts

In each of the CLERP Paper and the EM, a major deficiency of the courts as a dispute resolution forum for takeovers was identified; namely, that court procedure meant that a challenge to a takeover (whether as to the legalities of the takeover proposal itself or as to the adequacy of the information contained in takeover documents) needed to be determined either:

1. on an interlocutory basis (where an interlocutory determination on incomplete evidence had the commercial effect of a final determination); or
2. on a final basis where, in effect, the court allowed the takeover bid to proceed with the potential for it to be unwound subsequently once the case was finally determined (giving rise to substantial commercial uncertainty in relation to the bid).

The support for this criticism related solely to the treatment by the courts of alleged deficiencies in the information in takeover documents. There was some justice in the criticism in that area because an inaccuracy identified in an interlocutory determination on the adequacy or otherwise of disclosure meant that the bidder was practically required to create a new set of takeover documents and commence a new takeover scheme.

Taking non-information deficiencies first, it should be noted that in general these were and are almost entirely questions of law which require little factual material and where any required factual material is relatively easily provided. Accordingly, both as a matter of logic and also from experience, such matters can easily be dealt with on an "interlocutory as final" basis or can be dealt with finally on an accelerated court timetable.

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[3] Unless otherwise stated statutory references are to the *Corporations Act 2001*. These are in most relevant cases identical to the *Corporations Law* for the period from March 2000 to July 2001.

The real issue related almost entirely to the traditional tactic of a target challenging the adequacy of disclosure by the bidder in what was then a Part A Statement (now a bidder's statement). At the time, the takeovers code[4] did not allow for the supplementation of the document lodged by the bidder as its Part A Statement. So in the extreme circumstances where the bidder's offers and Part A Statement had already been sent to target shareholders, there was no alternative for a bidder whose Part A Statement had been found to be defective but to start again (including by serving a new Part A Statement and offer document and waiting the statutory period of 14 days).

Even in the "bad old days", this rarely occurred. Bidders were rarely so reckless as to dispatch a document where the target had stated that it had concerns. Targets were correctly advised that they should seek injunctive relief as soon as possible and, in any event, before the time for dispatch of offers (principally because a court would be unlikely to give relief where the target had not acted expeditiously).

A weird symbolic dance developed in which the target would as soon as practicable give the bidder a letter setting out its alleged deficiencies and the bidder would agree to the obvious ones and negotiate the others on the basis that the target would consent to the early dispatch of a new Part A Statement containing in the agreed amendments. In these circumstances, ASIC (and its predecessors) typically agreed to abridge the time provided in the legislation and gave the required modification (it in fact became a class order and is now in the legislation).[5]

Similarly if the parties could not agree, and the matter ended up before a court, either by reason of an interlocutory injunction or undertakings, no documents would be dispatched and the argument was about what changes were required in order to satisfy the criticisms made by the target that the court upheld. If the court was satisfied that the replacement Part A Statement met the target's valid criticisms, it was a brave target which would not consent to the document being dispatched.

So the alleged principal deficiency was, even at that time, somewhat overstated. The Government, however, was providing in the CLERP Act for supplementary takeover documents which could correct takeover documents, even those which were already in the hands of shareholders.[6] If this facility had been available, a court determination that a Part A Statement or bidder's statement was deficient would not have entirely derailed the bid but rather the court would have put the bid back on the rails by ordering supplementary disclosure. Unfortunately, because at the same time as this reform was

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[4] The term 'takeovers code' is used to describe the legislation from time to time dealing with acquisition of shares, substantial holding disclosure, tracing of beneficial ownership of shares and declarations of unacceptability under the co-operative legislative scheme (1980-1991), the Corporations Law scheme (1991-2001), the Corporations Act 2001 and the Australian Securities and Investments Commission Act 2001.

[5] section 633(1) step 6 and ASIC CO 00/344

[6] sections 643 and 644

introduced the courts were stripped of their jurisdiction, we were never able to test the proposition that with this benefit available, the courts would have been able to fashion more flexible remedies and prevent bids being derailed.

Procedural expectations of the Panel

Among the expectations of the Panel, several related to the procedures that the Panel would follow. These were that the Panel would:

1. be quick and efficient[7]
2. conduct proceedings informally[8]
3. deal with issues finally[9]
4. avoid unmeritorious claims[10]
5. excuse technical breaches[11]
6. operate throughout Australia[12]
7. hear matters in the State or Territory most appropriate for the case[13]
8. hold its hearings in public unless there was a real reason not to do so.[14]

In order to assess these expectations, I should outline the course of a typical Panel proceeding, as many may not be aware of the way in which Panel proceedings are conducted.

The first step is the preparation of an application. An application must be made in writing[15] and must be made within two months of the date at which the unacceptable circumstances occurred or at any other time with the leave of the Panel.[16] The Panel is required to act quickly by the legislation in that it may only make a declaration of unacceptable circumstances under section 657A on a day which is either within three months of the date on which the unacceptable circumstances occurred or one month after the application was received.[17]

The application is typically served on the Panel and the other likely parties by e-mail.[18] The other parties then give their notices of appearance, if they wish to participate (again by email).[19] The applicant in its application and the other parties in their notices of appearance agree to abide by the rules of the Panel and, in particular to keep confidential information confidential and not to engage in "media canvassing". Among the information that must be kept confidential is all correspondence concerning the Panel proceedings including all correspondence from the Panel to parties and all correspondence from parties to the Panel as well as submissions and evidence provided in the

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7 EM at 7.16; CLERP Paper at 37
8 CLERP Paper at 39
9 EM at 7.15; CLERP Paper at 37
10 EM at 7.20; CLERP Paper at 38
11 CLERP Paper at 38
12 CLERP Paper at 39
13 ibid
14 CLERP Paper at 40
15 *ASIC Regulations* reg 19 and Takeovers Panel Rules for Proceedings (**Rules**) r 2 and 4
16 section 657C(3)
17 section 657B
18 Rules r2.3 and r6
19 Rules r2.1(e) and 3

proceedings. All correspondence is by email to, or copied to the Panel, through the Panel executive and, except in rare instances, other parties. Confidentiality lasts throughout the period of the proceedings in relation to all of those documents and, as regards documents that are not otherwise confidential, finishes when the proceedings finish. However, if confidential information that really is confidential is provided during the proceedings, the confidentiality obligation continues.[20]

Having received the application, the President (or a substitute president if the President is unwilling or unable to act, for example, because of conflict of interest or because he is outside Australia or on vacation[21]) usually in consultation with the Panel executive appoints a panel of three members to conduct the proceeding in relation to that application.[22] Bearing in mind that all of the panel members are part-time members, that conflict of interest must be avoided and the panel selected should have the skills necessary to deal with the issues raised by the application, this process of selection and appointment may take two or three business days and has been known to take up to a week or more. For example in selecting the panel to deal with the proceeding remitted to it by Emmett J. relating to Austral Coal, the Panel took more than a fortnight to appoint the relevant members and, in the course of doing so, managed to appoint a person who had a conflict by reason of being a director of an organisation which was an adviser to one of the parties.[23]

Having been appointed, the sitting panel members meet privately (generally by telephone) with the Panel executive to consider whether they wish to commence proceedings on the application.[24] If the application contains a real and serious question, it is unusual for the Panel not to commence proceedings. Examples where proceedings have not been commenced include where the matter is being more appropriately handled by a court, where there is no issue pertaining to corporate control involved, where the matter is frivolous or does not raise any matters to which Chapter 6 relates.[25]

Where the sitting panel members decide to conduct a proceeding on the application, the Panel is required to prepare and give to the parties a brief setting out the issues that the panel wishes to be the subject of submissions by the parties.[26] From now on, the determination of what issues the Panel wishes to consider and the manner in which it wishes to consider them as well as the evidence that the sitting panel requires in order to make a decision on those issues are all matters solely within the control of the sitting panel.

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20 see Rules r8 and r12.

21 *ASIC Act* section 182

22 *ASIC Act* section 184

23 *Takeovers Panel v Glencore International A.G.* [2005] FCA 1628 at [15]

24 *ASIC Regulations* reg 20(a)

25 *St Barbara Mines Limited* [2000] ATP 10; 18 ACLC 913; *Richfield Group Limited* [2003] ATP 41; *Grand Hotel Group* [2003] ATP 34 at [51]-[54]; *St Barbara Mines Limited 02* [2004] ATP 13; *Rivkin Financial Services Limited* [2004] ATP 14, 50 ACSR 147;

26 *ASIC Regulations* reg 20(b)

The only restriction on this is the limitation in section 657C that any declaration or order must be made "on an application". Certainly this means that the Panel is not allowed to act on its own motion. Precisely how closely related the unacceptable circumstances must be to the matters raised in the application so that a declaration is made "on the application" is a matter which has yet to be determined. It is clear however that some sitting panel regard themselves as having carte blanche to consider anything that might be raised in connection with a takeover that they might have included in an application once they are seized with a matter while others seem to regard the matter as providing a real fetter on their jurisdiction.[27]

Typically the parties receive the brief eight to 14 days after the application. The usual timetable that the Panel establishes is for each of the parties to make submissions (only in writing again and attaching written evidence) in two business days and then for each party to provide rebuttal submissions (which may not introduce new material except in response to the submissions of other parties) by the end of the next business day.[28]

The sitting panel then reads the material submitted and meets privately (again usually by telephone) with the Panel executive to consider the state of the matter in light of the submissions and rebuttal submissions by the parties. At this stage the sitting panel might either issue another part of the brief to obtain further submissions or make a decision. Usually the decision at this stage is whether or not circumstances are unacceptable.

If the decision is that there are unacceptable circumstances, typically there will be another process for submissions on the orders. Experience indicates that it takes between five and 10 days for the sitting panel to communicate to the parties the result of their deliberations on the unacceptability issue. When it does so, if further submissions and rebuttal submissions on orders are required, they will again be on the two business days plus one business day timetable. The process of consideration, potential further submissions being required and then delay while a decision on orders is made and communicated then follows.

Experience indicates that a Panel proceeding which is not resolved by one or other party proffering undertakings[29] takes between three and five weeks.

***Is this process quick and efficient*?** By comparison with court proceedings for damages in personal injuries matters or even in commercial contract cases, it is quick. Is it quicker or more efficient than the court processes that were adopted by the Federal and State and Territory Supreme Courts in relation to

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[27] The only discussion touching on this can be found in *Breakfree Limited 04R* [2003] ATP 42 at [42]-[50] where the Panel indicated that the Panel can consider all the factual and other matters raised in the application and all the factual and other matters logically connected to those matters

[28] Rules r9.6

[29] Binding undertakings can be given by a party under *ASIC Act* section 201A; the Panel has taken the view that the effect of a suitable undertaking may be to remove any unacceptable element from the relevant circumstances (see eg *Online Advantage Limited* [2002] TPA 14; *S A Liquor Distributors Limited* [2002] ATP 22, 47 ACSR 249)

takeover matters before March 2000? In some cases the answer is "Yes" but in many cases the answer is resoundingly "No". In terms of efficiency, more worrying is the fact that any speed element is as a result of the **parties** being required to respond on abbreviated timetable – the sitting panel itself has unregulated periods of time to meet and respond. Experience suggests that more than 50% of the time taken with a Panel proceeding involves the matter being "in the Panel's court". One must doubt whether this is efficient.

Is the process informal? In the sense that it doesn't involve barristers in wigs and gowns and rules of pleading and evidence, the answer is necessarily "Yes". However, the Panel's current process requires communication to be written and separates the parties from the decision-makers by mediating all communication through the Panel executive. This means that no party ever has the sense of directly communicating with the actual decision-maker and allowing parties more clearly to understand the issues the decision maker is actually concerned about (and whether that concern is based on a misconception). One must ask whether this is not in a very real sense more formal than the free-wheeling exchange of views that occurs in court.

Again, in the sense that the Panel is not bound by the rules of evidence, the process is informal. But Panel proceedings must necessarily be conducted with procedural fairness[30] and this requires that the panel act on logically probative material and that any proposition on which the Panel proposes to rely be squarely made known to the parties so that they might have an opportunity to rebut it or correct a misapprehension on which the sitting panel is operating. This imposes a degree of formality, especially so that the Panel is sure that the party has understood the matter raised by it.

Does the Panel finally dispose of matters? Clearly it finally disposes of matters, subject only to the Panel being challenged on grounds which relate to the supervision of administrative bodies by the High Court pursuant to section 75 of the Constitution. That the Panel was amenable to review by the High Court on this basis, notwithstanding the privative clause in section 659A, was confirmed in the recent Glencore cases.[31]

In relation to unmeritorious claims, the Panel initially was quite reluctant not to conduct proceedings. There was a period in 2003 and 2004 when the Panel appeared to exercise a more rigorous approach to unmeritorious claims by refusing to conduct proceedings at all although it has not exercised its general power not to proceed with vexatious claims at all.[32] Perhaps the consequence of this approach was to reduce the number of unmeritorious applications being made. In any event, the number of occasions on which the Panel has formed the view that proceedings ought not to be commenced has notably reduced since 2004.

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30 *ASIC Act* section 195(4)

31 *Glencore International A.G. v Takeovers Panel* [2005] FCA 1290, 23 ACLC 1781 (**Glencore 1**) esp at [33]-[35] and *Glencore International A.G. v Takeovers Panel* [2006] FCA 274 (**Glencore 2).**

32 The Panel has declined to conduct proceedings under *ASIC Regulations* reg 20(a) rather than exercise the power relating to vexatious proceedings in section 658A.

When it comes to technical breaches, the Panel has proved to be somewhat hamstrung. In some cases, it has indicated that breaches of the legislation (even the most fundamental provision relating to the 20% threshold) can sometimes not be unacceptable and in those cases has refused on that basis to make a declaration of unacceptable circumstances. [33] However, the Panel has not been endowed either with jurisdiction to modify the legislation through its orders or to exempt a person from a contravention by means of its orders. In these circumstances, additional Panel proceedings have sometimes arisen when, in order to achieve the Panel's stated goal, parties have applied to ASIC for the relevant modification or exemption and been refused, leading then to further Panel proceedings pursuant to section 656A to review the ASIC decision.[34]

Does the Panel operate throughout Australia? In a technical sense it does because the same process operates wherever the parties are located and in terms of the procedure, there is no difference whether you are in Perth or Hobart, Sydney or Darwin. In a practical sense, however the requirements for written submissions, electronic distribution of documents and avoiding direct contact between Panel members sitting on the proceeding and the parties, with all communication is being channelled through the Panel executive, mean the Panel does not meaningfully operate anywhere in Australia. In particular, the Panel does not **hear** its own matters but rather attends to them as if they were the application for administrative relief.

Finally, and probably most importantly, in no sense does the Panel conduct proceedings in public. Not only is the matter conducted in written form and electronically without interaction directly between the parties and their representatives and the Panel's sitting members but all participants are in effect gagged so that no party may talk to the media and the discipline of public scrutiny of Panel proceedings does not assist Panel decisions. Other jurisdictions with Takeovers Panels use face-to-face hearing held in public (eg New Zealand and the UK), as does the Company Auditors and Liquidators Disciplinary Board. On might ask what is so different about takeovers that they don't merit this?

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33 for example, *Isis Communications Limited* [2002] ATP 10

34 for example *National Foods Limited 02* [2005] ATP 10

Approach expectations

In terms of its approach to matters before it, the Government indicated that the Panel would:

1. have regard to the spirit of the takeover rules [35]
2. provide consistency, in part through a full-time President sitting, at least initially, on all matters[36]
3. minimise the use of tactical litigation in takeovers[37]

Spirit of the legislation

The "spirit of the legislation" is in several ways, an interesting concept but the most important thing is how Parliament chose to embody this general concept in the legislative mandate that it gave the Panel.

Nowhere in the Panel's legislation is there any mention of the "spirit of the legislation". What Parliament did instead, which is both sensible and appropriate, bearing in mind that the Panel was meant to apply the consensus of the takeovers community and be formed by members of that community, was to require the Panel to look at the **effect** of circumstances upon the fundamental matters that were the subject of regulation by the takeovers code. Those fundamental matters were and remain:

- control or potential control of companies (and listed managed investment schemes); and
- an acquisition or proposed acquisition of a substantial interest in such bodies.

Having determined the effect of the relevant circumstances, the Panel was directed to determine whether, having regard to a list of matters set out in section 657A(3), it considered, using its own expertise and the evidence before it, the circumstances to be unacceptable. The matters to be considered include the purposes of Chapter 6 set out in section 602.

One of the matters that the Panel must do in order to fulfil its statutory obligation is to determine what the effect of the relevant circumstances is on control or potential control, or the acquisition or proposed acquisition of a substantial interest. On these fundamental issues the Panel was found in the two Glencore cases concerning the Panel's proceedings in relation to Austral Coal 02 to have made errors that constituted jurisdictional error.

In the first Glencore decision, Emmett J held that the Panel must determine the **actual** effect of the relevant circumstances and that it was not sufficient for it to hypothesise or speculate as to possible effects. As a consequence, since the relevant sitting panel had not stated in its reasons or its declaration of unacceptable circumstances any finding as to effect but had merely stated that

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35 CLERP Paper at 37 and 38, EM at 7.22, 2RS at 1286
36 CLERP Paper at 37, EM at 7.25
37 CLERP Paper at 38, EM at 7.16, JPCR at 3.51

the relevant circumstances may or could have had certain consequences or effects, Emmett J. quashed that sitting panel's decision and remitted that proceeding to the Panel for determination in accordance with law.

In the second Glencore decision, which concerned the attempt by a new sitting panel to make that determination of those proceedings according to law, Emmett J. found that the new sitting panel had made different jurisdictional errors being:

- the view that the interest of Glencore in certain cash-settled equity swaps (which the Panel considered did not confer on Glencore a relevant interest in any shares nor make Glencore and the bank counterparties under those arrangements associates of each other) could be taken into account in determining whether Glencore had acquired a "substantial interest" ; and
- that the circumstances had an effect (which again was only expressed in terms of possibilities and potentialities) on the acquisition of shares by the bidder, Centennial Coal Company.

Clearly, the latter "effect" was insufficient for the same reasons as Emmett J had already given in the first Glencore case.

In relation to whether the interests of Glencore under the cash-settled equity swaps (contracts for differences) to which it was a party could be aggregated with its actual shareholding to constitute a "substantial interest" whose acquisition was affected by the circumstances found by the Panel, the debate really was whether something that was not a relevant interest (although the Panel said that there was some degree of "control" falling short of a relevant interest, which finding Emmett J. described as “a very curious result”) and which did not make Glencore an associate of its counterparties or vice versa, could be a “substantial interest”.

His Honour considered in detail the pattern of regulation provided in the takeovers code and concluded that the interpretation preferred by the Panel (which would have included equities swap exposures in Glencore's "interest" and made it "substantial") was incompatible with that pattern of regulation. Instead his Honour found that the interpretation of the concept of "substantial interest" that more clearly advanced the legislative policy contained in all of the takeovers code (or the spirit of the legislation) was one which required that a substantial interest be, at least, "voting power" (that is a relevant interest of a person or that person's associate).

The Panel had based its wider view of "substantial interest" in part on the view that the Panel's role was "anti-avoidance" and, accordingly, a wider view was required in order to ensure that this purpose was fulfilled. His Honour dealt with this by observing that the Panel cannot use its flexible mandate on policy issues as a means by which the statutory language can be adjusted to suit its circumstances. In other words, the Panel could not extend the meaning of "substantial interest" by a reference to considerations of policy

and it is only after the relevant jurisdictional facts have been established that the Panel is required or able to form a view, informed by policy, of the acceptability or unacceptability of the relevant circumstances.

In relation to this, one reason for the confusion in the Panel's mind may come from the history to which Emmett J. referred of the use of the concept of "substantial interest" in the various manifestations of the takeovers code.[38] In its first manifestation in the Companies (Acquisition of Shares) Act and Codes, the expression was associated with the express anti-avoidance provision in section 60 which was an extension beyond the courts allowing the NCSC to deal with conduct which may have been legal but which was unacceptable. Similarly, the original Panel, established under the Corporations Law in response to concerns that it was inappropriate for the regulator to be policeman, investigator, prosecutor and tribunal also had a limited function which was expressly one of anti-avoidance.

However, by becoming the principal forum for the resolution of takeover-related disputes,[39] the Panel became both more important but also necessarily had to forego some of its "anti-avoidance" jurisdiction in order to become a dispute resolution body. In other words, it is one thing to be a body solely considering concerns expressed by the regulator that legally permissible conduct nonetheless offends the objects (or spirit or purposes) of the legislation, it is quite another to be a dispute resolution body applying similar policy concerns to the disputes between parties and disposing of those disputes by adjusting the rights of parties and making new rights.[40] In this regard, the fact that the panel does not have a general "anti-avoidance" role is reinforced by the fact that it can only act on an application – this indicates that its primary function is to resolve the dispute revealed by that application, not to seek out occasions for considering whether there has been avoidance of policy.

A further consideration raised by this issue of "anti-avoidance" relates to the role of the purpose set out in paragraph 602(a). That provision states that a purpose of Chapter 6 is:

"*to ensure that... the acquisition of control over... the voting shares in a listed company... takes place in an efficient, competitive and informed market*".

Leaving aside the somewhat curious concept of the acquisition of control over shares (rather than the acquisition of control of a company, which is the concept used in section 657A), the efficient, competitive and informed market concept has changed in its function in the takeovers code over time. In the Acquisition of Shares legislation and Corporations Law its only role was as a matter which the NCSC and its successors needed to take into account in

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38 Glencore 2 at [60]-[85]

39 see sections 659AA, 659B and 659C

40 This basis for the validity of the original Corporations and Securities Panel as not involving the exercise of the judicial power of the Commonwealth contrary to section 70 of the *Constitution* was upheld in *Precision Data Holdings Limited v Wills* (1991) 173 CLR 167 at 188-190 was also relied on in relation to the current Panel in Glencore 1 at [54]-[57].

determining whether or not to grant exemptions or modifications. It did not appear in the sections dealing with unacceptability. Also, it was expressed as a general principle which was given specific content in the context of takeovers by the Eggleston principles.[41] It was only by the CLERP Act that the Masel principle[42] was moved from a general statement given specific meaning by the Eggleston principles to a specific purpose having the same status and role as the Eggleston principles.

There is a fundamental difference between the Masel principle and the Eggleston principles which is explained by their different original purposes. The Eggleston principles set standards to be satisfied - there must be disclosure of the identity of the bidder, there must be "reasonable" time to consider, there must be "enough" information to assess the merits of a bid and there should be "reasonable and equal "opportunities to participate in the bid's benefits. But the Masel principle contains no such criteria – it just seeks "an efficient, competitive and informed market".

One way of dealing with the issue is that if the relevant market (whatever it may be) is **sufficiently** efficient, **reasonably** competitive and **adequately** informed so that it can be described as "**an** efficient, competitive and informed market", then it does not matter that it might be "further informed", "more competitive" and "more efficient". This view is appropriate and would be consistent with the other paragraphs of section 602.

However, the approach taken by the Panel in relation to disclosure of interests in cash-settled derivative instruments and in other circumstances appears to take a second, more absolute view.[43] This takes policy to the extreme of actually allowing the Panel to reason that if the relevant circumstances might be seen as occurring so that the market **might have been** more efficient, or more competitive or better informed had the circumstances been otherwise, then the circumstances that actually occurred are unacceptable by reason of falling short of that higher, but non-existent standard. To replace the word "an" with the words "the most" (which is in effect what the Panel has tried to do) is entirely inappropriate.

The Panel's approach to information over the last six years has changed dramatically by reason of this approach to the purpose in paragraph 602(a).

In its earlier decisions, the Panel quite consciously and determinedly set its face against the trend of that had been developing in court decisions in the 1990s requiring higher and higher disclosure standards so that takeover

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41 The expression of section 59 of the *Companies (Acquisition of Shares) Act 1980* is illustrative: "*the Commission shall take account of the **desirability** of ensuring that the acquisition of shares in companies take place in an efficient competitive and informed market and, …shall have regard to the **need** to ensure…*" (emphasis added).

42 A B Greenwood, "In addition to Justin Mannolini" (2000) 11 AJCL 1 at 4 indicates that Leigh Masel, as Chairman elect of the NCSC, developed this formulation, hence the description of it as the "Masel principle".

43 For example *Austral Coal Limited 02(RR)* [2005] ATP 20, 23 ACLC 1797 at[126].

documents became more and more difficult to prepare.[44] In taking this approach, the panel emphasised the Eggleston principle that there be "enough information to enable [assessment] of the merits of the [bid]". More recently, this realistic assessment of what information is sufficient to enable shareholders to assess the merits of the takeover appears to have been lost. The recent decision in *Sydney Gas Ltd 01* [45] suggests that the Panel is applying a significantly higher standard of information than "enough information" – in this regard the inappropriateness of the Masel principle as guidance for the Panel is becoming quite clear.

Consistency

The concern expressed in relation to consistency when takeover disputes were handled by the Federal and State and Territory Courts was that these matters were handled by a large number of judges in 9 separate courts, many of whom did not have particular expertise in the area and who might not see takeover matters except on very rare occasions. As a consequence, it was feared that there was a lack of consistency in the approach of the different judges in the several courts. It was thought that, by having a centralised decision-maker, the degree of consistency would be increased. To facilitate that, at least in the early period, it was envisaged that the Panel would have a full-time President who would initially sit on all proceedings. Certainly this has not been the case, as the Panel President has remained a part-time appointment and he has certainly not sat on a majority of the matters that have been dealt with by the Panel.

To that extent, the steps that were to enhance consistency were not adopted by the Government and could not be implemented by the Panel.

In terms of personnel, therefore, the Panel has had a large number of members (up to about 50 at any one time) acting in groups of three, who rarely talk to each other and each of whom may be involved in no more than one or two Panel proceedings each year.

The Panel has tried to encourage consistency by having regular information-sharing meetings. Typically they hold three sessions of these each year. Two of those sessions are held on a decentralised basis while the last is held at a central place. The Panel members meet to discuss issues arising from recent Panel work with a view to sharing the knowledge gained by that and developing some commonality of approach.

However, it remains the case that the Panel has on many occasions been subject to suggestions that its decisions are inconsistent. In my view there is some justice in this criticism but equally it proceeds, in part, on a misunderstanding of what consistency should be in the case of the Panel.

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[44] For example *Taipan Resources NL (No 11)* [2001] ATP 16 at [85]-[87]; *EPHS Limited* [2002] ATP 12 at [7]-[16] and *PowerTel Limited 02* [2003] ATP 27 at [55]-[72].

[45] [2006] ATP 9 at [99] (especially footnote 10).

As discussed above, the critical determination made by the Panel, having determined the effect that the relevant circumstances may have had on control or potential control or an acquisition or proposed acquisition of a substantial interest is whether that effect is unacceptable in light of the purposes of Chapter 6. When a body applies policy goals, and if one accepts that similar facts may have different effects in different circumstances, it is easy to see that applying the same policy may give rise to different assessments of acceptability and unacceptability in different cases. In mid-2004, the then Acting Director of the Panel, George Durbridge and I wrote a paper for the Annual Workshop of the Corporations Committee of the Law Council of Australia seeking to provide the legal profession with an insight into the difference between a consistent approach to policy and the kind of consistency derived from the judicial doctrines of precedent and judicial respect. That analysis showed that there was a greater degree of consistency in Panel decisions than some of the critics of the Panel would otherwise have persons believe.

However, one of the principal deficiencies in terms of consistency has been the tension that exists between explaining the policy basis for decisions so as to demonstrate that a particular decision is consistent with the Panel's approach to policy and a desire on the Panel's part to avoid making any decision that might be seen as a "precedent".

There have been too many occasions on which the Panel has had to explain in subsequent proceedings or reasons why the approach in an earlier decision either is or is not consistent with policy and either is or is not appropriate to be applied to the circumstances of the case before the Panel.[46] This suggests that the Panel has not gone through this process itself in making its earlier decision and has not adequately explained the results of that process in its reasons.

Consistency is a desirable feature of decision-making not principally because it is good in itself but because it promotes efficiency by enabling market actors and their advisers to predict the responses of the decision-maker to the particular factual circumstances. In the case of the Panel this means that the Panel's understanding of:

- its required jurisdictional facts; and
- the policies that it is to take into account,

should be clearly explained. These explanations can be given in any number of forms but must be helpful and clear. It is not helpful to obfuscate in an attempt always to provide discretionary "wriggle room". The approach and the policy should be made clear. The discretion comes in the application of that to particular facts and reasons the decision need to articulate both the approach and the application.

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[46] For example, the discussion in *National Foods Limited* [2005] ATP 8, 23 ACLC 911 at [61]-[65] of its earlier decision in *LV Living Limited* [2005] ATP 5.

Experience has indicated that the quality of Panel documents vary dramatically, notwithstanding that the same Panel executive prepares these documents. On occasions and apparently without considering previous Panel decisions, a sitting panel has decided that a determinative factor was a matter which a previous panel had said could never be a relevant factor![47]

In summary, therefore, the Panel is, at best, equally inconsistent with the predecessor courts and probably more inconsistent, because it has an equally inefficient use of multiple part-time practitioners and has had an approach to making and explaining its decisions which has tended to confuse rather than to enlighten.

Tactical litigation

It is not at all clear that tactical litigation has been minimised. The fact that there were the long-running Taipan Resources, Pinnacle VRB, Anaconda Nickel, Skywest and Austral Coal sagas involving multiple Panel applications and proceedings suggests that the tactical use of the Court has been simply replaced by a tactical use of the Panel.

Some aspects of the Panel's procedures which have encouraged this trend include:

- the lack of any requirement to give undertakings as to damages when obtaining interim relief having an injunctive effect
- the lack of any cost penalty applying to an applicant whose application is unsuccessful
- the relative cheapness of Panel proceedings
- the proclivity of some sitting panels for taking an application and running with it where they will and the lack of certainty referred to above engenders a degree of "random decision generation".

Together, these factors encourage parties (not just bidders and targets but also shareholders, counter-bidders and others) to "have a punt".

This is not the Panel's fault (except as regards the last factor listed above). They are rather the necessary consequence of some inadequate legislation (in particular the first two aspects), and the uncertainty factor discussed above when applied to the elevated emotions and conflict associated with corporate control transactions.

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[47] For example, in *Data & Commerce Limited* [2004] ATP 7 the Panel indicated that the intentions of the applicants concerning taking up their rights under a rights issue were irrelevant to whether that rights issue was unacceptable by failing to be "genuinely accessible', this was the basis for the decision of the Review Panel In *Emperor Mines Limited 01(R)* [2004] ATP 27

Personnel issues

There were two expectations in relation to personnel in addition to the expectation that there be a full-time President who initially sat on all sitting panels:

- that the Panel would be a specialist body largely comprised of takeover experts; and
- that there would be a full-time independent executive to service the Panel and to deal with market participants on a day-to-day basis.

Without in any way criticising any individual member of the Panel, it appears to me that a significant proportion of them do not have the experience, reputation or qualifications to be called takeover experts and, in particular do not have that degree of those qualities as to make them widely respected within the business and takeover the advisory community **by reason of their** takeover experience.

The Panel model is based on a concept of peer review by members of the relevant peer group who are recognised by other members of that group as having exceptional skills and experience so that their word on an issue typically goes. Although there are some of the members of the Panel who meet that description, I consider that few of the Panel members would regard themselves as having that status.

There is also an element relating to the concept of peer review in Australia that needs to be taken into account. Unlike the academic community which has accepted peer review of scholarly work as a necessary part of that profession, the commercial community and the advisory community typically does not expose itself to that kind of unself-interested analysis. To the contrary, the Australian commercial and advisory community is characterised by a combination of personal competitiveness and "tall poppy syndrome" which, in effect, means that peer review is unlikely to be successful, at least where the relevant peers are not universally accepted not merely as good practitioners but as pre-eminent and experienced. Australia does not have the degree of respect for the authority that allows the London Panel to operate effectively.

The composition of the Panel has been weakened by the appointment of:

- too few senior investment bankers and legal practitioners,
- too few senior business people who have participated in numerous contested acquisitions
- too many people with general advisory or business experience or who are characterised more as being solid and having common sense rather than expertise and respect, and
- too many people actively involved in day-to-day takeover activity (and hence subject to constant disqualification for conflict of interest).

In addition what appear to have been conscious decisions in relation to both gender and geographic representation have exacerbated this problem.

In terms of personnel, I believe that fewer persons should have been appointed, that the fact that the greatest expertise in this area is to be found in Sydney and, to a lesser degree Melbourne and to a much lesser degree in other State capitals should have been accepted and reflected in the appointments and that rather than looking at the current leading practitioners, who are in day-to-day conflict with each other and other members of the takeover profession, elder statesmen of the takeover advisory community and recently retired senior practitioners should have been appointed on a full-time or more than occasional basis.

The Panel executive has also failed to live up to the expectations expressed on it. The fact that the permanent members of the Panel executive have been drawn solely from ASIC has tended to give the organisation less of the character of a dispute resolver and more of the character of an organisation considering applications for grace and favour.

This was probably appropriate in 1999-2000 – the Panel had to be set up in a way that fitted in with Public Service and Government requirements and it was expected that the principal source of work for the Panel would be reviews of ASIC decisions under section 656A and not applications for declarations of unacceptable circumstances. Since Panel members had little ASIC background, the experience of former ASIC officers would be most useful in applications for review of ASIC decisions.

However, time has passed and we now know that the overwhelming bulk of the Panel's work is under section 657A. This suggests that the executive should have more representation from the takeover community to balance the pre-conceptions that come from dealing with takeovers from the perspective of ASIC.

In this regard, the Panel executive differs markedly from the executive that services the London Panel. That executive is drawn from the takeover advisory market, sees itself as a servant to its market and sees its role as assisting Panel members to keep members of the market within the bounds of the market's own commercial morality rather than as in some way having a role of leading the market.

The role that the Panel executive has by reason of the process by which proceedings are conducted (which means that they intermediate entirely all communication between Panel members and parties) goes well beyond the description of servicing the Panel and conducting day-to-day contact with market participants. In my view it insulates the Panel members from that direct discourse with the parties without which decisions can only be sub-optimal.

Report card

In summary, therefore, the assessment is that the Panel has fallen well short of achieving its expectations in all of the procedural, approach and personnel aspects.

In terms of the goodwill of the business community to the Panel, a historical perspective suggests that there have been four principal phases:

1. initial phase - during the first year or two of the Panel's existence in reconstituted form, it exercised significant restraint, listening to complaints and generally finding them not to be made out or to be capable of rectification by relatively simple undertakings. During this phase, the initial goodwill which the business community granted the Panel was reinforced.
2. first "activist" phase - during the second, third and fourth years, the Panel expanded the range of things it would do and seek to influence. It made declarations of unacceptable conduct, it found new grounds for them such as frustrating action[48] and it intervened in matters which, had parties had their own wishes, would have been the subject of separate court proceedings[49] and it engaged in the brokering of new resolutions.[50] Notable dissent on the Panel was begun to be heard.
3. analytic phase - an attempt, in the fourth and fifth years, while still exercising a degree of innovation (e.g. considering the control effects of rights issues[51] and divesting shares where inadequate market disclosure had been made contrary to the provisions of Chapter 6C[52]), to link Panel decisions to policy and to give clearer indications to the market as to the circumstances in which the Panel had jurisdiction and to the approach to application of the Chapter 6 policies and protections. Some goodwill was restored.
4. the second activist phase - a return to the activism of the second phase with an even more aggressive approach to attempting to preserve future administrative discretion and consciously taking the view that the Panel knew better than market participants.

If the second activist phase continues, the loss of goodwill that has been occasioned by the two activist phases and which was only partially recovered during the analytic phase will inevitably lead to calls for the Panel to be

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48 *Pinnacle VRB Limited (No. 8)* [2001] ATP 17, 39 ACSR 55, 19 ACLC 1252

49 For example in *AMP Shopping Centre Trust 01* [2003] ATP 21, 45 ACSR 496 and *AMP Shopping Centre Trust 02* [2003] ATP 24, 45 ACSR 524, the application in effect was to allow the parties to take their disagreement on the construction of a document to court for that dispute to be resolved – it was the Panel that decided that it could resolve the matter by deciding whether, if the construction for which the target was arguing was correct, unacceptable circumstances existed.

50 For example, *Brisbane Broncos Limited (Nos 1 and 2)* [2003] ATP 1, 40 ACSR 459, *Brisbane Broncos Limited (No 3)* [2003] ATP 3

51 *InvestorInfo Limited* [2004] ATP 6, 22 ACLC 1249

52 *Village Roadshow Limited* [2004] ATP 4, 22 ACLC 578

abolished. If the Government wishes to prevent this, urgent reconsideration of the entire Panel regime is required.

A Recipe for Reform

A mixture of changes need to be made in my view, if the Panel is to be saved. The changes which should be considered and adopted include:

Changes to Legislation

- Permitting the use of court actions on alleged contraventions of statute or general law during the bid period concerning a takeover (except in relation to the adequacy of takeover documents) where the Panel certifies that, if the complaint is upheld by the Court, the Panel would regard the relevant contravention as constituting, or as likely to constitute, unacceptable circumstances. A provision should also be included so that if the certificate is not given within, for example, five business days, it would be deemed to have been given.
- Making Panel decisions under section 656A and Review Panel decisions (which only relate to proceedings under section 657A) amenable to review under the *Administrative Decisions (Judicial Review) Act 1975*.
- Restoring the centrality of the Eggleston principles with their sensible establishment of proper levels and making it clear that the Masel principle does not have separate existence or relevance but is a goal served by the Eggleston principles.
- Allowing the Panel to make costs orders in all matters before it and indicating that the Panel should award costs in most circumstances with costs following the outcome of the matter.
- Requiring the Panel to make a condition of interim relief the giving of an undertaking as to damages, other than in exceptional circumstances.
- Clarifying the jurisdictional facts on which the Panel's jurisdiction relies so that less speculative approaches to this issue are required by the Panel and reinforcing the "effect-based" nature of the Panel's jurisdiction in terms of the effects rooted in the Eggleston principles.
- Relieving the Panel of the basis of jurisdiction founded on contravention of the takeover code as being unnecessary if the Panel-monitored gateway to the courts proposal is adopted.
- Recasting section 659C so that it allows for proper exercise of judicial power and at the same time accords proper respect from the Courts to Panel decisions.
- Recasting the process for the conduct of Panel proceedings so that:
    - Panel proceedings relate solely to matters the subject of the application and do not allow the Panel to enquire beyond the matters specifically raised or to fashion remedies not sought by the parties;

- There is greater involvement by the parties in defining the issues to be considered by the Panel;
- The brief simply becomes the means by which the Panel indicates the evidence that it considers it requires from the parties in relation to those issues;
- Parties have a right to address directly the Panel members on matters that the party considers to be relevant, preferably in person and, at least, through a videoconferencing facility; and
- All written correspondence between the Panel and the parties in the course of the proceeding be public, and all dialogue between the Panel members and parties occur in public, subject only to the preservation of necessary confidentiality of currently confidential information.

- Permitting the Panel to excuse conduct considered by it not to be unacceptable, notwithstanding that it may constitute an existing contravention of the takeovers code.

Other changes

- Recruiting replacement Panel members on a full-time basis or half-time basis from among senior and recently retired prominent investment bankers, takeovers lawyers and business people with extensive takeover experience.
- Removing substantial numbers of the Panel members, including in particular those whose qualifications do not give them pre-eminence amongst the takeover community or who are extensively involved in current takeover activity. This should be done by allowing retirements, resignations and lapses of appointments rather than by active removal.
- Recruiting replacement members for the Panel executive from the takeover community.
- Establishing the promised review of the Panel by government (which is now some four years late).[53]
- Provide for Panel members and the Panel as a whole to be subject to review against measurable expected outcomes conducted by a body comprising Government and members of the takeover community.
- Establish that Panel members ought to take responsibility for:
  - drafting, or preparing drafting instructions for the Panel executive for, reasons the decision and guidance notes; and
  - signing or specifically authorised the signing of all correspondence to parties from the Panel.

[53] EM at [2.41]

These changes would put the Panel back on track and allow it to fulfil more of the expectations originally made of it; bearing in mind that six years of experience with the reconstituted Panel has indicated that some of those expectations were probably ill-founded.

The Australian business community responded positively to Joe Hockey's challenge and conferred substantial goodwill on the Panel. However, the Panel's behaviour, particularly in recent times, risks losing that goodwill entirely. If the Government wishes to proceed with the Panel experiment it needs to act to show that it remains committed to the expectations it earlier enunciated to preserve and enhance the good things that the Panel can do and to give proper weight to the rule of law and the proper involvement of the courts as the forum for legal disputes. To do nothing to rectify the Panel and its performance will lead inevitably to irresistible calls for its abolition and a return to the Courts for **all** takeover dispute resolution.