15 November 2006

Mr D Sullivan
Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Sullivan

Exposure Draft of the Corporations Amendment (Takeovers) Bill 2006

Finsia welcomes the opportunity to comment on the Exposure Draft of the *Corporations Amendment (Takeovers) Bill 2006.*

We have previously provided comments on the Bill to Treasury and enclose a copy of that submission for the Committee's consideration. We would welcome the opportunity to provide any further input into your Inquiry.

Should you require any further information, please contact either myself or Mark Ley, Senior Manager Markets Policy on 02 8248 7556.

Yours sincerely,

Brian Salter F Fin
Chief Executive Officer

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5 October 2006

Mr G Miller
General Manager
Corporations Amendment (Takeovers) Bill 2006
Corporations and Financial Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Mr Miller,

Exposure Draft – *Corporations Amendment (Takeovers) Bill 2006*

Finsia, through its Markets Policy Group[1], welcomes the opportunity to comment on the draft to the *Corporations Amendment (Takeovers) Bill 2006 ('the Bill').*

Finsia, the Financial Services Institute of Australasia, was formed following the merger of the Securities Institute of Australia (SIA) and the Australasian Institute of Banking and Finance (AIBF). We are committed to maintaining and raising the standards and integrity of the financial services industry. We represent over 20,000 members and have over 19,000 enrolled students.

General observations on the Bill

Finsia strongly supports the proposed amendments to the Corporations Act contained in the Bill.

We have been concerned that recent Federal Court decisions[2] may be interpreted as limiting the jurisdiction and practical operation of the Takeovers Panel. As we discuss further below, this would have an adverse impact on the effective operation of Australia's takeovers regime. An efficient and effective takeovers regime is an integral part of the operation of the equities market and the Australian economy. Takeovers, and the prospect of takeovers, provide benefits to shareholders, corporations, and the economy generally as they provide a market driven incentive to improve corporate efficiency, enhance management discipline and, ultimately, generate greater wealth.

The implementation of the CLERP reforms in March 2000 expanded the role of the Takeovers Panel and Parliament's intention for the administration of takeover bid disputes was clearly outlined in section 659AA of the Corporations Act 2001. It states that the "object of section 659B and 659C is to make the Panel the main forum for resolving disputes about a takeover bid until the bid period has ended."

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[1] The Markets Policy Group's role is to examine legislative and regulatory changes impacting on the securities and financial markets reflecting Finsia's policy principles and the broader views of our membership. Seven of the fifteen members of Finsia's Markets Policy Group are part-time members of the Takeovers Panel. A further member is currently on secondment to the Panel's Executive.

[2] *Glencore International AG v Takeovers Panel* [2005] FCA 1290 and *Glencore International AG v Takeovers Panel* [2006] FCA 274.

In our opinion, since the CLERP reforms, the Takeovers Panel has been generally successful as an effective, efficient and expeditious forum for resolving disputes during takeover bids. We consider that the creation of the Panel, as the central dispute resolution forum, ensures that the court process, sometimes involving considerable delays, is not used as a tactical device in the takeovers process.

We note that the Panel, in its most recent annual report, states that the time taken to determine applications was 15 calendar days in 2004-05. This has been reduced from 17 calendar days in 2002-03 and 16 days in 2003-04. Timeliness is considered to be a key feature of the Panel and this facilitates the efficient market evaluation of bids.

However, in a recently published academic article, Emma Armson noted that:

> "*…the approach outlined in Glencore, namely that the court should be 'slow to interfere….where the market is significantly volatile by reason of the currency of takeover offers', does not provide adequate protection against the damaging impact that the potential for litigation can have upon a Panel-centred system of takeover decision-making.*" [3]

And, further:

> "*Our Panel-based system of takeover dispute resolution could be undermined significantly through the potential for litigation seeking to challenge Panel decisions.*"[4]

The measures contained in the Bill will significantly reinforce the Panel's ability to act efficiently and effectively as the 'main forum for resolving disputes about a takeover bid'.

An additional concern arising from the Glencore decisions was the extent to which Panel members could rely upon their commercial experience in determining the impact of various circumstances.

It was clearly the intention of Parliament that the Panel relies on the specialist expertise of its members. Under subsection 172(4) of the Australian Securities and Investment Commission Act *2001,* Panel members are appointed by virtue of their "knowledge of, or experience in, one or more of the following fields, namely, business, the administration of companies, the financial markets, law, economics and accounting."

The Bill's amendments, clarifying that it is enough for the Panel to be satisfied as to the impact that the circumstances are 'likely to have', ensure that the specialist expertise of members can be utilised.

Finsia supports the specific amendments proposed in the Bill. In summary, we note the Bill:

- Includes a definition of term 'substantial interest' to allow the Panel to deal with new and developing tactics in relation to takeovers.
- Amends section 657A to allows the Panel to take account of the past, present or likely future effects of circumstances in making their declaration of 'unacceptable circumstances'.
- Amends section 657D(1) to restrict the opportunity to make a submission, prior to the Panel making an order, to each person to whom a proposed order is directed, rather than to each person to whom a proposed order relates (currently this could include all existing and potential shareholders).
- Amends section 657D(2) to allow the Panel to make the order it thinks is appropriate to protect the rights of any persons that have been, are being, will be or are likely to be affected by unacceptable circumstances.
- Clarifies the time limit for a review of a Panel decision.

[3] Armson, E 'The Australian Takeovers Panel and Judicial Review of its Decisions', (2005) 26 *Adelaide Law Review,* p 327-358 at 354.
[4] Armson, at 356

We do not have any technical concerns regarding the drafting of these amendments.

Further comment - *Cash settled equity swaps*

Finsia notes that the Glencore legislation involved the Panel's ability to make determinations concerning the impact of 'cash settled equity swaps'. In the Glencore decision, Emmett J described a 'cash settled equity swap' as:

> "*An arrangement between an investor and a bank whereby the bank agrees to pay the investor an amount equal to the difference between the value of a given number of equity securities at the time of the closing out of the swap and the value of those equity securities at the time when the arrangement was entered into. Under such an arrangement the investor does not acquire any interest in any equity securities and the investor has no right to call for delivery of equity securities or to require the bank to undertake any action involving the acquisition, holding or disposal of equity securities. Closing out of, and settlement under, such as swap will, depending on the terms of the arrangement be either at the option of one party or be automatic.*" [5]

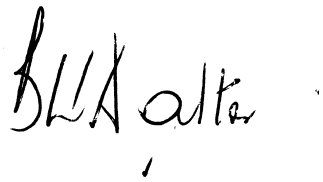
Generally, to hedge their risk exposure the banks will acquire an equivalent number of shares, which will then be sold or transferred to the counterparty at the conclusion of the swap.

We note that another of the Eggleston Principles, as espoused in section 602 of the Corporations Act 2001, is that shareholders know the "identity of any person who proposes to acquire a substantial interest in the company, body or scheme". By including an expanded definition of 'substantial interest' in the Bill, the Panel will be better able to consider the likely impact of 'cash settled equity swaps' in its deliberations. However, we consider that the use of these arrangements may continue to thwart some important disclosure and consumer protection provisions such as the substantial holding provision in section 671B of the Corporations Act 2001.

Further amendments to section 671B, and similar provisions, are required to ensure that all relevant information is disclosed to the market. We recommend that the Government consider further amendments to ensure market transparency.

Should you wish to discuss this submission further, please do not hesitate to contact Mark Ley, Senior Manager, Markets Policy on 02 8248 7556 or at m.ley@finsia.edu.au.

Yours Sincerely



Brian Salter F Fin
Chief Executive Officer

[5] *Glencore International AG v Takeovers Panel* (2005) 220 ALR 495,498