

# **THE NEW TAKEOVERS PANEL – A BETTER WAY?**

**Nicole E Calleja**  
BA LLB (Hons) (Melb) LLM (Melb)  
Senior Associate, Allens Arthur Robinson

**TAKEOVERS PANEL  
and  
CCH AUSTRALIA LIMITED  
and  
CENTRE FOR CORPORATE LAW AND SECURITIES REGULATION  
FACULTY OF LAW  
THE UNIVERSITY OF MELBOURNE  
2002**

Published in Melbourne by the Takeovers Panel, the Centre for Corporate Law and Securities Regulation and CCH Australia Limited

**Takeovers Panel**

Level 47  
Nauru House  
80 Collins Street  
Melbourne Vic 3000  
Australia

Phone: 61 3 9655 3501  
Fax: 61 3 9655 3511  
Email: [takeovers@takeovers.gov.au](mailto:takeovers@takeovers.gov.au)  
Website: <http://www.takeovers.gov.au>

**Centre for Corporate Law and Securities Regulation**

Faculty of Law  
The University of Melbourne  
Vic 3010  
Australia

Phone: 61 3 8344 5281  
Fax: 61 3 8344 5285  
Email: [cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au)  
Website: <http://cclsr.law.unimelb.edu.au>

**CCH Australia Limited**

ACN 000 063 197  
101 Waterloo Road  
North Ryde NSW 2113  
Australia

Phone: 61 2 9857 1300  
Fax: 61 2 9857 1600

Calleja, Nicole E  
The New Takeovers Panel – A Better Way?

ISBN 0 7340 2205 0

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The Centre's contact details are:

Tel: 61 3 8344 5281

Fax: 61 3 8344 5285

E-mail: [cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au)

<http://cclsr.law.unimelb.edu.au>

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# Chapter 1

## Introduction

As a result of the enactment of the *Corporate Law Economic Reform Program Act 1999* (the **CLERP Act**) which commenced on 13 March 2000, the Takeovers Panel (**Panel**), which was previously known as the Corporations and Securities Panel, became the recipient of increased powers and therefore, has a new and important role to play regarding the adjudication of disputes involving takeovers.

The Panel is a peer review body, with part time members who are experienced corporate practitioners from differing disciplines in Australia's takeovers and business communities. The members are assisted by a full time executive based in Melbourne.

This book is divided into 8 chapters. Chapter 2 sets out a brief overview of the powers of the Panel under the new legislative regime and canvasses the rationale and policy behind the revamp of the Panel's role.

Chapter 3 examines the history of the Panel. It considers why so few cases were decided by the Panel in the ten year period prior to the enactment of the CLERP Act and examines the limited body of case law that arose during that period, and the difficulties experienced by the Panel in those cases.

Chapter 4 explores in detail the functions and responsibilities of the Panel. It reviews the key legislative provisions that empower the Panel and examines the relationships between the Panel and the Australian Securities and Investments Commission (**ASIC**), the Australian Stock Exchange (**ASX**) and the courts, and some of the issues related to the division of regulatory and adjudicative powers between these bodies.

Chapter 5 provides an international perspective by investigating international takeover panel models that exist and examining the similarities and differences between the Panel and the London City Panel on Takeovers and Mergers, which is a non-statutory panel and the Irish Takeovers Panel which, like the Panel in Australia, has statutory powers. It considers whether Australia adopted the best possible model for its Panel.

Chapter 6 looks at the newly rejuvenated Panel in the context of its performance under the new regime. It reviews the policy and analyses the decisions generated by the new Panel in its first 18 months of operation.

Chapter 7 assesses the Panel's performance to date and looks at some of the challenges that confront the Panel, including the difficulties that face the Panel as a new entity taking over from the courts, challenges to its decisions and constitutionality and the Panel's cautious use of its declaration power and orders.

Chapter 8 addresses the question posed in the title, that is, does the new Panel represent a better way to govern takeovers?

The laws and Panel applications and decisions discussed in this book are the laws in force, and the Panel applications and decisions, as at 30 September 2001.

## Chapter 2

# Overview of the Powers of the New Panel

### The New Legislative Regime – Key Changes

While regulation of the new regime is still divided between ASIC and the Panel, the Panel has significantly expanded responsibilities. Although the general administration of the *Corporations Act 2001* (Cth) (the *Corporations Act*), as it relates to takeovers and mergers (including the power to conduct investigations, monitor transactions, prosecute contraventions and develop policy) remains the responsibility of ASIC, the Panel is to be the primary forum for resolving disputes during a takeover. In addition, from time to time the tasks of the Panel may also involve forays into the area of policy development, and when conducting a proceeding, the area of investigations.

The following is a catalogue of the key changes introduced to the role of the Panel by the CLERP Act. The Panel:

- Has replaced the Administrative Appeals Tribunal as the reviewer of most ASIC decisions relating to exemptions or modifications under the takeover rules.<sup>1</sup>
- Will continue to consider applications for a declaration of unacceptable circumstances from ASIC, but can also now accept applications from bidders, targets, or any other interested persons.<sup>2</sup>
- Is able to declare circumstances in relation to the affairs of the company to be unacceptable. This is a broader power than the previous power.<sup>3</sup>
- Can conduct reviews of its own decisions.<sup>4</sup>
- Can deal with all disputes during the course of a bid, even where the circumstances constitute a breach of the *Corporations Act*.<sup>5</sup>
- Can make rules supplementing the operation of the takeover provisions so that emerging issues in takeover regulation can be dealt with quickly and flexibly, and enforce those rules in court.<sup>6</sup>
- Can hear matters referred to the Panel by the courts.<sup>7</sup>

Unlike ASIC, the Panel does not have the power to act on its own initiative. An application is necessary to enliven the powers of the Panel.

The two primary pieces of legislation that empower and regulate the operations of the Panel are Part 6.10 of the *Corporations Act* and Part 10 of the *Australian Securities and Investments Commission Act 1989* (Cth) (*ASIC Act*). There are also other relevant

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1 Section 656A of the *Corporations Act*.

2 Section 657C of the *Corporations Act*.

3 Section 657A of the *Corporations Act*.

4 Section 657EA of the *Corporations Act*.

5 Section 657A of the *Corporations Act*.

6 Section 658C of the *Corporations Act*.

7 Section 657EB of the *Corporations Act*.



enactments such as the Corporations Act Regulations, the Australian Securities and Investments Commission Regulations (*ASIC Regulations*) and the Panel's procedural rules which are made pursuant to section 195 of the ASIC Act. The scope of the Panel's new powers under these laws and rules is discussed in greater detail in Chapter 4.

## Rationale and Policy Behind the Changes

Under the old regime there was no express statement of the purposes and principles underlying Chapter 6, however, it was generally accepted that the "Eggleston principles"<sup>8</sup> in section 731 of the pre-CLERP Corporations Law, constituted the policy of Chapter 6.<sup>9</sup> Post-CLERP, the Eggleston principles have found a new home in section 602 of the Corporations Act which explicitly sets out the policy of Chapter 6. Section 602 provides:

The purposes of this chapter are to ensure that:

- (a) the acquisition of control over:
  - (i) the voting shares in a listed company, or an unlisted company with more than 50 members; or
  - (ii) the voting shares in a listed body; or
  - (iii) the voting interests in a listed managed investment scheme; takes place in an efficient, competitive and informed market; and
- (b) the holders of the shares or interests, and the directors of the company or body or the responsible entity for the scheme:
  - (i) know the identity of any person who proposes to acquire a substantial interest in the company, body or scheme; and
  - (ii) have a reasonable time to consider the proposal; and
  - (iii) are given enough information to enable them to assess the merits of the proposal; and
- (c) as far as practicable, the holders of the relevant class of voting shares or interests all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the company, body or scheme; and
- (d) an appropriate procedure is followed as a preliminary to compulsory acquisition of voting shares or interests or any other kind of securities under Part 6A.1.

Section 602 incorporates the original Eggleston principles and an additional principle that the acquisition of control of listed companies, or listed managed investment schemes, takes place in an efficient, competitive and informed market. The Panel aims to advance the policy set out in section 602 of the Corporations Act.

In addition to the overt and specific statement of policy in section 602, the initiatives relating to the Panel which were espoused during the reform process are also consistent

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8 The Eggleston principles were formulated in response to concerns that shareholders lacked sufficient protection. The Eggleston principles were first stated in the 1969 report of the Company Law Advisory Committee (*Eggleston Committee*): Company Law Advisory Committee, *Second Interim Report* No 43 (1969) Vol 1, 1008. The Eggleston principles and their relevance to the concept of unacceptable circumstances is discussed in the first part of Chapter 4 below. For a discussion of the role of the Eggleston Committee, see Barbara Mescher, "Regulation of Takeovers by the Corporations & Securities Panel: The Occurrence of Unacceptable Circumstances" (1994) 4 *Australian Journal of Corporate Law* 90, 91.

9 Renard, Ian and Joseph Santamaria, *Takeovers and Reconstructions in Australia* (1996) [203]. Mescher, above n 8, 91; George Williams, "The Corporations and Securities Panel – What Future?" (1994) 12 *Companies and Securities Law Journal* 164, 164; and Emma Armson, "AAT Review of the ASC's Decision to Apply or not to Apply to the Takeovers Panel" (1994) 12 *Companies and Securities Law Journal* 439, 440.

with the general policy objectives which CLERP set out to achieve, namely, to streamline the operation of the regulatory regime in order to improve its efficiency and reduce costs for business and market participants.<sup>10</sup>

One way in which it is hoped the Panel can assist the achievement of these objectives is through minimising the tactical litigation employed by target companies to delay hostile takeover bids, and freeing up court resources to attend to other priorities.<sup>11</sup> Also, in creating a specialist body comprised of takeover experts and practitioners, it is clear that the architects of CLERP aspired to create a more responsive body that can quickly and efficiently resolve takeover disputes, thus reducing the costs for the parties involved and ensuring that the outcome of the bid can be decided by the proper arbiters – the target shareholders.<sup>12</sup>

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10 The Parliament of the Commonwealth of Australia, House of Representatives, *Corporate Law Economic Reform Program Bill 1998 Explanatory Memorandum* (1998) [2.5].

11 *Ibid.*, [7.16].

12 *Ibid.*

## Chapter 3

### The History of the Panel

The Panel was first introduced to the Australian landscape of corporate regulation in 1991 as part of the Corporations Law when each State enacted legislation which adopted section 82 of the *Corporations Act 1989* (Cth), as a law of that State. This legislative scheme replaced the co-operative scheme Codes that had been in operation since 1981.<sup>13</sup>

Prior to 1991 the National Companies and Securities Commission (NCSC) as the regulator of the co-operative scheme Codes performed a role similar to that which was eventually bestowed upon the Panel. The NCSC was empowered to intervene to declare an acquisition or conduct unacceptable if in the NCSC's opinion it offended the basic principles underpinning the Code, even if the conduct was otherwise lawful.

One of the rationales behind the introduction of the Panel was that it was considered inappropriate for the regulator to also perform adjudicatory functions. In fact, the NCSC was roundly criticised for acting as “prosecutor, judge and jury.”<sup>14</sup> Furthermore, the NCSC's powers were very broad and it “became apparent that any attempt by the NCSC to use these powers, particularly if it conducted a public hearing, was retarded or blocked by litigation at each step of the process.”<sup>15</sup>

Therefore, in 1991 the Corporations Law was introduced and while many of the powers that the NCSC had were preserved, those powers were vested in a separate body, the Panel. However, it is widely accepted that the Panel proved to be no more effective than its predecessor had been in using the powers vested in it or declaring acquisitions or conduct to be unacceptable.<sup>16</sup>

From its inception until recently, the Panel was used rarely. ASIC referred just four matters to the Panel over a period of approximately 10 years.<sup>17</sup> Accordingly, most participants in takeover battles have had to rely on the courts to resolve their disputes. A brief description of the facts and issues in relation to the Panel's first four referrals made by ASIC is set out below.

13 There were essentially four individual Codes – the Companies Code, the Securities Industry Code, the Companies (Acquisition of Shares) Code and the Futures Industry Code. With the enactment of the Corporations Law, these statutes that dealt separately with companies, the securities industry, takeovers and the futures industry were brought together.

14 The Parliament of the Commonwealth of Australia, House of Representatives, *Australian Securities Commission Bill 1988 Explanatory Memorandum* (1988) [44]. See also, *Green v Crusader Oil NL* (1985) 4 ACLC 118, 121, per Young J.

15 Robert Baxt, Ian Ramsay, Ian Renard, Robert Jimkisu and Jon Webste, *CLERP Explained: the Corporate Law Economic Reform Program Act 1999* (2000) [3–280].

16 Ivor Ries, “Corporate Watchdog gets a Whipping” *Australian Financial Review*, 2 December 1994, 68. See also, Nicole Calleja, “Furthering the Objectives of the Corporations Law – Will Simplification Help?” (1997) 15 *Companies and Securities Law Journal* 208, 215; Baxt, above n 15, [3–280] and Renard and Santamaria, above n 9, [222].

17 ASIC was, during the period, the only person or entity with the power to refer a matter to the Panel.

## The First Referral – *Re Titan Hills Australia Limited*<sup>18</sup>

The Titan Hills application was the first matter presided over by the Panel. The application was made on 4 July 1991, almost 2 years after legislation establishing the Panel was enacted. However, during the course of the case the Panel became “embroiled in a series of court battles which trivialised its own decision.”<sup>19</sup>

The facts which gave rise to the first decision of the Panel are complicated, partly due to the fact that both parties, Titan Hills Australia Limited (*Titan Hills*) and Precision Data Holdings Limited (*Precision Data*) regarded each other as takeover targets. Precision Data purchased 19.5% of Titan Hills and then acquired 1.9 million convertible notes in Titan Hills from a third party. Titan Hills applied to court in an attempt to prevent the conversion of the notes to shares, but its application failed.<sup>20</sup> Titan Hills then set about acquiring shares in Precision Data by offering Dabby Pty Limited (*Dabby*), a holding company of Precision Data, 2 Titan Hills shares as consideration for each Precision Data share it held.<sup>21</sup>

The board of Titan Hills had requested Bessemer O’Duill to provide an independent expert report to assess whether the proposed takeover of Precision Data was fair and reasonable to non-associated shareholders of Titan Hills. Unbeknownst to Bessemer O’Duill, Ernst & Young had been commissioned by Precision Data’s bankers to prepare certain business planning and financial review reports on Precision Data and its related entities.

The alleged unacceptable circumstances were said to be constituted by the failure to provide to Bessemer O’Duill information relevant to its report, namely the Ernst & Young reports, and the failure to disclose to Titan Hills’ shareholders relevant information which might have affected their consideration of the report.

However, the case became mired in litigation which included a referral by the Panel of a question of law to the Federal Court under section 196 of the ASIC Act, concerning the Panel’s powers to make interim orders prior to making a declaration that an acquisition or conduct was unacceptable. Ryan J held that the Panel did have this power.<sup>22</sup> However, that decision was successfully appealed to the Full Federal Court.<sup>23</sup> Meanwhile, the applicant applied to the AAT for a review of ASIC’s decision to apply to the Panel for a declaration.<sup>24</sup> It was held by DP McMahon that the AAT did not have jurisdiction to review the decision.

In addition, the High Court was asked to determine whether the Panel was unconstitutional on the grounds that the Panel’s powers purport to grant it the judicial power of the Commonwealth contrary to sections 71 and 72 of the Constitution.<sup>25</sup> The High Court held that the Panel was constitutional on the basis that its decisions do not concern existing rights and are therefore not judicial in character. The High Court went on to explain

18 (1992) 10 ACLC 131.

19 Calleja, above n 16, 213.

20 See *Precision Data Holdings Ltd v Titan Hills Australia Ltd* (1990) 2 ACSR 707.

21 Dabby held 51% of Precision Data’s shares.

22 *Wills, Adler and Jooste v ASC* (1991) 103 ALR 473.

23 *Cullen v Wills, Adler and Jooste* (1991) 31 FCR 19.

24 *Gallivan Investments Ltd v ASC* (1991) 9 ACLC 1,324.

25 *Precision Data Holdings Ltd v Wills, Adler and Jooste* (1991) 173 CLR 167.

that Panel decisions are determinations in relation to new rights based on considerations of policy and are not an adjudication of a dispute about existing rights and obligations. Accordingly, the High Court found that the Panel's decisions under that legislation were valid because they do not proceed from an exercise of judicial power.<sup>26</sup>

Due to the time taken to make its decision, the Panel had to apply on 2 December 1991, to the Federal Court for an extension of time. The Federal Court granted the extension until 29 February 1991.<sup>27</sup> This explosion of litigation explains to some extent why it was six years before the Panel was used again.

Eventually the Panel determined the preliminary issues. It found that Titan Hills' acquisition of shares in Precision Data through Dabby did not constitute unacceptable circumstances. Although Titan Hills had not disclosed important information, Precision Data, not Titan Hills, was the target, and so the non-disclosure was irrelevant.<sup>28</sup> In contrast, the Panel held that the acquisition of a "substantial interest" in Titan Hills by Dabby was unacceptable because shareholders and directors of Titan Hills were not provided with enough information to enable them to assess the merits of the proposal.<sup>29</sup> Despite this finding, no declaration or orders were made on the grounds that the parties had offered undertakings that produced a "not unacceptable resolution of the matter."<sup>30</sup>

The Panel's first outing was roundly criticised for a number of reasons including its slowness<sup>31</sup> and the flood of additional litigation that it generated.<sup>32</sup>

Some of the other criticisms levelled at the first decision of the Panel were that the Panel ignored a commercial, efficient and market-sensitive policy based approach in favour of a strict black letter interpretation regarding whether or not a "substantial interest" had been acquired.<sup>33</sup> In this way, it was alleged that in circumstances where relatively small parcels of shares are used to influence the outcome of a battle for corporate control, or where an exercise of corporate control does not coincide with acquisitions of shares, this decision created a precedent that may have precluded a finding that unacceptable circumstances occurred.<sup>34</sup>

## The Second Referral – *Re Pivot Nutrition Pty Limited*<sup>35</sup>

It was almost six years before another matter was referred to the Panel. The second reference to the Panel occurred on 20 January 1997 in relation to a mop-up takeover bid by Pivot Nutrition Pty Limited (*Pivot Nutrition*) for the remaining shares in Gibson's Limited (*Gibson's*). Pivot Nutrition initially offered \$4.80 for each Gibson's share. Both

<sup>26</sup> This case is discussed in more detail at 6.4 below.

<sup>27</sup> *Wills, Adler and Jooste v ASC* (1992) 10 ACLC 236.

<sup>28</sup> Although this reasoning is logical if treating the section as an anti-avoidance provision, it has been criticised as not being consistent with the spirit of the Eggleston principles: Carl Thompson and Anita Jeffrey, "Takeovers and Public Securities: The Role of the Panel and the ASC" (1992) 10 *Companies and Securities Law Journal* 278, 280; and Calleja, above n 16, 214.

<sup>29</sup> *Re Titan Hills Australia Limited and Ors* (1991) 10 ACLC 131, 135..

<sup>30</sup> (1992) 10 ACLC 131, 136.

<sup>31</sup> ASIC made its application on 4 July 1991 and the Panel's statement of reasons is dated 20 December 1991.

<sup>32</sup> Ries, above n 16.

<sup>33</sup> Williams, above n 9, 164.

<sup>34</sup> The precedent value of the case is now not an issue as the CLERP Act has widened the application of unacceptable circumstances so that it is not necessary for there to be an acquisition of a substantial interest in order for unacceptable circumstances to have occurred: section 657A(2).

<sup>35</sup> (1997) 15 ACLC 369.

Pivot Nutrition and Gibson's were subsidiaries of Pivot Limited (*Pivot*). Prior to the takeover bid, Pivot directed that another subsidiary, Cripps Bakery Pty Limited (*Cripps*) redirect orders for flour from Gibson's to Pivot Nutrition.

In its application to the Panel, ASIC alleged that the loss of this arrangement had the effect of depressing the value of Gibson's shares in the months preceding Pivot Nutrition's takeover offer, and this factor should have been taken into account when setting the bid price.<sup>36</sup> The independent directors of Gibson's recommended that shareholders reject Pivot Nutrition's offer on the basis of an experts report provided by Arthur Andersen which stated that a fair and reasonable price would be between \$5.30 and \$6.15 per share.<sup>37</sup>

ASIC sought a declaration of unacceptable circumstances and orders preventing Pivot acquiring Gibson's shares unless the price was fair and reasonable. In the interim, Pivot raised the bid price to \$6.00 per share.

Despite the \$1.20 per share price increase, the Panel found that Pivot's conduct constituted unacceptable circumstances on the basis that the shareholders of Gibson's did not have reasonable and equal opportunities to participate in the benefit obtained by Pivot by virtue of the transfer of the contract.<sup>38</sup> Pivot responded to the declaration by undertaking to raise the bid price to \$6.20. The Panel accepted Pivot's undertaking and refrained from making orders.

In contrast to the feedback the Panel received after the Titan Hills case, the response to the outcome of the Pivot case was more positive but still mixed. It was said that the case demonstrated "the effectiveness of the panel in achieving the aims of the legislation which set it up – namely a swift, impartial and commercially sensitive takeovers regulator."<sup>39</sup> ASIC's Tasmanian Regional Commissioner said at the time that:

The undertaking [extracted from Gibson's] has the effect that the takeover bid by Pivot Nutrition for Gibson's is now where it would likely have been had the unacceptable conduct not occurred. This is a stark example [of] how effective the Panel is in protecting the integrity of the fairness principle in takeovers.<sup>40</sup>

On the other hand, some criticised the Panel for failing to pay sufficient attention to the fact that Pivot's bid "was undertaken in circumstances where there were potentially anti-competitive practices in place in Tasmania which the relevant acquisition was aimed at removing."<sup>41</sup> Further, the Panel did not inquire as to whether the previous supply arrangement artificially inflated Gibson's share price. The failure of the Panel to consider such matters arguably rendered its investigation superficial and one-sided.<sup>42</sup>

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36 Bill Pheasant, "Pivot to Lift Gibson's Bid" *Australian Financial Review*, 22 January 1997, 19.

37 Bryan Frith, "Court Challenge Looms in Wake of Panel Declaration" *The Australian*, 18 February 1997, 22.

38 (1997) 15 ACLC 369, 380.

39 Bill Pheasant, "Pivot Role Criticised by Panel" *Australian Financial Review*, 18 February 1997, 17.

40 ASIC, *ASIC'S application to Takeovers Panel successfully concluded*, Press Release, No 97/044 (27 February 1997).

41 Robert Baxt, "The Dinosaur Rises – The Takeover Panel Comes to Life" (1997) 13 *Company Director* 43, 44.

42 Calleja, above n 16, 215.

### **The Third Referral – *Re Australian Securities Commission and John Fairfax Holdings Limited***<sup>43</sup>

Just 7 months later another matter came before the Panel. This referral related to an acquisition by Brierley Investments Limited (*BIL*) of a parcel of shares in John Fairfax Holdings Limited (*Fairfax*). BIL was keen to acquire a parcel of shares comprising 25% of Fairfax which was owned by Hollinger International Inc (*Hollinger*). BIL entered into an agreement to acquire a 19.9% stake unconditionally and the balance subject to shareholder approval pursuant to what was then section 623 of the Corporations Law.<sup>44</sup>

Prior to the shareholder meeting, Merrill Lynch (Australia) Futures Limited (*Merrills*), who acted for Hollinger, acquired the remainder of the parcel of Fairfax shares. It was agreed that if shareholder approval was given it would deliver the shares to BIL. However, the resolution failed. Therefore, BIL could only acquire up to 20% of the Fairfax shares. To acquire the entire 25% parcel would place BIL in breach of the prohibition in what was then section 615 of the Corporations Law.<sup>45</sup> Accordingly, BIL then made a number of public statements that it would rely on the creep rule provisions (in what was then section 618, and is now item 9 of section 611 of the Corporations Act) to increase its holding in Fairfax.

Soon after, Merrills and a subsidiary of BIL entered into 5 cash settled equity swap agreements in respect of approximately 5% in aggregate of the shares in Fairfax. The first 3 agreements were to mature after 6 months, at which time the creep rules would permit BIL to increase its entitlement by 3%. The balance were to mature six months later.

ASIC alleged that the cash swap agreements were tantamount to warehousing because even though there was no express obligation or arrangement that Merrills would sell the shares to BIL at the end of the 6 and 12 month periods, such an arrangement was in fact superfluous. This is because if the parties traded at the same time and around the same price, the effect would be the same – BIL would acquire the shares held by Merrills. Moreover, the Fairfax shares provided Merrills with a hedge in respect of the cash swap agreements, so there was a strong economic incentive for Merrills to hold onto the shares and then sell them into the market at a time when BIL would be free to acquire the shares and had some economic incentive to do so because of the terms of the swaps.

Following the referral, BIL commenced proceedings in the Federal Court<sup>46</sup> seeking a review of:

- ASIC's decision to make the referral to the Panel.
- The Panel President's decision to appoint 2 members to the Panel who disclosed interests which arguably conflicted with the proper performance of their duties.
- The decision of the Panel to conduct proceedings in relation to the matter.

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43 (1997) 25 ACSR 441.

44 Section 623 permitted such acquisitions to be passed by resolution at a general meeting, where neither the person acquiring or disposing of the shares (nor any associate) votes in respect of the resolution. The post-CLERP equivalent of this provision is item 7 of section 611.

45 The post-CLERP equivalent of this provision is contained in section 606.

46 *Brierley Investments Ltd v ASC* (1997) 24 ACSR 629.



BIL's application for a review of ASIC's decision to make an application was dismissed. Emmett J held that ASIC's decision to make an application was not subject to challenge. He said that ASIC did not have to demonstrate that unacceptable circumstances had or may have occurred in order to make a referral to the Panel.<sup>47</sup>

Emmett J also found that there was no basis for concluding that the President of the Panel did not have reasonable grounds for his belief that the interests of the members appointed to constitute the Panel were immaterial or indirect and would therefore not be prevented from acting impartially in relation to the matter.<sup>48</sup>

Finally Emmett J dismissed BIL's application for a review of the Panel's decision to conduct proceedings in relation to the matter. Emmett J stated that merely because conduct is expressly authorised (in this case, acquiring up to 3% of the shares of a company as provided for in what was then section 618) does not mean that it is incapable of constituting unacceptable circumstances.<sup>49</sup>

Although the Panel concluded that the parcel of shares in question constituted a "substantial interest" in Fairfax, it was not satisfied that unacceptable circumstances had occurred. The Panel held that sections 732(1)(a) to (c) of what was then the Corporations Law had not been breached as BIL was visible both in the course of trading on market and in notifying its intention to lift its entitlement to Fairfax shares via the creep rule.<sup>50</sup> Further there were no benefits given in connection with the acquisitions by BIL, within the meaning of section 732(1)(d) of the Corporations Law, that were denied to Fairfax shareholders. The dynamics of the market and the high level of liquidity of Fairfax shares were relevant to this finding.<sup>51</sup> Finally, the Panel held that even if unacceptable circumstances had occurred it was not inclined to make a declaration because it was not satisfied that it would be in the public interest to do so as there was no evidence that the purchases by BIL had an appreciable impact on Fairfax's share price.<sup>52</sup>

### **The Fourth Referral – *Re ASIC and Wesfi Limited***<sup>53</sup>

This matter arose during a takeover bid for Wesfi Limited (*Wesfi*) by Blend Investments Pty Limited (*Blend*), a wholly owned subsidiary of Bristile Limited (*Bristile*). Pursuant to the takeover offer, Blend was offering Wesfi shareholders one Bristile share and \$0.10 cash.<sup>54</sup> ASIC referred the matter to the Panel because of the acquisition of several parcels of Wesfi shares by a company called CP Ventures Limited (*CPV*).

CPV acquired the Wesfi shares on-market following a board resolution of CPV's parent company, Innerhadden Limited (*Innerhadden*), which authorised CPV's management to spend up to \$8,000,000 acquiring Wesfi shares.<sup>55</sup> The parcels acquired amount-

47 Ibid, 638.

48 Ibid, 642.

49 Ibid, 640.

50 *Re Australian Securities Commission and John Fairfax Holdings Ltd* (1997) 25 ACSR 441, 455–456.

51 Ibid, 456.

52 Ibid, 457.

53 (1999) 17 ACLC 1690.

54 Although this was later increased to \$0.25 cash.

55 Based on the market value of Wesfi's shares at the relevant time, \$8,000,000 was roughly equal to 10% of Wesfi's shares.



ed to approximately 1.9% of the shares in Wesfi. CPV then accepted Blend's offer in relation to all the Wesfi shares it acquired on-market.

At the time the acquisitions occurred, CPV, Bristile and Innerhadden shared a common director who was involved in the strategy and implementation of the bid for Wesfi, and was also involved in the purchases of the Wesfi shares by CPV. In addition, CPV was the largest single shareholder in Bristile, holding approximately 19.7% of the shares in Bristile.

ASIC alleged that CPV's purchase and sale of the Wesfi shares was unacceptable and sought orders that would effectively rescind the transactions that resulted in the acquisition of the Wesfi shares by CPV. Alternatively, ASIC demanded that Blend be required to ensure that all Wesfi shareholders have an equal opportunity to participate in the bid.

However, the Panel did not consider that the number of shares purchased by CPV (which amounted to just 1.9% of Wesfi) constituted a "substantial interest" for the purposes of what was then section 732 of the Corporations Law. Accordingly, the Panel was not satisfied that unacceptable circumstances had occurred for the purpose of former section 733(3) of the Corporations Law, and therefore made no declaration.

Despite the fact that no declaration was made, the Panel expressed the view that if the number of shares acquired by CPV had amounted to a "substantial interest" then given the association between Wesfi and CPV it may have been in the public interest to declare CPV's acquisition of shares in Wesfi unacceptable.<sup>56</sup> This was because the Panel indicated that it considered that CPV's conduct constituted "side-running". "Side-running" occurs when, in a scrip bid, a third party acquires shares in the target on-market and then sells them into the bid.<sup>57</sup> Side running effectively allows the bidder to have the benefit of shares coming available on the market without having to offer a full cash alternative.<sup>58</sup> If the side-runner is at arm's length to the bidder then such action would not amount to unacceptable circumstances. However, the Panel indicated that if, as was the case in relation to the acquisition of shares in Wesfi, the side runner is associated with the bidder, and the number of shares sold into the bid represents a "substantial interest", then the Panel may find that such an acquisition constitutes unacceptable circumstances.<sup>59</sup>

## Reasons Why the Panel Was Not Used

Prior to the CLERP Act amendments introduced on 13 March 2000, the Panel could only act where ASIC referred a matter to it. In addition, the Panel was reliant upon ASIC for financial and administrative support. It is arguable that this lack of independence from ASIC fundamentally undermined the position of the Panel as an independent adjudicator. Given that ASIC made only four referrals to the Panel during a ten year period, it would appear that ASIC was reluctant to utilise the Panel.

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56 (1999) 17 ACLC 1,690, 1,702.

57 Michael Gething and Kimberley Ould, "The Wesfi Takeovers Panel Application: Lessons for the Future" (2000) 18 *Company and Securities Law Journal* 351, 362.

58 Section 621 of the Corporations Act provides that a bidder cannot acquire shares on market during a bid without offering a cash alternative under the bid.

59 (1999) 17 ACLC 1,690, 1,702.

ASIC's reasons for this are unclear. However, in a recent article, ASIC case officers stated that the main reason for the limited number of referrals during this period was the limits placed on the jurisdiction of the Panel, in that a contravention of the law was not of itself enough to give the Panel jurisdiction.<sup>60</sup> Instead, ASIC had to make a threshold assessment of whether the Eggleston principles had been breached.

Aside from the uncertainty surrounding the precise limits of the Panel's jurisdiction, there was also the fact that sometimes the parties were predisposed to challenge everything from the Panel's jurisdiction and decisions to the appointment of members.<sup>61</sup> In addition, it was perhaps easier for ASIC to maintain its position of authority as the sole regulator and go to court rather than use the Panel, especially since there was an established culture of referring takeover disputes to the courts. This was understandable, particularly in circumstances where, for example, there was a very clear contravention of the law and an injunction was required, as courts have significant experience with such circumstances and can be quick if required. Indeed, ASIC may have been concerned that if the Panel was given an opportunity to implement a "commercial" approach to takeover dispute resolution, it would, by introducing yet another regulator in this area, significantly alter the predictability of the existing court processes.

Another possible reason for ASIC's reluctance to refer matters to the Panel could be a perception that the Panel was a last resort in the regulatory arsenal, to be relied upon only when all attempts to achieve legal redress had failed. In other words, ASIC allocated to the Panel a deterrent, rather than active, role in the regulation of takeovers. There is some support for this contention in that the then Chairman of ASIC said publicly that he perceived that it was the legislature's intention that "peer review should have the role of articulating more precise ethical standards."<sup>62</sup> Accordingly, ASIC appears to have envisaged a role for the Panel as an adjudicator of market morality rather than legality.

## **A New Beginning**

Perhaps as a result of ASIC's reluctance to refer matters to the Panel, many commentators were of the view that a better venue was needed to "resolve time-sensitive commercial issues than the traditional court system."<sup>63</sup> The rethinking and updating of the Panel's functions began as part of the proposals of the Simplification Task Force.<sup>64</sup> Some of the Task Force's key proposals which concerned the Panel included:

- Removing recourse to the Administrative Appeals Tribunal (AAT) for the purpose of contesting:
  - ASIC decisions to grant exemptions and modifications pursuant to former sections 728 and 730 of the Corporations Law; and

<sup>60</sup> Gething and Ould, above n 57, 352–353.

<sup>61</sup> See *Precision Data Holdings Ltd v Wills, Adler and Jooste* (1991) 173 CLR 167 and *C P Ventures Pty Limited v McKeon* (as president of the Corporations and Securities Panel) and *Another* (1999) 32 ACSR 660.

<sup>62</sup> See Tony Hartnell, Chairman of the ASC, *In the Public Interest – Some Reflections on Corporate Regulation* (Address given for the Second Annual Lecture at the St James Ethics Centre, 10 November 1992).

<sup>63</sup> Bill Pheasant, "Panel Revived to Decide Pivot Case" *Australian Financial Review*, 21 January 1997, 13. See also John Green, "Takeover Rules, OK?" (Paper presented to at the 1996 Corporate Law Workshop of the Business Corporations Act Section of the Corporations Act Council of Australia, Adelaide, 11–13 October 1996).

<sup>64</sup> Corporations Law Simplification Program Taskforce, *Takeovers – Proposal for Simplification* (January 1996) 8 and 19–20.

- applications to the Panel for a declaration of unacceptable circumstances pursuant to former section 733 of the Corporations Law.
- Widening the circumstances in which the Panel may make declarations of unacceptable circumstances to cover shifts in control of a company whether or not an acquisition of a substantial interest in the company has occurred.
- Giving interested parties a direct right of access to the Panel.<sup>65</sup>

These proposals were first incorporated in the Third Simplification Bill which, subsequent to the election of the Liberal/National Coalition Government in the Federal election of March 1997, became the CLERP Act. Although some fine tuning of these proposals ensued, the end product combines these key proposals first suggested by the Simplification Taskforce with a number of further initiatives designed to reinvigorate the Panel.

The 3 proposals of the Simplification Taskforce can be found in sections 656A, 657A(2) and 657C(2) of the Corporations Act. Section 656A provides that the Panel is the adjudicator in relation to disputes regarding ASIC decisions to grant exemptions and modifications to the Corporations Act.<sup>66</sup> Section 657A(2) has widened the situations in which the Panel may make declarations of unacceptable circumstances, and section 657C(2) provides that any interested person affected by the relevant circumstances, including the bidder, target or ASIC, may refer a matter to the Panel.

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<sup>65</sup> Farah Farouque, "Government to 'Demystify' Takeover Rules" *The Age*, 24 January 1996, 23.

<sup>66</sup> ASIC's exemption and modification power can now be found in section 655A of the Corporations Act. In addition, section 1317C(gc) of the Corporations Act expressly states that the Administrative Appeals Tribunal cannot review ASIC's decision whether to apply to the Panel.

## Chapter 4

# The Functions and Responsibilities of the New Panel

The proposals of the Simplification Taskforce were just the first step in the rejuvenation of the Panel, and a number of additional provisions were included as part of the CLERP process. This Chapter is divided into 3 parts. The first part deals with the new powers of the Panel which are set out in Part 6.10 of the Corporations Act. These include, inter alia, the broadening of the test for unacceptable circumstances and the Panel's new rule-making power under section 658C. The second part considers the changes to Part 10 of ASIC Act, the ASIC Regulations and the Panel's new procedural rules which have impacted significantly upon the way in which Panel matters are conducted. The third part of this Chapter explores the relationship between ASIC, the Panel, the ASX and the courts and examines some of the issues related to the division of regulatory and adjudicative powers between these bodies.

### Part 6.10 of the Corporations Act

#### *Main forum for takeover disputes*

The substantive powers of the Panel are set out in Part 6.10 of the Corporations Act. The Panel has wide powers. Under section 659B of the Corporations Act, the parties to a takeover no longer have the right to commence civil litigation, or seek injunctive relief from the courts in relation to a takeover, while the takeover bid is in progress. Once a takeover bid has been announced only ASIC or another public authority of the Commonwealth or a State can commence court proceedings before the end of the bid period.<sup>67</sup> Therefore, many disputes which were previously resolved in the civil jurisdiction of the courts will now be resolved by the Panel. In other words, the Panel is now the "main forum for resolving disputes about a takeover bid until the bid period has ended."<sup>68</sup> What this effectively means is that it is the Panel rather than the courts who decides whether or not to grant an injunction. Historically, injunctions have been, and still are, the principal form of relief sought by parties involved in takeover disputes. Importantly, the Panel's powers do not extend to schemes of arrangement, and the courts remain in charge of supervising schemes.<sup>69</sup>

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<sup>67</sup> Section 659B of the Corporations Act.

<sup>68</sup> Section 659AA of the Corporations Act. However, civil proceedings may be initiated after the bid period has ended: section 659C of the Corporations Act.

<sup>69</sup> See *Cleary and Another v Australian Co-operative Foods Ltd and Others (Nos 2 and 3)* (1999) 32 ACSR 701, 715. The Panel has expressly acknowledged this in *Re St Barbara Mines Ltd and Taipan Resources NL* (2000) 18 ACLC 913, 917, where it was stated that "the Law expressly reserves schemes of arrangement for the jurisdiction of the Courts. The fact that subsection 411(17) gives the Courts such a wide discretion is evidence of a legislative intention that the Courts be the forum for the resolution of issues relating to schemes." Accordingly, schemes of arrangement remain within the purview of the courts despite the extended powers of the Panel. This is in contrast to the position in the UK where the London Panel shares the regulation of schemes with the court: The Panel on Takeovers and Mergers, *The City Code on Takeover and Mergers and The Rules Governing Substantial Acquisitions of Shares* (6th ed, 2000) A8.

However, there is still some uncertainty surrounding the precise limits to the jurisdiction of the Panel. This issue is discussed further in the third part of this Chapter.

### ***Unacceptable circumstances***

The primary power of the Panel is its ability to declare circumstances, in relation to the affairs of a company, unacceptable.<sup>70</sup> The Panel may make a declaration of unacceptable circumstances in 2 situations. First, if the Panel finds that circumstances regarding the control of an Australian company, or the acquisition of a substantial interest<sup>71</sup> in an Australian company, are unacceptable, it may make a declaration, even if there has been no breach of the Corporations Act.<sup>72</sup> The Panel may also make a declaration if it finds that a breach of Chapter 6, 6A, 6B or 6C constitutes unacceptable circumstances. In making a declaration of unacceptable circumstances, the Panel must consider the public interest and can only make a declaration, or decline to make a declaration, if it considers that doing so is not against the public interest.<sup>73</sup> In addition to the Eggleston principles, the Panel must also have regard to the other provisions of Chapter 6, any Panel rules made pursuant to section 658C, and matters prescribed in the regulations. The Panel may also take into account any other policy considerations it deems relevant.

There is no definition of unacceptable circumstances in the Corporations Act. Under the previous regime the Panel only ever made 1 declaration of unacceptable circumstances.<sup>74</sup> However, between 13 March 2000 and 30 September 2001, the new Panel made 5 declarations of unacceptable circumstances.<sup>75</sup> In addition, the Panel has given some guidance as to further circumstances it might consider unacceptable in its reasons for decisions<sup>76</sup> and in published policy.

Panel Policy 1 sets out four broad categories of unacceptable circumstances.<sup>77</sup> The first is where holders of voting shares or units in a company do not have reasonable and equal opportunities to take part in the benefits accruing to holders of shares or units in connection with a transaction that affects the control of the company.<sup>78</sup> The second category relates to situations where holders of voting shares or units do not have the necessary information to make an informed decision or are misled in relation to the relevant control transaction.<sup>79</sup> The third category of unacceptable circumstances is where an effi-

70 Although “the affairs of a company” are not defined with reference to the Panel, the definition in section 53 of the Corporations Act could, if necessary, be made to apply by regulation.

71 Although this term is not defined in the Corporations Act it has been explored judicially: *Brierley Investments Ltd v ASC* (1997) 78 FCR 255, 264. The Panel has also provided a view on the interpretation of this term: *Re ASC and John Fairfax Holdings Ltd* (1997) 15 ACLC 1,457.

72 Section 657A(2) of the Corporations Act.

73 This is in contrast to the position of the Panel under the previous regime prior to 13 March 2000 where the Panel had to determine that such a declaration was positively in the public interest: former section 733(3)(b) of the Corporations Law.

74 See *Re Pivot Nutrition Pty Ltd & Ors* (1997) 15 ACLC 369.

75 They are: *Re Realestate.com.au Ltd* (2001) 19 ACLC 618, *Re Pinnacle VRB Ltd (No 4)* (2001) 19 ACLC 1,142, *Re Taipan Resources NL (No 9)* (2001) 38 ACSR 111, *Re Taipan Resources NL (No 10)* (2001) <http://www.takeovers.gov.au/Content/Decisions/TaipanNo10PublishedReasons.asp>, and *Re Namakwa Diamond Company NL (No 2)* (2001) <http://www.takeovers.gov.au/Content/Decisions/Namakwa2.asp>. These cases are discussed in detail in Chapter 6.

76 See, for example, *Re ASIC and Wesfi Ltd* (1999) 17 ACLC 1,690, 1,702 and *Re Brickworks Limited (No 2)* (2000) 18 ACLC 934, 944.

77 [http://www.takeovers.gov.au/Content/Policy/010228\\_PS1.asp](http://www.takeovers.gov.au/Content/Policy/010228_PS1.asp). This policy is discussed further in Chapter 6.

78 *Ibid* [1.11].

79 *Ibid*, [1.12].

cient, competitive and informed market in the securities of the relevant company is inhibited.<sup>80</sup> The fourth category is where appropriate procedures are not followed leading up to compulsory acquisition of securities pursuant to Part 6A.1.<sup>81</sup> Policy 1 also canvasses comments that the Panel has made in its published decisions about what constitutes unacceptable circumstances and comments that ASIC and the NCSC have made about situations in which unacceptable circumstances may arise.

The CLERP Act amendments have expanded the number of situations in which the Panel has jurisdiction to consider whether unacceptable circumstances exist. Clearly the Panel is no longer limited to declaring conduct or an acquisition unacceptable only in situations where the Eggleston principles<sup>82</sup> are contravened. While the Panel should be guided by the Eggleston principles as set out in section 602 of the Corporations Act, and must take them into account,<sup>83</sup> it can also make a declaration of unacceptable circumstances where a provision of Chapter 6 has been contravened.

Further, because the Panel can now declare circumstances, as opposed to conduct or an acquisition, unacceptable, the focus is on the way in which persons are affected by the circumstances, rather than the intention or guilt of the person who causes the circumstances.<sup>84</sup>

### ***Referrals***

Whereas previously only ASIC could refer a matter to the Panel, section 657C of the Corporations Act now provides that a wider range of persons, including the bidder, target, ASIC or any other person whose interests are affected, may apply to the Panel for a declaration of unacceptable circumstances.

One issue with which the Panel has had to contend, and in relation to which there is no guidance in the legislation (or subordinate legislation), is that of the withdrawal of referrals. A number of cases before the Panel have either settled, or it has become apparent to the applicant that there is not sufficient substance in the application for them to continue to press it. However, the Corporations Act is unclear as to whether an application can be withdrawn from the Panel's consideration. The approach most commonly used by Australian courts and tribunals in such circumstances is to allow the application to be withdrawn subject to the consent of the court or tribunal.<sup>85</sup> Accordingly, it would be sensible for the Panel to adopt a procedural rule (pursuant to section 195 of the ASIC Act) which permits an applicant to withdraw its application with the consent of the President of the Panel.<sup>86</sup> That way, the Panel could retain discretion and may refuse a

80 Ibid, [1.13].

81 Ibid, [1.14].

82 Refer to n 8 above for further information regarding the Eggleston principles.

83 Section 657A(3) of the Corporations Act.

84 However, the intention or guilt of the person who caused the circumstances may impact upon the remedy that is chosen by the Panel. See Takeovers Panel, Remedies and Enforcement – Policy 4, [http://www.takeovers.gov.au/Policy/010228\\_PS4.htm](http://www.takeovers.gov.au/Policy/010228_PS4.htm) [4.13]. Although it is not the role of the Panel to punish parties, the Panel may well be less concerned about the collateral damage that a party must endure as a result of an order it makes where that party has caused the unacceptable circumstances which necessitated the making of the order.

85 See for example, section 74 of the *Victorian Civil and Administrative Tribunal Act 1998*.

86 Presumably if a Panel has been appointed in relation to the application then the consent of the President of the sitting Panel must be obtained. However, if a Panel is yet to be appointed, it is likely that the applicant will have to apply for the consent of the substantive President of the Panel.



request for withdrawal of an application if there are grounds for believing that unacceptable circumstances would persist after the withdrawal of the application.

### ***Remedies and enforcement***

The orders that the Panel may make have not changed markedly.<sup>87</sup> The Panel's power to make orders is very broad and includes any order that it thinks appropriate to:

- (a) protect the rights or interests of any person affected by the circumstances; or
- (b) ensure that a takeover bid or proposed takeover bid in relation to securities proceeds (as far as possible) in a way that it would have proceeded if the circumstances had not occurred; or
- (c) specify in greater detail the requirements of an order made under this subsection [657D(2)]; or
- (d) determine who is to bear the costs of the parties to the proceedings before the Panel...

but precludes an order directing a person to comply with an order made by the Panel or a requirement of Chapter 6, 6A, 6B or 6C.<sup>88</sup>

Pursuant to section 657E the Panel or the sitting President of the Panel, may make interim orders. Interim orders have a limited life of 2 months and can be made in the absence of a declaration of unacceptable circumstances, or an application for unacceptable circumstances. In deciding whether to make interim orders similar considerations to those which are relevant to the grant of an interlocutory injunction apply.<sup>89</sup>

As set out above, the Panel also has a new power to make orders determining who is to bear the costs of the parties to the proceedings before the Panel.<sup>90</sup> However, the provision is expressed in such a way that it appears that the Panel can only make a costs order after a declaration of unacceptable circumstances has been made. In addition there is no express power to make costs orders in respect of a review of an ASIC exemption or modification or in relation to an interim application. Therefore, parties have been generally unable to recoup costs because the new Panel has in the majority of cases to date declined to make a declaration, usually because the matter has been withdrawn, or the applicant was unsuccessful, or because the respondent offered an undertaking that addressed the Panel's concerns.

In the event that the Panel did make a declaration and subsequent orders which were not complied with, or the Panel (or another party to the proceedings) apprehended that the orders may be contravened,<sup>91</sup> the President of the Panel, ASIC, a party to the proceedings in which the order was made, or a person to whom the order relates, would need to apply to a court to secure compliance with the order.<sup>92</sup> This is because the Panel cannot enforce its own orders.<sup>93</sup>

<sup>87</sup> Section 657D of the Corporations Act.

<sup>88</sup> Undoubtedly, this was a deliberate decision, as the power to enforce orders and provisions of the law are attributes of a court and therefore, may have given rise to an allegation that the Panel is unconstitutional. This issue is discussed further in Chapter 7.

<sup>89</sup> *Adsteam Building Industries Pty Ltd v Queensland Cement and Lime Co Ltd* [1984] 2 Qd R 1 and *NCSC v Monsoon Nominees Pty Ltd* (1990) 9 ACLC 43 and Baxt et al, above n 15, [3–280].

<sup>90</sup> Section 657D(2)(d) of the Corporations Act.

<sup>91</sup> Section 657F of the Corporations Act provides that it is an offence to contravene a Panel order.

<sup>92</sup> Section 657G of the Corporations Act.

<sup>93</sup> If the Panel had been given such a power which is traditionally a function of the courts, it would have been a serious threat to the constitutional validity of the Panel. Refer to the discussion of constitutional issues in Chapter 7 below.

### **Review powers**

The Panel has a variety of review powers one limb of which is set out in section 656A of the Corporations Act. The Panel may review decisions of ASIC made pursuant to section 655A of the Corporations Act to exempt or modify the application of Chapter 6. The Panel may also review decisions of ASIC made pursuant to section 673 of the Corporations Act, to modify the substantial shareholding provisions made during the bid period. This review function was previously undertaken by the AAT. As was the case with the AAT, the Panel may exercise all the powers and discretions conferred on ASIC by Chapter 6. In other words, the Panel can affirm or vary ASIC's decision, or set aside the decision and either substitute its own decision, or remit the matter for reconsideration by ASIC.<sup>94</sup>

Section 657EA of the Corporations Act enables the decision of a Panel to be subject to review by another Panel (a **review Panel**), made up of 3 members who were not involved in the decision under appeal. The President's consent is required, unless the application for review concerns a declaration of unacceptable circumstances or an interim or final order in relation to proceedings for such a declaration.<sup>95</sup> Therefore, procedural decisions cannot be reviewed as of right, the President's leave must be obtained. In addition, reviews of ASIC decisions by the Panel under section 656A of the Corporations Act cannot be the subject of a further review by the Panel.

There can be only one review of an original Panel decision by a review Panel. The review Panel has the same powers as the original Panel, and can affirm, vary or set aside the decision of the original Panel, and if it wishes, substitute its own decision. However, a review Panel cannot refer a decision back to the original Panel.<sup>96</sup> The review is a *de novo* reconsideration on the merits, and in considering what is the preferable decision in relation to both Panel and ASIC decisions, the Panel has stated that it will apply the same policy as was applied by ASIC or the original Panel, unless there are cogent reasons why that policy should not be applied generally or in that case.<sup>97</sup> It should be noted that an application for review of a decision of the Panel does not affect the operation of its decisions or prevent the taking of action to implement a Panel decision.

The Panel also has an additional review function in relation to matters which are referred to it by the courts, under section 657EB of the Corporations Act.

### **Rule-making power under section 658C**

Another new power of the Panel is the rule-making power. This should not be confused with the power to make procedural rules to govern Panel process which is discussed in the next part of this Chapter. Pursuant to section 658C, the President of the Panel has the power to make rules, after consultation with the members of the Panel, which clarify or supplement the provisions of Chapter 6 of the Corporations Act. However, any such rules must not be inconsistent with either the provisions of the Corporations Act or the Regulations. The precise scope of the rule-making power is uncertain because the meaning of "not inconsistent with" the provisions of the Corporations Act or the Regulations is unclear.

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<sup>94</sup> Section 656A(3) of the Corporations Act.

<sup>95</sup> Section 657EA(2) of the Corporations Act.

<sup>96</sup> Section 657EA(4) of the Corporations Act.

<sup>97</sup> *Re Email Limited (No 2)* (2000) <http://www.takeovers.gov.au/Content/Decisions/0040-email-limited.asp> [4].



It is clear that a rule is inconsistent with Chapter 6 if it requires a person to do something that is prohibited by Chapter 6. A rule is probably also inconsistent with Chapter 6 if it allows a person to refrain from doing something required by Chapter 6. Therefore, it seems to follow that any rule which exempts a person from a provision of Chapter 6 is inconsistent with Chapter 6, and that the scope of the rule-making power is limited to requiring conduct which is not actually required by the provisions of Chapter 6, but is still consistent with those provisions.<sup>98</sup>

In this way, it appears that the drafters of section 658C unintentionally created an internal conflict by including a power to alter the operation of the provisions of Chapter 6 by rules having general application and making the exercise of that power subject to the requirement that those alterations be “not inconsistent with” the Corporations Act and Regulations. Any rules made pursuant to this section are therefore open to attack on the ground of inconsistency. There is probably no urgent requirement for a rule that could not be satisfactorily dealt with by ASIC using its class orders or its general exemption and modification powers, or alternatively, by the Panel dealing with matters as they arise on a case by case basis or by the Panel’s guidance notes indicating how it will deal with such issues if brought before it. In fact, it is probably preferable that such issues be dealt with in this way, at least until section 658C is amended to remove the “inconsistency” limitation.

Given the confusion with respect to the scope of section 658C, it is not surprising that the Panel is yet to make any rules under this section. Instead, the Panel has preferred to issue statements of policy in order to provide guidance to market participants. However, the Panel has stated that any rules it does make “will encapsulate policy which the Panel has already applied in particular cases.”<sup>99</sup> In addition, prior to making such rules, it is likely that the Panel will invite public submissions on the content and desirability of such rules.<sup>100</sup>

## **Part 10 of the ASIC Act, the ASIC Regulations and Panel Rules**

The procedures of the Panel are set out in various laws, regulations and rules. The Panel is established under section 171 of the ASIC Act. The ASIC Act also contains provisions which deal with issues such as membership, the appointment of the President, the requirement that the Panel prepare an Annual Report, and some guidelines concerning the conduct of Panel business, including Panel proceedings.

Many of the concepts outlined in the ASIC Act, particularly those concerning Panel proceedings, are expanded in the ASIC Regulations and Panel Rules.<sup>101</sup> The ASIC Regulations are secondary legislation which further develop the provisions of Part 10 of the ASIC Act and give additional specific powers to the Panel, and prescribe a number of specific requirements in respect of Panel proceedings. The Panel Rules were drafted

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98 An example would be a rule requiring that any material sent to target shareholders with the bidder’s statement must be lodged at the same time that the bidder’s statement is lodged with ASIC. This would prevent bidders withholding material such as the Chairman’s letter and the upfront marketing information which usually accompanies a bidder’s statement and often contains controversial material, but which is not always lodged with the bidder’s statement.

99 <http://www.takeovers.gov.au/Content/Policy/Policy3-MakingRules.asp> [3.3].

100 *Ibid*, [3.7].

101 The Panel’s Rules are published on its web site at <http://www.takeovers.gov.au/Content/Rules/Proceedings.asp>

by the Panel executive and agreed by the Panel members. Each sitting Panel adopts the rules pursuant to section 195 of the ASIC Act (which empowers the Panel to determine the procedures which will govern Panel proceedings) as part of the ‘Brief’ in relation to each new matter brought before the Panel. A number of the provisions of the ASIC Act, ASIC Regulations and Panel Rules are discussed below.

### ***Panel members***

Panel members are appointed by the Governor General, on the nomination of the Minister, under section 172 of the ASIC Act. The State Ministers may make submissions to the Federal Minister and submit potential members for nomination to the Panel. There must be a minimum of five members.<sup>102</sup> All current members are part time members, including the President. The Minister nominates members on the basis of their knowledge or experience in one or more of the following fields: business, the administration of companies, financial markets, law, economics or accounting. It is intended that the Panel have an appropriate mix of professions and business expertise, as well as geographical and gender representation. Members hold office for a maximum period of five years, but may be re-appointed at the end of that period.

### ***The President of the Panel***

The Governor-General must appoint one member to be the President of the Panel under section 173 of the Act (the ***substantive President***). Various provisions in the Corporations Act and the ASIC Act make references to the President and his or her functions. When members of the Panel sit to consider proceedings (a ***sitting Panel***), the substantive President may be the President of that Panel, or he or she may appoint another member to be the President (the ***sitting President***) of that Panel. The substantive President<sup>103</sup> has a number of important tasks, including determining which Panel members will constitute the Panel for particular matters.

### ***Constituting a Panel***

The first step in the process of constituting a Panel involves the Panel executive making enquiries of the applicant regarding the director’s legal and financial advisers, the auditors and any major financiers of the parties, where these are known to the applicant.<sup>104</sup> This information is then used to help select potential Panel members who will not have a material conflict. The substantive President also considers other factors including each member’s availability, qualifications and expertise. The substantive President then selects 3 Panel members, and in order to ensure that these members are in fact free from any material conflict or bias which would prevent any of them from being appointed to the sitting Panel, they must consider their personal and professional interests in relation to the matter and complete a declaration of interests.<sup>105</sup>

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102 Currently there are 44 members. A list of current members and their occupation and location (as at 31 March 2002) can be found behind Annexure 1.

103 The current substantive President of the Panel is Simon McKeon, Executive Director, Macquarie Bank.

104 The Panel Rules have recently been amended to add a requirement that applicants include this information in their application. See Panel Rule 2.1 at <http://www.takeovers.gov.au/Content/Rules/Proceedings.asp>.

105 The declaration of interests requires members to disclose, as far as possible, any interest that may cause a conflict or a perception of conflict. For example, whether the member or their firm has a personal and/or business relationship or has performed work for any of the parties involved, or a related entity of any of the parties involved (including the directors of those parties); and whether the member or their firm has traded in or has a personal shareholding in any of the parties involved or a related entity of any of the parties involved (including details about the shareholding).

Section 185(1) of the ASIC Act provides that where a Panel has been constituted, a member of that Panel must disclose “*any interest, pecuniary or otherwise*” that could conflict with the proper performance of the member’s functions. Under sections 185(1)(a) and (b), the member must disclose the interest to the substantive President and the parties involved in the matter and thereafter must not take any further part in the matter, except with the consent of the President. The President may, pursuant to section 185(1A), only give such consent in circumstances where the President believes on reasonable grounds that the member’s interest is immaterial or indirect and will not prevent the member from acting impartially in relation to the matter.

Parties are also provided with copies of the declaration of interests for each member and are invited to raise any issues or objections that they have in relation to the appointment of any Panel member with the Panel executive.

In addition, to appointing the members to constitute a Panel, the substantive President must also decide which member is to be the sitting President and which member is to be the deputy President. If the substantive President is a member of the sitting Panel then he or she will be the sitting President.<sup>106</sup>

### ***Panel proceedings***

The procedures to be followed by the Panel when conducting proceedings are found predominantly in the ASIC Regulations and Panel Rules. The ASIC Regulations expressly require the Panel to ensure that any proceedings it conducts are:

- (a) as fair and reasonable; and
  - (b) conducted with as little formality; and
  - (c) conducted in as timely a manner;
- as the requirements of ... [the legislation pertaining to the Panel] and a proper consideration of the matters before the Panel, permit...<sup>107</sup>

Accordingly, these objectives underpin all Panel proceedings, and the procedures that govern such proceedings, including those outlined in the Panel Rules. As a result of the changes introduced by the CLERP Act, the Panel has been given increased power to determine the conduct of its proceedings. Section 195 of the ASIC Act empowers the Panel to make rules (***Rules***) in order to determine the procedures to be followed in Panel proceedings. These Rules are published on the Panel’s website.<sup>108</sup>

### ***Threshold issue – whether to conduct proceedings***

Once a Panel has been constituted the Panel then considers the threshold issue of whether it will commence proceedings in relation to the matter<sup>109</sup>. If the Panel decides to conduct proceedings it must inform ASIC and each company and person to whom the application relates.<sup>110</sup> If it decides not to proceed with a matter it must also notify ASIC and each company and person to whom the application relates, and it must provide its reasons for that decision at the same time.<sup>111</sup> There have been several cases where the Panel has

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106 Section 184 of the ASIC Act.

107 Regulation 13 of the ASIC Regulations.

108 See <http://www.takeovers.gov.au/Content/Rules/Proceedings.asp>

109 Regulation 20 of the ASIC Regulations.

110 Regulation 21 of the ASIC Regulations.

111 Regulation 21(2) of the ASIC Regulations.

declined to conduct proceedings. For example, in *St Barbara Mines Ltd and Taipan Resources NL*<sup>112</sup> the Panel declined to conduct proceedings on the basis that the applicant wanted the Panel to consider a scheme of arrangement which was already being overseen and considered by the Supreme Court of Western Australia. The Panel considered that the matters raised in that application could be dealt with as part of the scheme approval process, and that it would not be in the public interest for two proceedings to be considering the same transaction and issues simultaneously. Accordingly the Panel decided not to conduct proceedings.

Similarly in *Re Taipan Resources NL (No 2)*<sup>113</sup> the issues and evidence involved overlapped the issues that the Supreme Court of Western Australia was considering under an oppression action brought by Troy, and in its consideration of the proposed merger of Taipan and St Barbara under the scheme of arrangement. Both of these actions were already before the Court. It was observed that it would generally be inappropriate for the Panel to conduct proceedings in relation to an application where the evidence and the issues to be considered by the Panel were already before a court and that the Panel is keen to avoid duplicative proceedings and to discourage forum shopping where the functions of a court and the Panel overlap.<sup>114</sup>

### *The brief*

Once the Panel has commenced proceedings it must also issue a brief describing the matters to be examined in the proceedings.<sup>115</sup> ASIC Regulation 20 requires that:

As soon as practicable after receiving an application, the Panel must:

- (a) decide whether to conduct proceedings in relation to the application; and
- (b) if the Panel decides to conduct proceedings – prepare a brief setting out:
  - (i) a general description of the matters to be examined in the Panel proceedings; and
  - (ii) the issues to be addressed in submissions for the proceedings.

The Rules provide that Panel proceedings are to be primarily determined on the basis of written submissions.<sup>116</sup> The brief is drafted in a way that is intended to assist the parties in deciding how to address the issues in their written submissions.

### *Time for response*

It is implicit in the policy of Regulation 13, which requires the Panel to conduct its proceedings in a timely manner, that the Panel may allow much shorter periods for responses to submissions, or limit the scope of submissions more narrowly than another body which does not have the same legislative time imperatives.

112 (2000) 18 ACLC 913.

113 (2001) 19 ACLC 785.

114 Takeovers Panel, *Panel Declines to Hear Further Application in relation to Taipan Resources*, Press Release 00/44 (16 November 2000) 1. See also, Tony Greenwood, “Are the courts finished with takeover disputes? The IAMA merger with Wesfarmers Dalgety” (2001) 19 *Company and Securities Law Journal* 454; Takeovers Panel, *Panel Receives Application in Relation to Pinnacle VRB Ltd*, Press Release 00/18 (30 July 2000) 1, *Re Pinnacle VRB Ltd (No 7)* (2001) <http://www.takeovers.gov.au/Content/Decisions/PinnacleNo7.asp>, *Re Namakwa Diamond Company NL (No 3)* (2001) <http://www.takeovers.gov.au/Content/Decisions/Namakwa3.asp> and *Re Namakwa Diamond Company NL (No 4)* (2001) <http://www.takeovers.gov.au/Content/Decisions/Namakwa4.asp>

115 Regulation 20 of the ASIC Regulations.

116 Rules 1.3 and 10.3 of the Panel Rules.

In general parties are given 3 business days to respond to a brief which concerns an initial application for a declaration or order (other than an interim order); and 1 business day to respond to a brief which concerns an application for an interim order, a request for a review of an ASIC or Panel decision, or a submission (other than an initial application).<sup>117</sup> Less time is allowed for interim orders because they are typically urgent and therefore need to be dealt with quickly. In relation to requests for a review of an ASIC or Panel decision, much of the material will be able to be accessed immediately and additional submissions are often unnecessary, or if necessary can be very brief. Similarly, in respect of submissions other than an initial application, the Panel (in the interests of natural justice) allows parties the opportunity to make submissions rebutting the points and arguments raised in each other parties' submissions. Such submissions can generally be prepared quite quickly, however, the Panel may allow more or less time depending upon the types of legal and commercial issues involved, the time at the Panel's disposal, difficulties in obtaining the necessary information and other relevant matters.

#### *Panel deliberations and conferences*

After the submissions are received, they are reviewed by the Panel. At this stage the Panel may go back to the parties and request that they produce documents or more information or additional submissions. It is typically at this stage that it becomes apparent whether or not a conference will be necessary to resolve the dispute. The Panel is not obliged to convene a conference,<sup>118</sup> however, if it resolves to hold a conference the parties are notified in accordance with ASIC Regulation 37. Despite receiving 39 applications between 13 March 2000 and 30 September 2001, the Panel held only 5 conferences with parties, including 1 via telephone and 2 using video-conferencing facilities. Regulation 38(3) of the ASIC Regulations requires that a transcript must be made of a conference.

The Panel has significant powers at a conference, including the power to take evidence on oath, subpoena witnesses, examine witnesses or subpoena documents.<sup>119</sup> However, Regulation 16(2) provides that the rules of evidence do not apply to Panel proceedings. Although the rules of evidence do not apply, the rules of procedural fairness do apply to the extent that they are not inconsistent with the legislation applicable to the Panel.<sup>120</sup>

Parties may be accompanied and advised at a Panel hearing by their commercial solicitors and financial advisers who have been involved in the transaction. In fact Rule 11 of the Panel Rules specifies that oral and written submissions to the Panel can only be made by persons who have taken direct part in the relevant transactions. A party may not be represented at a Panel hearing by a lawyer or other advocate without the leave of the Panel.<sup>121</sup> Leave will typically be given only for specific purposes or where special skills are required, such as arguing a point of law or examining a witness. While Rule 11 expressly includes the solicitors advising the parties it would not include barristers or litigation solicitors unless they have been advising the parties throughout the transaction.

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<sup>117</sup> Rule 9.6 of the Panel Rules.

<sup>118</sup> Regulation 35 of the ASIC Regulations.

<sup>119</sup> See section 192 of the ASIC Act and rule 7.1 and 7.7 of the Panel Rules.

<sup>120</sup> Section 195(4) of the ASIC Act.

<sup>121</sup> Section 194 of the ASIC Act and rule 11 of the Panel Rules.

Generally, all parties are entitled to be present throughout the entire hearing and have access to all papers submitted. However, the Panel also has broad powers to control the dissemination of information amongst parties to a Panel proceeding. The Panel may be required to keep confidential information provided to it by ASIC pursuant to section 127 of the ASIC Act. Further, in order to promote maximum candour amongst persons appearing before it, and in submissions to it, the Panel keeps confidential any commercially sensitive information provided to it. This type of information is generally information which the relevant party would otherwise be under no legal obligation to disclose and may include financial projections, minutes of board meetings, board presentations, or trade secrets or processes.

The Panel may also restrict or prevent access to submissions or evidence given to the Panel by only allowing some parties or their advisers to view certain documents or submissions.<sup>122</sup> This can be useful in situations where, for example, there is a dispute regarding the disclosure of the intentions of a bidder. The Panel could ask for access to commercially sensitive information presented to the board of a bidder prior to the board resolving to proceed with a hostile takeover, in order to satisfy itself that the intentions of the bidder have been adequately disclosed. However, in practice it is very difficult for the Panel to restrict a party's access to information without the co-operation of the party whose access is restricted as there will always be a risk that the party may seek to challenge any such decision of the Panel on the grounds that they were denied procedural fairness.

### *The Panel executive*

There is no mention made in the Corporations Act or the subordinate legislation of the Panel executive. Accordingly, a relatively conservative stance has been taken on the scope of the role of the executive in relation to their involvement in proceedings. The narrative provided on the Panel's web site states that it is the function of the executive to:

provide information to market participants and other persons about the Panel, facilitate early enquiries about particular aspects, receive all documents for Panel proceedings, support the Panel in proceedings, provide policy advice, and provide continuity for the Panel and Panel members.<sup>123</sup>

A significant part of the role of the executive involves policy work and conducting information sessions for members to keep them abreast of recent developments and relevant cases. The Panel executive also receive a number of queries from takeover practitioners. While parties are encouraged to approach the executive to seek their advice regarding procedural aspects relating to proposed applications, it is not the role of the executive to give rulings interpreting the Corporations Act. Moreover, the executive can only consult and counsel parties prior to the appointment of a sitting Panel of 3 members. After the appointment of a Panel, the executive coordinates the proceedings, provides advice and support to the Panel and liaises with the parties on behalf of the Panel. The Panel executive produce drafts of all documents issued by the Panel in connection with

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<sup>122</sup> Section 190 of the ASIC Act.

<sup>123</sup> <http://www.takeovers.gov.au/Content/AboutThePanel/AboutThePanel.asp>



a matter including press releases, the brief and the reasons for decision, all of which are settled by the Panel members of the sitting Panel.

There is some concern that substantive involvement of the executive in the pre-application stages of a matter could “taint” any proceedings which follow and expose the sitting Panel to allegations of bias and procedural “unfairness”. However, the executive do make careful notes of discussions with advisers in the pre-application stages and inform advisers that anything they disclose to the Panel executive at this point will be communicated to the sitting Panel if an application eventuates.

## **The Relationship Between ASIC, the Panel, the ASX and the Courts**

Unlike some Panels, such as the London City Panel on Takeovers and Mergers (the *London Panel*), the Panel in Australia does not have exclusive jurisdiction in relation to takeovers and must cooperate with the other regulators and dispute resolving entities, namely ASIC, the ASX and the courts. There have been a number of cases that have raised important jurisdictional questions for the Panel. These cases and various relevant issues are discussed below.

### ***ASIC and the Panel***

Under the old regime, it was said that the Panel suffered from a lack of independence from ASIC with respect to financial, administrative, and adjudicative matters.<sup>124</sup> This was recognised as one of the fundamental stumbling blocks of the previous regime and clearly needed to be rectified if “the strong policy reasons for the creation of the Panel [were] to be observed.”<sup>125</sup> As a result of the changes introduced by the CLERP Act the Panel has finally achieved that independence and is now clearly a separate entity. Moreover, the Panel from time to time sits in judgement of ASIC, since power has been taken from the AAT and given to the Panel to review ASIC decisions relating to exemptions and modifications of the Corporations Act as it relates to takeovers.<sup>126</sup>

In addition, there is some overlap in respect of the roles of ASIC and the Panel in relation to the development of policy. While ASIC clearly remains the custodian of the Corporations Act and is responsible for prosecuting breaches of the Corporations Act, as well as enforcement and policy development, the Panel as arbiter of takeover disputes also has a role to play in the development of takeovers policy. To date the Panel and ASIC appear to be sharing the workload regarding the development of takeovers policy amicably. For instance, this year ASIC has clarified its policies regarding joint takeover bids and the building of pre-bid stakes, while the Panel has published policies on issues such as when it will restrain the despatch of takeover documents and when it will consider lock-up devices to be unacceptable. One topic which would benefit from a clarificatory policy statement is that of ‘truth in takeovers’. The Corporations Act prohibits a person who has publicly announced an intention to make a takeover bid from making that bid on less advantageous terms to target shareholders than those described in the

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124 John Green, “An Australian Takeover Panel – What Do We Want? A Poll and Critique” (1989) 7 *Company and Securities Law Journal* 6, 10.

125 That is, separating the function of declaring conduct unacceptable from investigating and prosecuting suspected misconduct: Williams, above n 9, 165.

126 Section 656A of the Corporations Act.

announcement. However, parties sometimes attempt to take liberties with this rule. It will be interesting to see whether ASIC or the Panel will take on the task of providing guidance to the market on this issue.

Further, the Panel's rule-making power in section 658C of the Corporations Act is based upon policy considerations and arguably usurps a function that has, until now, been performed exclusively by ASIC Policy Statements, Practice Notes and Class Orders in relation to takeovers. This view is supported by the fact that section 658D of the Corporations Act states that if there is an inconsistency between a rule made by the Panel and an exemption or modification given by ASIC under section 655A, the Panel rule prevails to the extent of any inconsistency. This is a clear indication that in the area of takeovers policy the Panel is paramount.

Clearly there is potential for conflict between the Panel and ASIC. In fact the Panel and ASIC have issued contrary statements concerning an important area of takeover policy. Much was made of the conflicting approaches taken by ASIC and the Panel in relation to the minimum bid price principle, a provision introduced by the CLERP Act.<sup>127</sup> The minimum bid price principle is in section 621 of the Corporations Act and requires that a bidder must offer the same value, in cash or other securities, as the highest price the bidder or an associate paid for bid class securities in the four months before the bid. If the consideration offered under a bid includes scrip, subsection 621(4) provides that the bidder must value the consideration at the time the offer is made. However, it is practically impossible for a bidder to value the consideration, print and send its bidder's statement and offer document on the same day.

On 7 March 2000, ASIC expressed the view that bidders could use market prices from the period prior to printing its offer documents to value its scrip. ASIC's initial estimate was that 2 days should be sufficient.<sup>128</sup>

The Panel issued a press release on 28 March 2000 in which it expressed a view that the 2 days suggested by ASIC was "too short" and that bidders may need up to 5 business days to value the consideration and prepare the documents required.<sup>129</sup>

ASIC has since said that it proposes to grant bidders offering quoted scrip<sup>130</sup> as the bid consideration class order relief to allow the bidder to value the scrip 5 business days before the offers are sent. However, ASIC has warned that any exploitation of short term fluctuations in price by bidders may be referred to the Panel for a declaration of unacceptable circumstances.<sup>131</sup>

In addition to the overlap in the sphere of takeovers policy, some points of difference have arisen between ASIC and the Panel regarding the outcome of certain Panel proceedings. For example, following the Panel's decision in *Re.Realestate.com.au Ltd*<sup>132</sup> not

127 Bryan Frith, "Takeover Revamp Leaves Room for Bureaucratic Biffo" *The Australian*, 17 March 2000, 22 and

Bryan Frith, "Ending up a Takeover Hostage is Written in the Scrip" *The Australian*, 1 June 2000, 20.

128 ASIC, *ASIC Gives Guidance on Takeovers Issues*, Information Release, No 00/008 (7 March 2000) 2.

129 Takeovers Panel, *Policy: Minimum Price Requirement s621(3) & (4)*, Press Release, No 00/05 (28 March 2000) 1.

130 The position in relation to unquoted scrip is slightly more complex and ASIC may not give relief from section 621(4), or if it does grant relief may require, as a condition to granting relief, that the bidder either obtain an expert's report to assess whether the consideration is fair and reasonable, or alternatively, allow an expert to determine the non-cash consideration: Richard Cockburn, *CLERP Issues for the Regulator* (Paper presented at the 2000 Corporate Law Workshop, Fremantle, 21–23 July 2000) 5. See also, Bryan Frith, "Disgruntled Email wants Panel to Draw Smorgon's Fire" *The Australian*, 12 May 2000, 22.

131 Cockburn, above n 130, 3.

132 (2001) 19 ACLC 618. This decision is discussed in Chapter 6.



to make any orders, ASIC issued a media release which stated that, after reviewing the Panel's decision and the announcements made by Realestate, it considered that further action was warranted. ASIC prohibited Realestate from using the shorter form disclosure document available for listed companies for a period of 12 months. The effect of this prohibition is that if Realestate seeks to raise funds during this period, it must conduct an audit and due diligence if it wishes to issue a prospectus.

There is also potential for discord between ASIC and the Panel because ASIC is not precluded from bringing an action in the courts during the period a bid is open.<sup>133</sup> If ASIC were to commence proceedings in the courts at the same time that the Panel was dealing with a matter or instead of taking the matter to the Panel, it is possible (depending upon the approach taken by the court) that two different, and perhaps conflicting, decisions could be the result. The clear intention of the legislature is that the Panel is to be the main forum for resolving disputes during the course of a takeover bid. However, there may actually be cases where it is desirable for ASIC to commence court proceedings in relation to a takeover during the bid period. One such example of a positive intervention by ASIC is discussed in the following paragraphs.

Section 606 of the Corporations Act prohibits certain acquisitions of relevant interests in voting shares, namely acquisitions that exceed the 20% threshold. However, section 611 of the Corporations Act provides for certain exceptions to the prohibition in section 606, including an acquisition that results from the acceptance of an offer under a takeover bid. Section 612 states that if there is a contravention of certain sections<sup>134</sup> then the takeover bid cannot be a valid exception to the prohibition in section 606. If one of these sections is breached during the currency of the bid, the bid will be invalid. A court may validate a contravention of Chapter 6, 6A, 6B or 6C pursuant to section 1325D. However, section 659B precludes the bidder from approaching the court to seek an order validating the contravention during the bid period. Only ASIC (or another public authority) has the power to approach the court during a bid.<sup>135</sup> In addition, although the Panel can make remedial orders,<sup>136</sup> it may not have the power to validate such a contravention of the Corporations Act. If the power to make such orders was extended to validating a contravention of the Corporations Act it may be argued that the Panel was exercising judicial power, and accordingly a constitutional issue may arise.<sup>137</sup> Therefore, if in such circumstances ASIC did not commence proceedings to validate the bid, the bidder would have to wait until the end of the bid period before approaching the court to request that the contravention be validated. This is an unsatisfactory situation for bidders, and accepting target shareholders, because there is no certainty of outcome.<sup>138</sup> This problem is particularly striking in situations where a minor or technical breach occurs, for example, where the bidder contravenes one of the procedural steps in section 633, such as failing to despatch the bidder's statement between 14 and 28 days after serving it upon the target.

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133 Section 659B of the Corporations Act.

134 That is, sections 618, 619, 621(3), 624(1), 625 through to and including 630, items 2, 3 and 6 in the table in section 633(1), or items 3, 4 and 6 in the table in section 635.

135 Section 659B of the Corporations Act.

136 Section 657D(2) of the Corporations Act.

137 Cockburn, above n 130, 9.

138 Bryan Frith, "Email Wrangle Highlights Takeovers Panel Anomaly" *The Australian*, 19 May 2000, 22.

However, ASIC may not be willing to go to court on behalf of a bidder in order to provide it with the certainty that its bid may be validated. Another potential solution may be for ASIC to exempt a person from the operation of section 659B so that they may commence proceedings to validate the bid. It is not clear whether ASIC can in fact exempt a person from the operation of section 659B.<sup>139</sup> However, section 655A provides that ASIC has the power to exempt a person from a provision of Chapter 6 or declare that Chapter 6 applies to a person as if specific provisions were omitted, modified or varied, and section 659B clearly falls within the confines of Chapter 6. Moreover, section 659B does not categorically prevent recourse to the courts, it merely prevents certain persons from commencing proceedings before the end of the bid period. If it had been intended that persons be denied recourse to the courts absolutely, it could have been stated beyond doubt. Therefore, it appears possible that ASIC could sanction such an application for relief.

Clearly, in order for market participants to have confidence in ASIC and the Panel as joint regulators in this sphere, it is imperative that the two organisations coordinate their approach on takeovers policy and regulation. In an effort to do just that, ASIC and the Panel have entered into a Memorandum of Understanding which establishes various consultative and other processes, including exchange of information. It is hoped that this arrangement will assist the regulators to engender confidence in market participants by ensuring that “the market sees a smooth and seamless relationship between the regulators.”<sup>140</sup>

### ***The Panel and the courts***

The potential problem of demarcation between the Panel and the courts was acknowledged by the Government as a difficulty well before the Panel was first introduced.<sup>141</sup> In determining the scope of the Panel’s jurisdiction it is useful to start with section 659AA of the Corporations Act. Section 659AA provides that the Panel is *the main forum for resolving disputes about a takeover bid until the bid period has ended*. However, prior to 13 March 2000, takeover dispute resolution was a function performed by the courts. Therefore, in order to determine the scope of the Panel’s jurisdiction it is helpful to consider what role the courts now have with respect to takeover dispute resolution, and the guidance that the legislature has given to the courts’ regarding their newly confined jurisdiction.

It is important to note that section 659AA does not state that the Panel is the *only* forum for resolving disputes about a takeover bid. However, it was clearly intended that the courts surrender jurisdiction to the Panel during the course of a takeover bid. Section 659B(1) of the Corporations Act provides that only ASIC, a Commonwealth or a State Minister, a holder of an office established by a law of the Commonwealth or a State, or body corporate that is exercising a power conferred by a law of the Commonwealth or a

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<sup>139</sup> Section 659B prevents a person or entity (other than ASIC, a Commonwealth or a State Minister, a holder of an office established by a law of the Commonwealth or a State, or body corporate that is exercising a power conferred by a law of the Commonwealth or a State) commencing court proceedings in relation to a takeover bid, or proposed takeover bid, before the end of the bid period.

<sup>140</sup> Takeovers Panel, *The Takeovers Panel Signs MOU With ASIC*, Press Release 01/70 (20 August 2001) 1.

<sup>141</sup> Commonwealth, Attorney-General’s Department, *Current Issues in Takeover and Merger Regulation in Australia* (June 1986) 14.

State, can commence court proceedings in relation to a takeover bid, or proposed takeover bid, before the end of the bid period. In addition, an explicit power has been bestowed upon the courts to stay proceedings that have already commenced in relation to a takeover bid, or a proposed takeover bid, or that would have a significant effect on the progress of a takeover bid, until the bid period has ended.<sup>142</sup>

The legislature has included further guidance for the courts in section 659B(3) which provides that in deciding whether to exercise its power to stay proceedings, a court must have regard to the purposes of Chapter 6 of the Corporations Act and the fact that a decision of the Panel is reviewable under Division 2 of Part 6.10. In other words, the courts are being reminded that the Panel is now the main forum for takeover dispute resolution, and that because Panel decisions are reviewable, courts should refrain from second-guessing the Panel by entertaining applications for review under the *Administrative Decisions (Judicial Review) Act 1977* or other collateral attacks in the courts.

Despite what appears to be the very clear intention of the legislature, there will undoubtedly be some occasions which give rise to a dispute between parties concerning the precise boundaries of the jurisdiction of the Panel and the courts. One example of a situation in which such difficulties may occur is where an issue arises in a proceeding before a court which concerns, for example, control of a company or a breach of Chapter 6 of the Corporations Act, and a bid materialises during the course of the proceedings resulting in an overlap of the jurisdiction of the Panel and the court. In these circumstances, the court will have the discretion to adhere to the legislative intent in section 659AA and stay any pre-existing court proceedings pursuant to section 659B(2). However, if the court decided not to stay proceedings another solution would be for the Panel to decline to deal with any application for a declaration of unacceptable circumstances on the grounds that it is against the public interest for two bodies to deal with the same dispute at the same time.

Another situation where a jurisdictional overlap may occur is where an issue over which the Panel does not have jurisdiction arises during the course of a Panel proceeding. For instance, a breach of the listing rules or issues concerning the interpretation of a contract, such as a confidentiality agreement. To some extent this type of problem may be alleviated by the fact that the Panel may of its own volition refer questions of law which arise during Panel proceedings to the courts for determination.<sup>143</sup> It is also possible for the Panel to deal with a breach of the Corporations Act as a contravention which amounts to unacceptable circumstances.<sup>144</sup> Whether this is a satisfactory way in which to deal with such matters may well depend upon the remedy required to rectify the breach. This is because the Panel cannot order compliance with Chapter 6.<sup>145</sup> Therefore in cases where compliance is the remedy sought, such as to rectify a breach of the substantial shareholder notice provisions, the Panel may not be the best forum.

Ultimately, if the courts have confidence in the competence of the Panel (and it is up to the Panel to convince the courts of its competence) then the courts are less likely to intervene in Panel matters. This is certainly the approach that the courts in the UK have

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142 Section 659B(2) of the Corporations Act.

143 Section 659A of the Corporations Act.

144 Section 657A(2)(b) of the Corporations Act.

145 Section 657D of the Corporations Act.

taken in relation to the London Panel. The following is an often quoted extract from *R v Panel on Take-Overs & Mergers; Ex parte Datafin plc* [1987] QB 815, where Lord Donaldson MR stated that:

in the light of the special nature of the panel, its functions, the market in which it is operating, the time scales which are inherent in that market and the need to safeguard the position of third parties, who may be numbered in thousands, all of whom are entitled to continue to trade on the assumption of the validity of the panel's rules and decisions, unless and until they are quashed by a court, I should expect the relationship between the panel and the court to be historic rather than contemporaneous. I should expect the court to allow contemporary decisions to take their course, by considering the complaint and intervening, if at all, later and in retrospect by declaratory orders which would enable the panel not to repeat any error and would relieve the individuals of the disciplinary consequences of any erroneous findings of breach of the rules.<sup>146</sup>

However, it should be noted that at the time this statement was made the London Panel had already been operating for over 20 years. In other words, it took 20 years for the findings of the London Panel to be challenged. Clearly takeover participants and the courts in the UK have confidence in the decisions of the London Panel. One of the reasons for this confidence is the internal appeal process, which has been cited as a reason why the UK courts respect the Panel's jurisdiction and refrain from intervening.<sup>147</sup> It is also hoped that the Australian Panel's formal internal review process will engender a similar confidence in the courts in Australia. Justice Santow has observed that the internal review power means that:

if the court feels the Panel may have got it wrong, it can remit back to the new Panel for the Panel to deal with the matter by way of internal Panel review – in effect an internal appeal. The court may more readily enforce the Panel's order....knowing that it is able to remit if necessary or knowing that the parties had the opportunity to seek internal review.<sup>148</sup>

The courts in the UK have clearly taken the view that “historic rather than contemporaneous” review by the courts is the appropriate way to police decisions of the London Panel. The courts have sought to justify such an approach because when a takeover is in progress “the time scales involved are so short and the need of the markets and those dealing in them to be able to rely on the rulings ... are so great, that contemporary intervention by the court will usually either be impossible or contrary to the public interest.”<sup>149</sup> However, such an approach is controversial because it means that any errors can only be corrected in retrospect, and accordingly it can be argued that the applicant is denied any “real time” possibility of redress or correction.

At the same time if the Australian courts do not follow the example set by the courts in the UK and instead indicate a willingness to routinely entertain appeals for judicial review of Panel decisions, then the *raison d'être* of the Panel will be lost and the Panel will become nothing more than “another tier of dispute handling procedure in a field that is already far too complex.”<sup>150</sup>

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146 [1987] QB 815, 842.

147 *R v Panel on Take-Overs & Mergers; Ex parte Datafin plc* [1987] QB 815, 841.

148 Justice Santow, *CLERPing the Panel* (Paper presented to Panel members, 10 November 1999) 4.

149 *R v Panel on Take-overs and Mergers; Ex parte Guinness plc* [1989] 2 WLR 863, 868 per Lord Donaldson MR.

150 Brent Davis, “Takeovers Turmoil” (1989) 9 *Australian Business* 48, 49.

There are a number of applications which have come before the Panel that have raised issues of overlap and uncertainty in respect of the Panel's role and the role of the courts.

The first matter which raised this issue concerned an application by IAMA Limited (**IAMA**).<sup>151</sup> IAMA applied to the Panel seeking a declaration of unacceptable circumstances in relation to actions and public statements made by persons and companies associated with Futuris Limited (**Futuris**).

No takeover bid for IAMA had been made by Futuris (or any other company). However, at the time there were several parties interested in acquiring a substantial stake in, or effecting a merger with, IAMA. In fact the application by IAMA was prompted by circumstances related to a potential change of control of IAMA in that, as a result of a recent placement of 15% of its share capital to Wesfarmers, and the announcement of a possible merger, Futuris launched court proceedings seeking access to IAMA's books under section 247A of the Corporations Act. Futuris asserted that it wanted access to IAMA's books in order to make an assessment of IAMA's prospects with a view to making a competitive bid for IAMA.

In view of the court proceedings which were already underway, the Panel issued a media release stating that it would shape its proceedings in light of developments in proceedings involving IAMA and Futuris in the Supreme Court of South Australia.<sup>152</sup> The Panel was concerned that to the extent that the application before it overlapped with the application and issues brought before the court that the Panel would be interfering in issues that ought to be dealt with by the courts. The Panel was right to be mindful of the court proceedings as it is arguable that to the extent that Panel proceedings overlap with issues for determination before a court, the Panel proceedings may be in contempt of court.

In this case, the court proceedings settled quickly and as a result the applicant sought to withdraw its application, and the Panel accepted the applicant's request to withdraw.

Shortly after the IAMA matter was withdrawn, the Panel received an application from Pinnacle VRB Limited (**Pinnacle**). This matter was similar to the IAMA matter in that the application did not relate directly to a takeover bid, although in this case there was a takeover bid on foot for Pinnacle at the time the application was made.

In this case, Pinnacle's directors sought a declaration of unacceptable circumstances in relation to actions by a group of shareholders seeking to alter the board of Pinnacle. The directors requested interim orders on behalf of Pinnacle that the shares of this particular group of shareholders be vested in ASIC, or not be counted in any resolution to alter the board of Pinnacle at a meeting which was called for Monday 31 July 2000. Despite the fact that the board of Pinnacle postponed the meeting for a period of 2 weeks, the shareholders who requisitioned the meeting indicated that they intended to proceed with the meeting on 31 July.

The Panel was asked to intervene on the basis that the numbers required to requisition the meeting had been marshalled by a breach of section 606. On closer examination, namely, after a number of discussions concerning this allegation with various board

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<sup>151</sup> This application is discussed more fully in Chapter 6. The treatment of this application by the Panel is also critiqued in Greenwood, above n 114.

<sup>152</sup> Takeovers Panel, *Panel receives application in relation to IAMA Ltd*, Press Release, No 00/17 (31 July 2000) 1.

members and shareholders of Pinnacle, the Panel discovered that the “arrangements” in place were such that a number of shareholders appeared to have a high regard for a particular shareholder and (when it suited their interests) tended to follow his lead. Therefore, there was insufficient evidence to prove an association capable of constituting a breach of section 606. Accordingly, the Panel considered that in the absence of any such association, it did not have jurisdiction to make the requested interim orders in relation to the meeting.<sup>153</sup>

Pinnacle subsequently applied to the Supreme Court of Victoria and was successful in obtaining a declaration that the meeting requisitioned by the shareholders was invalid as the meeting had been validly postponed.<sup>154</sup>

Another matter in which there was an overlap between the Panel and courts concerned an application by a number of shareholders of St Barbara Mines Limited (*St Barbara*). The shareholders were trying to prevent a proposed scheme of arrangement between St Barbara and Taipan Resources NL (*Taipan*).

The application alleged that the two largest shareholders of St Barbara, Strata Mining Corporation NL<sup>155</sup> (*Strata*) and Larue Investments Inc<sup>156</sup> (*Larue*), were associates and had breached section 606 of the Corporations Act because Larue was warehousing St Barbara shares for Strata. The applicants also complained that disclosure in the scheme documentation was inadequate in that it did not comply with sections 670A, 710 and 995 of the Corporations Act.

The Panel declined to conduct proceedings under Regulation 20 of the ASIC Regulations because it considered that the issues raised were matters that concerned the scheme of arrangement which is the responsibility of the courts.<sup>157</sup> The Panel stated that it was satisfied that the courts have sufficiently wide powers so as not to be confined to black letter law considerations in deciding whether or not to confirm a scheme of arrangement. Accordingly, the Panel determined that the matters raised in the application could quite properly be dealt with by the court as part of the scheme approval process. The Panel also noted that it would not be in the public interest for two proceedings to be considering the same transaction simultaneously.

The Panel observed that it would generally be reluctant to initiate proceedings where a court had already commenced its scrutiny of a scheme. However, if there were issues which the court considered should be examined by the Panel, the Panel was quite prepared to consider those issues in any application that was made to supplement the court’s proceedings.

In addition to the initial application by shareholders in St Barbara, there have also been a number of other intersections between the courts and Panel during the battle between St Barbara and Troy Resources NL (*Troy*) for control of Taipan. There were 11 separate Panel applications involving Taipan, Troy and St Barbara. The first application concerned a request for an interim order by Troy to prevent a meeting of Taipan from proceeding (the *Taipan Meeting*). At the Taipan Meeting, Taipan shareholders were to

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153 Takeovers Panel, *Panel Receives Application in Relation to Pinnacle VRB Ltd*, Press Release, No 00/18 (30 July 2000) 1.

154 *Pinnacle VRB Ltd v Ronay Investments Pty Ltd* (2000) 18 ACLC 733.

155 Which held approximately 13.2% of St Barbara.

156 Which held approximately 9.5% of St Barbara.

157 *Re St Barbara Mines Limited and Taipan Resources NL* (2000) 18 ACLC 913.



consider and vote on a number of resolutions which would facilitate a proposed merger (by way of scheme of arrangement) between St Barbara and Taipan. However, Troy had made it a pre-condition of its takeover bid for Taipan that the proposed merger between St Barbara and Taipan not proceed. Concurrent to the Panel application, Troy applied to the Supreme Court of Western Australia seeking an interlocutory injunction to prevent the Taipan Meeting proceeding.<sup>158</sup>

Justice Scott considered the scope of the privative clause in section 659B and the respective roles of the courts and the Panel. He found that it was not necessary to determine whether in the circumstances the court was precluded by section 659B from dealing with Troy's application. Instead it was only necessary to determine whether the application should more appropriately be dealt with by the Panel.

Justice Scott found that although the matter Troy raised did not relate directly to a proposed takeover bid as section 659B(4) requires, it was sufficiently connected, in the sense that the takeover was conditional upon the scheme not proceeding, so that the matter should more appropriately be dealt with by the Panel.<sup>159</sup> He noted that even though the formal takeover bid had not yet been made it was preferable that the Panel be appraised of the proceedings and the "manoeuvrings that preceded the bid".<sup>160</sup> Other factors which appeared to influence Justice Scott in referring the matter to the Panel was the fact that the Panel had the power to make orders of the type sought by Troy and could "be convened at short notice and deal with the matter before the meeting was scheduled."<sup>161</sup>

Justice Scott noted that his reasons related only to the particular circumstances of the case before him as he had not had very long to consider these questions raised by Troy's application and counsel had not been able to point out any authority on the interpretation or application of section 659B of the Corporations Act.

Despite Justice Scott's attempt to confine his decision in *St Barbara Mines Ltd and Taipan Resources NL* to the particular facts before him, Justice Hill in *St Barbara Mines Ltd v ASIC and Anor*<sup>162</sup> appears to have been influenced by Justice Scott's decision. In that case, Justice Hill was considering an application from St Barbara who was seeking judicial review of ASIC's decision to refuse to accept lodgment of St Barbara's bidder's statement. ASIC contended that the Federal Court lacked jurisdiction to review the decision because of section 659B of the Corporations Act. Justice Hill accepted this argument and dismissed St Barbara's application because he considered that the application was clearly "in relation to" a takeover bid and therefore squarely within section 659B and the Panel's jurisdiction. Justice Hill also observed that St Barbara could seek to have ASIC's decision reviewed by the Panel.<sup>163</sup>

In summary, these 5 matters demonstrate that there are a wide range of areas of potential overlap as regards the jurisdiction of the Panel and the courts and, as illustrated by these matters, the resolution of such situations is likely to proceed on a case by case basis.

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158 *Troy Resources NL v Taipan Resources NL* (2000) 35 ACSR 663, 668.

159 This case is discussed further in Chapter 6 and in part 3 of Chapter 7.

160 (2000) 35 ACSR 663, 668.

161 *Ibid.*

162 (2001) 19 ACLC 564.

163 *Ibid.*, 565.

### ***ASX and the Panel***

The overlap between the ASX and the Panel is not so pronounced as the overlap between the Panel and ASIC or the Panel and the courts. However, to the extent that the ASX listing rules impact upon the regulation of takeovers, the ASX's administration of the listing rules has the potential to encroach upon the jurisdiction of the Panel. For instance, in the context of a takeover, parties sometimes request a waiver of certain ASX listing rules. There are no disclosed examples as yet, however, it is obvious that to the extent that a waiver (or enforcement of) a listing rule would have an impact upon the equality of treatment of shareholders or any of the other principles contained in section 602, the actions of the ASX may be very relevant to the role of the Panel. The ASX and the Panel have discussed the potential for their roles to intersect but at this stage no formal consultative process has been established between the two regulators.

Another way in which discord may occur between the ASX and Panel is in relation to disputes concerning the ASX's interpretation or application of the listing rules during takeovers. Typically, such disputes were taken to the courts. The two main avenues by which decisions of the ASX and breaches of the listing rules can be brought to the courts are through sections 777 and 1114 of the Corporations Act. However, in the event that a dispute arose during the course of a takeover, the dispute would now need to be referred to the Panel.

In relation to the issue of review of ASX decisions, the Federal Court has held that ASX decisions are not reviewable under the ADJR Act.<sup>164</sup> However, the courts have not yet been required to decide whether the State Supreme Courts can review ASX decisions in the exercise of their inherent common law jurisdiction. It may be that if the UK case of *R v Panel on Take-overs and Mergers; Ex Parte Datafin Plc*<sup>165</sup> is followed in Australia, it may permit judicial review of ASX decisions.<sup>166</sup> *Datafin* was a landmark decision in the UK as it confirmed and legitimated the authority and position of the London Panel. The Court of Appeal in *Datafin* held that decisions of the London Panel are reviewable, despite the fact that it is a non-government agency, essentially because "the reviewability of the exercise of non-statutory powers turns not on who is exercising it, so much as on whether the power is public."<sup>167</sup> Clearly this is a principle which could be applied to the ASX. Of course section 659B would prevent judicial review from occurring until after the bid period has ended.

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164 *Chapmans Ltd v Australian Stock Exchange Ltd* (1996) 137 ALR 433 (Full Federal Court).

165 [1987] 1 QB 815.

166 Ashley Black, "Judicial Review of Discretionary Decisions of the Australian Stock Exchange Limited" (1989) 5 *Australian Bar Review* 91.

167 Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) 98.



## Chapter 5

### International Perspective

The Panel as it operates in Australia (in this Chapter described as the *Australian Panel*) is a unique creature, however, there are a number of other jurisdictions which also have takeovers panels. There are basically two models – statutory and non-statutory. Perhaps the best known is the London Panel in the UK which is a non-statutory panel. However, Hong Kong and Singapore also have non-statutory panels. There are also takeovers panels in South Africa, Switzerland, New Zealand and Ireland which, like the Australian Panel, derive their powers from statute. A brief description of the regimes operating in Hong Kong, Singapore, South Africa, Switzerland and New Zealand is set out below, followed by a detailed examination of the Irish Takeovers Panel (a statutory regime) and the London Panel (a non-statutory panel) and a discussion of some of the ways in which these panels differ from the Australian model. This Chapter will conclude with an assessment regarding whether Australia has adopted the best model for its Panel.

#### Hong Kong – The Takeover and Mergers Panel

The Hong Kong Code on Takeovers and Mergers and Share Repurchases does not have the force of law, and expressly states that it should not be interpreted as if interpreting a statute.<sup>168</sup> The primary purpose of the Code is stated in the General Principles as seeking to achieve equality of treatment of shareholders, mandating disclosure of timely and adequate information to enable shareholders to make an informed decision regarding the merits of an offer and ensuring that there is a fair and informed market in the shares of companies affected by takeover and merger transactions and share repurchases. The Code is administered by the executive of the Takeover and Mergers Panel (formerly known as the Committee on Takeovers and Mergers). The Takeover and Mergers Panel is a committee of the Securities and Futures Commission (*SFC*) which is established under section 6(1) of the SFC Ordinance.<sup>169</sup>

#### Singapore – The Securities Industry Council

Singapore has a panel which is part statutory and part non-statutory. The Singapore code on takeovers and mergers is non-statutory in nature. It is “intended to supplement and in some ways, expand on the statutory provisions dealing with takeovers found in the *Companies Act*.”<sup>170</sup> However, the Securities Industry Council (*SIC*) which administers the takeover code in a very similar manner to the London Panel has a statutory role, its legislative status being conferred by the Securities Industry Act.

The fundamental rationale behind Singapore’s takeover regime is that if there is a change in the management of a company, the minority shareholders must be given an

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168 <http://www.hksfc.org.hk/eng/takeovers/html/index/html>

169 *Ibid*.

170 <http://web.singnet.com.sg/~tantan/Takeover.htm>

opportunity to opt out. In addition, the Code seeks to further a set of principles which are very similar to the Eggleston principles, namely equality of treatment of all shareholders, sufficient information to enable shareholders to decide the merits of a bid, fair markets at all material times and preventing target companies from taking action to frustrate an offer.<sup>171</sup>

## South Africa – The Securities Regulation Panel

In South Africa, the Securities Regulation Panel (*SRP*) is a statutory body established to investigate insider trading and regulate acquisitions and takeovers where there is a change of control in public companies and private companies in which the shareholders' interests exceed R5,000,000 and there are more than ten beneficial shareholders. At present, "control" is deemed to be the holding of more than 35% of the voting shares of the target company. Transactions extending shareholdings already over 35% but under 50% are in certain circumstances also subject to the SRP. The SRP has published a Code and Regulations, which have the force of law. Copies of all relevant documents and announcements concerning transactions affected by the Code are required to be lodged with the executive director of the SRP for approval prior to issue. The SRP's Code and Regulations contain strict provisions governing disclosures in affected transactions. The SRP's powers include the power to compel the making of like offers to minorities or to reverse transactions which have been implemented. In appropriate circumstances, the SRP will grant exemption from compliance with any or all of the provisions of the Code and Regulations.<sup>172</sup>

## Switzerland – The Commission for Public Takeovers

The Swiss Commission for Public Takeovers, more commonly known as the Takeovers Board, is a Federal Commission established in 1995 under the Federal Act on Stock Exchanges and Securities Trading. One of the purposes of that Act is expressly stated as being to ensure that public takeover offers are fair and transparent and that investors are treated equally.<sup>173</sup>

The Takeovers Board has jurisdiction to issue general rules and ensure compliance with the provisions applicable to public takeover offers whether the offer is voluntary or mandatory. In particular, the Takeovers Board must issue a recommendation in respect of each public takeover offer stating whether or not these provisions have been complied with. The Takeovers Board is also charged with responsibility for drawing up circulars and opinions, in order to inform interested parties of its practices.<sup>174</sup>

## New Zealand – The Takeovers Panel

On 1 July 2001, after 2 decades of intense debate, a new Takeovers Code in conjunction with new takeovers legislation (the *Takeovers Act 1993*) was introduced in New Zealand.

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171 Ibid.

172 <http://mbendi.co.za/werksmns/sabus05.htm>

173 [http://www.takeover.ch/intro\\_en.html](http://www.takeover.ch/intro_en.html)

174 Ibid.

Now, for the first time, New Zealand has a Takeovers Panel which is supported by a statutory takeover regime, which has as its cornerstone, the requirement that, as far as practical, all shareholders be treated equally. In addition, shares can only be acquired under a full or partial offer if a sufficient number of acceptances have been received to enable the bidder to control more than 50% of the voting rights in the target company.<sup>175</sup>

The Takeovers Panel has between 5 and 8 members appointed by the Minister of Commerce, and it has various statutory functions including developing the Takeovers Code, reviewing practices relating to takeovers of companies subject to the Takeovers Code, enforcing the Code and promoting public understanding of takeover law and practice.<sup>176</sup> The Takeovers Panel is supported by, and receives professional and administrative services from, the Securities Commission.

It is interesting to note that the New Zealand Panel has appointed a member of the Australian Panel, Mr Denis Byrne, to be a member of the New Zealand Panel. This is a reciprocal arrangement and the Australian Panel has invited Mr John King, a member of the New Zealand Panel to be a member of the Australian Panel.<sup>177</sup>

## Ireland – The Irish Takeover Panel

The Irish Takeover Panel (the *Irish Panel*) was instituted following the independent establishment of the Irish Stock Exchange in December 1995, and the consequent agreement that the functions of the London Panel concerning Irish companies should be given to an Irish regulator.<sup>178</sup> The process of establishing the Irish Panel was also aided by the London Panel's overt reluctance to be involved in supervising takeovers of Irish public companies.<sup>179</sup> The operation of the Irish Takeover Panel is in many ways strikingly similar to the Australian Panel and its characteristics are explored below.

### *Statutory framework*

The Irish Panel is incorporated pursuant to the *Irish Takeover Panel Act 1997* (the *Irish Act*) as a public company limited by guarantee, which has no share capital.<sup>180</sup> The principal objects of the Irish Panel which are stated in its memorandum of association are to:

- Monitor and supervise takeovers and other relevant transactions so as to ensure that the provisions of the Irish Act and any rules made pursuant to that Act are complied with.<sup>181</sup>
- Make rules under section 8, for the purposes mentioned in that section, in relation to takeovers and other relevant transactions.

175 John King, Chairman, Takeovers Panel, "An Introduction to the Takeovers Code" (2000) 11 *Journal of Banking and Finance Law and Practice* 352.

176 <http://www.takeovers.govt.nz/new/releases/130801.htm>

177 Takeovers Panel, *Trans-Tasman Appointment to the New Zealand Takeovers Panel*, Press Release, 01/86 (11 October 2001) 1, and Takeovers Panel, *Trans-Tasman Appointment to the Takeovers Panel*, Press Release, 02/10 (29 January 2002) 1.

178 Irish Takeover Panel, *The Irish Takeover Panel Act 1997, Takeover Rules and Substantial Acquisition Rules* (1997) T11.

179 Editorial, "A makeover for the takeover" 27 May 1997, <http://www.the-lawyer.co.uk/cgi-bin/W3Vnewlib/MO=3/UI=?CT=FEATURE&SC=&RI=0000154716.htm>

180 Section 3 of the *Irish Takeover Panel Act 1997*.

181 Section 7 of the *Irish Takeover Panel Act 1997*.

The Irish Panel is also charged with a responsibility to enforce and interpret the principles applicable to the conduct of takeovers which are set out in Schedule 1 of the Irish Act. The Irish Panel must base any Rules it makes upon these principles, many of which are very similar to the Eggleston principles which the Australian Panel must enforce. For instance, the first principle is that all target shareholders in the same class shall be treated similarly by a bidder. The second principle provides that where information is tendered by the bidder or target or their respective advisers to target shareholders in the course of any offer, such information must be made available equally to all of the shareholders who may accept the offer. Another principle states that shareholders to whom an offer is sent are entitled to receive such information and advice as will enable them to make an informed decision on the offer. Such information and advice must be accurate and adequate and be furnished to the shareholders in a timely fashion. A further principle provides that a substantial acquisition of securities can only take place at an acceptable speed and is subject to adequate and timely disclosure.

The Irish Panel also has the power to do anything which appears to it to be “ requisite, advantageous or incidental to, or which appears to it to facilitate, either directly or indirectly, the performance by it of its functions” provided that it does not do anything which is inconsistent with the Act.<sup>182</sup> The wording of this section is very similar to that of section 658C of the Corporations Act which empowers the Australian Panel to “make rules, not inconsistent with the [Corporations Act] or the Regulations, to clarify or supplement the operation of the provisions of [Chapter 6].”

### ***Membership***

The Irish Panel has 5 members – the Consultative Committee of Accountancy Bodies – Ireland, the Law Society of Ireland, the Irish Association of Investment Managers, the Irish Bankers Federation, and the Irish Stock Exchange – each of whom may appoint a director to the board of the Panel. In addition, the Governor of the Central Bank appoints the chairperson and deputy chairperson.<sup>183</sup>

Although the directors of the Irish Panel are nominees of the members, the members are prohibited from instructing the directors regarding the carrying out by the directors of their duties in so far as they relate to the functions of the Irish Panel.<sup>184</sup>

### ***The role of the executive***

Unlike the Australian Panel, there is specific provision made for the Irish Panel to perform any of its functions through its officers or employees or any other person duly authorised by the Panel under the Irish Act.<sup>185</sup> This is because the Irish Panel, like the London Panel, does much of the work which in Australia is performed by ASIC.

Accordingly, the executive deals with the general administration of the Irish Panel and its Rules and handles queries which do not require the consideration of the board, and is available for consultation and to provide guidance before and during takeover transactions. However, like the executive of the Australian Panel, the executive of the

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182 Section 5 of the *Irish Takeover Panel Act 1997*.

183 Section 6(1)(b) of the *Irish Takeover Panel Act 1997*.

184 Section 6(3) of the *Irish Takeover Panel Act 1997*.

185 Section 6(2) of the *Irish Takeover Panel Act 1997*.

Irish Panel cannot make rulings or give directions as these are functions that the Irish Panel itself must perform.<sup>186</sup>

### ***Procedure***

Whereas only 3 Panel members take part in each decision of the Australian Panel, all of the board members of the Irish Panel participate in making formal decisions on the interpretation and enforcement of the principles contained in Schedule 1 of the Irish Act. Where a matter under consideration is likely to create a conflict of interest for any director of the Irish Panel, that director can withdraw from hearings or meetings regarding that matter.<sup>187</sup> In addition, the Rules contemplated by the Irish Act are made by the board of the Irish Panel in the form of rulings and directions, unlike in Australia where the President of the Panel, after consultation with the members, is empowered to make rules pursuant to section 658C.<sup>188</sup> One special additional power which the Irish Panel possesses is the ability to make rulings of its own volition as well as on the application of any interested person.<sup>189</sup>

Under section 11 of the Irish Act the Irish Panel has the power to conduct hearings “for the purpose of exercising the powers conferred upon it to issue rulings, directions, advice, admonitions or censures.”<sup>190</sup> Parties must set out their case in writing prior to the hearing taking place. The executive also submits its views on the matters under consideration, both to the board and the parties. If after considering the written submissions, the Irish Panel considers that the interests of any party concerned render it appropriate, a hearing or any part of it may be held in private.<sup>191</sup> The Irish Panel can also compel the production of documents or other material and the appearance of witnesses.

Pursuant to sections 9(1)(b) and 9(2)(b) of the Irish Act, the Irish Panel may publish any ruling or direction that it makes. It may also publish notice of the giving of advice, admonishment or censure in relation to the conduct of a person under section 10(3) of the Irish Act.

### ***Reviewing decisions***

Section 13 of the Irish Act provides that a person may only question the validity of a ruling or direction of the Irish Panel, or a Rule itself or any derogation from or waiver of a Rule, by way of application to the High Court for judicial review of the matter concerned.

In addition, section 10 of the Irish Act provides that a person who has been advised, admonished or censured by the Panel may appeal the matter to the High Court. In such cases the court may confirm the Irish Panel’s decision or annul it and in the latter case will either direct that a fresh inquiry be conducted or that a notice be published of the decision of the court.

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186 Irish Takeover Panel, above n 178, T15.

187 Section 11(3) of the *Irish Takeover Panel Act 1997*.

188 Irish Takeover Panel, above n 178, T16.

189 Section 9(1)(a) of the *Irish Takeover Panel Act 1997*.

190 Irish Takeover Panel, above n 178, T16.

191 Section 11(2) of the *Irish Takeover Panel Act 1997*.

***Enforcement of decisions***

Like the Australian Panel, the Irish Panel may make a summary application to the court for an order to enforce its rulings or directions. The court has significant and extensive powers to enforce a ruling or direction of the Irish Panel and may for instance require any party to a takeover or other relevant transaction to do or to refrain from doing anything specified in the order, or annul a transaction, or provide any consequential relief or relief of a restitutionary nature.

**UK – The London City Panel on Takeovers and Mergers**

Whereas the Irish Panel was in its infancy throughout the gestation of the CLERP legislation, much emphasis was placed on the success achieved by the London Panel by those responsible for the CLERP legislation. This is not surprising given that the Australian Panel received just 4 applications over approximately 10 years, whereas the London Panel (over the course of 32 years) has handled some 7,000 announced offers and, in addition, approximately half as many cases where no offer was announced. (The London Panel figures include the exemption and modification applications that ASIC deals with in Australia.)

For the year 31 March 1999 to 31 March 2000 alone, the London Panel executive handled 305 published takeover or merger proposals.<sup>192</sup> Of the 305 proposals that were raised with the London Panel executive 298 reached the stage where formal takeover documentation was sent to shareholders.<sup>193</sup> These proposals related to 285 target companies.<sup>194</sup> The following paragraphs explore the key differences between the Australian Panel and London Panel and offer some suggestions as to why the London Panel has been so much more successful than its previous Australian counterpart.

***Statutory framework***

Unlike the Corporations Act which governs Australian corporations, the Companies Acts which govern UK corporations contain very few provisions directly concerning takeovers. The main exception is in relation to the provisions concerning compulsory acquisition. Accordingly, takeover activity is regulated solely by the London Panel through the City Code on Takeovers and Mergers (the *Code*), although the Financial Services Authority plays an indirect role through its licensing of corporate financiers. The Code provides a scheme of non-statutory regulation that applies directly to takeovers affecting listed companies and indirectly (through the rules governing the conduct of business by intermediaries whose services are necessarily involved in the process) to takeovers affecting non-listed companies.<sup>195</sup> Although the London Panel remains a non-statutory body, it is supported by a number of organisations backed by statute, such as the Department of Trade and Industry, the London Stock Exchange and the Financial Services Authority. The primary enforcement power of the London Panel is to make a referral to an organisation recognised under the *Financial Services Act 1986*. These organisations have the power to revoke the licences of the advisers to parties to a

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<sup>192</sup> The Takeover Panel, *1999–2000 Annual Report*, Report by the Director General, 10.

<sup>193</sup> *Ibid.*, 20.

<sup>194</sup> *Ibid.*

<sup>195</sup> The Panel on Takeovers and Mergers, above n 69, A8.



takeover. In this way, although the sanctions employed impact squarely on the advisers, they impact indirectly on the parties in that it would be very difficult for a party who engaged in misconduct to enlist the services of an adviser and therefore, to do business in London.

There are also rules that govern substantial acquisitions of shares that are administered by the London Panel. These rules are designed to prevent substantial acquisitions being made by stealth or through rapid on-market purchases. The thrust of these rules can be summarised as preventing a person (together with any persons acting by agreement or understanding) from acquiring shares or rights over shares which represent 10% or more of a company's voting rights within any seven day period, if the acquisition together with shares or rights already held would then carry between 15% and 30% of the voting rights. There are a number of exceptions to this restriction.<sup>196</sup>

The Code and rules administered by the London Panel are also supported by a number of statutory provisions in the *Companies Act 1985* which are indirectly relevant to takeovers. These include sections 151–158 which relate to financial assistance by a company for acquisition of its own shares, sections 198–210 which provide that disclosure must be made of 'substantial' interests in the shares of a public company and of 'concert party' interests, and sections 312–316 which prohibit payments to directors in takeover situations (such as for loss of office) unless particulars are disclosed to shareholders and approved by the company.<sup>197</sup>

The insider trading provisions may also be relevant in takeover situations as there is every likelihood that information about the takeover will be price-sensitive information within the meaning of section 56 of the *Criminal Justice Act 1993*, that is, it is "information likely to have a significant effect on the price of the securities if made public". The offence of insider dealing is committed where an 'insider' deals on the basis of such information.<sup>198</sup>

Under the *Fair Trading Act 1973* the Secretary of State for Trade and Industry, advised by the Office of Fair Trading and the Monopolies and Mergers Commission evaluate the public interest aspects of takeovers, most notably, the effect that a takeover has on competition.<sup>199</sup>

Sections 47 and 57 of the *Financial Services Act 1986* which concern misleading statements and practices and restrictions in relation to advertising respectively, are also of relevance to documents and announcements made concerning a takeover.

### **Membership**

The Panel draws its membership from major financial and business institutions to ensure a spread of expertise in takeovers, securities markets, industry and commerce.<sup>200</sup> The Panel is supported by the Bank of England (its original sponsor) and the Governor of the Bank of England appoints the Chairman, the Deputy Chairmen and 3 independent members.

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196 For instance, an acquisition is permitted if it is made within the terms of a tender offer, or it is from a single shareholder, or it immediately precedes and is conditional upon the announcement of an offer which is recommended or has been agreed to by the board of the target company.

197 Section 313 of the *Companies Act 1985* (UK).

198 See sections 52–64 and Schedule 1 and 2 of Pt V of the *Criminal Justice Act 1993*.

199 Lord Alexander of Weedon QC, "Takeovers: The Regulatory Scene" [1990] *Journal of Business Law* 203, 204.

200 <http://www.thetakeoverpanel.org.uk/Report 2001>.



The 3 independent members appointed by the Governor are appointed for 3 years with the possibility of re-appointment thereafter for a further term of 3 years. There is no limit to the number of terms that can be served. Members of the Panel and the Executive are asked to suggest names of suitable candidates. Once a list of candidates has been compiled, it is considered by a Nominations Committee of the Panel which compiles a short-list. The Committee then submits recommendations to the Governor.<sup>201</sup>

The other members of the London Panel are nominated by supporting bodies such as the Association of British Insurers, the British Bankers' Association, the Confederation of British Industry, the Institute of Chartered Accountants in England and Wales, the Investment Management Regulatory Organisation, the London Investment Banking Association, the London Stock Exchange, the National Association of Pension Funds, the Securities and Futures Authority, the Association of Unit Trusts and Investment Funds, and the Association of Investment Trust Companies.

### ***The role of the executive***

The roles of the executive of the London and Australian Panels differ greatly. The executive of the London Panel, like the Irish Panel, is responsible for the general administration of the Code. This includes document reviews and processing applications for modifications and exemptions as well as conducting investigations and monitoring transactions either on its own initiative, or at the request of third parties. For example, the executive may institute disciplinary proceedings when it considers that there has been a breach of the Code.

The executive of the London Panel is also available for consultation with parties and can give rulings on issues before or during a transaction. In fact parties are encouraged to consult the executive in advance. It is expressly stated in the introduction to the Code that obtaining legal or other professional advice is not an alternative for seeking the views of, or a ruling from, the executive. The executive will only refer a matter to the London Panel for a decision without itself giving a ruling when it considers that there is a particularly unusual, important or difficult issue at stake. The members of the London Panel (as opposed to the executive) only consider a handful of applications each year.

By way of contrast, the executive of the Australian Panel have a much less proactive role as the responsibility for making decisions rests with the Panel members and cannot be delegated to the executive.<sup>202</sup>

### ***Procedure***

While all members of the London Panel are invited to each hearing, the quorum for a London Panel hearing is 5, including a chairman. Hearings are informal, private, and the rules of evidence do not apply. A transcript is made of the hearing but is destroyed at the end of the bid period. Usually, the case is presented by the parties or their advisers. Like the Australian Panel, the London Panel does not normally allow parties to engage a legal

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201 Ibid.

202 For instance, for the year ended 31 March 2001, the London Panel met just once to consider an appeal against a ruling by the executive. The appeal was not successful. In order to view this statistic in context – for the year ended 31 March 2001, the executive of the London Panel considered 198 published takeover or merger proposals, of which 193 reached the stage where formal takeover documentation was sent to shareholders. These proposals related to 186 target companies: <http://www.thetakeoverpanel.org.uk/Report 2001>.

advocate to present their case and requires that parties set out their case in writing prior to the hearing. However, unlike the Australian Panel, the executive of the London Panel submit a written summary of the issues, together with its ruling or views, in the same way as ASIC does for the Australian Panel. The parties are permitted to call whatever witnesses they consider necessary.

Generally, all parties are entitled to be present throughout the entire hearing and have access to all papers submitted to the London Panel. Occasionally, a party may request permission to submit information of a confidential and commercially sensitive nature in the absence of some or all of the other parties. In such cases, if the London Panel is satisfied that such measures are justified, it may accede to the party's request.

Therefore, it is clear that in many respects, the procedures employed by the new Australian Panel to manage the applications brought before it are quite similar to those adopted by the London Panel.<sup>203</sup>

### ***Appeals***

A party to a proceeding before the London Panel has a right of appeal to the Appeal Committee if:

- The London Panel finds that the Code has been breached and proposes to take disciplinary action.
- It is alleged that the London Panel has acted outside its jurisdiction.
- The London Panel refuses, or ceases, to recognise the exempt status of a market-maker or fund manager.

In all other circumstances a party must seek the leave of the London Panel to appeal to the Appeal Committee.<sup>204</sup> Parties rarely make application to the Appeal Committee. For instance, during the year ended 31 March 2001, the London Panel met just once to consider an appeal. Prior to that appeal the last application to the Appeal Committee was in December 1996 and that appeal was also unsuccessful.<sup>205</sup>

An Appeal Committee usually comprises 2 members who were not involved in the decision under appeal and a Chairman, who will normally have held high judicial office. The London Panel normally suspends publication of the findings of its initial hearing during this time although it may make an interim announcement, if appropriate.

The Appeal Committee does not normally hear new evidence. However, if it considers that there is new evidence which could not reasonably have been presented to the London Panel at the initial hearing, it may hear such evidence itself or remit the matter back to the London Panel. In most other respects, proceedings before the Appeal Committee are conducted in the same way as those before the London Panel. If the appeal is upheld, the appellant is consulted about the form of the statement, if any, which is to be published. If an appeal is dismissed, the findings of the London Panel are normally published and their suggested actions are implemented. In such circumstances, the Appeal Committee may make any further comment it considers fit.

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203 The procedures followed by the Australian Panel in its proceedings are described in detail in part 2 of Chapter 3 above.

204 [http://www.thetakeoverpanel.org.uk/Report 2001](http://www.thetakeoverpanel.org.uk/Report%202001)

205 <http://www.thetakeoverpanel.org.uk/Report1997>

### ***Enforcement of decisions***

As mentioned above, the UK Code does not have the force of law and operates by way of peer review. It has been acknowledged by both government and other regulatory authorities that those who seek to take advantage of the facilities of the securities markets in the UK should conduct themselves in accordance with best business standards set out in the Code. By way of sanction, those facilities may be withheld from practitioners who do not adhere to the Code. In particular, the organisations recognised under the FSA may require that those subject to their jurisdiction do not act in a takeover for any person who is not likely to comply with those standards. Further, if a person authorised to carry on an investment business by an organisation recognised under the FSA fails to comply with the Code or a ruling of the London Panel, their authorisation may be withdrawn.

The executive may institute disciplinary proceedings when it considers that there has been a breach of the Code. In such circumstances, the person concerned is informed in writing of the alleged breach and invited to appear before the London Panel. If the London Panel finds that there has been a breach of the Code, it may privately or publicly reprimand those concerned, report the offender's conduct to another regulatory authority, require that further action be taken, or some combination of these remedies.

In Australia, the power to secure compliance with an order made by the Panel rests with the courts. The President of the Australian Panel, ASIC, a party to the proceedings in which an order was made, or a person to whom an order relates, may apply to the courts to request that an order be enforced. The Australian Panel also utilises public censure as a remedy against parties.<sup>206</sup>

### **Why Has the London Panel Been So Much More Successful Than its Australian Counterpart?**

There are a number of possible explanations for why the London Panel has enjoyed such success whereas until recently the Australian Panel has been largely ignored and moribund. For instance, the London Panel has always had a full-time executive who are empowered to make rulings. Accordingly, the executive, and where necessary the London Panel, can deal with matters very quickly and informally as they are not fettered by the acts, regulations and rules to which the Australian Panel must adhere. The London Panel also has a significant body of established precedent upon which it can rely. By way of contrast, the Australian Panel did not, until recently, have an executive, it has also made fewer decisions, has less experience to draw on and every decision must be referred to a Panel of 3 part-time members.

Further, notwithstanding judicial criticism of tactical litigation in takeovers in Australia<sup>207</sup> such litigation has been a significant weapon in the arsenal of a defensive target. That is not the case in the UK for two reasons. Firstly, because the London Panel

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<sup>206</sup> See, for example, *Re Email Limited (No2)* (2000) <http://www.takeovers.gov.au/Content/Decisions/0040-email-limited.asp> [52], *Re Email Limited* (2000) 18 ACLC 708, 725, and Takeovers Panel, *Panel Censures Breach of Confidentiality in Relation to Namakwa Diamond Company Application*, Press Release, 01/37 (27 April 2001) 1.

<sup>207</sup> For example, see the comments of Santow J in *Cultus Petroleum NL v OMV Australia Pty Ltd* (1999) 32 ACSR 1, 21.

lacks a statutory base, aggrieved parties have no direct legal remedy and therefore must rely upon proceeding against the relevant regulators for the public law remedies available, namely judicial review or a private law declaration. Second, aggrieved parties have found the English courts unsympathetic to this type of litigation. In fact the English courts have positively discouraged such litigation.<sup>208</sup>

This non-litigious culture in the UK was commented upon in the course of debate concerning the implementation of the rejuvenated Australian Panel:

we have some doubts about our ability to emulate the success of the UK's panel. Australia has a somewhat different business culture from that of Britain. Based on evidence provided to the Joint Committee on Corporations and Securities, British corporations are less adversarial and less inclined to pursue litigation compared to their Australian counterparts.<sup>209</sup>

However, protecting and preserving the culture in which the London Panel operates has not been an easy task. The proposed implementation of the European Community's 13th Company Law Directive on Takeovers and Other General Bids (the *Directive*) generated much concern and intense debate over the last decade in the UK.<sup>210</sup> The primary concern being that the introduction of the Directive would undermine the non-statutory foundation of the Panel which would lead to an increase in tactical litigation in UK takeovers. This concern stemmed from the fact that community law would have required that all member states, including the UK, ensure that the Directive be "implemented in a framework which is public, certain and legally effective."<sup>211</sup> Arguably this would mean enacting legislation. Once the powers of the London Panel were ensconced in an act, they would be vulnerable to tactical litigation both in the UK and European Courts, particularly in the European Court of Justice.<sup>212</sup> Also there was some concern that the English courts would not continue to be dismissive of litigation in relation to takeovers.<sup>213</sup> This is because the *Datafin* case is based on the status of the London Panel as an unincorporated association and not a statutory entity, which is what was contemplated by the Directive. Another factor which was thought may also increase the prospect of litigation is the increased presence of the US investment banks in the UK.

The London Panel has admitted that it harboured major reservations about the Directive as the amendments that it sought to introduce would have impacted heavily upon the two key factors which have made the London Panel so successful, namely:

- (a) its non-statutory nature, which prevents parties taking each other to court, for example, a target in the UK cannot take a bidder to court over the deficiencies in its bid and its bid documents to the extent that the alleged deficiencies amount to a failure to comply with the positive requirements of the Code; and

208 *R v Panel on Take-Overs & Mergers; Ex parte Datafin plc* [1987] QB 815.

209 Commonwealth, *Parliamentary Debates*, Senate, 12 October 1999, 9471 (Senator Stephen Conroy, ALP, Victoria).

210 Robert Falkner, "Non-statutory Takeover Panel: Advantage or Anachronism?" (1990) 9 *International Financial Law Review* 15.

211 *Ibid.*

212 Neil Harvey and Alex Harle, "The Takeover Directive – A Current Perspective" (2000) 7 *International Company and Commercial Law Review* 240, 243 and 246.

213 See *Mannesmann Ag v Goldman Sachs* [1999] All ER 1292, as an example of a recent case in which Lightman J dismissed with disdain an application by Mannesmann that Goldman Sachs ought not be allowed to act for Vodafone. Goldman Sachs was advising Vodafone in relation to its takeover of Mannesmann. Mannesmann argued that Goldman Sachs should not act for Vodafone because Goldman Sachs was in possession of confidential information about Mannesmann because it had previously acted for Orange during the takeover of Orange by Mannesmann.

- (b) the unique business culture of the UK, which has meant that the rulings of the London Panel are rarely challenged and that the threat of public censure is sufficient to elicit compliance from parties.

However, on 4 July 2001, some 12 years after discussions began, the Directive was abandoned. The vote in the European Parliament failed to achieve the simple majority required (it was tied with 273 votes both for and against the Directive, and 22 abstentions). On 18 July 2001, the current Chairman of the London Panel, Peter Scott QC, stated that he considers it unlikely that there will be much enthusiasm in the immediate future from either Member States or from the European Parliament for re-addressing this topic from first principles.<sup>214</sup>

### **Has the Best Model Been Chosen for the New Australian Panel?**

Given the importance of the UK's unique business culture to the success of the London Panel, and the fact that the London model was (at the time that the Australian Panel was being revised) under threat from the Directive, it would have been an incredible leap of faith for Australia to switch from the statutory model established in 1991 to a non-statutory regime.

However, the London model was clearly attractive to the architects of CLERP as many of the features of the London Panel can be identified in the Australian Panel, albeit modified in a way that accommodates the statutory framework within which the Australian Panel operates. In this way, the architects of CLERP have constructed an interesting hybrid model for the new Australian Panel. It is probably too early to tell whether the new Australian Panel is the best possible model, however, since its inception it has made an important contribution to the takeover landscape, receiving 39 applications between 13 March 2000 and 30 September 2001, and numerous queries from takeover practitioners.

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214 <http://www.thetakeoverpanel.org.uk/Report2001>

## Chapter 6

### The Performance of the New Panel

This Chapter examines the early contribution of the Panel and is divided into two parts. The first part gives an overview of the published policies of the Panel. The second part describes each of the applications made to the Panel between 13 March 2000 and 30 September 2001. It analyses the decisions made by the Panel in some of those cases, and illustrates the development of the Panel's reasoning and decision-making process.

#### Policy of the Panel

The new Panel has adopted a number of policies since its rebirth in March 2001. The Panel's practice is to release a discussion draft of the policy for public comment (the documents are available on the Panel's web site) and then adopt the policy once the views of the market and practitioners have been considered and, where appropriate, refinements made.<sup>215</sup>

#### *The minimum price rule*

The Panel's first attempt at policy-making related to compliance with the minimum price requirement set out in subsection 621(3) of the Corporations Act.<sup>216</sup> It resulted from indications from market participants and practitioners who anticipated difficulties in complying with section 621(3), because a bidder offering scrip as consideration does not know how much scrip it must offer, until it posts its offers. If the market price falls after the bidder lodges its offer and before it is posted, the bidder may need to increase its bid and amend its bidder's statement accordingly.

The policy sets out the circumstances in which relief is required from strict compliance with the section, whether there is any need for Panel rules to supplement it and whether it should be amended to reduce the market exposure of scrip bidders. It also sets out interim guidelines on valuing scrip for the purposes of section 621(3). The circumstances surrounding the issue of this policy are discussed further in the third part of Chapter 4 above.

#### *Unacceptable circumstances*

Policy 1 sets out what constitutes unacceptable circumstances. It acknowledges that as there is no definition of unacceptable circumstances in the Corporations Act it will be up to the Panel to use section 602 and Chapter 6 of the Corporations Act as reference points to determine when circumstances are unacceptable.<sup>217</sup> In its statement of policy, the Panel makes it clear that whether unacceptable conduct has occurred or there is an intention to bring about an objectionable state of affairs is not relevant when deciding whether unacceptable circumstances exist.<sup>218</sup> In addition, while conduct may give rise to unacceptable

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<sup>215</sup> <http://www.takeovers.gov.au/Content/Policy/Policy3-MakingRules.asp> [3.8 – 3.10].

<sup>216</sup> [http://www.takeovers.gov.au/Policy/s621\(3\)&\(4\).asp](http://www.takeovers.gov.au/Policy/s621(3)&(4).asp)

<sup>217</sup> <http://www.takeovers.gov.au/Content/Policy/PS1Published.asp> [1.6].

<sup>218</sup> *Ibid*, [1.7].



circumstances as well as breaching the Corporations Act, not all unacceptable circumstances will constitute a breach of the Corporations Act.<sup>219</sup> Moreover, not every breach will result in a mischief of a kind relevant to section 602. The content of Policy 1 is discussed in detail in the first part of Chapter 4 above.

### **Reviewing decisions**

Policy 2 sets out the Panel's policy in relation to reviewing decisions.<sup>220</sup> The Panel acknowledges that when it reviews a decision of ASIC or the decision of another Panel, such reviews must be *de novo* in that the Panel must conduct a merits review of the application for the decision. Policy 2 explains the grounds for review of decisions, the information that will be taken into account and the policy that will be applied. For instance, the Panel has stated that when reviewing ASIC decisions it will follow ASIC's published policy wherever it applies, unless there are cogent reasons from departing from that policy.<sup>221</sup> The Panel aims to provide consistency in its review of decisions.<sup>222</sup>

There have been 4 requests for a review of an ASIC decision between 13 March 2000 and 30 September 2001.<sup>223</sup> In one such case, the Panel complied with the request to vary a decision made by ASIC,<sup>224</sup> in the remaining 3 cases it affirmed the ASIC decision under review. In addition, there have been 5 requests for a review of a Panel decision under section 657EA of the Corporations Act between 13 March 2000 and 30 September 2001.<sup>225</sup> In 4 of those cases the review Panel affirmed the decision of the Panel at first instance.<sup>226</sup>

### **Rule-making**

Policy 3 explains the Panel's approach to its rule-making power. It also discusses the process of public consultation that the Panel has adopted in relation to making rules under section 658C of the Corporations Act and section 195 of the ASIC Act. The Panel has not yet made any rules pursuant to section 658C, however, the procedural rules adopted by the Panel pursuant to section 195 of the ASIC Act can be found on its web site.<sup>227</sup> The Panel acknowledges that the purpose of the rule-making power in section 658C is to reduce uncertainty in relation to the application of the Corporations Act and

219 Ibid, [1.8].

220 <http://www.takeovers.gov.au/Content/Policy/Policy2-ReviewingDecisions.asp>

221 Takeovers Panel, *Panel Publishes Draft Policy*, Press Release 00/16 (19 July 2000) 1.

222 <http://www.takeovers.gov.au/Policy/Policy2-ReviewingDecisions.htm> [2.16].

223 *Re Infratil Australian Ltd (No 1)* (2000) <http://www.takeovers.gov.au/Content/Decisions/000503gdu.asp>, *Re Pinnacle VRB Ltd (No 3)* (2001) 19 ACLC 605, *Re Taipan Resources NL (No 5)* (2000) <http://www.takeovers.gov.au/Content/Decisions/TaipanNo5PublishedReasons.asp> and *Re Taipan Resources NL (No 6)* (2001) 19 ACLC 797.

224 See *Re Pinnacle VRB Ltd (No 3)* (2001) 19 ACLC 605.

225 Namely, *Re Email Limited (No 2)* (2000) <http://www.takeovers.gov.au/Content/Decisions/0040-email-limited.asp>, *Re Pinnacle VRB Limited (No 6)* (2001) 19 ACLC 1,249, *Re Taipan Resources NL (No 11)* (2001) <http://www.takeovers.gov.au/Content/Decisions/TaipanNo11PublishedReasons.asp>, *Re Namakwa Diamond Company NL (No 4)* (2001) <http://www.takeovers.gov.au/Content/Decisions/Namakwa4.asp> and *Re Pinnacle VRB Limited (No 8)* (2001) 19 ACLC 1,252.

226 *Re Email Limited (No 2)* was the only matter where the review Panel reached a substantively different outcome of that of the Panel at first instance. However, it should be noted that *Re Taipan Resources NL (No 11)* and *Re Pinnacle VRB (No 8)*, were reviews instigated by the original applicant on the basis that the initial Panel's decision was not tough enough. Also, in *Re Pinnacle VRB Ltd (No 6)*, although the review Panel upheld the declaration of unacceptable circumstances it revoked the orders made by the Panel at first instance on the basis of fresh evidence, thus enabling the bid to proceed. Contrast this with *Re Pinnacle VRB Ltd (No 8)*, where not only did the review Panel uphold the declaration made at first instance, it also required more stringent undertakings from the parties.

227 <http://www.takeovers.gov.au/Content/Rules/Proceedings.asp>



promote the objectives set out in section 602.<sup>228</sup> Moreover, the Panel intends that rules made pursuant to section 658C will generally encapsulate policy which the Panel has already applied in particular cases.<sup>229</sup> The Panel has decided that any rules it makes under section 195 of the ASIC Act will follow the same procedures.

### ***Enforcement and remedies***

Policy 4 concerns the Panel's powers of enforcement and remedies and sets out when the Panel will use its primary remedies, namely the power to declare circumstances unacceptable and make orders.<sup>230</sup> The types of orders the Panel can make range from final orders pursuant to section 657D(2) following a declaration of unacceptable circumstances, to interim orders which can be made without a declaration of unacceptable circumstances being made, remedial orders which are defined in section 9 of the Corporations Act as ancillary and consequential orders, and orders as to parties' costs.<sup>231</sup>

Generally when the Panel uses a remedy it will be seeking to either get a bid back on track, and in doing so protect the rights or interests of affected persons, or correct misinformation, or reverse a mischief caused by incorrect (or an omission of) information, or establish benchmarks and standards of corporate behaviour. Policy 4 also deals with the issue of awarding costs, and when and what type of undertakings the Panel will accept.

### ***Restraint of despatch***

With the exception of Policy 1 concerning unacceptable circumstances (which is discussed in detail in the first part of Chapter 4), the Panel's initial policies were largely procedural in nature. However, Policy 5 is an example of how the Panel's recent policy work is becoming progressively substantive. It sets out the considerations which the Panel takes into account when deciding whether or not to restrain despatch of takeover documents, in particular, bidder's and target's statements. Restraint of despatch is a remedy most commonly sought by target companies during the period between the date that the statement is served on the target and the date that the statement and offer are posted to target shareholders. The usual reason for seeking to restrain despatch of a bidder's statement is that disclosure in the statement is defective, but structural and procedural defects in the bid are also often raised.<sup>232</sup> The policy may benefit from an express acknowledgement that the underlying motivation for many targets in requesting a restraint of despatch is that they are seeking to buy time to either locate a rival bidder or implement some other type of defence strategy.

The Policy notes that applications for interim relief at short notice prejudice the ability of the Panel to fully consider the issues before it must make a decision whether to restrain despatch, and accordingly, may prejudice the applicant. In general, the shorter the time available between the application and the need for a decision, the greater the threshold of alleged harm that an applicant must demonstrate.<sup>233</sup> At a minimum, the Panel suggests that an application to restrain despatch of a bidder's statement should nor-

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228 <http://www.takeovers.gov.au/Policy/Content/Policy3-MakingRules.asp> [3.2].

229 *Ibid.*, [3.3].

230 <http://www.takeovers.gov.au/Policy/Content/Policy4-RemediesandEnforcement.asp>.

231 *Ibid.*, [4.2] – [4.4].

232 [http://www.takeovers.gov.au/Content/Policy/010403\\_PS5.asp](http://www.takeovers.gov.au/Content/Policy/010403_PS5.asp) [5.2].

233 *Ibid.* [5.3].

mally be made not less than 5 calendar days before the first day on which the offer documents can be posted, having regard to the requirements of section 633 and any other restraints on the bidder.<sup>234</sup> The Panel's policy is guided by a number of key considerations, namely:

- The quality of disclosure in the takeover document.<sup>235</sup> The Panel considers that one of its major objectives is to raise the quality of disclosure. Accordingly, bidders that attempt to disclose minimal information risk having their disclosure declared unacceptable by the Panel.
- Where the balance of convenience lies in relation to restraint of despatch.<sup>236</sup> This will involve weighing up the harm that would be suffered by the bidder if despatch of its bidders' statement is held up, with the harm that might ensue if the bidder is allowed to despatch.
- That it is generally preferable for these issues to be settled by arm's-length negotiation between the parties, rather than by the Panel.<sup>237</sup>

The Policy also establishes guidelines regarding the type of information that applicants should include in an application for restraint of despatch of documents.

### ***Lock-up devices***

The Panel's most recent policy concerns lock-up devices, which are agreements that parties usually employ to facilitate proposals for changes of control.<sup>238</sup> They include arrangements such as break fees, no-shop and no-talk agreements, and some pre-emptive right agreements. They have become more common in Australia in recent times, although they have been well established overseas for some time. The Panel is concerned that lock-up devices be consistent with the Eggleston principles and in particular, the principle espoused in paragraph 602(a) of the Corporations Act, namely that control acquisitions take place in an efficient competitive and informed market.<sup>239</sup> The Panel is particularly keen to ensure that lock-up devices are not used to confer unequal benefits between shareholders. In particular, they should not be "a material disincentive to the prospect of the emergence of a rival offer."<sup>240</sup>

In this draft policy the Panel outlines the principles which it intends to apply in exercising its powers in relation to lock-up devices. It does not purport to comment on the legal validity or enforceability of particular arrangements, rather it establishes guidelines for determining whether a lock-up device is unacceptable. For instance, the Panel has set a general limit of 1% of the bid value for break fees<sup>241</sup> and has indicated that whether or not a break fee arrangement is unacceptable will depend upon whether it is consistent with those principles of Chapter 6 of the Act and whether it is, in all the circumstances,

234 Ibid [5.12].

235 Ibid [5.4].

236 Ibid [5.5].

237 Ibid [5.7].

238 <http://www.takeovers.gov.au/Content/Policy/DraftPolicyOutlineLockUpDevices.asp>

239 Ibid.

240 Ibid.

241 Although it has said that "1% will be too high in the case of large bids and may be too low for some small bids": Takeovers Panel, *Panel Releases Policy On Lock-Up Devices For Comment*, Press Release, No 01/65 (2 August 2001) 1.

reasonable. The Panel has stated that no-shop and no-talk agreements will be unacceptable if they do not contain a carve out allowing directors to fulfill their duties to target shareholders. It has also suggested that no-talk agreements will be harder to justify than no-shop agreements and both will be harder to justify continuing in force once a bid has been announced. The Panel also considers that pre-emptive rights agreements concerning key assets which are on uncommercial terms, are triggered by changes of control, and are likely to affect an auction process adversely, would be unacceptable. An exception is where properly informed shareholders have approved the pre-emptive rights.<sup>242</sup>

The Panel's policy on lock-up devices has been heralded as a "welcome step forward in Australian corporate regulation"<sup>243</sup> and one which has provided "much-needed guidance where global developments have left a clear policy void in the Australian market."<sup>244</sup>

### ***Future development of policy***

Aside from the Panel's express statements of policy, there are also the more general policy principles that can be garnered from the various reasons for decisions issued by the Panel. The principles of policy generated by the Panel's decisions are discussed in the next part of this Chapter. While in some cases there may be good reason to confine the operation of a Panel decision to the particular facts of the case before it, market participants and practitioners have demonstrated an insatiable appetite for information and guidance regarding "hot topics" such as the circumstances in which forecasts ought to be included in takeover documentation, and keenly pick over reasons issued by the Panel for guidance on such issues. For this reason it seems unlikely that the Panel will be able to confine the development of its policy which is likely to be driven by the Panel's decision-making.

The way in which Panel policy develops over the next few years will be interesting to observe. No doubt there will be instances where the Panel publishes policy which is largely based on the practices that the Panel establishes to deal with certain types of applications that are frequently made, the policy concerning restraint of despatch is an example of a policy that developed in this way. However, there may also be cases where a policy is generated to deal with emerging trends, especially where there is no case law or existing policy. The policy on lock-up devices was generated to fill such a "policy void" which arose as a result of the recent increase in the use of break fees in Australia.<sup>245</sup> Finally, it is possible that there may be instances where, perhaps because of unusual facts, an individual case may give rise to a need to issue clarificatory policy.

## **Decisions of the Panel**

Although the first 7 weeks of the rejuvenated Panel passed without incident, its 8th and 9th weeks of operation in early May 2000 saw the Panel receive 3 applications over 12 days. Since then the flow of applications to the Panel has been somewhat sporadic.

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242 Ibid.

243 Editorial, "Panel's Timely Break on Fees" *Australian Financial Review*, 13 August 2001.

244 Ibid.

245 Takeovers Panel, *Panel Releases Policy On Lock-Up Devices For Comment*, Press Release, No 01/65 (2 August 2001) 1.

As at 30 September 2001 there were a total of 40 formal applications, which averages out to approximately 2 applications per month. The identity of the applicants has been surprising. ASIC, which was the only person or body that could make a referral to the Panel prior to the proclamation of the CLERP Act amendments in March 2000, has made only 1 application.<sup>246</sup> There has been 1 application by aggrieved shareholders,<sup>247</sup> 27 applications by bidders,<sup>248</sup> 17 of which were instigated by bidders in situations where there was a rival bidder,<sup>249</sup> and 11 applications by the target.<sup>250</sup> Perhaps the most surprising statistic is that significantly more applications have been received from bidders than targets. This is unusual because prior to the Panel assuming responsibility for the resolution of takeover disputes, the majority of court cases were instigated by the target (often in order to buy some time to formulate a defence strategy) usually on the basis that the bidder's takeover documentation was deficient or defective. However, it may be that these statistics have been skewed by the high number of multiple applications particularly those involving rival bidders. For example, the takeover of Taipan Resources NL resulted in a total of 12 applications, 9 of which were initiated by Troy Resources NL, one of the bidders.

In addition, the Panel executive receive many inquiries each week, mostly from practitioners. Practitioners have availed themselves of the Panel executive's invitation to discuss the process involved in applying to the Panel, and oftentimes this includes whether the Panel in fact has jurisdiction to consider the relevant issues. This process helps ensure that matters which come before Panel members are meritorious. However, on occasion applications are made which are not pursued either because the applicant with-

246 That application was made on 30 November 2000 in *Re Realestate.com.au Limited* (2001) 19 ACLC 618.

247 *Re St Barbara Mines Limited and Taipan Resources NL* (2000) 18 ACLC 913.

248 *Re Infratil Australia Limited (No 1)* (2000) <http://www.takeovers.gov.au/Decisions/000503gdu.asp>, *Re Email Limited (No 2)* (2000) <http://www.takeovers.gov.au/Content/Decisions/0040-email-limited.asp>, *Re Advance Property Fund* (2000) 18 ACLC 777, *Re Ashton Mining Limited* (2000) 36 ACSR 40, *Re Brickworks Limited (No 1)* (2000) 18 ACLC 927, *Re Taipan Resources NL* (2000) 18 ACLC 919, *Re Pinnacle VRB Limited (No 2)* (2000) <http://www.takeovers.gov.au/Decisions/Pinnacle2publishedreasons.asp>, *Re Taipan Resources NL (No 2)* (2000) 19 ACLC 778, *Re Taipan Resources NL (No 4)* (2001) 19 ACLC 791, *Re Taipan Resources NL (No 5)* (2001) <http://www.takeovers.gov.au/Content/Decisions/TaipanNo5PublishedReasons.asp>, *Re Taipan Resources NL (No 6)* (2001) 19 ACLC 797, *Re Pinnacle VRB Limited (No 3)* (2001) 19 ACLC 605, *Re Taipan Resources NL (No 8)* (2001) 38 ACSR 102, *Re Taipan Resources NL (No 9)* (2001) 38 ACSR 111, *Re Pinnacle VRB Limited (No 6)* (2001) 19 ACLC 1,249, *Re Pinnacle VRB Limited (No 7)* (2001) <http://www.takeovers.gov.au/Content/Decisions/PinnacleNo7.asp>, *Re Namakwa Diamond Company NL (No 2)* (2001) <http://www.takeovers.gov.au/Content/Decisions/Namakwa2.asp>, *Re Namakwa Diamond Company NL (No 3)* (2001) <http://www.takeovers.gov.au/Content/Decisions/Namakwa3.asp>, *Re Namakwa Diamond Company NL (No 4)* (2001) <http://www.takeovers.gov.au/Content/Decisions/Namakwa4.asp>, *Re Taipan Resources NL (No 10)* (2001) <http://www.takeovers.gov.au/Content/Decisions/TaipanNo10PublishedReasons.asp>, *Re Taipan Resources NL (No 11)* (2001) <http://www.takeovers.gov.au/Content/Decisions/TaipanNo11PublishedReasons.asp>, *Re Pinnacle VRB Limited (No 5)* (2001) 19 ACLC 1,154, *Re Pinnacle VRB Limited (No 8)* (2001) 19 ACLC 1,252, *Re Vincorp Wineries Limited* (2001) 38 ACSR 584, *Re Alpha Healthcare Limited* (2001) 39 ACSR 238 and *Re Australian Liquor Group Limited (No 1 and 2)* (2001) 39 ACSR 14.

249 These 17 applications related to just 4 matters, namely the takeovers of Ashton Mining Limited, Advance Property Fund, St Barbara Mines Limited and Pinnacle VRB Limited which were all contested takeovers.

250 *Re Infratil Australia Limited (No 2)* (2000) 18 ACLC 699, *Re Email Limited (No 1)* (2000) [www.takeovers.gov.au/Content/Decisions/00-003-Email.asp](http://www.takeovers.gov.au/Content/Decisions/00-003-Email.asp), *Re Email Limited (No. 3)* (2000) 18 ACLC 708, *Application by Pinnacle VRB Limited*, *Application by IAMA Limited*, *Application by QCT Resources Limited*, *Re Brickworks Limited (No 2)* (2000) 18 ACLC 934, *Re Taipan Resources NL (No 3)* (2001) 37 ACSR 173, *Re Taipan Resources NL (No 7)* (2001) 37 ACSR 189, *Re Pinnacle VRB Limited (No 4)* (2001) 19 ACLC 1,142 and 1,249 and *Re Namakwa Diamond Company NL (No 1)* (2001) <http://www.takeovers.gov.au/Content/Decisions/Namakwa4.asp>.

draws the allegations or because the Panel declines to conduct proceedings. There have been 7 such applications in the short life of the rejuvenated Panel.<sup>251</sup>

The remainder of this Chapter sets out a brief summary of the facts and findings of the applications that have been brought before the Panel to date in chronological order, and comments on the significance of each of the determinations of the Panel.

### ***Re Infratil Australia Limited (No 1)***<sup>252</sup>

Infratil Australia Limited (***Infratil***) was a listed investment company which specialised in infrastructure projects, such as power companies, airports, sea ports and tollways. Australian Infrastructure Fund Limited (***AIF***) is a listed infrastructure fund, which has been established as a dual entity that issues “stapled” securities, each one being a share in Australian Infrastructure Fund Limited and a unit in the Australian Infrastructure Fund. Stapled securities are frequently structured to have particular tax benefits. AIF offered 2 AIF stapled securities for every 5 Infratil shares. AIF suggested that there would be significant synergies, and a re-rating of an enlarged merged entity.

AIF served its bidder’s statement on Infratil on 10 April 2000. Infratil then raised a number of concerns with AIF regarding the content of its bidder’s statement. Following discussions between the bidders and the target, the bidders lodged a revised bidder’s statement on 26 April which met some, but not all, of Infratil’s concerns. Under ASIC Class Order 00/344, AIF would ordinarily have to wait 14 days after lodging the amended bidder’s statement before it could despatch the bidder’s statement to Infratil’s shareholders.<sup>253</sup> AIF applied to ASIC to shorten this period, but ASIC declined the application when Infratil advised it was in the process of applying to the Panel for a declaration of unacceptable circumstances. There was evidence that ASIC’s decision was at least in part based on not wanting to remove the substance of any application by Infratil for a declaration of unacceptable circumstances from the Panel before the Panel had a chance to consider Infratil’s complaints about the bidder’s statement.

On 1 May 2000, AIF applied to the Panel for a review of ASIC’s decision refusing consent and requesting an order allowing the despatch of the replacement bidder’s statement as soon as possible on the grounds that ASIC did not properly apply its policy and did not give proper weight to certain commercial and regulatory considerations involved in the decision, including the following:

- The Panel, not ASIC, should decide whether Infratil’s application to the Panel justifies any further delay in despatch of the bidder’s statement.
- It was in the interests of Infratil shareholders that they receive the bidder’s statement without further delay. Infratil was merely seeking the inclusion of additional information, if the Panel determined that the disclosure in the bidder’s

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<sup>251</sup> *Application by IAMA Limited, Application by Pinnacle VRB Limited, Application by QCT Resources Limited, Re Namakwa Diamond Company NL (No 3)* (2001) <http://www.takeovers.gov.au/Content/Decisions/Namakwa3.asp>, *Re Pinnacle VRB Limited (No 7)* (2001) <http://www.takeovers.gov.au/Content/Decisions/PinnacleNo7.asp>, *Re Taipan Resources NL (No 2)* (2000) <http://www.takeovers.gov.au/Content/Decisions/TaipanNo2PublishedReasons.htm> and *Re St Barbara Mines Limited and Taipan Resources NL* (2000) 18 ACLC 913.

<sup>252</sup> (2000) <http://www.takeovers.gov.au/Decisions/000503gdu.asp>

<sup>253</sup> Under section 633 of the Corporations Act, a bidder may despatch offers and copies of the bidder’s statement to holders of bid class shares between 14 and 28 days after it has sent the statement to the target. Under section 643, if the bidder becomes aware of a deficiency in the original bidder’s statement at any time between lodging the original statement and the close of the bid, it must lodge a supplementary bidder’s statement and send copies to the target and the ASX. Accordingly, unless the target or ASIC consents, the 14 day timetable begins again.

statement was inadequate, then a supplementary statement could be used to convey additional information to Infratil shareholders.

- The changes to the bidder's statement were not substantial and Infratil had been aware of them for approximately 12 days and accordingly, ASIC's policy objectives had been met.

The Panel comprised Brett Heading (sitting President), Alice McCleary (sitting deputy President) and Jennifer Seabrook.

The Panel found that the policy which ASIC applied (Interim Policy Statement 159 paragraphs 35 and 36) was policy that it was open to ASIC to adopt.<sup>254</sup> That policy gives effect to the legislative objective which requires a bidder to wait 14 days after serving its bidder's statement on the target company and before posting offers, namely to give the target adequate time to consider the changes.

However, this decision was not made by a simple application of the policy. ASIC argued that the policy does not cover all contingencies, and ASIC in fact refused its consent on a consideration which is not mentioned in Interim Policy Statement 159, that is, "to facilitate the despatch of the replacement bidder's statement to target shareholders when there was a genuine dispute as to the adequacy of the content of the statement would have been contrary to the interests of target shareholders."<sup>255</sup>

This review of ASIC's decision took less than 48 hours. In part the Panel decided to affirm ASIC's decision to refuse consent to the early despatch of AIF's bidder's statement because it had received Infratil's application the day after it received AIF's application and believed it could consider and decide Infratil's application within the period for which the bidder's statement was already restrained by the ASIC class order.<sup>256</sup> Another factor which assisted a speedy resolution of this application was that the Panel considered that AIF's application could be decided on the basis of the written submission received from the parties, and accordingly decided not to conduct a conference.

### ***Re Infratil Australia Limited (No 2)***<sup>257</sup>

On 2 May 2000, the day after AIF lodged its application, Infratil applied for a declaration under section 657A of the Corporations Act that unacceptable circumstances existed in relation to AIF's bidder's statement and for orders designed to remedy those circumstances. Infratil alleged that the bidder's statement, even as amended, was defective because it contained insufficient information in several respects including in relation to earnings.

A brief was circulated to parties on 5 May, inviting them to make written submissions. The Panel reviewed the submissions and resolved to conduct a conference on 8 May, the matter concluded the following morning. Again the Panel comprised Brett Heading (sitting President), Alice McCleary (sitting deputy President) and Jennifer Seabrook.

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254 (2000) <http://www.takeovers.gov.au/Decisions/000503gdu.asp> [16].

255 *Ibid.*, [14].

256 *Ibid.*, [23-27]. Under the Class Order, the bidder's statement could be posted on 10 May. The Panel decided to conduct a conference on Infratil's application on Monday 8 May, with a view to making a decision on the application by 10 May.

257 (2000) 18 ACLC 696.



The major issue was whether AIF could give any forecast of its earnings and distributions which are technically determined by the report of an independent valuer who assesses the earnings and value of AIF's investments. AIF asserted that small differences in the long term interest rate and other variables chosen by the independent valuer could make major differences in the earnings and available distributions of AIF, and accordingly reliable forecasts could not be provided.

The Panel accepted this argument but said that despite this, the bidder's statement was defective because of the absence of comparable earnings figures.<sup>258</sup> While the Panel did not require financial projections, the Panel and the parties devised a compromise for AIF to give Infratil shareholders better information to make an assessment of the prospects of AIF by ensuring that the bid remained open until after AIF published its 30 June 2000, half yearly distribution. Also AIF agreed to provide a pro-forma consolidated balance sheet for the merged entity using AIF's balance sheet and a set of figures provided by Infratil in a similar form to AIF's trust-based balance sheet. The Panel also required that additional information be provided in a supplementary document accompanying the bidder's statement in order to rectify other deficiencies which the Panel identified. This included certain continuous disclosure information and basic information concerning the tax consequences of the takeover and the tax status of the distributions of the merged entity.<sup>259</sup>

The Panel accepted AIF's argument, in this particular case, that requiring AIF to incorporate the new information into a new bidder's statement would involve unwarranted additional printing costs, and delay. In any event it was considered that the additional material would stand out more clearly if in a separate document and target shareholders would not be confused or disadvantaged if the additional material was sufficiently cross-referenced to the original bidder's statement.

This case also illustrates the responsiveness of the Panel and the timely manner in which it can deal with takeover disputes. Infratil lodged its application on 2 May 2000 and within 6 business days the Panel had considered the submissions it received in response to its brief, held a conference and negotiated undertakings with the parties.

### ***Re Email Limited (No 1)***<sup>260</sup>

Email was a public listed company comprising a steel distribution business, a metering business, a security products business and a major appliances business. Smorgon Distribution Limited (*Smorgon*), a wholly owned subsidiary of Smorgon Steel Group Limited (a listed public company) was a special purpose bid vehicle, created specifically to acquire the Email shares.

Smorgon's bid was complex for the reason that it was keen to integrate Email's steel distribution business into its own steel operations, but not Email's other businesses. Smorgon planned to find buyers for Email's metering and security products business, and "spin-off" Email's appliances business leaving it in the hands of Email's shareholders.

Smorgon decided that it would pay \$1.85 per Email share for the steel distribution, metering, and security products businesses of Email. In relation to Email's appliances

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258 Ibid, 702.

259 Ibid, 706–707.

260 (2000) <http://www.takeovers.gov.au/Content/Decisions/00-003-Email.asp>



business, it proposed to issue to Email shareholders convertible, redeemable appliance preference shares (*CAPs*) in Smorgon. SG Hambros was commissioned by Smorgon to value the appliances business. Hambros came up with a range of 87c to \$1.21. The value attributed to the CAPs was the midpoint (that is, \$1.04) of the range

On 30 April 2000, Smorgon purchased 5.4% of Email's ordinary shares on market for prices up to \$2.89. Given the consideration for each Email share was \$1.85 cash plus a CAP, this effectively "locked in" a minimum price of \$1.04 for the CAPs, in order for the minimum bid price rule in section 621(3) to be complied with.

Smorgon lodged and served its bidder's statement on 2 May. Email's application was received on 12 May. Email sought various interim and final orders, as well as a declaration of unacceptable circumstances.

Email contended that the issues before the Panel were legally complex and sought an order under section 194 of the ASIC Act for leave to be legally represented in proceedings before the Panel. In addition, Email sought an order under section 659A of the Corporations Act and Rule 9.10 of the Panel's Rules that certain questions of law be referred to a court for decision before the final hearing of the application before the Panel.<sup>261</sup>

Email also argued that there were a number of documents that the bidder should produce in order to assist in the determination of the matter and sought an order under section 192 of the ASIC Act and under Rule 7.5 of the Panel's Rules for the issue of certain summonses to produce documents.

The Panel comprised Annabelle Bennett SC (sitting President), Michael Tilley (sitting deputy President) and Karen Wood.

Without any interim restraining orders under section 657E of the Corporations Act, Smorgon would have been entitled to despatch its offer document on 17 May, therefore, the Panel had just 3 business days to determine the interim issues. After a preliminary consideration of the issues, the parties were asked to provide additional information. On 17 May, the Panel decided (after Smorgon offered to include some clarifying material in its bidder's statement) to allow the bidder's statement to be despatched. The clarifying material Smorgon offered to put in its bidder's statement included:

- A more detailed expression of Smorgon's intention to convert the CAPs (along the lines that Smorgon would use all reasonable endeavours to achieve the conversion).
- A provision that the appliance business would be sold if it could not be spun off.
- A provision that if the CAPs were redeemed, the redemption price of the CAPs would reflect the price for which the appliance business had been sold.
- An express statement that it was Smorgon's intention to redeem the CAPs if they could not be converted by 30 September 2002.

Ultimately the Panel concluded that even if they determined that additional information and clarifications were necessary once they had considered the substantive issues,

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<sup>261</sup> The reasons of the Panel do not set out the questions of law that Email sought to have referred to the court. The reasons merely state that the questions related to the legal issues raised by Smorgon's proposal to distribute shares in the appliance business and whether the bid contravened section 621(3).

the bidder's statement was fit to be despatched, as the additional information and clarifications could be appropriately made in the target's statement, or in a supplementary bidder's statement.<sup>262</sup>

Another factor that appeared to influence the Panel in its decision not to restrain despatch was the fact that "allowing offers to be posted while the substantive issues are open will not give rise to unacceptable circumstances, since those issues can be resolved before the offers become unconditional."<sup>263</sup>

That same day Email applied for a review of the Panel's decision under section 657EA of the Corporations Act. Therefore, the sitting President of the Panel ordered that despite its finding, Smorgon could not despatch its bidder's statement until 5pm Friday 19 May, in order to allow a review Panel to be appointed and given an opportunity to review the decision.

In relation to the other orders sought by Email, the Panel decided that it was premature to consent to legal representation regarding the determination of the final issues when written submissions on those issues had not been received.<sup>264</sup> The Panel also decided that it should consider questions of law itself, rather than refer them to court.<sup>265</sup> In relation to the request for summonses to produce documents the Panel said it would consider what summonses to issue, if any, once it had issued a brief under Regulation 20 in relation to the substantive issues and the parties had discussed voluntary production of documents.<sup>266</sup>

### ***Re Email Limited (No 2)***<sup>267</sup>

On Friday 19 May 2000, a review Panel comprising Brett Heading (sitting President), Les Taylor (sitting deputy President) and Maria Manning was appointed. The review Panel decided that it needed more time to consider the matter and so extended the order that Smorgon must not despatch its bidder's statement until 5pm Monday 22 May.

On 22 May 2000, the review Panel decided to restrain despatch of Smorgon's bidder's statement. The review Panel had the opportunity to consider some additional information, namely an oral submission made by PricewaterhouseCoopers to the director of the Panel executive on 17 May, and more time to consider the late information provided by Hambros in relation to its valuation report concerning the CAPs.<sup>268</sup> The fact that there was no public information about the bidder (as it was a special purpose bid vehicle) and insufficient information in the public domain concerning the additional debt that the Smorgon Group would have to undertake in order to takeover Email also influenced the review Panel to restrain despatch.

The review Panel concluded that if the bidder's statement including Hambros' valuation report regarding the value of the CAPs was despatched, and was later found to be wrong then it would "propagate an erroneous view as to the value of the CAPs"<sup>270</sup> which

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262 (2000) <http://www.takeovers.gov.au/Content/Decisions/00-003-Email.asp> [33].

263 *Ibid*, [35].

264 *Ibid*, [8].

265 *Ibid*, [23].

266 *Ibid*, [12].

267 <http://www.takeovers.gov.au/Content/Decisions/0040-email-limited.asp>

268 *Ibid*, [45].

269 *Ibid*, [47].

270 *Ibid*, [48].

could not be rectified by the issue of a supplementary statement. In this way, the review Panel agreed with the policy applied by the Panel at first instance, however, it reached a different conclusion on the basis of the facts that were before it. Accordingly, the review Panel ordered that Smorgon be restrained from despatching its amended bidder's statement until Friday 2 June, in order to allow the Panel to determine the substantive issues.

### ***Re Email Limited (No 3)***<sup>271</sup>

Following the decision of the review Panel, the matter reverted back to the Email No 1 Panel who, after receiving written submissions, convened a conference to determine the substantive issues.

The Panel permitted the parties to be legally represented at the conference by both the commercial solicitors involved in the transaction as well as counsel. The Panel decided that there was no need to refer the legal issues raised by Smorgon's proposal to distribute shares in the appliance business or the alleged breach of section 621(3) to a court for a ruling as they were both questions of fact for determination by the Panel.<sup>272</sup> The Panel also considered it unnecessary to issue summonses as all the information it required to reach its decision had been volunteered by the parties.<sup>273</sup>

In relation to Email's allegation that Smorgon's offer breached section 621(3), the Panel found that the provision had not been breached.<sup>274</sup> The Panel accepted, after taking its own independent advice from Grant Samuel, the valuation of the CAPs adopted by Smorgon's, in the absence of convincing evidence to the contrary.<sup>275</sup> However, the Panel did indicate that it would have preferred an explicitly independent expert and that:

Much of the delay experienced by Smorgon could have been avoided had it commissioned an independent expert report on the value of the CAPs which complied with ASIC Practice Notes on independence and valuation methodology.<sup>276</sup>

Despite finding that section 621(3) had not been breached, the Panel found that there was insufficient material in Smorgon's bidder's statement in relation to key issues.<sup>277</sup> Accordingly, the Panel indicated that based on evidence presented during the course of the conference, it considered that Smorgon's bidder's statement in its current form was unacceptable, and additional information had to be provided.<sup>278</sup>

The scope of this additional information was agreed between the Panel and the parties, and due to the fact that Smorgon had already printed its bidder's statement it was permitted to send the information in the form of two supplementary statements to Email shareholders.

<sup>271</sup> (2000) 18 ACLC 708.

<sup>272</sup> *Ibid.*, 714.

<sup>273</sup> *Ibid.*

<sup>274</sup> *Ibid.*, 720.

<sup>275</sup> Smorgon had engaged SG Hambros to determine the value of the CAPs. SG Hambros provided Smorgon with a range which they considered represented the value of the CAPs and Smorgon selected the mid-point of that range (\$1.04) as the value of a CAP. Email disputed this valuation. However, the Panel was not convinced by evidence from Email's expert from PricewaterhouseCoopers, that the valuation range adopted was wrong or that taking the mid-point of the valuation range gave an unlikely value for the CAPs: Frith, above n 130.

<sup>276</sup> (2000) 18 ACLC 708, 724.

<sup>277</sup> *Ibid.*

<sup>278</sup> *Ibid.*

Smorgon undertook to provide the following information in its first supplementary statement which accompanied its bidder's statement:

- Information clarifying Smorgon's obligations in the event that it was unsuccessful in effecting either conversion or exchange of the CAPs into ordinary shares in a company holding Email's major appliances business (this amendment had been volunteered by Smorgon earlier in the process).
- A more detailed discussion of some of the potential risks relating to the CAPs.
- An addition to the Hambros Report clarifying the possible outcomes for CAPs holders including information on the type of discount rates to be applied if the CAPs became perpetual debt securities.

Smorgon also provided an undertaking that within 5 days of release of Email's interim final results (which occurred on Thursday 1 June) it would provide a second supplementary statement setting out pro forma consolidated financial information for SSSL and the bidder, on the basis that the bidder acquires all of the ordinary shares in Email, and on the basis that it acquires 50% of the ordinary shares in Email, subject to, and in a form approved by, the Panel.

On this basis, the Panel revoked the order restraining Smorgon from posting its bidder's statement. Both supplementary statements were sent to Email shareholders. Interestingly, the Panel chastised both parties in the reasons for their conduct during the course of the proceedings:

This matter has been notable because of the way in which parties attempted to have the last word and responded after deadlines to submissions which were lodged at the deadlines. Both parties made further submissions after it was appropriate and this did not assist the cases they sought to present.<sup>279</sup>

However, perhaps the most significant issue to arise from this decision is that, when viewed in light of the Infratil proceedings, a pattern can be seen with respect to the types of financial information the Panel demands in merger documentation. In both cases, the Panel required that the bidder provide pro forma consolidated financial information for the combined entity. The Panel accepted historical consolidated information (as opposed to forecast information) presumably because of the difficulties of requiring that the targets provide commercially sensitive information to a potential acquirer in a hostile bid situation.

### ***Application by IAMA Limited***

On 27 July 2000, an application was received from IAMA Limited (*IAMA*) for a declaration of unacceptable circumstances in relation to actions and public statements made by persons and companies associated with Futuris Limited (*Futuris*). IAMA alleged that the following gave rise to unacceptable circumstances:

- Actions undertaken by New Ashwick Pty Limited and CP Ventures Limited (companies associated with Futuris) were intended to obstruct and possibly thwart negotiations between IAMA and Wesfarmers Limited (*Wesfarmers*) to develop a proposal to put to IAMA shareholders for Wesfarmers to acquire a substantial interest in IAMA.

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<sup>279</sup> Ibid, 725.

- Statements made by persons associated with Futuris were intended to destabilize IAMA's share price and injure its public image in order to enhance the prospects of an acquisition by Futuris of a substantial interest in IAMA.
- Statements made by or on behalf of Futuris or its associates created an impression of an intention to make a takeover bid for IAMA but in a manner which avoided the obligations of section 631 of the Corporations Act which relates to public statements concerning proposed bids.

The Panel appointed by the Acting President of the Panel, Simon Mordant, comprised Jeremy Schultz (President), Meredith Hellicar (sitting deputy President) and Marian Micalizzi.

At the time IAMA's application was received related proceedings were already underway in the Supreme Court of South Australia. The main substance of those proceedings was that Futuris was seeking access to the books of IAMA, pursuant to section 247A of the Corporations Act, in order to make an assessment of IAMA's prospects with a view to making a competitive bid for IAMA. Accordingly, the Panel issued a media release stating that it would shape its proceedings in light of developments in proceedings involving IAMA and CP Ventures in the Supreme Court of South Australia.<sup>280</sup>

On 2 August, IAMA requested that the Panel treat its application as withdrawn following the settlement of the court proceedings which occurred when IAMA agreed to give Futuris access to some of the documents which they were seeking. The Panel acceded to IAMA's request.<sup>281</sup>

### ***Application by Pinnacle VRB Limited***

On 28 July 2000, the day after the IAMA application was received, an application was received from Pinnacle VRB Limited (***Pinnacle***). Pinnacle applied for a declaration of unacceptable circumstances in relation to actions by a group of persons and companies seeking to alter the board of Pinnacle, and requested interim orders that the shares of the group be vested in ASIC, or not be counted in any resolution to alter the board of Pinnacle at a meeting which was scheduled for 31 July 2000.

The Panel appointed by the President of the Panel, Simon McKeon, comprised himself as President, Professor Ian Ramsay (sitting deputy President) and Robyn Ahern.

The Panel made inquiries over the course of the weekend (29 & 30 July) and reached the conclusion that the information available to it was insufficient to assure it that it had jurisdiction to make the interim orders requested in relation to the meeting. Accordingly, the Panel refrained from making any interim orders.<sup>282</sup>

There were two issues in dispute. The first was in relation to the requisitioned meeting scheduled for 31 July. There was a material dispute between parties as to whether the 31 July meeting was validly postponed by the company under its articles until 15 August. The board claimed that the meeting had been validly postponed, while the group of shareholders which requisitioned the meeting insisted that it was not.

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<sup>280</sup> Takeovers Panel, *Panel Receives Application in Relation to IAMA Ltd*, Press Release, No 00/17 (31 July 2000) 1.

<sup>281</sup> Takeovers Panel, *Application in Relation to IAMA Ltd*, Press Release, No 00/20 (4 August 2000) 1.

<sup>282</sup> Takeovers Panel, above n 152.

The second concerned an allegation that a group of shareholders may have breached the 20% threshold in section 606 of the Corporations Act by acting in concert in acquiring shares in Pinnacle. However, after a number of discussions with various board members of Pinnacle, it appeared that the “arrangements” in place were simply that a number of shareholders had a high regard for a particular shareholder and (when it suited their interests) would tend to follow his lead, rather than anything which would result in an association capable of constituting a breach of section 606.

In the absence of any proven association the Panel was not sure that it had jurisdiction to make the requested orders. As a result the requisitioned meeting went ahead and at that meeting resolutions were passed which purported to replace four of the current board members. However, Pinnacle was subsequently successful in arguing before the Supreme Court of Victoria that the meeting had been validly postponed.<sup>283</sup>

On 1 August 2000, Pinnacle requested that the Panel consent to the withdrawal of its application. The Panel consented.<sup>284</sup>

### ***Re Brickworks Limited (No 1)***<sup>285</sup>

On 3 August 2000, an application was received from GPG (No 4) Pty Limited (***GPG***) for a declaration that circumstances in relation to the affairs of Brickworks Limited (***Brickworks***) and Washington H Soul Pattinson & Company Limited (***Soul Pattinson***) were unacceptable having regard to the effect of the circumstances on the control or potential control of Brickworks. GPG sought an order that Soul Pattinson be required to disclose to the market a valuation report obtained by it from KPMG Corporate Finance (Australia) Pty Limited (the ***KPMG Report***).

GPG lodged and served its bidder’s statement on 19 April 2000. The consideration offered by GPG was 4 shares in Soul Pattinson plus \$100 cash for every 5 ordinary shares in Brickworks. The bidder’s statement and offers were despatched on 2 May. Brickworks’ target’s statement was despatched on 17 May 2000. However, GPG did not hold sufficient Soul Pattinson shares to perform the bid contracts. Accordingly, it proposed to buy shares in Soul Pattinson from Brickworks at the conclusion of the bid, at market. Further, the bid was conditional upon GPG receiving sufficient acceptances to proceed to compulsory acquisition, and because GPG would be unable to procure Brickworks to sell its shares in Soul Pattinson unless it obtained control of Brickworks, GPG needed Soul Pattinson to either accept its offer or sell its shares in Brickworks to people who would accept GPG’s offer.

On 25 May, Soul Pattinson announced to the Australian Stock Exchange that it had considered, and would not be accepting, GPG’s takeover offer (the ***Announcement***) and that it had obtained advice from KPMG to the effect that the GPG offer undervalued Soul Pattinson’s investment in Brickworks. GPG alleged that the failure to disclose the KPMG Report and specifically, the methodology, assumptions and standards applied in the KPMG Report which supported the conclusion that the consideration offered by GPG under its bid undervalued Soul Pattinson’s investment in Brickworks, resulted in unac-

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283 See *Pinnacle VRB Ltd v Ronay Investments Pty Ltd* (2000) 18 ACLC 733.

284 Takeovers Panel, *Application in Relation to Pinnacle VRB Ltd Withdrawn*, Press Release, No 00/19 (1 August 2000) 1.

285 (2000) 18 ACLC 927.



ceptable circumstances in that the Announcement was, or may be, misleading, and accordingly:

- Brickworks' shareholders lack sufficient information to make an informed decision about the merits of the GPG bid.
- GPG's proposed acquisition of a substantial shareholding in Brickworks could not take place in an efficient, competitive and informed market.

The Panel comprised Les Taylor (sitting President), Marian Micalizzi (sitting deputy President) and Louise McBride.

On 24 August 2000, the Panel issued a statement that it had resolved not to make a declaration of unacceptable circumstances.<sup>286</sup> The Panel stated that it had considered submissions from 3 directors of Soul Pattinson, and had satisfied itself that Soul Pattinson had not intended to convey an impression that KPMG had been asked to provide a valuation report or that advice from KPMG was an assessment of the value of the GPG offer from the investment perspective of any person other than Soul Pattinson.<sup>287</sup> The Panel also accepted that KPMG had evaluated GPG's offer from the standpoint of Soul Pattinson, against Soul Pattinson's investment objectives and criteria using only public information about Brickworks.

It was clear from the Panel's reasons that Soul Pattinson had been invited to make a clarification about its Announcement, but declined.<sup>288</sup> No reasons for this were given, but clearly the Panel felt that the issue was of sufficient importance for it to make a clarificatory statement instead.<sup>289</sup>

### ***Re Brickworks Limited (No 2)***<sup>290</sup>

On 5 September 2000, shortly after the resolution of the application of GPG (No 4) Pty Limited (*GPG*), Brickworks Limited (*Brickworks*) applied to the Panel. Brickworks made numerous allegations that unacceptable circumstances existed in relation to GPG's bid, the affairs of GPG or the affairs of Brickworks. Brickworks argued that the fact that GPG purported to make a takeover offer to Brickworks shareholders that could not be implemented, constituted unacceptable circumstances. Brickworks also alleged that GPG's takeover offer contravened section 618(1) of the Corporations Act and did not provide sufficient information to allow Brickworks' shareholders to properly assess the merits of the GPG's proposal.

Brickworks also complained about GPG's extension of its takeover offer at a time when it appeared that the offer could not be implemented, and the fact that GPG was using its purported takeover offer as a forum to criticise Brickworks and its directors.

Brickworks sought an order that GPG be required to withdraw its offer and not make a further offer for Brickworks shares within a period of twelve months from the date of the Panel's order without the prior consent of the Panel. A range of alternative orders were sought in the event that the Panel declined to make such an order.

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<sup>286</sup> Takeovers Panel, *Panel Declines Application in Relation to Brickworks Ltd*, Press Release, No 00/22 (24 August 2000) 1.

<sup>287</sup> *Ibid.*

<sup>288</sup> (2000) 18 ACLC 927, 934.

<sup>289</sup> Takeovers Panel, above n 286.

<sup>290</sup> (2000) 18 ACLC 934.



Again, the Panel comprised Les Taylor (sitting President), Marian Micalizzi (sitting deputy President) and Louise McBride.

By the time the Panel had resolved the issues the bid had closed.<sup>291</sup> However, even though the bid closed without any change in control of Brickworks and the Panel had decided not to make a declaration or orders, the Panel prepared reasons because GPG indicated that it may make a similar bid in the future.<sup>292</sup>

The Panel stated that GPG should have:

- Offered to provide target shareholders with copies of Soul Pattinson's releases to the market since the issue of the annual report, including the half-yearly report at 31 December 1999, as well as the annual report for 1998-1999.
- Discussed the effect on Soul Pattinson of disposing of its holding in Brickworks.
- Discussed the overall tax implications of the bid, so as to enable target shareholders to obtain meaningful advice about its effect on them.
- Disclosed the source of funding to purchase the Soul Pattinson shares held by Brickworks.
- Procured a meeting of Guinness Peat Group plc to be convened to approve the bid, before the closing date of the offers, before any extension.

The Panel noted that if GPG's bid was renewed without these matters being first attended to, it would be minded to order GPG to attend to them, and if Brickworks issued a target's statement, the Panel would expect it to contain sufficient information to enable shareholders to be in a reasonable position to make an informed decision.<sup>293</sup>

### ***Application by QCT Resources Limited***

On 8 September 2000, QCT Resources Ltd (*QCT*) applied to the Panel seeking a declaration of unacceptable circumstances concerning the takeover offer made by Metcoal Holdings (Qld) Pty Ltd (*Metcoal*) for all the shares in QCT. QCT also requested an order that Metcoal be required to provide additional disclosure in its bidder's statement or a supplementary statement, and that Metcoal be restrained from despatching its bidder's statement until the Panel had considered the matter, or the additional disclosure had been made.<sup>294</sup>

The additional disclosure pertained to information in the possession of BHP Ltd which managed various joint ventures that constituted the majority of QCT's coal assets. Metcoal was a BHP Ltd subsidiary.

The Panel comprised Jennifer Seabrook (sitting President), Meredith Hellicar (sitting deputy President) and Denis Byrne.

Before the Panel had a chance to consider the issues, the parties advised the Panel that Metcoal had agreed to QCT's request for additional disclosure and would despatch that information to shareholders with its bidder's statement. Therefore, the Panel consented to the parties' request that the matter be withdrawn.<sup>295</sup>

291 The application was made on 5 September and the bid closed on 21 September.

292 (2000) 18 ACLC 934, 937.

293 Ibid, 944.

294 Takeovers Panel, *Panel Application in Relation to QCT Resources Ltd*, Press Release, No 00/24 (8 September 2000) 1.

295 Takeovers Panel, *Application in Relation to QCT Resources Ltd Withdrawn*, Press Release, No 00/25 (11 September 2000) 1.

### ***Re Advance Property Fund***<sup>296</sup>

On 18 September 2000, the Panel received an application by Mirvac Funds Limited (*Mirvac*) for a declaration and orders in relation to Advance Property Fund (*Advance*). Mirvac sought declarations from the Panel that the following circumstances constituted unacceptable circumstances:

- The acquisition by St George Bank Limited (*St George*) of 47,500,000 units in Advance on 26 June.
- The relationship and pre-bid agreements between St George and Stockland Property Management Ltd (*Stockland*).

This matter concerned competing off-market takeover bids for all of the units in Advance by Mirvac and Stockland. St George owned all the shares in Advance Asset Management Limited (*AAML*), the responsible entity for Advance.

Mirvac and St George had discussions in early June in relation to a possible merger between Advance and a Mirvac fund. On 16 June, Mirvac wrote to St George concerning the proposed merger requesting a response from St George by 26 June. The letter stated that the alternatives which would be considered by Mirvac “*could include an off market bid for issued units in Advance Trust*”.

On 26 June St George responded to Mirvac that it was not interested in participating in further discussions in relation to a proposed merger. Also on 26 June, St George acquired 47,500,000 units (10.08%) in Advance from various institutional shareholders.

On 8 August, Mirvac announced its takeover bid for Advance. On 1 September, Stockland announced a rival bid. Also on 1 September, Stockland and St George entered into a relationship agreement and a pre-bid agreement.

Under the pre-bid agreement St George agreed to accept an unconditional offer by Stockland for its units in Advance at Stockland’s request. Under the relationship agreement, selected staff of AAML would be offered employment by Stockland and Stockland would provide property services and access to property development opportunities to St George.

The Panel comprised Professor Ian Ramsay (sitting President), Alice McCleary (sitting deputy President) and Jennifer Seabrook.

The Panel resolved not to make a declaration of unacceptable circumstances in relation to the affairs of Advance. The Panel was satisfied that St George did not have enough information about Mirvac’s intentions at the time it acquired the 10% interest in Advance on 26 June to link the acquisition to Mirvac’s bid.<sup>297</sup> The Panel noted that the proposal Mirvac had put to St George concerned an agreed merger not a hostile bid, and this fact, combined with the delay between the lapse in merger discussions and the announcement of Mirvac’s bid supported the Panel’s conclusion.<sup>298</sup>

The Panel was also satisfied that the interplay between the pre-bid and relationship agreements between St George and Stockland did not give St George a premium for agreeing to accept Stockland’s bid and so did not amount to a collateral benefit.

Mirvac contended that the pre-bid agreement which bound St George to accept

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<sup>296</sup> (2000) 18 ACLC 777.

<sup>297</sup> *Ibid*, 782.

<sup>298</sup> *Ibid*, 783.

Stockland's bid was a collateral benefit. The Panel found that the only benefit St George received was some certainty that Stockland would bid, but it lost the opportunity to sell into a higher bid. Accordingly, if any benefit existed it passed the wrong way, that is, from St George to Stockland.<sup>299</sup>

As regards the relationship agreement, Mirvac submitted that because it was agreed that Stockland would provide St George with property and asset management services, St George was obtaining an unlimited amount of valuable services for just \$500,000 per year. However, the Panel found that the amount St George had to pay for the services was far from clear on the face of the agreement which was little more than an agreement to agree.<sup>300</sup> Mirvac also argued that the relationship agreement was an unacceptable benefit on the basis that it might save St George significant redundancy payments. The Panel rejected this submission as it considered that the direct benefit went to the employee, not St George, and benefits to employees are outside the policy of section 602(c) and 623.<sup>301</sup> Moreover, any benefit to St George is indirect and a hypothetical side-effect of the benefits to the employees as any redundancy costs would have to be paid by Advance, not St George.<sup>302</sup>

### ***Re St Barbara Mines Limited and Taipan Resources NL***<sup>303</sup>

On 27 September 2000, an application was received from Janice Irene Franke, Wordtown Pty Ltd and Gail Ann Oats (the *Applicants*) for a declaration of unacceptable circumstances and interim and final orders concerning a proposed merger between St Barbara Mines Limited (*St Barbara*) and Taipan Resources NL (*Taipan*).

The proposed merger between St Barbara and Taipan was to be implemented via a scheme of arrangement between St Barbara and its shareholders and optionholders. An explanatory statement was lodged with ASIC on 15 August 2000 and served on shareholders and optionholders of St Barbara and Taipan on 15 August 2000 (*Explanatory Statement*).

Three court ordered meetings of St Barbara shareholders took place on 13 October 2000 and the scheme was approved. The merger (had it gone ahead) would have resulted in:

- Each St Barbara shareholder (other than Taipan) receiving 3 Taipan shares for each St Barbara share held.
- Each St Barbara optionholder receiving 3 Taipan options for each St Barbara option held.
- The cancellation of all St Barbara shares and options (other than a parcel of 100 St Barbara shares held by Taipan).
- St Barbara becoming a 100% subsidiary of Taipan and the subsequent delisting of St Barbara from the ASX.

The Applicants alleged that certain aspects of the structure of the proposed merger did not comply with the Corporations Act, namely sections 606(1) and (2) and 621(3),

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299 Ibid, 783.

300 Ibid.

301 Ibid, 784.

302 Ibid.

303 (2000) 18 ACLC 913.

and that disclosure in the Explanatory Statement was inadequate in that it did not comply with sections 670A, 710 and 995.<sup>304</sup> Much of the application was based upon the assumption that Larue Investments Inc (*Larue*) was warehousing its 9.5% shareholding in St Barbara for Strata Mining Corporation NL (*Strata*) (which already had a relevant interest in approximately 13.2% of St Barbara).

The Applicants requested declarations that various statements contained in the Explanatory Statement were misleading and deceptive, and various orders, including an order requiring the production of documents relating to the beneficial ownership of the St Barbara shares held by Larue and Strata and cancelling or declaring voidable the merger implementation agreement between St Barbara and Taipan and the scheme of arrangement.

The Panel comprised Simon McKeon as President, Professor Ian Ramsay (sitting deputy President) and Denis Byrne.

The Panel decided under Regulation 20 of the ASIC Regulations not to conduct proceedings primarily because schemes of arrangement are overseen and approved by the Supreme Court. The courts have wide powers to ensure the interests of shareholders are safeguarded and, like the Panel, are not confined to black letter law considerations in deciding whether or not to confirm a scheme of arrangement.<sup>305</sup> Accordingly, the Panel considered that the matters raised in the application could quite properly be dealt with as part of the scheme approval process. The Panel also considered that it would not be in the public interest for two proceedings to be considering the same transaction and issues simultaneously.<sup>306</sup>

The Panel made it clear that it would generally be reluctant to initiate proceedings in relation to a scheme of arrangement where a court had already commenced its scrutiny of the scheme.<sup>307</sup> However, the Panel noted while there may be “exceptional cases in which the Panel’s functions may complement rather than interfere with those of the Court this is not one of those cases.”<sup>308</sup>

### ***Re Ashton Mining Limited***<sup>309</sup>

On 29 September 2000, the Panel received an application by De Beers Australia Holdings Pty Ltd (*De Beers*) for an interim order and a declaration and final orders in relation to the affairs of Ashton Mining Limited (*Ashton*). The application concerned a rival takeover bid for Ashton made by Capricorn Diamonds Investments Pty Limited, a subsidiary of Rio Tinto Limited (*Rio Tinto*).

De Beers alleged that the Rio Tinto bidder’s statement was deficient in that it:

- Contained misleading statements in relation to the marketing arrangements proposed by De Beers for the Argyle diamonds acquired through Ashton following a successful takeover of Ashton by De Beers.
- Omitted information about the prices recently achieved for Argyle diamonds.

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304 Takeovers Panel, *Application in Relation to St Barbara Mines Ltd*, Press Release, No 00/31 (3 October 2000) 1.

305 (2000) 18 ACLC 913, 917.

306 *Ibid*.

307 *Ibid*, 918.

308 *Ibid*.

309 (2000) 36 ACSR 40.

- Did not contain sufficient information about the quantum and timing of the capital expenditure required for, and the likely production potential of, a proposed underground mining extension to the Argyle mine.
- Did not contain a consent as required by section 636(3) from the Western Australian Department of Resources and Development (**WADR**) regarding the publication of the Department's view that the Argyle joint venturers would need to make a joint approach to the Minister to change the marketing arrangements for the Argyle diamonds.

De Beers applied for interim orders preventing despatch of Rio Tinto's bidder's statement, and a declaration that unacceptable circumstances exist in relation to the bid as well as orders to rectify those circumstances.

De Beers made a cash bid for all of the ordinary shares in Ashton, conditional, *inter alia*, on De Beers obtaining 50.1% control of Ashton and (in effect) on Ashton being able to withdraw from its present marketing arrangements in relation to the Argyle Diamond Mining Joint Venture by the end of 2001.<sup>310</sup> The marketing of the Argyle diamonds is regulated by a number of agreements between the joint venturers, to some of which the Western Australian government is also party. De Beers did not have access to the complete relevant agreements, and although Ashton published a great deal of information about those agreements in its target's statement, Ashton, De Beers, and Rio Tinto published conflicting views on their interpretation.

The Panel comprised Brett Heading (sitting President), Karen Wood (sitting deputy President) and Denis Byrne.

The Panel decided not to make a declaration of unacceptable circumstances in relation to the affairs of Ashton. The Panel also declined to make any interim order restraining Rio Tinto from despatching its bidder's statement to Ashton shareholders.

The Panel reiterated its general policy not to hold up despatch of a bidder's statement unless it contains misleading matter, and its despatch may propagate erroneous information which later supplementary statements may not succeed in correcting.<sup>311</sup> The Panel also stated that formal defects and omissions which are not misleading can generally be remedied by a supplementary bidder's statement and an extension of the relevant bid, if necessary.<sup>312</sup>

The Panel's decision followed an undertaking by Rio Tinto to issue, within a week, a supplementary bidder's statement making one change to its current bidder's statement. The change was the deletion of the reference in the bidder's statement to the fact that Rio Tinto believed that it was the view of WADR that it agreed with Rio Tinto regarding the need for its approval of modified marketing arrangements for Argyle diamonds. Rio Tinto had not stated in its bidder's statement that it made the reference with the consent of the WADR.

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310 The largest part of Ashton's business was its 40.2% interest in the Argyle Diamond Mining Joint Venture with Rio Tinto. Rio Tinto had a 59.7% interest in the joint venture prior to the takeover, and is the mine operator.

311 (2000) 39 ACSR 40, 42.

312 *Ibid.* See also *Re Email Limited (No 1)* (2000) <http://www.takeovers.gov.au/Content/Decisions/00-003-Email.asp> [33] and *Re Email Limited (No 2)* (2000) <http://www.takeovers.gov.au/Content/Decisions/0040-email-limited.asp> [48].

The Panel did not agree with the other concerns raised by De Beers in relation to Rio Tinto's bidder's statement.<sup>313</sup>

***Re Taipan Resources NL***<sup>314</sup>

On 11 October 2000, the Panel received an application by Troy Resources NL (***Troy***) for an interim order that a meeting of the shareholders of Taipan Resources NL (***Taipan***) scheduled for 12 October be adjourned for a minimum period of 2 weeks and that, in the interim, the Panel should decide whether or not to make a remedial order requiring Taipan to send a corrective statement to its shareholders.

Troy announced to the ASX that its proposed bid was subject to a condition that the merger proposal between Taipan and St Barbara not be approved by Taipan shareholders (or otherwise not proceed).

In order to effect the merger, the ASX considered that Taipan had to pass an ordinary resolution approving the merger.<sup>315</sup> Accordingly, a general meeting of Taipan (the ***Taipan Meeting***) was scheduled in order to pass this resolution, and a number of others.

In addition, on 5 October, Taipan sent a letter to its shareholders which included the statement to the effect that it is open for Troy to waive the condition that the Taipan/St Barbara merger not proceed. Taipan stated that its shareholders should not consider the Troy bid as an alternative to the merger because the prospects of a fully priced bid for Taipan were likely to be enhanced through successful implementation of the merger.

On 6 October, Troy filed an application in the Supreme Court of Western Australia seeking an interlocutory injunction to adjourn the Taipan Meeting scheduled for 12 October. Troy alleged that Taipan contravened section 995 of the Corporations Act, by engaging in conduct that is misleading or deceptive or is likely to mislead or deceive in:

- Suggesting in a letter to its shareholders on 5 October 2000 that Troy might waive the condition that Troy's proposed bid will not be made if the merger with St Barbara is approved (the ***Condition Issue***).
- Failing to properly disclose in the notice for the meeting the impact of a claim by Westgold Resources NL on the accounts of St Barbara (the ***Westgold Issue***).
- Making statements in the Chairman's letter in the Information Memorandum for the Taipan Meeting which contradict statements by the independent experts in the same document concerning the forecast gold production of St Barbara (the ***Gold Production Issue***).

Justice Scott in the Supreme Court of Western Australia heard Troy's application for an interlocutory injunction on 10 October. Justice Scott noted that a decision was required as a matter of urgency and that looking at section 659B of the Corporations Act sensibly and overall, the proceedings initiated by Troy were "in relation to a takeover bid

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313 Takeovers Panel, *Panel reasons in relation to Ashton Mining Ltd*, Press Release, No 00/38 (11 October 2000) 1.

314 (2000) 18 ACLC 919.

315 "This is because under the merger, Taipan was deemed by ASX to be acquiring a substantial asset from Strata Mining NL (***Strata***), namely a 22.51% interest in the shares of St Barbara, in that Taipan's economic interest in St Barbara would be increased by Taipan obtaining a greater percentage of shares in St Barbara through the cancellation of Strata's shareholding in St Barbara. The consideration for this would be the issue by Taipan of Taipan shares to Strata. ASX Listing Rule 10.1 requires, *inter alia*, that an entity must not acquire a substantial asset from a substantial holder without the approval of holders of the entity's ordinary securities. Strata is a substantial holder of Taipan shares": *Ibid*, 922.



or proposed takeover bid” within the meaning of section 659B(1).<sup>316</sup> Justice Scott also observed that the Panel has power to make orders of the type sought by Troy. Accordingly, he found that Troy’s application ought to be made to the Panel rather than the Court.

Following the decision of Justice Scott, Troy made an application to the Panel on 11 October on the same grounds as those contained in the application to the court.

The Panel comprised Simon McKeon as President, Professor Ian Ramsay (sitting deputy President) and Denis Byrne.

The Panel decided that the balance of convenience favoured the meeting going ahead because of the prejudice which may be caused by a further delay.<sup>317</sup> The Panel also agreed with the conclusion of Justice Scott that there was sufficient information available to shareholders to alert a typical shareholder to the issues in contention.<sup>318</sup>

The Panel also considered the decision of Justice Scott of the Supreme Court of Western Australia in a concurrent application by Robert Catto and Batoka Pty Ltd for an injunction to stop the Taipan Meeting from proceeding in which the court also considered the Westgold and Gold Production Issues raised by Troy’s application to the Panel. The court held that the balance of convenience in relation to those issues did not favour adjourning the meeting. The Panel agreed with this conclusion.

However, the Panel said that “shareholders at the meeting should be properly appraised of the issues raised in the application and that the issues should be handled in an objective and balanced manner.”<sup>319</sup> The Panel noted that the decision not to grant the interim order would not prevent the business at the meeting from coming under subsequent scrutiny.<sup>320</sup>

At the Taipan Meeting, the issues raised in the application were brought to the attention of shareholders by the Taipan directors and extracts from the parties’ submissions to the Panel were read out.

The Panel also addressed the issue of costs in this matter. Taipan had asked for an order that Troy pay its costs in relation to the proceedings. The Panel declined to do so because the costs provision in section 657D(1) of the Corporations Act is expressed in such a way that it appears that the Panel can only make a costs order if a declaration of unacceptable circumstances is made.<sup>321</sup> Accordingly the Panel did not think that it had the power to award costs in the circumstances.<sup>322</sup>

### ***Re Pinnacle VRB Limited (No 2)***<sup>323</sup>

On 16 October 2000, Federation Group Limited (***Federation***) applied for declarations and orders in respect of statements issued by Pinnacle VRB Limited (***Pinnacle***) which Federation claimed affected its bid for the shares and options of Pinnacle. Federation alleged a number of deficiencies in statements made by Pinnacle, both in a letter Pinnacle

316 The decision of Justice Scott in *Troy Resources NL v Taipan Resources NL* (2001) 19 ACLC 778, is discussed in greater detail in the third part of Chapter 3 above.

317 (2000) 18 ACLC 919, 926.

318 *Ibid.*

319 Takeovers Panel, *Reasons in relation to Taipan Resources NL*, Press Release, No 00/41 (25 October 2000) 1.

320 (2000) 18 ACLC 919, 927.

321 *Ibid.*, 926.

322 This anomalous position concerning costs is discussed further in the first part of Chapter 4.

323 (2000) <http://www.takeovers.gov.au/Content/Decisions/Pinnacle2publishedreasons.asp>



sent to its shareholders on 9 October (*Pinnacle Letter*) and in its target's statement. Federation's complaint in relation to the Pinnacle Letter was that it represented that Pinnacle, and not Vanteck (VRB) Technology Corporation (*Vanteck*) had taken the initiative in respect of the commercial development of the VRB technology, namely the ESKOM system.<sup>324</sup>

Federation initially applied for:

- Interim orders that Pinnacle post to each of its share and optionholders a notice that Federation has sought orders from the Panel in relation to the Pinnacle Letter and that Pinnacle make an announcement to ASX to the same effect.
- A declaration that the circumstances resulting from the Pinnacle Letter are unacceptable, because the letter is misleading and may adversely affect the success of Federation's proposed acquisition of a substantial interest in Pinnacle under the takeover bids.
- Final orders that Pinnacle make a corrective announcement to acknowledge the matters set out in an announcement made by Federation in reply to Pinnacle's Letter and post copies to its share and optionholders.

After Pinnacle posted its target's statement, Federation amended its application to seek relief in relation to several statements in that document. These related to possible arrangements concerning licensing of the VRB technology by Pinnacle to Expectation Pty Ltd (*Expectation*). Federation also sought a declaration on the basis that Pinnacle had not devoted adequate care to ensuring that its target's statement was complete and accurate.

Federation made takeover bids for all of the shares and options issued by Pinnacle. Pinnacle owns intellectual property concerning electricity storage technology using vanadium redox batteries. Federation offered 2 shares for every 11 Pinnacle shares and 1 of its shares for every 8 Pinnacle options. Federation's bidder's statement was dated 18 September. Offers were posted on 2 October and were due to close on 3 November.

On 17 October Pinnacle lodged and despatched its target's statement which dealt with all Federation's bids. Pinnacle's target's statement contained the claim that Pinnacle had better financial and technical capacities than Federation for the development of the VRB technology. Pinnacle claimed that its target's statement clarified the outstanding issues in relation to the commercial development of the VRB technology, however, nothing in the target's statement repeated or corrected the statement in the Pinnacle Letter concerning the ESKOM system.

The Panel comprised Simon McKeon as President, Professor Ian Ramsay (sitting deputy President) and Robyn Ahern.

The Panel was concerned about the misstatements and omissions made by Pinnacle. As a listed company and a company subject to a takeover bid, the Panel considered that Pinnacle should use the utmost care in preparing and checking its ASX announcements and takeover documents for completeness and accuracy.<sup>325</sup> The Panel noted that subsec-

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<sup>324</sup> Vanteck is a 51% owned subsidiary of Federation which is listed on the Canadian Stock Exchange. Pinnacle licensed Federation to exploit and utilise VRB technology in all of Africa (other than Egypt and the Middle East) and Federation has assigned that licence to Vanteck.

<sup>325</sup> (2000) <http://www.takeovers.gov.au/Content/Decisions/Pinnacle2publishedreasons.asp> [31].

tions 1308(4), (5) and (6), 1309(2), 670A(1), 995(2), 1001A(2) and section 999 in various ways require reasonable steps to be taken to ensure the accuracy of information, or penalise negligence.<sup>326</sup>

In particular, the Panel considered that the licensing arrangements which had not been disclosed by Pinnacle could be material to Pinnacle's prospects of profiting from the commercial development of the VRB technology. In the time available, Pinnacle could not have been expected to say definitively whether the licensing arrangements were valid, but the Panel concluded that the existence of the licensing arrangements and the potential effect on Pinnacle's prospects needed mention.<sup>327</sup>

The misstatements and omissions were material to decisions which share and optionholders needed to make over Federation's bid. Accordingly, the Panel considered that they were capable of giving rise to unacceptable circumstances under sections 602(a) and (b)(iii).<sup>328</sup>

Pinnacle, however, indicated that it was prepared to issue a corrective statement and post it to share and optionholders. Given Pinnacle's willingness to comply and the recent changes in its management, the Panel decided that a declaration of unacceptable circumstances would be excessive.<sup>329</sup> Federation agreed to extend its bid by 14 days, and as a corrective statement could be issued in time for share and optionholders to have it week before Federation's offers closed, the Panel decided that interim orders were unnecessary.

Accordingly, the Panel asked Pinnacle to prepare a supplementary target's statement incorporating corrections to the Pinnacle Letter and to its target's statement. It also included information concerning the Expectation license. The parties (and Expectation) were given the opportunity to comment on a draft of the supplementary target's statement before it was released to the ASX and sent to target share and optionholders.<sup>330</sup>

### ***Re Taipan Resources NL (No 2)***<sup>331</sup>

On 24 October 2000, the Panel received another application from Troy for a declaration and orders in relation to the affairs of Taipan. The application concerned whether the resolution to approve the merger between St Barbara and Taipan which was passed at the Taipan Meeting held on 12 October should be overturned because St Barbara was prohibited under the ASX Listing Rules from voting on the resolution as it was an "associate" of Strata within the meaning given in the Corporations Act. The application also raised a number of other issues in relation to the affairs of Taipan.

The Panel was the same as for the previous applications by shareholders of St Barbara on 27 September and Troy on 11 October, namely Simon McKeon as President, Professor Ian Ramsay (sitting deputy President) and Denis Byrne.

As all of the substantive issues raised in the application had also been raised by Taipan and other parties in a concurrent application to the Western Australian Supreme Court, the Panel declined to conduct proceedings under ASIC Regulation 20.

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326 Ibid, [32].

327 Ibid, [37].

328 Ibid, [37].

329 Ibid, [38].

330 Ibid, [39].

331 (2000) 19 ACLC 778.

The Panel stated that it would “generally be inappropriate for the Panel to conduct proceedings in relation to an application where the evidence and the issues to be considered by the Panel are already before the court”.<sup>332</sup> The Panel stated that where possible duplicative proceedings and forum shopping in circumstances where the functions of the Court and the Panel overlap, should be discouraged.<sup>333</sup>

It was also noted that because the issues raised by Troy’s application substantially overlap with the issues raised by the concurrent applications before the court, and because any Panel proceedings would inevitably involve the Panel examining witnesses and evidence and determining questions of fact and law which are central to the court’s deliberations in the proceedings before it, there was a very real risk that if the Panel conducted proceedings it could be in contempt of court.<sup>334</sup>

The Panel did state that if the court declined to consider any of the substantive issues raised in Troy’s application to the Panel then Troy would be able to make a further application to the Panel at that time.<sup>335</sup>

### ***Re Taipan Resources NL (No 3)***<sup>336</sup>

This was an application made by Taipan on 16 November concerning Troy’s bidder’s statement. Taipan alleged that Troy’s bidder’s statement contained inadequate disclosure in relation to:

- Troy’s ability to fund its bid for Taipan.
- Entitlements to shares in Taipan.
- Discussions between Troy and Rothschild Australia, the holder of a \$1,500,000 convertible note in Taipan.

Taipan also made an allegation of association between Troy and Mr Robert Catto (a well-known greenmailer) and other opponents to the St Barbara/Taipan merger. Taipan requested an interim order restraining despatch as well as substantive relief in the form of a declaration. A very quick turnaround was required (and achieved) for consideration of the interim issues as Troy was entitled to despatch its bidder’s statement on 17 November (the day after the application was received).

The Panel was the same as for the previous Troy/Taipan applications. Simon McKeon as President, Professor Ian Ramsay, (sitting deputy President) and Denis Byrne.

On 17 November, the Panel declined to make an interim order restraining despatch of Troy’s bidder’s statement. After determining the remaining issues, on 20 December, the Panel refused to make a declaration concerning Troy’s bidder’s statement largely due to the fact that the Troy bid was about to lapse very shortly and the indications that Troy would make another bid for Taipan.<sup>337</sup> The Panel also said that it may consider Taipan’s allegations in the event that Troy’s new bidder’s statement did not address all these issues adequately.

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332 Ibid, 789.

333 Ibid, 789–790.

334 Ibid.

335 Ibid, 790.

336 (2001) 37 ACSR 173.

***Re Realestate.com.au Limited***<sup>338</sup>

On 30 November 2000, ASIC made an application (the first by ASIC under the new regime) for a declaration and a variety of orders concerning the bid by two companies associated with RP Data Limited (***RP Data***) for Realestate.com.au Ltd (***Realestate***).

RP Data announced a bid for Realestate on 5 October 2000 which was conditional on due diligence investigations by the bidder (in addition to a number of other conditions). On 30 October RP Data withdrew this bid and announced a new bid for Realestate. The new bid was not conditional on due diligence, but was conditional on a number of other matters, including Realestate's shareholders approving a restructuring proposal. The new bid also omitted a 10 cent per share cash component which was included in the original announcement. RP Data claimed that the revised bid was a result of learning, during the due diligence process, that Realestate's financial position was not as strong as they had expected. Ultimately, neither bid proceeded because Realestate's shareholders agreed to issue 44.2% of the share capital of Realestate to News Corporation in return for \$10.75 million cash and other services.

The Panel comprised Jeremy Schultz (sitting President), Marian Micalizzi (sitting deputy President) and Fiona Roche.

The declaration in *Re Realestate* deserves careful scrutiny, both because it was the first declaration under the new regime, and because it was an unusual matter insofar as it did not involve the typical complaint that the takeover documents contain inadequate information, or are misleading and deceptive.

The Panel found that unacceptable circumstances resulted from the making of the 5 October announcement and that a false market existed in Realestate shares between 5 and 30 October 2000, when the new bid was announced. The Panel cited the immediate cause of the false market as being the reckless announcement by RP Data of an unsustainable bid which was not appropriately qualified.<sup>339</sup>

The Panel also noted that RP Data had used the due diligence condition as a safeguard, instead of properly analysing the public information and the information it had gathered in discussions with Realestate. Moreover, RP Data had failed to take adequate heed of the warning signs which the Panel considered it should have seen in the disclosures, or lack of, made by Realestate in a meeting between RP Data and Realestate on 3 October. In addition, the Panel found that Realestate, by encouraging RP Data to bid without providing any caution to RP Data that Realestate's current financial disclosures were no longer representative of Realestate's financial position, also contributed to the existence of unacceptable circumstances.<sup>340</sup> In the aftermath of the Panel's decision, these statements were seized upon by the media and other commentators who queried whether the Panel might be suggesting that Realestate had failed to comply with its statutory reporting responsibilities. Although the Panel stopped short of claiming that

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337 The delay in making this decision (ie 22 business days between the date of the interim order decision and resolution of the substantive issues) was largely due to the myriad of intervening and more urgent applications by the parties in this matter. However, it should be noted that the Panel advised the parties on 13 December that it saw little point in proceeding with this application when Troy had announced on the same day that it intended to let its current bid lapse in order to launch a fresh bid for Taipan.

338 (2001) 19 ACLC 618.

339 Ibid, 630–631.

340 Ibid, 630–631.

Realestate purposefully misled RP Data, by criticising Realestate for encouraging RP Data to bid without providing any warning that its financial disclosures were not representative of its current financial position, the Panel clearly implied that the information relating to Realestate in the market was wrong and in need of updating.

It is probably as a result of this criticism that there is a perception that the Panel sided with RP Data and that Realestate was more “at fault” than RP Data.<sup>341</sup> This is despite the fact that the Panel stated clearly that both parties contributed to this state of affairs.<sup>342</sup>

In addition, in the penultimate paragraph of its reasons for decision, the Panel observed that Realestate had failed to provide the financial information it required in a timely and coherent manner, and that future Panels in need of financial information ought to consider ordering that a party must engage an external accountant to prepare the information required.<sup>343</sup> The new Panel has issued a number of these type of directives in its reasons statements. Such directives, if acted upon by future Panels, are likely to have far-reaching consequences for market participants.

It is also interesting to note that despite making a declaration, the Panel refused to make any of the orders suggested by ASIC on the grounds that it would impose unfair detriment on RP Data to require it to bid in accordance with the terms announced on 5 October (that is, to omit the reconstruction condition from the 30 October terms and to reinstate the 10 cent per share cash element) in view of the offset in the value of RP Data shares, the rights in damages under section 670E of the Corporations Law, and the substantial contribution to the circumstances of the management of Realestate itself.

As discussed in the third part of Chapter 4, ASIC, perhaps dissatisfied with the Panel’s refusal to make any orders, issued a statement that further action was warranted. The result was that ASIC prohibited Realestate from using the shorter form of disclosure document available for listed companies for a period of 12 months.

### ***Re Taipan Resources NL (No 4)***<sup>344</sup>

On 30 November 2000 (the same day as ASIC’s application in relation to Realestate.com.au was received) Troy sought an interim order restraining the issue of any shares by Taipan,<sup>345</sup> without the leave of the Panel, pending the decision of the Panel on the substantive application in *Re Taipan Resources NL (No 3)*, which concerned an application by Taipan regarding the content and adequacy of Troy’s bidder’s statement. Troy also applied for a declaration that the proposed placement of Taipan shares was an unacceptable defensive issue of shares.

The Panel was the same as for the previous Troy/Taipan applications. Simon McKeon as President, Professor Ian Ramsay (sitting deputy President) and Denis Byrne.

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341 Bryan Frith, “Panel Sides With RP Data Over Lowered Takeover Offer” *The Australian*, 25 January 2001, 20.

342 Takeovers Panel, *Panel Declares Circumstances Unacceptable in Relation to RP Data’s bid for Realestate.com.au Ltd* (23 January 2001) 1. Takeovers Panel, *Panel Publishes Reasons in Relation to Realestate.com.au Ltd Decision* (7 February 2001) 1.

343 (2001) 19 ACLC 618, 632.

344 (2001) 19 ACLC 791.

345 Taipan had called a meeting to pass a number of resolutions, including a resolution authorising the placement of 25 million Taipan shares.

On 14 December, the Panel declined to make the declaration requested. Taipan was able to demonstrate to the Panel's satisfaction that it was in need of the funds which the issue of shares would provide. However, the Panel warned that unacceptable circumstances could arise, particularly if shares were issued to parties involved in the St Barbara merger or their associates, and that if this occurred, the Panel would be willing to consider a further application in relation to those circumstances.<sup>346</sup>

### ***Re Taipan Resources NL (No 5)***<sup>347</sup>

On 4 December 2000, Troy requested a review of a decision by ASIC to allow Taipan extra time to despatch its target statement. Troy sought the earliest possible despatch of Taipan target's statement.

Again the Panel was the same as for the previous Troy/Taipan applications. Simon McKeon as President, Ian Ramsay (sitting deputy President) and Denis Byrne.

The basis for ASIC granting Taipan relief delaying despatch of its target statement was that Troy had applied to ASIC requesting that ASIC waive the defeating condition in its bid. As a condition of earlier relief, ASIC had required that Troy make the condition (ie that the Supreme Court of Western Australia not approve, or St Barbara withdraw its application for approval of, the proposed merger between St Barbara and Taipan) non-waivable.

Troy was seeking the reversal of this condition. ASIC was aware that if it granted Troy's request for relief and allowed it to waive the defeating condition, Taipan would have to make material changes to its target's statement. Accordingly, ASIC consented to Taipan delaying despatch of its target's statement until ASIC had made a decision concerning Troy's application for relief. One of the factors that influenced ASIC in granting Taipan this relief was that Troy had made its application, requesting that the defeating condition be waived, very close to the deadline for despatch of Taipan's target statement. It was at this point that Troy made its application to the Panel.

On 6 December the Panel affirmed ASIC's decision to allow Taipan to delay despatch of its target's statement until ASIC had made a decision concerning Troy's application for relief. In the meantime ASIC refused Troy's application to have the defeating condition waived. The Panel noted that because ASIC had refused Troy's application to have the defeating condition waived, and as the ASIC instrument granting Taipan relief required that Taipan despatch its target's statement by 7 December, there was no order that the Panel could usefully make. In fact even if the Panel had found completely in favour of Troy in its review of the ASIC decision, it could have made no order that would have caused Taipan's target's statement to be sent any earlier.

### ***Re Taipan Resources NL (No 6)***<sup>348</sup>

On 8 December 2000, Troy applied for a review of ASIC's decision to refuse to allow it to waive the defeating condition to its bid.

The Panel was the same as for the previous Troy/Taipan applications. Simon McKeon as President, Professor Ian Ramsay (sitting deputy President) and Denis Byrne.

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346 (2001) 19 ACLC 791, 795–796.

347 (2000) <http://www.takeovers.gov.au/Content/Decisions/TaipanNo5PublishedReasons.asp>

348 (2001) 19 ACLC 797.



ASIC had refused Troy's application to waive the pre-condition that a merger between Taipan and St Barbara Mines not proceed, and in fact ASIC went a step further and made the pre-condition a defeating condition of Troy's bid. As described in *Re Taipan Resources NL (No 5)*, Troy applied to ASIC for a waiver of the defeating condition on 5 December.

The Panel affirmed ASIC's decision to refuse to allow Troy to waive the defeating condition in its bid for Taipan. The Panel said that ASIC's decisions concerning the conversion of the pre-condition into a defeating condition and the subsequent maintenance of that condition, were intended to ensure that the terms of Troy's bid were consistent with Troy's public statements from 19 September until 29 November that its intention was that its current bid would remain subject to the defeating condition.

It was noted that while Troy had at no stage ruled out seeking a waiver of the condition, it did not protest against or challenge ASIC's decision to convert the pre-condition into a defeating condition until 27 November. Moreover, the overall impression given by Troy's public statements was that the bid was conditional on the merger between Taipan and St Barbara not proceeding, thereby offering Taipan shareholders a choice between mutually exclusive alternatives. As a result, many of the acceptances received by Troy under its current bid had been obtained while Troy maintained that public position and accordingly, the Panel agreed with ASIC that in the interests of an informed market, Troy should not be able to free the current bid from the defeating condition.

The Panel went on to say that had it allowed Troy to waive the defeating condition, it would have required:

- Troy to extend its current bid for a sufficient period of time to allow Taipan shareholders to assess the merits of the revised bid and to ensure that Taipan shareholders were not subjected to coercive time pressures in deciding whether or not to accept the bid.
- Taipan shareholders who have already accepted Troy's bid to have a reasonable time to withdraw their acceptances.
- Full and clear supplementary disclosure of Troy's intentions, including its intentions in relation to:
  - representation on the Taipan board;
  - completion of the proposed merger between St Barbara and Taipan; and
  - the merged entity, if the merger proceeds.<sup>349</sup>

The Panel affirmed ASIC's decision, but said that it would not object to Troy making a new and unconditional bid (ie after the close of the current bid it would not declare a fresh bid by Troy unacceptable merely because it was unconditional). However, the Panel noted that in order to reduce confusion amongst Taipan shareholders, a new bid should not commence until after the close of the current bid. Troy proceeded to make a new bid on 18 December 2000, following the close of its first bid.<sup>350</sup>

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<sup>349</sup> Ibid, 802.

<sup>350</sup> Takeovers Panel, *Panel Affirms ASIC Refusal to Allow Troy to Waive Condition*, Press Release, No 00/52 (12 December 2000) 1.



**Re Taipan Resources NL (No 7)**<sup>351</sup>

On 15 December 2000, Taipan applied for a declaration of unacceptable circumstances in relation to Troy's announcement on 13 December that would allow its current, conditional bid for Taipan to lapse and to make another unconditional offer.

Taipan sought a declaration of unacceptable circumstances, and both interim and final orders, including an order restraining Troy from bidding for Taipan. Taipan alleged that its shareholders (and St Barbara's shareholders) could be disadvantaged by the terms of Troy's proposed bid, and that the interests of St Barbara's shareholders should be taken into account because they ought to be treated as contingent Taipan shareholders, pending the confirmation of the proposed merger of Taipan and St Barbara by scheme of arrangement.

The Panel for this application comprised Professor Ian Ramsay (sitting President), Peter Cameron (sitting deputy President) and Trevor Rowe.

On 18 December 2000, Troy lodged a bidder's statement with ASIC. The offer was subject to various conditions, including a number of 'prescribed occurrences' which prohibited certain events during the bid period, namely, Taipan could not: convert shares into a larger or smaller number of shares; reduce capital; enter into a buy-back agreement; issue convertible notes; dispose of property; or wind up the company.

On 18 December, the Panel announced that it had decided not to make interim orders restraining Troy from acquiring shares in Taipan on-market under the new takeover offer. The Panel said that it considered that declining to make interim orders would not cause irretrievable harm if it later decided that the on-market acquisitions, or the new offer, lead to unacceptable circumstances.

The Panel announced its decision concerning the substantive issues in the application on 22 December and dismissed Taipan's application for a declaration of unacceptable circumstances and orders. The Panel said that it did not have sufficient evidence to conclude that there was any material risk that either Taipan or St Barbara shareholders would be unfairly disadvantaged by the terms of, or the making of, Troy's proposed new bid. The Panel noted that there will be other circumstances where a change of intention may cause shareholders and the market harm, and in those cases it will prevent parties from avoiding their stated intentions.

The Panel noted that Troy's announcement and the notices of withdrawal sent to shareholders, had adequately notified the market (and Taipan shareholders) that the previous bid had finished, and that Troy was making a new bid.

**Re Pinnacle VRB Ltd (No 3)**<sup>352</sup>

On 25 January 2001, Federation Group Ltd (*Federation*) applied under section 656A of the Corporations Act for a review of a decision by ASIC not to grant unconditional relief to allow it to exercise options over ordinary shares in Pinnacle VRB Limited (*Pinnacle*) acquired during its takeover bid which, if exercised would take its voting power above the 20% threshold.

The Panel comprised Les Taylor (sitting President), Trevor Rowe (sitting deputy President) and Maxine Rich.

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351 (2001) 37 ACSR 189.

352 (2001) 19 ACLC 605.

The Panel decided to vary the relief granted by ASIC on 29 January 2001, by removing the conditions imposed by ASIC on the exemption it granted to Federation to enable it to acquire ordinary shares in Pinnacle by exercising options acquired by Federation under its takeover bids for Pinnacle.<sup>353</sup>

Under the original relief granted by ASIC, Federation was permitted to exercise the options and acquire the shares, but had to sell (within 14 days) any shares it acquired by exercising the options that would give it more than 20% of the voting rights in Pinnacle. The Panel removed the requirement to sell those shares that would give Federation more than 20% of the voting rights in Pinnacle.

ASIC's main reason for requiring that Federation dispose of those shares within 14 days was that Federation had not positively advised the market in its bid that it may seek to exercise the options, or apply to ASIC to allow it to exercise them. However, the Panel accepted that the market, and Pinnacle shareholders, would have expected Federation to have been able to exercise the options it acquired under its bids, and to have exercised them, especially given that the options were in the money, and that one set of options was due to expire just after the bid closed.<sup>354</sup>

The Panel considered ASIC's unpublished draft policy concerning such situations, and largely followed that policy. The Panel also decided under the circumstances of this application that it was reasonable to allow Federation to retain the excess shares because ASIC's draft policy was not public and accordingly, Federation had no knowledge of it and there appeared no evidence that shareholders and optionholders were unequally or unfairly treated.<sup>355</sup>

### ***Re Taipan Resources NL (No 8)***<sup>356</sup>

On 5 February 2001, Troy applied for interim orders and a declaration of unacceptable circumstances in relation to a takeover bid announced by St Barbara on 21 December 2000 for Taipan. Troy complained that St Barbara's bid:

- breached sections 605, 618, 619 and 650A(2) of the Corporations Act because it was not offering the same consideration for fully and partly paid Taipan shares;
- breached section 621(3) of the Corporations Act because there had been an acquisition of Taipan shares by St Barbara in the four months prior to its bid that required St Barbara to offer more than it had proposed; and
- would be unacceptable if the Taipan directors consented to an abridgement of the time between service and despatch of St Barbara's bidder's statement under item 6 of section 633(1).

The Panel in this matter comprised Professor Ian Ramsay (sitting President), Denis Byrne (sitting deputy President) and Michael Burgess.

It was not necessary for the Panel to make interim orders restraining despatch of St Barbara's bidder's statement because St Barbara undertook not to despatch its statement until 14 February 2001, by which time the Panel hoped to have considered and resolved the substantive issues. On 14 February, the Panel rejected Troy's application.

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353 Ibid, 606.

354 Ibid, 613.

355 Ibid, 612 and 616.

356 (2001) 38 ACSR 102.

The Panel declined to consider Troy's first complaint as that issue was the subject of an application before ASIC for a modification pursuant to section 655A of the Corporations Act. This is yet another example of how the Panel and ASIC are working together to avoid duplication and jurisdictional clashes, thus ensuring that takeovers issues are quickly and efficiently resolved. In relation to the second and third issues, the Panel accepted St Barbara's evidence that there was no breach of section 621(3) and refused to prevent Taipan's directors from agreeing to shorten the time between service and despatch of St Barbara's bidder's statement.

Again in this matter, the Panel showed that it is not averse to criticising the tactical conduct of the parties. In its statement of reasons, the Panel expressed concern at the "serial and adversarial nature" of the matters brought before it by Troy and Taipan.<sup>357</sup> The Panel noted that the "excessively adversarial conduct of the parties has not advanced the interests of the Taipan shareholders" and that it was "particularly disappointed" that Troy chose to raise the issue regarding the alleged breach of section 621(3), as ASIC had investigated this matter and had reported that it was satisfied with St Barbara's response.<sup>358</sup>

### ***Re Taipan Resources NL (No 9)***<sup>359</sup>

On 13 February 2001, Troy applied for interim orders and a declaration of unacceptable circumstances in relation to St Barbara's takeover bid for Taipan.

The Panel for this matter comprised Professor Ian Ramsay (sitting President), Denis Byrne (sitting deputy President) and Trevor Rowe.

On 9 March 2001, the Panel declared that St Barbara had caused unacceptable circumstances and breached section 606 of the Corporations Act by acquiring 4 million shares in Taipan on 12 October 2000, because the acquisition by St Barbara increased Strata Mining Corporation NL's voting power in Taipan to more than 20%.<sup>360</sup>

The Panel invited St Barbara and ASIC to make submissions on the orders proposed by the Panel as a result of its declaration of unacceptable circumstances. The orders concerned 2.7 million Taipan shares – the number of shares by which St Barbara's acquisition caused Strata's voting power to exceed 20%. On 14 March 2001, the Panel resolved to vest the shares in ASIC for sale and ordered that:

- ASIC retain a broker to sell the shares by tender to the highest bidder;
- the shares not be acquired by St Barbara, Strata or any of their associates;
- the shares must be sold no later than 5.00pm on the date prior to the close of St Barbara's takeover bid, currently 20 March 2001;
- ASIC return the net proceeds of sale to St Barbara; and
- if Taipan offers to buy back and cancel the shares at a price equal to or greater than the highest bid received for the shares, ASIC may sell the shares to Taipan.

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357 Ibid, 109.

358 Ibid, 109–110.

359 (2001) 38 ACSR 111.

360 This was because Strata had a relevant interest in the 4 million shares acquired by St Barbara because at all relevant times, Strata's voting power in St Barbara was greater than 20% and therefore it was deemed under section 608(3) of the Corporations Act to have the same relevant interests as St Barbara.

***Re Pinnacle VRB Ltd (No 4)***<sup>361</sup>

On 15 March 2001, Pinnacle applied for a declaration and orders in respect of a takeover bid by Reliable Power Inc (***Reliable***) for all of the ordinary shares in Pinnacle. Pinnacle alleged that Reliable's bidder's statement was deficient in that it contained insufficient information about the funding for its bid.

The Panel comprised Marian Micalizzi (sitting President), Louise McBride (sitting deputy President) and Robyn Ahern.

On 9 April 2001, the Panel decided to make a declaration of unacceptable circumstances because Reliable had not made sufficient arrangements to ensure that it would have funding to pay the consideration offered to shareholders under its bid, with the result that:

- the insufficient funding arrangements detracted from an efficient, competitive and informed market in shares in Pinnacle; and
- Pinnacle shareholders did not have enough information to enable them to assess the merits of Reliable's offer.<sup>362</sup>

The Panel ordered that the offers and contracts under Reliable's bid be cancelled, and that Reliable notify the ASX and shareholders of Pinnacle that its bid had been stopped. The Panel also prohibited Reliable from acquiring a further interest in Pinnacle shares as a result of offers made or acceptances received under its bid.<sup>363</sup>

***Re Pinnacle VRB Ltd (No 6)***<sup>364</sup>

On 10 April 2001, the Panel received an application for the review of its decision in *Re Pinnacle VRB Ltd (No 4)* to stop Reliable's off-market cash takeover offer for the ordinary shares in Pinnacle.

The Pinnacle No 4 Panel decided that Reliable had not demonstrated to the Panel's satisfaction that it, through its financier, New West Capital LLC, had sufficient funds in place for the purpose of paying the consideration offered under its bid.

Reliable's application for review asserted that the Panel's orders should be set aside because the Panel applied an incorrect policy and incorrectly applied that policy because it was presented with evidence that New West had more than sufficient financial resources to meet its obligations to Reliable. Reliable also requested that the Panel extend the date of application of the orders made by the Pinnacle No 4 Panel until the review was completed.

The review Panel comprised Karen Wood (sitting President), Brett Heading (sitting deputy President) and Alice McCleary.

On 1 May 2001, the review Panel announced that it had upheld the decision of the Pinnacle No 4 Panel and the policy it applied, namely, that, in order to ensure that the acquisition of control over the voting shares in a listed company takes place in an efficient competitive and informed market, bidders need to have adequate funding arrangements in place to ensure that they are able to pay the consideration offered under a bid.<sup>365</sup>

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361 (2001) 19 ACLC 1,142.

362 Ibid, 1,148.

363 Ibid, 1,152.

364 (2001) 19 ACLC 1,249.

365 Ibid, 1,250.

However, the review Panel allowed Reliable to proceed with its bid for Pinnacle, subject to Reliable providing further disclosure of its funding arrangements to the shareholders of Pinnacle (such disclosure to be approved by the Panel before being despatched to shareholders).<sup>366</sup> This was because the review Panel received fresh evidence from Reliable concerning its funding arrangements with New West and US Global LLC, and their financial capacity.<sup>367</sup> Accordingly, the review Panel could be satisfied that Reliable had sufficient funding to pay the consideration offered under its bid.

Perhaps the most interesting aspect of this case is that it is one of the rare occasions in which the Panel has ordered that a party pay costs. In this case, the Panel ordered that Reliable pay the party and party costs of the parties to the Pinnacle No 4 proceedings, using the Federal Court scale.<sup>368</sup> The Panel made this order because of “Reliable’s delay in producing satisfactory evidence in relation to its funding arrangements in the Pinnacle 4 proceedings.”<sup>369</sup>

### ***Re Pinnacle VRB Ltd (No 7)***<sup>370</sup>

On 30 April 2001, Reliable applied for a declaration of unacceptable circumstances in relation to the takeover bid made by it on 20 March 2001 for Pinnacle. Reliable alleged that an article published on the internet site of StockHouse International (<http://www.stockhouse.com>) on 27 April 2001, was misleading in relation to the Panel’s decision in *Re Pinnacle VRB Ltd (No 4)*. In particular, Reliable asserted that the heading of the article “*US Takeover Bid Thrown Out Says Pinnacle Director*” was misleading.

The Panel comprised Karen Wood (sitting President), Brett Heading (sitting deputy President) and Alice McCleary.

On 3 May 2001, pursuant to Regulation 20 of the ASIC Regulations, the Panel declined, to commence proceedings in relation to Reliable’s application. The Panel considered the complaint “insignificant” and that the content of the article was clear and not misleading as to the status of Reliable’s bid. The Panel also noted that the appropriate place for the correction of such alleged misconceptions, is in takeover documentation, such as Reliable’s supplementary bidder’s statement.<sup>371</sup>

### ***Re Namakwa Diamond Company NL (No 1)***<sup>372</sup>

On 26 March 2001, the Panel received an application from Namakwa Diamond Company NL (*Namakwa*) for an interim order restraining Majestic Resources NL (*Majestic*) from despatching its bidder’s statement to Namakwa shareholders, and a declaration and orders that unacceptable circumstances exist in relation to Majestic’s bid.

Namakwa’s application asserted that Majestic had contravened section 606 of the Corporations Act and that misleading or deceptive conduct and market manipulation had occurred.

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366 Ibid, 1,251–1,252.

367 Ibid, 1,251.

368 Ibid, 1,252.

369 Ibid.

370 (2001) <http://www.takeovers.gov.au/Content/Decisions/PinnacleNo7.asp>

371 Ibid, [4].

372 (2001) <http://www.takeovers.gov.au/Content/Decisions/Namakwa1.asp>

The Panel comprised Nerolie Withnall (sitting President), Fiona Roche (sitting deputy President) and Chris Photakis.

During the course of the proceedings, the Panel issued a press release concerning an announcement made to the ASX by Namakwa on 30 March 2001 which related to this application. The Panel said that the announcement overstated the extent of the proceedings and contravened the Panel's draft rules which prohibit debating the merits of applications before the Panel in the media. The Panel requested that Namakwa limit the content of future releases to stating the existence, nature and outcome of the proceedings.<sup>373</sup>

On 1 May 2001, the Panel decided to take no further action in relation to the Namakwa application because of a lack of conclusive or sufficient evidence regarding market manipulation in respect of Majestic and Namakwa shares, or breaches of section 606 in relation to Namakwa.<sup>374</sup>

However, the Panel stated that it would keep these issues under review during the currency of the bid. It also required that Majestic not waive the minimum acceptance condition in its bid, without giving the Panel 2 business days' notice of its intention to do so, and details of the level of acceptances and the identities of the target shareholders who have accepted for parcels in excess of 5%.<sup>375</sup>

### ***Re Namakwa Diamond Company NL (No 2)***<sup>376</sup>

On 30 March 2001, the Panel received a second application from Namakwa concerning the takeover bid announced on 15 March by Majestic for all of the shares in Namakwa. This application, like the first, alleged that there were irregularities in acquisitions of Namakwa shares by Majestic and other persons, as well as defects in Majestic's bidder's statement.

Again, the Panel comprised Nerolie Withnall (sitting President), Fiona Roche (sitting deputy President) and Chris Photakis.

On 27 April 2001, the Panel announced that it had made a declaration that unacceptable circumstances in relation to Majestic's bid for Namakwa. The Panel declared that Majestic's disclosure in its bidder's statement and in the Chairman's letter was deficient in that it made claims about projected production capacity and mineral reserves that were not substantiated. Also, the mineral resources were described in terms which were misleading and did not comply with the requirements of the Australian Code for Reporting of Mineral Resources and Ore Reserves. In addition, the bidder's statement did not set out the material assumptions underlying the pro-forma balance sheets provided.<sup>377</sup>

The Panel required that Majestic extend its offer period until at least 17 May 2001, and that it prepare and send to Namakwa shareholders, a supplementary bidder's statement remedying the stated deficiencies.

Again, during the course of this proceeding the Panel had cause to issue a press release censuring the leakage of confidential documents to the media. An article was published on 27 April 2001 in the Australian Financial Review, titled "The Prospectus that Hijacked Namakwa" which contained material from confidential submissions to the

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373 Takeovers Panel, *Panel Receives Further Application in Relation to Majestic Resources' Bid for Namakwa Diamond Company*, Press Release, No 01/27 (2 April 2001) 1.

374 (2001) <http://www.takeovers.gov.au/Content/Decisions/Namakwa1.asp> [50], [55], [65] and [72].

375 *Ibid*, Introduction and [73].

376 (2001) <http://www.takeovers.gov.au/Content/Decisions/Namakwa2.asp>

377 *Ibid*. See paragraphs [16] and [26] – [29].



Panel. In the press release, sitting President Nerolie Withnall stated that this sort of behaviour is “a potential threat to the effectiveness of the Panel’s informal, commercial and expeditious approach.”<sup>378</sup>

***Re Namakwa Diamond Company NL (No 3)***<sup>379</sup>

On 9 May 2001, Majestic applied for a declaration of unacceptable circumstances and orders in relation to alleged deficiencies in the valuation of Namakwa in the independent expert report prepared by Ernst & Young Corporate Finance Pty Ltd (*Ernst & Young*) which accompanied the target’s statement issued by Namakwa on 23 April 2001 (the *Valuation*).

The Panel comprised Nerolie Withnall (sitting President), Fiona Roche (sitting deputy President) and Chris Photakis.

The Panel declined, under Regulation 20 of the ASIC Regulations, to commence proceedings in relation to Majestic’s application on the basis that there was insufficient evidence supporting the application.

The Panel considered that the issues raised by Majestic were matters of opinion which could be appropriately addressed by Majestic in a supplementary bidder’s statement in response to Namakwa’s target’s statement.<sup>380</sup>

Moreover, the Panel observed that the assumptions used by Ernst & Young were carefully and clearly set out in the Valuation enabling readers to make their own assessment of the Valuation.<sup>381</sup>

***Re Taipan Resources NL (No 10)***<sup>382</sup>

On 27 February 2001, Troy applied for interim orders and a declaration of unacceptable circumstances in relation to St Barbara’s takeover bid for Taipan.

Troy applied for a declaration that unacceptable circumstances existed and requested orders that St Barbara issue a replacement bidder’s statement and dispose of any on-market purchases. The application asserted that St Barbara’s bidder’s statement contained disclosure deficiencies in relation to: St Barbara’s funding for its bid; St Barbara and its prospects; and St Barbara’s intentions. The application also asserted that St Barbara’s offer to pay commission to brokers following acceptances by clients was unacceptable.

The Panel comprised Denis Byrne (sitting President), Trevor Rowe (sitting deputy President) and Michael Burgess.

On 16 March 2001, the Panel announced that unacceptable circumstances did exist as a result of the publication of a misleading statement about St Barbara’s funding for its bid for Taipan. St Barbara had stated in its bidder’s statement on 15 February that it had established arrangements with Credit Suisse First Boston International for the sale of the full interest in Goldfields Limited and that the terms of the arrangement were such that the directors believe that St Barbara would have sufficient cash to meet all acceptances within the relevant timeframe.

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378 Takeovers Panel, *Panel Censures Breach of Confidentiality in Relation to Namakwa Diamond Company Application*, Press Release, No 01/37 (27 April 2001) 1.

379 (2001) <http://www.takeovers.gov.au/Content/Decisions/Namakwa3.asp>

380 *Ibid*, [4].

381 *Ibid*, [6].

382 (2001) <http://www.takeovers.gov.au/Content/Decisions/TaipanNo10PublishedReasons.asp>.



However, St Barbara had not in fact made a firm arrangement with CSFB for the sale of the Goldfields shares. St Barbara and CSFB had agreed to use best endeavours to implement a proposal for the sale of the shares, but the price and the terms were still being negotiated and there was no obligation to proceed. The proposal was in fact abandoned on 2 March, after CSFB were unable to sell the Goldfields shares for a price acceptable to St Barbara.

The Panel concluded that St Barbara had not sufficiently explained the indefinite nature of the arrangement with CSFB and had materially overstated the extent to which it had ensured that funds from the sale of the Goldfields shares would be available to pay for acceptances for its bid for Taipan.<sup>383</sup>

However, the Panel decided not to make orders restraining St Barbara's bid or its on-market buying of Taipan shares, as St Barbara had since published firm arrangements to fund its bid.<sup>384</sup>

In relation to the other issues raised by Troy, the Panel found that St Barbara's reporting of its mineral resources in its bidder's statement was neither misleading nor deficient, that St Barbara's intentions regarding compulsory acquisition were sufficiently addressed in its supplementary bidder's statement, and that no further information needed to be disclosed concerning St Barbara's intentions with respect to the call payment schedule for the partly paid Taipan shares.<sup>385</sup>

Perhaps the most interesting aspect of this decision was the Panel's comments on the issue of forecast information. St Barbara's bidder's statement included profit forecasts for the period up to the end of the current financial year (30 June 2001). The Panel accepted that forecasts beyond the end of the financial year would be likely to be speculative and therefore of little use to Taipan shareholders. However, the Panel observed that the explanatory statement for St Barbara's previously proposed scheme of arrangement with Taipan contained projections and that if those projections were no longer a reliable indication of St Barbara's future production, that fact should be disclosed. In addition, the Panel noted that St Barbara was in the process of preparing forecast information for the year ending 30 June 2002, and that if that information was completed during the bid period, it should be disclosed by way of a supplementary bidder's statement.<sup>386</sup>

On the issue of the commission offered by St Barbara to brokers, the Panel noted that while it is possible that the offer of a brokers' commission by a bidder could potentially breach section 623 of the Corporations Act or amount to unacceptable circumstances if the broker or an associate of the broker is also a shareholder in Taipan, or if the commission is passed through to the shareholder by the broker, the Panel did not consider that the brokers' commission offered in this case was significant enough to be likely to induce a shareholder to accept St Barbara's scrip/cash alternative.<sup>387</sup>

Again, in this matter involving Troy and St Barbara, the Panel complained about the conduct of the parties noting that the proceedings "were hindered by the large number of

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383 *Ibid.*, [8].

384 *Ibid.*, [15].

385 *Ibid.*, [44], [65] and [66].

386 *Ibid.*, [56] and [61].

387 *Ibid.*, [89] and [90].

minor, immaterial issues raised by Troy” and that St Barbara’s failure to respond to Troy’s initial attempt to resolve some of the issues was “typical of the lack of cooperation between the parties”.<sup>388</sup>

***Re Pinnacle VRB Ltd (No 5)***<sup>389</sup>

This application concerned Reliable’s bid for all the shares in Pinnacle which was announced on 22 January 2001. During the course of the bid, Pinnacle announced that it had granted 5 year licences to foreign companies to market, sell, manufacture and utilise Pinnacle’s intellectual property in vanadium redox battery technology in various countries throughout the world (the *Transactions*).

On 31 March 2001, Reliable applied to the Panel for interim orders and a declaration of unacceptable circumstances in relation to the Transactions. Reliable argued that the Transactions ought to be subject to shareholder approval because they triggered a defeating condition in the bid, namely, that the target not enter into any material transactions out of the ordinary course of its business.

The Panel constituted Marian Micalizzi (sitting President), Louise McBride (sitting deputy President) and Robyn Ahern.

On 21 May 2001, the Panel announced that it agreed with Reliable, stating that “Pinnacle’s shareholders should decide if the Transactions should proceed, unless there were compelling reasons why shareholder approval should not be required in this particular case.”<sup>390</sup> However, the Panel did not make a declaration of unacceptable circumstances as Pinnacle gave an undertaking that it would convene a shareholders’ meeting to approve the Transactions.

This decision (and the ensuing application for review which is discussed below) are perhaps the Panel’s most controversial decisions to date. The Panel acknowledged that it was, in effect, retrospectively imposing policy on the parties in this case.<sup>391</sup> Despite this, the decision was upheld by the review Panel in *Re Pinnacle VRB Ltd (No 8)*, although the review Panel did add some qualifications to the decision at first instance.

***Re Pinnacle VRB Ltd (No 8)***<sup>392</sup>

On 23 May 2001, an application was made by Reliable following the Panel’s decision in *Re Pinnacle VRB Ltd (No 5)* that it would not make a declaration of unacceptable circumstances because Pinnacle had given an undertaking that it would convene a shareholders’ meeting to approve the Transactions.

The review Panel comprised Justice Kim Santow (sitting President), Trevor Rowe (sitting deputy President) and Denis Byrne.

Reliable argued that the Transactions could not proceed even with shareholder approval because the Transactions were “vitiating by improper purpose and/or lack of good faith on the part of Pinnacle’s directors in that the transactions were intended to defeat its bid.”<sup>393</sup>

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388 Ibid, [125] and [126].

389 (2001) 19 ACLC 1,154.

390 Ibid, 1,158.

391 Ibid, 1,160. The Panel made no apology for this retrospectively imposed policy which it justified by simply stating that “Part 6.10 of the Law must occasionally impose new policy retrospectively. The Panel will now develop a policy statement in relation to this issue to provide some guidance for target directors in the future”: Ibid, 1,163.

392 (2001) 19 ACLC 1,252.

393 Ibid, 1,258.

The review Panel disagreed and upheld the decision of the Pinnacle 5 Panel, citing section 602(c) of the Corporations Act as support for the proposition that in general, shareholder approval must be sought for any material transaction which would trigger a bid condition which is likely to lead to the defeat of the bid.<sup>394</sup> It is interesting to note that the Panel executive conducted an on-site investigation during the Pinnacle 5 proceedings and did not discover any evidence that the target intended to frustrate the bid.<sup>395</sup>

However, the review Panel did include some qualifications which it stated were intended to strike a balance between “restraining unfair defensive or condition-triggering manoeuvres on the target’s part whilst not interfering unreasonably with the ordinary and proper conduct of the target’s business during a bid period.”<sup>396</sup> The first qualification is that it does not necessarily follow that “the Panel would be satisfied that the target board may simply act to defeat or delay a takeover offer by entering into transactions of dubious benefit by the simple expedient of putting matters to members.”<sup>397</sup> In other words, a target board must remain mindful of its duties. The second qualification is that in some “exceptional circumstances” the Panel may be satisfied that approval of members need not be sought despite an action triggering a bid condition. The Panel cited, by way of example, a transaction so significantly advanced at the time of the bid that it could not have been designed to forestall the bid and which is clearly for the commercial advantage of the company.<sup>398</sup>

The review Panel also required the shareholders meeting be held as soon as practicable so that shareholders would be presented with the choice between allowing the Transaction to proceed which would defeat the bid or, alternatively, accepting the bid (which would allow the bidder to vote the shares to defeat the resolution).

Although this case has been criticised and debated at length, the decisions of both the Panel at first instance and the review Panel appear much less subversive and radical when confronted by the plethora of similar restrictions in other jurisdictions. The review Panel cited the restrictions concerning frustrating actions in the London City Code, the New Zealand Takeovers Code and the Hong Kong Code on Takeovers and Mergers, as support for its decision.<sup>399</sup>

One commentator has also suggested that the decisions in this case were made easier by the fact that there was “a clear relationship” between the target and a party in one of the “frustrating” transactions which caused the ASX to require shareholder approval under listing rule 10.1.<sup>400</sup> Another commentator has criticised the Panel for failing to determine whether the directors of Pinnacle had breached their duties and instead passed this regulatory function to the shareholders, who may or may not be equal to the task.<sup>401</sup>

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394 Section 602(c) of the Corporations Act provides that holders of the target’s shares must have a reasonable and equal opportunity to participate in any benefits from the bid proposal. The Panel’s finding is further supported by section 657A(3) which instructs the Panel to take into account the actions of directors when deciding whether to declare circumstances unacceptable, “including actions that caused the acquisition or proposed acquisition not to proceed or contributed to it not proceeding.”

395 (2001) 19 ACLC 1,154, 1,161.

396 (2001) 19 ACLC 1,252, 1,255.

397 *Ibid.*

398 *Ibid.*

399 *Ibid.*, 1,266–1,269.

400 See David Friedlander, “Year Two of the New Takeovers Panel: Some Thoughts” (2001) 18 *Butterworths Corporation Law Bulletin* [505].

401 Jennifer Hill and Jeremy Kriewaldt, “Theory and Practice in Takeover Law – Further Reflections on Pinnacle No 8” (2001) 19 *Companies and Securities Law Journal* 391, 392 and 395.

No doubt the policy which the Panel has foreshadowed that it will issue on this topic will inspire a lively debate once it is released.

### ***Re Namakwa Diamond Company NL (No 4)***<sup>402</sup>

On 15 May 2001, the Panel received an application from Majestic for a review of the decision in *Re Namakwa Diamond Company NL (No 3)*.

The Panel for this matter was Simon McKeon as President, Professor Ian Ramsay (sitting deputy President) and Elizabeth Alexander.

On 27 May 2001, the Panel decided that it would affirm the decision in *Re Namakwa Diamond Company NL (No 3)* on the basis that it was consistent with the decision in *Re Namakwa Diamond Company NL (No 2)*. The review Panel considered that the deficiencies that the Namakwa 2 Panel identified in Majestic's bidder's statement were materially different to those alleged in *Re Namakwa Diamond Company NL (No 3)* which concerned deficiencies in Namakwa's target's statement regarding a valuation report concerning Namakwa's shares. In addition, the review Panel agreed that:

- the valuation report criticised by Majestic in *Re Namakwa Diamond Company NL (No 3)* contained a sufficient description of the assumptions used so that readers would not be misled and could assess the uncertainties in those assumptions and the valuation; and
- the nature of the matters raised in Majestic's application meant that they could be appropriately raised by Majestic in a response to Namakwa's target's statement.<sup>403</sup>

### ***Re Vincorp Wineries Limited***<sup>404</sup>

On 28 February 2001, the Panel received an application for a declaration of unacceptable circumstances in relation to the bidder's statement issued by Simon Gilbert Wines (SGW) in its scrip bid for Vincorp Wineries Limited (**Vincorp**). The application asserted that SGW's bidder's statement contained insufficient disclosure in relation to the historical performance of SGW; the effects on SGW of the acquisition of the "Talbragar property"; and the future performance of SGW if its bid was partly or fully successful.

The Panel in this matter comprised Jennifer Seabrook (sitting President), Brett Heading (sitting deputy President) and Maxine Rich.

Following a Panel conference with the parties held on 20 February 2001, the Panel indicated that it had reservations about the adequacy of the information provided to Vincorp's shareholders by SGW in its bidder's statement, and SGW gave undertakings to the Panel to provide further information to Vincorp's shareholders in the form of a supplementary bidder's statement and to extend the close date for its bid. However, on 26 March 2001, the Panel dismissed Vincorp's application following an announcement by SGW that it intended to rely on a defeating condition of its bid which would not be fulfilled and that all contracts and acceptances under the bid would therefore be void at the end of the offer period on 2 April 2001. On this basis, the Panel consented to the withdrawal of the undertakings by SGW.

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402 (2001) <http://www.takeovers.gov.au/Content/Decisions/Namakwa4.asp>

403 *Ibid*, [20].

404 (2001) 38 ACSR 584.

This decision is important because of the guidance it provides for practitioners and market participants in respect of forecasts. There has been a good deal of uncertainty over the years as to when profit forecasts are required in scrip takeovers.<sup>405</sup> Generally speaking, the case law has distinguished between seasoned issuers and new entities, such that the former has often avoided the need for forecasts, whereas the latter has been required to provide them. This decision is problematic in that it does not make any distinction between seasoned and new issuers which is likely to irk practitioners and market participants who have come to expect that seasoned issuers with a share price history against which target shareholders can benchmark a bid, will obtain some benefit from that fact.<sup>406</sup>

Other important factors which have impacted upon whether or not forecasts are required include the industry in which the issuer participates and the level of reliability of the information which can be provided. In this matter, the Panel said that section 602(b), read in light of sections 636(1), 713(2) and 713(5) demonstrates a legislative policy that bidders offering scrip ought to provide profit projections and/or forecasts if they have reasonable grounds for doing so. Moreover, if it is not possible to provide such information, the Panel has indicated that the bidder needs to explain why.<sup>407</sup>

### ***Re Taipan Resources NL (No 11)***<sup>408</sup>

On 27 February 2001, the Panel received an application from Troy concerning the bid by St Barbara for all of the shares in Taipan.

Following the Panel's decision on 27 March 2001, in relation to *Re Taipan Resources NL (No 10)*, the Panel received an application from Troy for a review of the Panel's decision in that matter. The application by Troy requested that a review Panel be constituted to reconsider a number of the issues decided in *Re Taipan Resources NL (No 10)*, namely whether:

- the funding available to St Barbara was adequate to meet its obligations under its bid and whether St Barbara's disclosure in relation to its funding arrangements was adequate;
- the level of forecast disclosure by St Barbara was adequate;
- the valuation of the scrip/cash alternative in St Barbara's bidder's statement was unacceptable; and
- other issues raised by Troy in its application constituted unacceptable circumstances or, to the extent that they may have been unacceptable, whether they had been adequately remedied by St Barbara's supplementary disclosure.

The Panel for this matter was Dr Annabelle Bennett (sitting President), Peter Cameron (sitting deputy President) and Professor Ian Ramsay.

On 5 June 2001, the review Panel announced that it had affirmed the decisions made by the Panel in the matter of *Re Taipan Resources NL (No 10)*, and therefore dismissed Troy's application for review.

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405 Compare *Pancontinental Mining Ltd v Goldfields Ltd* (1995) 16 ACSR 491; *GIO Australia Holdings Ltd v AMP Insurance Investment Holdings Pty Ltd* (1998) 29 ACSR 584 and *Solomon Pacific Resources NL v Acacia Resources Ltd* (1996) 19 ACSR 238.

406 See Friedlander, above n 400.

407 (2001) 38 ACSR 584, 591.

408 <http://www.takeovers.gov.au/Content/Decisions/TaipanNo11PublishedReasons.asp>

This decision is interesting for the reason that it is one of the few decisions in which the Panel has required a party to pay the costs of another party. An undertaking as to costs was given by Troy at the request of Denis Byrne, the sitting President of the Panel in *Re Taipan Resources NL (No 10)*, who consented to the review application being processed subject to Troy undertaking to pay the reasonable costs of the parties in relation to the review proceedings if the review application failed.

This decision also builds upon the Panel's work in *Re Vincorp Wineries Limited* concerning forecasts. In *Re Taipan Resources NL (No 10)* it was argued by St Barbara, and accepted by the Panel, that the forward looking statements in the explanatory statement for the scheme of arrangement (which was later abandoned) that were sent to Taipan shareholders in or around September 2000 were 'projections' and accordingly should be distinguished from 'forecast' information, which is of higher quality.<sup>409</sup> St Barbara also argued that it should not be required to confirm or update the projections contained in the explanatory statement because of the progress it had made towards completion of forecast quality information and the possibility that the forecast may differ from the projections. While the review Panel in this case agreed that St Barbara ought not be required to provide additional forecast information in view of the information that was available to it and the unpredictable nature of St Barbara's mining operations, it went a step further and stated that St Barbara:

should have disclaimed [the] projections [in the scheme documents] and explained that they may no longer be reliable. We think it is sound policy that, where a bidder has recently issued forecasts or projections, the bidder should either disclaim or substantiate those forecasts or projections in its bidder's statement. St Barbara should also have explained why it was not appropriate to provide similar information in its bidder's statement.<sup>410</sup>

The review Panel noted that as a rule, the provision of such information will be of material benefit to shareholders. However, in the circumstances of this case, it did not make a declaration of unacceptable circumstances because it considered that the absence of any such disclaimer or explanation was not a material factor in a Taipan shareholder's decision whether or not to accept St Barbara's bid.<sup>411</sup>

### ***Re Alpha Healthcare Limited***<sup>412</sup>

On 3 May 2001, the Panel received an application from Alpha Healthcare Ltd (*Alpha*) in relation to the takeover bid by Ramsay Centauri Pty Limited (*Ramsay*) for all of the shares in Alpha. Alpha requested a declaration of unacceptable circumstances and orders concerning a pre-bid agreement dated 9 April 2001 (the *Pre-Bid Agreement*) between Ramsay, Ramsay Healthcare Ltd (*RHC*), SHG Holdings Pty Limited (receiver and manager appointed) (*SHG*) and Sun Healthcare Group Australia P/L (receiver and manager appointed) (*Sun Healthcare*).

Alpha complained about the level of disclosure in Ramsay's bidder's statement in relation to the Pre-Bid Agreement, and alleged that the Pre-Bid Agreement affected the market for control of Alpha, or placed the parties to that agreement (namely, Ramsay, SHG and Sun Healthcare) in an unfairly advantageous position.

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409 Ibid, [56] – [57].

410 Ibid, [58].

411 Ibid, [59].

412 (2001) 39 ACSR 238.



The Panel in this matter comprised Maxine Rich (sitting President), Jeremy Schultz (sitting deputy President) and Jennifer Seabrook.

On 21 May 2001, the Panel rejected Alpha's application. Under the Pre-Bid Agreement, Ramsay had agreed with Sun Healthcare to purchase from it all of the Alpha debt owed to Sun Healthcare for \$6,133,333, a substantial discount to its face value of \$24.7 million. It also agreed to purchase 19.9% of the voting shares in Alpha, part of the 37.5% parcel held by Sun Healthcare, for \$0.40 per share.

However, the Panel found Ramsay's evidence convincing and concluded that Ramsay's acquisitions from SHG and Sun Healthcare under the Pre-Bid Agreement (specifically of Alpha debts and the first 19.9% parcel of Alpha shares) did not show any transfer of value between the debt and equity components bought by Ramsay. Accordingly, the Panel found that there was no unequal benefit gained by Ramsay.<sup>413</sup>

Alpha also claimed that Ramsay's acquisition of Sun's remaining parcel of 17% of Alpha's shares breached section 606 of the Corporations Act. However, the Panel considered that this acquisition did not take place other than as permitted pursuant to Ramsay's takeover bid. As a result, the Panel concluded that the Pre-Bid Agreement did not adversely affect the market for control of Alpha.<sup>414</sup>

The disclosure issues were resolved between the parties without the assistance of the Panel. This is a good example of how the Panel process often assists the parties to resolve issues without the need to resort to a third party arbiter. In fact, the Panel commended Alpha, Ramsay and ASIC for their co-operation in achieving a "very sensible outcome" in relation to the disclosure issue.<sup>415</sup>

### ***Re Australian Liquor Group Limited (No 1 and 2)***<sup>416</sup>

On 12 July 2001, Liquorland Pty Ltd (a subsidiary of Coles Myer Limited) (*Liquorland*) applied for an interim order permitting it to withhold the bid consideration payable by it to all shareholders of Australian Liquor Group Ltd (*ALQ*), and for a declaration of unacceptable circumstances and final orders allowing it to reduce the consideration offered under its bid for ALQ on the basis that disclosure of ALQ's financial performance was inadequate.

The Panel in this matter comprised Alice McCleary (sitting President), David Gonski (sitting deputy President) and Carol Buys.

The Panel noted that this application was unusual because "the party which claims to have suffered because a bid took place in an uninformed market is the bidder".<sup>417</sup> The Panel also stated that its powers were not "limited to protecting shareholders other than a bidder, and unacceptable circumstances may exist, although the only person adversely affected by a lack of information in relation to a bid is the bidder. The issue is whether the market is informed, not whether any particular participant is informed."<sup>418</sup>

The Panel cited paragraph 657D(2)(a) as the provision which empowered it to make an order protecting the rights of Liquorland, being "a person affected by unacceptable circumstances".

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413 Ibid, 249.

414 Ibid, 254.

415 Ibid.

416 (2001) 39 ACSR 14.

417 Ibid, 18.

418 Ibid.



The Panel granted an interim order for a period of 14 days, restraining payment by Liquorland to the ex-directors of ALQ, and their associates, in respect of the shares which those persons sold into Liquorland's takeover bid. The Panel directed Liquorland to pay the monies owing to the ex-directors and their associates<sup>419</sup> into an interest bearing trust account. The Panel directed that the money, and accrued interest, be paid out of the account in 14 days, unless otherwise ordered by a court. However, the Panel made no order concerning the payments to other ALQ shareholders.

The interim orders were based upon submissions which indicated that it was likely that unacceptable circumstances existed in relation to the market in ALQ shares for a material portion of 2001. The evidence also suggested that during the first half of 2001, ALQ became aware that the information on which it based revenue and profit statements and forecasts was very likely to be materially unreliable, and that the directors of ALQ did not inform the market of the unreliability of its revenue and profit statements and forecasts in any relevant or timely manner. However, the Panel did not go on to test this evidence as it considered that the dispute was "likely to be prolonged and to involve the consideration of a great deal of documentary and oral evidence [such that] [i]t is most unlikely that it could be concluded within a period commensurate with the short time frames contemplated in Part 6.10."<sup>420</sup> For instance, the Panel stated that it would be difficult or impossible to decide what price Liquorland would have offered, and the ALQ shareholders would have accepted, had the market been adequately informed and that given that the Panel was unable to ascertain that price with confidence, it would be unfair to impose a price reduction on ALQ shareholders without offering them the choice of withdrawing their acceptances under the bid.<sup>421</sup> However, the Panel noted that because ALQ had ceased to exist as an entity, this did not appear to be a viable option.<sup>422</sup> Accordingly the Panel concluded that it would be preferable for it to decline to attempt to make the orders requested as a court would be a more appropriate forum to resolve Liquorland's allegations and to make orders for any compensation or damages.<sup>423</sup>

The Panel later modified and extended its interim order made on 17 July. However, when Liquorland initiated proceedings in the Supreme Court of Victoria, and that the court made consent orders further restraining payment to the ALQ directors, the Panel decided to hold over sine die its proceedings in relation to Liquorland's application.<sup>424</sup>

The decision shows that the Panel is clearly not focussed upon acquiring and holding on to its "territory" at all costs. It is clearly willing to appraise each individual matter and tailor a response that is most appropriate given all the circumstances, including relinquishing jurisdiction to the courts if that will facilitate a timely resolution of the dispute.

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419 However, the Panel did grant the "associates" of the ex-directors of ALQ 48 hours to make submissions as to why the consideration for their ALQ shares should be released prior to the 14 days of the interim order.

420 (2001) 39 ACSR 14, 21.

421 *Ibid.*, 19–20.

422 *Ibid.*

423 *Ibid.*, 21.

424 Takeovers Panel, *Panel Holds Over ALQ Proceedings*, Press Release, No 01/68 (8 August 2001) 1.

## Chapter 7

# Assessment of the Panel's Performance to Date and Current Challenges

This Chapter assesses the Panel's performance to date and examines some of the challenges which face the Panel over the coming months and years. Despite the work done by the Panel and its executive, the new Panel still has many challenges to confront and overcome. The reinvigorated Panel is still in its infancy and many of its members are very new to their role. It will take time for precedents to be established and for the confidence of the Panel members, as well as the confidence of the business community in the competence of the Panel, to grow.

The first part of this Chapter examines some of the criticisms raised by practitioners and the attempts that the Panel has made to address their concerns. The second part considers some of the difficulties that the Panel faces in taking over from the courts as the main forum for resolving takeover disputes. The third part explores the potential for challenges to the Panel's decisions, and the fourth part canvasses the more specific concern that the constitutional foundation of the Panel may be subject to challenge. The final part examines the Panel's initial reluctance to use its power to declare circumstances unacceptable and whether that will have any lasting impact on the Panel.

### Perceptions of the Panel<sup>425</sup>

The Panel and the rationale behind it, namely to provide a flexible, speedy and informal forum for takeover dispute resolution, has not been universally supported. As far back as 1987 at an address given at the annual dinner of the Victorian committee of the Commercial Law Association, Justice Marks of the Supreme Court of Victoria commented that:

Regulation without or with reduced avenues to the courts could lead to ... deprivation of rights with augmented bureaucratic power...[and] moves ... to reduce, if not withdraw, supervisory powers of the courts over the operation of the law in the area of takeovers threaten impartial application of the law, greater and more expensive obstacles to commercial freedom and propose the spectre of government interference...<sup>426</sup>

Despite the dire predictions of Justice Marks, commentators have generally been complimentary regarding the early efforts of the new Panel. John Durie stated that the Panel "won universal acclaim for its first outing in settling a range of disputes in the heated takeover battle"<sup>427</sup> between AIF and Infratil. It was noted that "the fact that both sides walked out claiming victory and the speed with which the decision was reached is testi-

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425 While this part of Chapter 7 draws upon some comments made in journal articles and in the media, it is based primarily upon reviews of Panel matters in which the author participated while a member of the Panel executive from 10 January 2000 to 10 January 2001.

426 Justice Marks, "Takeover Litigation in the Supreme Court of Victoria" (1987) *Commercial Law Quarterly* (June) 17, 20.

427 John Durie, "The old dog might get back some of its bite" *Australian Financial Review*, 11 May 2000, 78.

mony to the success"<sup>428</sup> of the Panel. In addition, it was thought that the "primacy of continuous disclosure was upheld and on any reading a rational commercial and legal outcome was reached quickly, which is exactly what the Panel is meant to deliver."<sup>429</sup>

The new Panel has from the very beginning been timely in its decision making. For example, the Panel achieved its 48 hour bench mark for dealing with requests for reviews of ASIC decisions in its first application for such a review from AIF in relation to its bid for Infratil. In relation to deciding applications for declarations of unacceptable circumstances, the Panel decided the substantive issues raised by Infratil's application, including conducting a conference, in just 5 business days. The Panel's second matter concerning Smorgon's attempted takeover of Email required the appointment of 2 Panels and encompassed 3 separate decisions<sup>430</sup> and yet it took just 15 business days (which included a 2 day conference) to resolve.

Overall, parties have been impressed with the Panel as an alternative to the courts, and in particular have appreciated the timeliness of its decisions and the quality of its reasons. Parties have also generally been satisfied with the outcomes achieved by the Panel. Even parties whose applications have been rejected are generally content with the treatment of their application by the Panel. Interestingly, parties have indicated that they view the Panel process as more of a commercial negotiation which is not strictly "win or lose" and cannot be approached in the same way as a court case. Rather, the Panel process is more conducive to achieving mutually agreed solutions.

Perhaps the most encouraging aspect of the new regime is that it has fostered a perception amongst bidders and their advisers that despatch of a bidder's statement is unlikely to be restrained, particularly if a party is willing to be reasonable and accommodate the key concerns of the target. This is a huge improvement because in the past there was always a perceived risk that a judge (usually lacking in takeovers experience) may make an arbitrary decision to restrain despatch of the bidder's statement.<sup>431</sup> It was generally acknowledged that "you may have a good case, but before a bad judge you can still lose."<sup>432</sup>

However, it has been the procedures employed early on in the life of the new Panel that have attracted the criticism of the parties. The Panel executive routinely conduct reviews of matters, also known as "post-mortems", several weeks after the Panel matter has concluded. This provides an opportunity for the parties (usually through their legal advisers) to comment on the process. It is also a valuable exercise for the Panel as it is the main way it gathers feedback which assists it to evaluate the service it provides. Overall the comments have been positive and criticism has been constructive. A number of sensible procedural changes suggested by parties in these sessions have, to varying degrees, been implemented. Some of these criticisms and suggestions are discussed in the following paragraphs.

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428 Ibid.

429 Ibid.

430 Namely, the Panel's decision at first instance in relation to the request for interim orders, the review of that decision by a review Panel, and the Panel's final decision in relation to the substantive issues.

431 Roman Tomasic and Brendan Pentony, "Judicial Technique in Takeover Litigation in Australia" (1989) 12 *University of New South Wales Law Journal* 240, 244. In this survey, it was the predominant view, even of the judges themselves that specialist commercial knowledge is essential to adequately deal with takeovers litigation.

432 The view of a merchant banker in Tomasic and Pentony, above n 431, 245.

Various practitioners have expressed a concern that the Panel process is skewed in favour of the applicant because applicants control the timing of the application and by filing the application as late as possible cause significant hardship for the respondent. This advantage is amplified by the fact that applicants have an extra opportunity to put their case, first in the application and again in response to the brief. In response to this complaint, the Panel now directs questions in the brief to particular parties so that generally applicants are asked only to provide more evidence or expand on factual details, whereas the questions directed to the respondent are much more wide ranging. Another initiative taken by the Panel which attempts to correct this imbalance is the procedures established by Policy 5 for the appropriate timing for applications to restrain despatch of takeover documents. That Policy, which is discussed in more detail in the first part of Chapter 6 above, states that an application to restrain despatch should be made not less than 5 calendar days before the first day on which the offer documents can be posted in order to ensure that the Panel has sufficient time to make its decision.<sup>433</sup> This Policy also assists respondents who may be prejudiced by tight timeframes.

Another issue often raised by parties is the infrequency of Panel conferences to resolve takeover disputes. The Panel has overwhelmingly preferred to decide matters on the basis of written submissions, and it is apparent from discussions with practitioners that there is some resistance to matters being decided without a conference. A portion of the takeovers community appears to have a perception that the Panel is a “black box” from which decisions emerge from time to time. Generally lawyers are more comfortable with this than the other participants in the process, namely the investment bankers and the clients. This is most likely because the Panel operates in much the same way as ASIC does when it has a request for an exemption or modification in respect of Chapter 6 of the Corporations Act that raises difficult policy issues which must go to a Regulatory Policy Group meeting. Accordingly, lawyers in this area of practice are already familiar with this type of in-camera decision-making. However, there is an argument that while such a process is acceptable in relation to ASIC’s administrative decision-making process it is not appropriate for the Panel because the Panel is performing a role more akin to that of a court. Accordingly, the Panel not only needs to be fair, it needs to be seen to be fair. Much of the formality attached to the court process is designed to engender a respect for the process so that even when a party is unsuccessful, its respect for the process is preserved because justice is seen to have been done. In this way it has been suggested that the Panel has underestimated the importance of transparency of proceedings which is essential if the Panel is going to earn the support and respect of the market.

However, the Panel has demonstrated that it is sensitive to parties’ concerns that conferences are not held often enough and it has held 7 conferences with parties including 4 face-to-face meetings, 1 via telephone and 2 using video conferencing facilities. Ultimately it is not practical for the Panel to conduct a conference in respect of every matter that is brought before it. In pursuing the mandate bestowed upon it by the legislature, the Panel’s decision-making must be timely and informal and conferences do not always promote these objectives. In addition, the expense and logistics of conducting conferences may in some cases be an issue, especially when Panels are comprised of members

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433 [http://www.takeovers.gov.au/Content/Policy/010403\\_PS5.asp](http://www.takeovers.gov.au/Content/Policy/010403_PS5.asp) [5.12].

in a number of different states and the parties and their advisers are similarly diversely situated. However, the Panel's obvious willingness to explore alternatives, such as telephone and video conferencing which may enable conferences to be conducted more frequently, is an indication that the Panel is keen to address the concerns of parties.

Another complaint is that proceedings in some cases have been too fast, and parties have not had an adequate opportunity to respond to the issues identified in the brief or the other parties' submissions. At this stage there do not appear to be any plans to change Panel Rule 9.6 which sets out the time periods for responses.<sup>434</sup> However, the Panel carefully monitors situations in which parties press for these time periods to be altered (such as where there has been a late application) to ensure that no party is disadvantaged.

A number of comments were made early in the life of the new Panel with respect to the Panel's tendency to accept undertakings rather than make declarations.<sup>435</sup> However, there is no evidence that this practice has led to any lasting negative perceptions about the Panel or a lowering of standards in relation to takeover documentation.<sup>436</sup> It could be argued, particularly in light of the reaction to the declaration in the Realestate matter, that the Panel's apparent reluctance to declare circumstances unacceptable elevated the threshold for a declaration of unacceptable circumstances (which is not intended to apportion blame) back up to the level of unacceptable conduct or an unacceptable acquisition, which was the threshold under the previous regime and which did contain an element of opprobrium.<sup>437</sup> However, the reaction to the Realestate declaration may have been due to it being the new Panel's first declaration, and the particular circumstances of that case which called into question whether Realestate had been complying with its continuous disclosure obligations.

Parties have also suggested that there ought to be a more representative spread of members, namely more lawyers and investment bankers from Melbourne and Sydney. This criticism was addressed, to some extent, when on 12 March 2001 it was announced that 18 new Panel members had been appointed, 9 of whom are lawyers or investment bankers in Melbourne and Sydney.<sup>438</sup>

## **Big Shoes to Fill – Replacing the Court as the Main Forum for Resolving Disputes About a Takeover Bid Until the Bid Period has Ended**

As discussed in the third part of Chapter 4, one of the most challenging aspects of the Panel's new role is having to step into the shoes of the court. Deciding whether or not to grant interlocutory relief in relation to takeovers has always been a difficult issue. Even the most experienced judges have struggled with whether to grant an injunction, often based upon incomplete evidence, or allow a bid to proceed notwithstanding that it

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434 That is, 3 days to respond to a brief regarding an application for a declaration or order and 1 day for a brief which concerns an application for an interim order, a request for a review of an ASIC or Panel decision, or a submission other than an initial application.

435 This issue is discussed in greater detail in the final part of this Chapter.

436 Nicole Calleja, "Tiptoeing Through Chapter 6 – The Panel's Reluctance to Declare Circumstances Unacceptable" (2001) 19 *Company and Securities Law Journal* 323.

437 See the discussion of *Re Realestate.com.au* in Chapter 6 above.

438 Corporations & Securities Panel, *New Takeovers Panel Completes Successful Year*, Press Release, 01/18 (12 March 2001) 2. A list of all the current Panel members is in Annexure 1.

may later be pronounced defective. It is widely acknowledged that as a result of “commercial consequences, the outcome of the application for interlocutory relief quite often determined the fate of the takeover bid.”<sup>439</sup>

In taking over this function of granting injunctive relief from the courts, the Panel has also assumed the burden of those issues that plagued the courts, such as consistency of decision making, as well as some new ones, such as timeliness, commerciality and informality which are imposed by the legislative regime that is peculiar to the Panel. In addition, the challenges presented by these issues are exacerbated by the fact that the Panel, in its current form, is a new body, with a diverse range of members both in respect of their experience and their geographical locations. There is a view that the Panel’s fluid and constantly fluctuating membership is not conducive to consistency and well-informed decision-making. Some advocates of this view consider that the judiciary is better equipped to evaluate and decide takeover disputes because there is no substitute for years of judicial experience. Admittedly, there are currently 44 members, and in any given matter there are many members who are ineligible for selection because they, or the firm they work for, has a conflict.<sup>440</sup> Therefore, the composition of sitting Panels has the potential to, and does, vary enormously.

However, each Panel generally includes a member who is a takeovers lawyer, an investment banker and an experienced business person who is well versed in the commercial consequences of regulatory and judicial interference in a bid. The Panel also has the advantage of being relieved of the formality of court processes. In addition, regular educational sessions are conducted by the Panel executive in order to try to promote consistency by keeping members abreast of current matters and issues. The Panel also has the benefit of work done by its policy sub-committees and the reasoning in the decisions of previous Panels. Some argue that this means the Panel is better placed to make an expedient and well-informed decision. However, that is not to say that the judiciary may not make a valuable contribution to the Panel.

The judiciary’s ability to make a valuable contribution to the development of the new Panel has been recognised and, in an attempt to harness some of the skills, knowledge and expertise of the judiciary, Justices Robert Austin and Kim Santow, both of whom are judges of the Supreme Court of NSW with significant experience in takeovers and general commercial matters, have been appointed as Panel members. This course of action is not without difficulties for the reason that a decision of a Panel in which one of these judges participated may be brought before the very court of which that judge is a member, after the bid has ended, for review. However, this type of problem is essentially one of conflict between Panel duties and the judicial members’ job and is an issue that all Panel members face. In this instance the problem could be ameliorated by ensuring that there are sufficient judges to deal with the matter should it be brought to the court, so that the judge who was a member of the Panel when the decision was made need not be involved. Admittedly, this may give rise to some inconvenience for the court when scheduling matters, however, it is arguable that the value of the contribution that judicial members will make outweighs that inconvenience.

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439 Baxt et al, above n 15, [3–280].

440 The types of interests which give rise to members being ineligible to serve on a Panel because of a conflict include, *inter alia*, advising one of the parties to the takeover or holding a significant parcel of shares in either the bidder or target.



One particular situation in which judicial members may perform an especially useful role is on review Panels. Currently, a review Panel comprises 3 Panel members who have not been involved in making the original decision. As explained in the third part of Chapter 4 above, a review Panel must conduct a merits review of the matter that the original Panel heard at first instance. In *Re Email Limited (No 2)*, for example, the review Panel unanimously decided to overturn the decision of the original Panel (which was also a unanimous decision). Accordingly, each decision was made by 3 Panel members. However, it is conceivable that a situation may arise where just 2 members of the review Panel (a majority) overturn the unanimous decision of an original Panel. In other words, the view of 2 members would prevail over the view of 4 members. One solution is to put more members on review Panels. However, from a logistical standpoint it would be very difficult to coordinate Panels comprising, for example, 5 part-time members. It would also require a regulation pursuant to section 184(4A) of the ASIC Act.

Another suggestion is to appoint a judicial member with significant commercial experience, preferably in takeovers, to be the sitting President of each review Panel. While this does not entirely eliminate the possibility of 2 Panel members overturning the preferred decision of 4 members, the fact that the Panel has the assistance and guidance of an experienced judicial member may give market participants more confidence in the ability of the Panel to make these types of difficult decisions.

However, it should be acknowledged that Justice Santow's involvement as President of the review Panel in *Re Pinnacle VRB Limited (No 8)* did not appear to make that decision any more palatable to practitioners and market participants. In *Re Pinnacle VRB Limited (No 8)* the Panel effectively decided that as a rule, shareholder approval ought to be sought in respect of a transaction that would trigger a defeating condition in a bid, or as one commentator put it "the possibility of shareholders participating in a takeover bid, in general, is more important than, and will not prevail over, the right and duty of directors to manage the company's business."<sup>441</sup> Despite the fact that many other jurisdictions (including the UK, Hong Kong and New Zealand) have a similar rule about when shareholder consent is required and the fact that the Panel heavily qualified its decision in the statement of reasons, the Panel has been accused of overturning:

"long settled law that directors of a target company are able, and obliged, to pursue transactions in the interests of the company without having to seek shareholder approval, even if the transaction may frustrate a takeover bid: *Pine Vale Investments Ltd v McDonnell and East* (1983) 8 ACLR 1999."<sup>442</sup>

However, market participants need to understand that the Panel is not a court and cannot and should not replicate the court process, particularly in light of its legislative constraints of timeliness, commerciality and informality. The Panel has the potential to be a great mediator/tribunal-type entity, however, it is not, and should not be criticised for not behaving like, a court.

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441 Rodd Levy, "Pinnacle 8 New Duties for Target Directors" (2001) 19 *Company and Securities Law Journal* 329, 329.

442 *Ibid*, 333.

## Challenges to the Decisions of the Panel – the Uncertainty Surrounding the Review and Appeal Processes

Notwithstanding the Panel's strengthened role, it is inherent in the nature of contested takeovers that all lawful means of defending against an unwelcome bid are likely to be tested. To date, parties have generally accepted decisions of the Panel, however, that may not always be the case. Aside from the possibility of a constitutional challenge regarding the scope of the Panel's powers which is considered in the next part of this Chapter, there are a number of other ways in which the decisions of the Panel may be challenged.

The first is via a request for an internal review. The review process which parties must comply with is described in detail in Chapter 4. In summary, section 657EA of the Corporations Act enables a party to proceedings in which a decision was made to apply for a review of that decision. The review Panel is made up of 3 members who were not involved in making the decision under appeal and the review is a *de novo* reconsideration on the merits.<sup>443</sup> However, procedural decisions cannot be reviewed as of right and the President's leave must be obtained in such cases.<sup>444</sup>

There have been just 5 requests for a review of a Panel decision under section 657EA of the Corporations Act.<sup>445</sup> None of those cases have been pursued further than the review Panel. In only one case, *Re Email Limited (No 2)*, did the review Panel reach a substantially different conclusion to that of the Panel at first instance. In that case, the Panel at first instance had refused Email's request for interim orders, deciding that Smorgon could despatch its bidder's statement before the Panel had considered the substantive issues. The Panel took the view that the additional and corrective disclosure sought by Email was such that it should not delay despatch because the defects complained of were such that they could be remedied by a supplementary statement. The review Panel overturned the decision of the Panel at first instance on the basis that the despatch of Smorgon's bidder's statement ought to be restrained until the substantive issues raised in Email's application had been determined.<sup>446</sup> However, it is likely that as more contested takeovers are brought before the Panel more reviews of Panel decisions will be requested, and it is possible that more decisions may be overturned.

In the event that a party is not satisfied with the decision of a review Panel, their remedies are somewhat restricted by the privative clause in section 659B of the Corporations Act. This is a controversial provision that purports to oust the jurisdiction of the courts during the bid period. It has been observed that the construction of privative clauses has a history as "a source of tension, if not open conflict, between courts and Parliaments."<sup>447</sup> In addition, the courts have "a strong tradition of reading down, even

443 The conditions attaching to a request for review are described in detail in Chapter 4.

444 Section 657EA(2) of the Corporations Act.

445 Namely, *Re Email Limited (No 2)* (2000) <http://www.takeovers.gov.au/Content/Decisions/0040-email-limited.asp>, *Re Pinnacle VRB Limited (No 6)* (2001) 19 ACLC 1,249, *Re Taipan Resources NL (No 11)* (2001) <http://www.takeovers.gov.au/Content/Decisions/TaipanNo11PublishedReasons.asp>, *Re Namakwa Diamond Company NL (No 4)* (2001) <http://www.takeovers.gov.au/Content/Decisions/Namakwa4.asp> and *Re Pinnacle VRB Limited (No 8)* (2001) 19 ACLC 1,252.

446 This matter is discussed in the second part of Chapter 6.

447 Bruce Dyer, "A Revitalised Panel?" (1998) 16 *Companies and Securities Law Journal* 261, 267.

virtually ignoring, privative clauses"<sup>448</sup> which suggests that the objectives of such a clause might not be realised and may even inflame relations between the Panel and the courts.<sup>449</sup>

However, this has not been the case to date. In fact, the Supreme Court of Western Australia has had cause to consider section 659B and adopted an interpretation of the provision consistent with Parliament's intention to make the Panel the main forum for takeover dispute resolution. As discussed in the third part of Chapter 4 and in Chapter 6, Justice Scott, in *Troy Resources NL v Taipan Resources NL*<sup>450</sup> considered the scope of the privative clause in section 659B and the intersection between the jurisdiction of the courts and the Panel. Justice Scott found that although Troy's request, for an injunction to prevent a meeting of Taipan's shareholders at which certain resolutions were to be put regarding a proposed scheme of arrangement with St Barbara, did not relate directly to a takeover bid as section 659B(4) requires, it was sufficiently connected with a takeover bid (because Troy's takeover offer was conditional upon the scheme not proceeding) so that the matter would more appropriately be dealt with by the Panel.<sup>451</sup>

However, it should be noted that *Troy Resources NL v Taipan Resources NL* was not a case in which the parties were seeking to challenge the decision of a Panel. Troy was merely pursuing concurrent applications to the Panel and the court for similar urgent relief.

The operation of the privative clause was also upheld by Justice Hill in *St Barbara Mines Ltd v ASIC and Anor.*<sup>452</sup> In that case, Justice Hill was considering an application from St Barbara who was seeking judicial review of ASIC's decision to refuse to accept lodgment of St Barbara's bidder's statement. ASIC contended that the Federal Court lacked jurisdiction to review the decision because of section 659B of the Corporations Act. Justice Hill accepted this argument and dismissed St Barbara's application because he considered that the application was clearly "in relation to" a takeover bid and therefore squarely within section 659B and the Panel's jurisdiction. Justice Hill also observed that St Barbara could seek to have ASIC's decision reviewed by the Panel, but not by a court.<sup>453</sup>

However, it is arguable that sections 659B and 659C ought to be read down so as not to be a bar to proceedings that appear to raise serious breaches of the Corporations Act which the Panel cannot, or will not address. At present, the privative clause seems to prevent a party from approaching the courts about issues which may relate to a takeover bid such as defamatory comments made during the course of a bid, or a dispute about the scope or enforcement of a confidentiality agreement or some other type of contract. The CLERP Explanatory Memorandum offers some guidance in that it indicates that the purpose of these sections is to prevent "tactical litigation".<sup>454</sup> Accordingly, one approach would be to restrict the application of the privative clause and related sections to tactical

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448 Ibid.

449 See also, Aronson & Dyer, above n 167, see Chapter 18 – especially at 675, which describes the history of judicial hostility towards privative clauses and the courts' practice of interpreting such clauses strictly.

450 (2000) 35 ACSR 663.

451 Ibid, 668.

452 (2001) 19 ACLC 564.

453 Ibid, 565.

454 The Parliament of the Commonwealth of Australia, above n 10, [7.2].

litigation. However, there are practical difficulties with such a suggestion. For instance, who would make the decision as to who ought to deal with the matter – the court or the Panel? How would the court or the Panel go about satisfying itself that the proceedings were not intended to be merely tactical or for the purpose of obtaining an advantage in the context of a takeover? Another possible solution would be to empower the Panel to grant a private litigant leave to approach the court for determination of a legitimate issue. Although distinguishing between legitimate and purely tactical issues may be difficult, it is submitted that such a power is not dissimilar to that contained in section 659A which enables the Panel to refer questions of law to the courts.

These issues are not perhaps as urgent as they might have been had the courts been reluctant to allow the Panel to take centre stage as the main forum for deciding takeover disputes. Accordingly, the options for relief available to a dissatisfied party during the bid period are very limited. A party must wait until after the bid period has ended to commence court proceedings in which case the remedial orders that a court can make are limited to monetary compensation.<sup>455</sup>

Prior to 1 July 2000, parties could have sought judicial review of a Panel decision in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) during the bid period. Although the issue was debated at length during the formulation of the CLERP legislation,<sup>456</sup> the Commonwealth Parliament did not include a provision limiting review by the Federal Court under the ADJR Act in the CLERP Act.<sup>457</sup> However, this loophole has been closed by the recent enactment of the *Jurisdiction of Courts Legislation Amendment Act 2000* (Cth). That Act inserted a new section 59A into the Corporations Act which effectively extends the operation of section 659B to apply to proceedings under the ADJR Act and proceedings in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

The only other option open to a dissatisfied party is to launch a constitutional challenge. Such an action could be initiated during the bid period because the right of the High Court to review decisions of “officers of the Commonwealth” is constitutionally protected in section 75 of the Constitution and therefore, is not affected by the privative clause.

## Constitutional Issues

### *The Precision Data case*

In *Precision Data Holdings Ltd v Wills, Adler and Jooste*<sup>458</sup> the constitutional validity of the Panel was upheld on the basis that Panel decisions do not concern existing rights and are therefore not judicial in character.

The High Court found that Panel decisions are not adjudications of a dispute about existing rights and obligations. Rather, the function of the Panel is to make orders and

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455 Section 659C of the Corporations Act.

456 Dyer, above n 447.

457 This is in contrast to Part 8 of the *Migration Act 1958* (Cth) which removed the Federal Court’s jurisdiction under the ADJR Act and section 39B of the *Judiciary Act 1903* (Cth).

458 (1991) 173 CLR 167.

create new rights and obligations. Accordingly, although the function entrusted to the Panel concerns declarations about past events or conduct, the fact that the Panel is bound to take account of considerations of commercial policy as set out in the Eggleston principles and any other matters it considers relevant, means that the Panel decisions are valid and do not proceed from an exercise of judicial power.<sup>459</sup>

Other factors that the court considered relevant in the Precision Data case were that the Panel was constrained to dealing only with contraventions of the Eggleston principles referred to it by ASIC.<sup>460</sup> The fact that only ASIC could make a referral reinforced the argument that the Panel was not determining existing rights as between the parties. The court noted that in referring a matter to the Panel, ASIC was not “seeking vindication of any right or obligation; a declaration when made, does not resolve an actual or potential controversy as to existing rights.”<sup>461</sup>

### ***Subsequent case law***

No subsequent decision has cast doubt on the correctness of the court's decision in Precision Data. In fact, these principles were affirmed in *Re Dingjan; ex parte Wagner*<sup>462</sup> and *Attorney-General for the Commonwealth v Breckler*.<sup>463</sup>

In *Re Dingjan; ex parte Wagner* it was held that if power to bring a new set of rights and obligations into existence is vested in a tribunal which is not a court, and policy considerations play a part in the tribunal's determination, then the power is not judicial even if it is necessary for the tribunal to decide disputed facts or form an opinion of existing rights and obligations as a step in arriving at its ultimate determination.<sup>464</sup>

Similarly in *Attorney-General for the Commonwealth v Breckler* which concerned a challenge to a decision of the Superannuation Complaints Tribunal, the Tribunal's determination was upheld because even though it involved the arbitration of a dispute using procedures and criteria which had their basis in statute, the fact that those procedures and criteria had been adopted in the trust deed at the centre of the dispute meant that the Tribunal was not exercising judicial power. Another key factor that influenced the court's finding that the Tribunal was not exercising judicial power was that the Tribunal's decision was not conclusive and could be challenged.

### ***The impact of the CLERP Act***

#### *Panel no longer limited to contraventions of the Eggleston principles*

The powers of the Panel have changed markedly and some of those new features may provide stronger grounds for a constitutional challenge. For example, under the regime that existed prior to 13 March 2000, the Panel was limited to dealing with contraventions of the policy set out in the Eggleston principles. As mentioned above, one of the key indicia that the court in *Precision Data* relied upon was that a declaration by the Panel “proceeds in part at least, from an assessment of consideration of commercial policy, not solely from an application of the law to the facts as found.”<sup>465</sup> However, as a result of the

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459 Ibid, 190.

460 Ibid.

461 Ibid.

462 (1995) 183 CLR 323.

463 (1999) 197 CLR 83.

464 (1995) 183 CLR 323, 328–329.

465 (1991) 173 CLR 167, 191.

CLERP Act the Panel's powers have been extended. It is no longer limited to dealing with contraventions of the Eggleston principles. Section 657A(2) of the Corporations Act gives the Panel jurisdiction to deal with contraventions of Chapter 6, 6A, 6B or 6C of the Corporations Act. If the Panel were to make a declaration of unacceptable circumstances solely on the basis that a provision of Chapters 6, 6A, 6B or 6C had been breached there would be a case for a constitutional challenge. However, pursuant to the final paragraph in section 657A(2), the Panel may only make a declaration, or decline to make a declaration under the section, if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant. The legislature even went so far as to state explicitly in section 602 the policy considerations to which the Panel ought to have regard. Accordingly, this provision was clearly intended to bring the Panel's declaration power squarely within the constitutional boundaries set out in *Precision Data*.

It should be noted that this was not the only provision included by the legislature in its attempt to thwart (or at least reduce the effect of) a constitutional challenge. For instance, section 657D(2) which precludes the Panel from making an order directing that a person comply with a requirement of Chapters 6, 6A, 6B or 6C, and section 657G which prevents the Panel from enforcing its own orders, were both obviously intended to protect the Panel from an allegation that it is exercising judicial power.

The Panel is also clearly alive to the spectre of a constitutional challenge and has sought to avoid such a challenge by very carefully enunciating the policy grounds upon which it bases its declarations of unacceptable circumstances. For example, in *Re Realestate.com.au Limited*<sup>466</sup> in which the Panel made its first declaration of unacceptable circumstances under the new regime, the Panel stated:

We have, however, concluded that unacceptable circumstances resulted from the making of the 5 October announcement, whether because in making it RP Data contravened subsection 631(2)<sup>467</sup> or because the circumstances defeated the policy of that subsection and led to a false market in shares in Realestate.<sup>468</sup>

It is arguable on the basis of the Panel's findings of fact that there was a straightforward breach of section 631(2) by RP Data in this matter.<sup>469</sup> However, the Panel was clearly being cautious in seeking to avoid basing the declaration solely on the contravention of section 631(2).

### *ASIC is no longer the only person who may refer matters to the Panel*

Another feature of the new regime that may render the Panel susceptible to a constitutional challenge is the fact that ASIC is no longer the only person who may refer a matter to the Panel. A range of persons, including the bidder, target, ASIC or "any other interested person whose interests are affected by the relevant circumstances" may make

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466 (2001) 19 ACLC 618.

467 Compare *Australian Securities Commission v Mount Burgess Gold Mining Company NL and others* (1995) 13 ACLC 271, 275.

468 (2001) 19 ACLC 618, 630.

469 Section 631(2) provides that a person must not publicly propose to make a takeover bid if the person knows that the proposed bid will not be made, or is reckless as to whether the proposed bid is made; or the person is reckless as to whether they will be able to perform their obligations relating to the takeover bid if a substantial proportion of the offers under the bid are accepted.

470 Section 657C(2) of the Corporations Act.



an application to the Panel.<sup>470</sup> In addition, section 659B prevents persons approaching the courts regarding disputes concerning a takeover during the bid period. In this way the Panel has taken over the role of the courts in relation to disputes concerning takeover bids, and if an issue were to arise during the bid period which concerns the pre-existing rights and obligations of a party, it is not clear whether the court or the Panel is intended to have jurisdiction. On a literal reading of section 659B, the parties would be prevented from approaching the courts during the bid period. However, if the Panel attempts to determine and enforce pre-existing rights and obligations of the parties it runs a risk of being accused of exercising judicial power. This raises an issue as to whether the new powers of the Panel breach Chapter 3 of the Constitution by conferring judicial powers which are the sole prerogative of the Commonwealth. In this respect section 659B could not prevail over section 75 of the Constitution which confers original jurisdiction on the High Court with respect to Commonwealth officers.

The willingness, or otherwise, of parties to challenge the constitutionality of the Panel on the basis that it is exercising judicial powers is probably less dependent upon the facts and circumstances of a particular case, and more dependent upon whether it can be argued that a particular section purports to confer judicial power. If a section does purport to confer such a power, then the issue will be to what extent is it be invalid? However, there are some matters which may more easily facilitate such a challenge because they raise issues that do not sit neatly within the Panel's jurisdiction or require the determination of a pre-existing right or obligation. For example, one of the issues in *Re Ashton Mining Ltd* (which was not raised with the Panel) was whether Ashton had the ability to terminate its diamond marketing arrangements under the joint venture with Rio Tinto. This was a crucial issue for De Beers as it wanted comfort that it could terminate the current arrangements and use its own diamond marketing facilities. De Beers was not a party to the Ashton/Rio Tinto joint venture marketing arrangements and so it was not open to De Beers to initiate proceedings to determine the scope of those arrangements. However, if Rio Tinto or Ashton had wanted a court to make such a determination then it is arguable that they would have been well within their rights to make such a request on the basis that the Panel does not have jurisdiction to determine an issue concerning pre-existing rights between the parties. Any issue which clearly concerns the interpretation of existing contractual rights is arguably not an appropriate matter to be determined by having regard to considerations of public interest "after taking into account any policy considerations that the Panel considers relevant"<sup>471</sup> even if it is technically a matter that falls within the scope of the privative clause because it has arisen "in relation to a takeover bid."<sup>472</sup>

However, as discussed in the third part of this Chapter, 2 judges in 2 separate cases have recently indicated that they will take a broad rather than a narrow view of what constitutes "in relation to a takeover bid".<sup>473</sup> This is despite the fact that section 659AA says the Panel is to be the "main forum" for the resolution of the disputes involving takeovers. It does not say that the Panel is the only forum for takeover dispute resolution. The fact

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471 Section 657A(2) of the Corporations Act.

472 Section 659B of the Corporations Act.

473 See the judgment of Justice Hill in *St Barbara Mines Ltd v Australian Securities & Investments Commission* (2001) 19 ACLC 564 and the judgment of Justice Scott in *Troy Resources NL v Taipan Resources NL* (2000) 35 ACSR 663.

that the legislature gave the courts the power to stay proceedings that have already commenced in relation to a takeover bid is a clear acknowledgement that the courts still have a role to play in resolving disputes relating to takeovers.<sup>474</sup> Accordingly, it appears that there is some risk that the courts may bar potential litigants' access to the courts, forcing them to ask the Panel to determine the dispute and risk a constitutional challenge.<sup>475</sup>

### ***The likely outcome of a constitutional challenge***

While there is still some concern that the Panel is vulnerable to a constitutional challenge, there is a view that, as time passes and the Panel becomes more established and accepted, it is less likely that such a challenge will eventuate. However, there is also a view that a constitutional challenge is more likely to be instigated by a very large and powerful multi-national company involved in a bitterly contested hostile takeover, whereas to date, most of the takeovers that the Panel has handled have been at the smaller end of the scale.

The likely outcome in the event of such a challenge is unclear, however, there are several options open to a court. If a court found that one of the Panel's powers was judicial in nature, the least worst outcome from the Panel's perspective would be for the court to either strike down (or read down) just that power, and leave the remainder of the Panel's powers intact. For example, if a court were to find that the Panel's power in section 657A(2)(b) to declare contraventions of Chapter 6 to be unacceptable was judicial in nature, it could sever that provision. It is arguable that a court is unlikely to make such a finding because even if a Panel makes a declaration of unacceptable circumstances on the basis that a contravention of Chapter 6 has occurred, that contravention is a mere threshold issue. The Panel must still have regard to the relevant factors in section 657A(3), namely the objectives of Chapter 6, the other provisions of Chapter 6, any rules under section 658C, the ASIC Regulations and any other matters it considers relevant.

However, the real danger is that, if such a power is struck down it may take other key provisions with it. For instance, if the court decided that paragraph 657A(2)(b) was integral to the scheme of sections 657A – 659C, it might strike down all the sections. It is also arguable that section 657A(2)(b) and section 659B stand or fall together because if the Panel cannot consider contraventions of Chapter 6 and provide parties with remedies when those provisions are breached during the bid period, then it is arguable that parties must have access to the courts in order to seek redress.

## **The Panel's Cautious Use of Declarations and Orders**

Although the Panel has recently been quite proactive, it was initially exceedingly restrained in using its power to declare circumstances unacceptable and make orders, preferring to adopt a mediator-type role in brokering solutions to the disputes that were brought before it. While there is no evidence that avoiding making declarations is a harmful practice, views differ on the sagacity of this approach.

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<sup>474</sup> Section 659B(2) of the Law.

<sup>475</sup> Of course in these circumstances the Panel could use its referral power to have such an issue determined by the courts pursuant to section 659A.

On the one hand minimising the use of declarations does have certain benefits. Dispensing with the adversarial approach previously employed by the courts when resolving takeover disputes, in favour of negotiating a resolution with the parties, facilitates in many cases a win-win perception of Panel proceedings. This is most likely due to the fact that participants perceive that the negotiation process will enable them to reach a more acceptable commercial result. In many cases this makes parties less inclined to want to “score points” and more relaxed and willing to shift their position in order to accommodate the requirements of the Panel and the requests of the other participants. More importantly, a challenge to a negotiated outcome is less likely. This is because parties are generally more satisfied with solutions which they have participated in constructing. Given that an adverse decision such as a declaration of unacceptable circumstances, or an interim order that a party perceives to be onerous or unfair, may well provide the trigger for a post-bid period court challenge to the validity of a Panel decision or even the Panel's constitutionality, the Panel's propensity to resolve matters in a cooperative way, particularly during its early years is arguably a very clever tactic.

However, there is a risk that the less the Panel uses its power to declare circumstances unacceptable and make appropriate orders, the more significance and stigma will attach to those declarations and orders that are made. This may result in the threshold for a declaration of unacceptable circumstances (which is not intended to apportion blame) being elevated back up to the level of unacceptable conduct or an unacceptable acquisition, which was the threshold under the previous regime and which did contain an element of opprobrium. It will also be interesting to see whether the opposite occurs, that is, will declarations become devoid of significance if the Panel makes greater use of its power to declare circumstances unacceptable? This is likely to depend on how often and in what circumstances the Panel uses the declaration power, and more importantly, the orders that the Panel makes to bolster its declarations.

There is also a risk that the Panel's tendency to accept undertakings rather than make declarations may lead to negative perceptions about the Panel or a lowering of standards in relation to takeover documentation. It is arguable that if the Panel fails to make declarations and orders it may lose its authority and support, and standards in takeover documentation may be undermined.

At this stage such fears appear unfounded. If anything the fact that the new Panel adopted a measured and cautious approach over the first year or so of its operation has meant that the Panel has gained greater acceptance in the community, and even more importantly, it has avoided having to make an order or decision that would provide a trigger for a serious challenge to the validity of a Panel decision or the Panel's constitutionality.

Although the Panel's use of declarations and orders has been sparing, the Panel has become more visible in the takeovers community, and has become considerably more proactive, particularly in the area of takeovers policy. As mentioned above, it has made 5 declarations of unacceptable circumstances, and has made a significant contribution to the development of takeover policy through its published policies and its decisions. One controversial example of such a contribution can be found in *Re Pinnacle VRB Ltd (No 8)*, where the Panel held that a company subject to a takeover bid wishing to enter into a material transaction that may trigger a defeating condition, thus causing the bid not to

proceed, must first seek shareholder approval. The Panel also made a bold move, vesting in ASIC the Taipan shares acquired by St Barbara in *Re Taipan Resources NL (No 9)* and it published a very harsh reprimand relating to a leakage of material to the press in the Namakwa matter.

Accordingly, the Panel seems well on the way to establishing that it is prepared to make hard (and potentially unpopular) decisions in pursuit of its mandate, namely to apply a commercial approach to resolving takeover disputes in a fair, informal and timely manner.

## Chapter 8

### Conclusion

The question posed in the title is whether the new Panel represents a better way to govern takeovers. The new Panel has only been operational for approximately 18 months and so any definitive pronouncement about its success or otherwise is premature. However, all indications to date are that the Panel does provide a better way to govern takeovers. The Panel appears to have had a positive impact and has gained widespread acceptance and support. This is clear from the fact that the new Panel has already been called upon to take part in resolving almost ten times as many disputes in the past 18 months as its predecessor did in a decade, and the fact that its decisions have not yet been challenged, except for internal reviews.<sup>476</sup>

The Panel is finally being given what it lacked during the first decade of its existence: an opportunity to “evolve its practices and processes in the light of experience.”<sup>477</sup> As more and more matters are channelled through the Panel it will be able to streamline and improve its procedures. In this way, the Panel has been greatly assisted by the abolition of the mandatory timeframes in the ASIC Regulations<sup>478</sup> and the new power to make rules governing its own procedures contained in section 195 of the ASIC Act.

There is no doubt that the London Panel in over 30 years of operation has been extraordinarily successful. If Australia’s revitalised and newly empowered Panel can perform a similar role to that of the London Panel and provide a consulting service to market participants it is likely to be a very useful resource indeed. However, the Panel is part of a statutory regime, it lacks the exclusive jurisdiction of the London Panel and operates in quite a different business community. Therefore, it will be crucial to the success of the Panel that it coordinate its activities with ASIC, the ASX and the courts to minimise confusion, particularly in relation to jurisdictional issues, and achieve the most efficient allocation of resources.<sup>479</sup>

In addition to fostering good relationships with other regulators, the Panel must continue to adjust to the changes wrought by the CLERP Act, particularly managing an increased and unpredictable workload. It must endeavour to give consistent decisions, face administrative and procedural challenges made by the parties affected by Panel decisions, and seek to establish practices and procedures aimed at minimising and ultimately avoiding such challenges.

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476 Namely, *Re Email Limited (No 2)* (2000) <http://www.takeovers.gov.au/Content/Decisions/0040-email-limited.asp>, *Re Pinnacle VRB Ltd (No 6)* (2001) 19 ACLC 1,249, *Re Taipan Resources NL (No 11)* (2001) <http://www.takeovers.gov.au/Content/Decisions/TaipanNo11PublishedReasons.asp>, *Re Namakwa Diamond Company NL (No 4)* (2001) <http://www.takeovers.gov.au/Content/Decisions/Namakwa4.asp> and *Re Pinnacle VRB Limited (No 8)* (2001) 19 ACLC 1,252. However, it should be noted that *Re Taipan Resources NL (No 11)* and *Re Pinnacle VRB Ltd (No 8)* were reviews instigated by the original applicant on the basis that the initial Panel’s decision was not tough enough.

477 Gething and Ould, above n 57, 370.

478 Ibid.

479 Such a venture is in the interests of the existing regulators, in particular ASIC, which has been subject to budget cuts recently: John Durie, “Costello’s strategy is high-risk” *Australian Financial Review*, 10 May 2000, 60. If the Panel successfully deals with certain enquiries that would previously have been directed at ASIC officers, then it will take some pressure off the financially constrained ASIC.

It is only by addressing such issues that the Panel will be able to consolidate its reputation and become a respected feature of the corporate landscape. However, the Panel members and its executive cannot meet these challenges unaided. The Minister for Financial Services and Regulation, Joe Hockey, MP observed, during the second reading of the CLERP Bill, that the reconstitution of the Panel:

is not just about an alternative means of resolving disputes during [a] takeover, it is about providing Australian business with the opportunity to show a level of maturity that has not been displayed during takeovers...it is a test of the goodwill of the business community in Australia in taking some responsibility for its own actions.<sup>480</sup>

Accordingly, the Panel will rely heavily upon the cooperation of the business community in seeking to ensure that takeovers proceed in an environment that provides speed, flexibility, consistency and certainty of outcome for all participants.

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<sup>480</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 3 June 1999, 5970 (Mr Joe Hockey, MP, Minister for Financial Services and Regulation).



## Annexure 1 – Panel members as at 31 March 2002

Name	Position/Occupation	State
Ms Robyn AHERN	Company Director	WA
Ms Elizabeth ALEXANDER AM	Partner, PricewaterhouseCoopers	VIC
Ms Ilana ATLAS	General Counsel & Group Secretary, Westpac Banking Corporation	NSW
Justice Robert AUSTIN	Judge, Supreme Court of NSW	NSW
Dr Annabelle BENNETT SC	Barrister	NSW
Mr Anthony BURGESS	Head of Corporate Finance Australasia, Deutsche Bank	VIC
Mr Michael BURGESS	Adjunct Professor, School of Business and Enterprise University of South Australia	SA
Ms Carol BUYS	Managing Principal, AMP Consulting	NSW
Mr Denis BYRNE	Director, Denis Byrne & Associates P/L	QLD
Mr Peter CAMERON	Partner, Allens Arthur Robinson	NSW
Ms Luise ELSING	Manager (Listings), Australian Stock Exchange	NSW
Ms Kathleen FARRELL	Consultant, Freehills	NSW
Mr David GONSKI	Chairman, Morgan Stanley Dean Witter	NSW
Ms Teresa HANDICOTT	Partner, Corrs Chambers Westgarth	QLD
Mr Brett HEADING	Partner, McCullough Robertson	QLD
Ms Meredith HELLICAR	CEO, Corrs Chambers Westgarth	NSW
Mr Braddon JOLLEY	Partner, Freehills	NSW
Mr John KING	New Zealand Takeovers Panel	NZ
Dr Tro KORTIAN	Lecturer, Finance Discipline, University of Sydney	NSW
Ms Alison LANSLEY	Partner, Mallesons Stephen Jaques	VIC
Ms Irene LEE	Company Director	NSW
Ms Louise McBRIDE	Partner, Deloitte Touche Tohmatsu	NSW
Mr Kevin McCANN	Partner, Allens Arthur Robinson	NSW
Ms Alice McCLEARY	Consultant, Company Director	SA
Ms Marie McDONALD	Partner, Blake Dawson Waldron	VIC
Mr Simon McKEON (President)	Executive Director, Macquarie Bank	VIC
Ms Maria MANNING	Company Secretary, Queensland Cotton	QLD
Ms Marian MICALIZZI	Company Director	QLD
Mr Simon MORDANT	Managing Director, Caliburn Partnership P/L	NSW
Ms Robyn PAK-POY	Partner, Minter Ellison	SA
Mr Chris PHOTAKIS	Director, KPMG Corporate Finance (Aust)	NSW
Professor Ian RAMSAY	Professor of Law, University of Melbourne	VIC

Mr Scott REID	Managing Director, JP Morgan Chase	NSW
Ms Maxine RICH	Company Director	NSW
Ms Fiona ROCHE	Managing Director, Estates Development Co	WA
Mr Trevor ROWE	Chairman, Investment Banking, Salomon Smith Barney (Australia)	NSW
Justice Kim SANTOW OAM	Judge, Supreme Court of NSW	NSW
Mr Jeremy SCHULTZ	Managing Partner, Finlaysons	SA
Ms Jennifer SEABROOK	Director, Gresham Partners	WA
Mr Leslie TAYLOR	General Counsel, Commonwealth Bank of Australia	NSW
Mr Michael TILLEY	Chairman, Merrill Lynch Australasia	VIC
Mrs Nerolie WITHNALL	Partner, Minter Ellison	QLD
Ms Karen WOOD	Company Secretary, BHP Billiton Limited	VIC
Mr Peter YOUNG	Executive Vice-Chairman, ABN-AMRO	NSW