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OFFICIAL BOOK LAUNCH THE TAKEOVERS PANEL AND TAKEOVERS REGULATION IN AUSTRALIA

29 March 2011

Thank you Kathy (*Farrell, President of the Takeovers Panel*) for that warm welcome and introduction.

It is an honour to be here this evening to launch this book.

The Takeovers Panel is a real success story.

And this book - *The Takeovers Panel and Takeovers Regulation in Australia* - provides a great account of the journey to that success.

It is a book that is heavy with years of experience. Professor Ramsay has brought together not only his own wealth of knowledge, but the wealth of knowledge of a number of his current and former colleagues, to put into print this detailed analysis of Australia's Takeovers Panel.

The Establishment and Revitalisation of the Takeovers Panel

The Panel has an interesting history.

And while I cannot expect to do justice to its history with my brief introductory remarks, I do wish to take a few minutes to reflect on its establishment in 1991 and revitalisation in 2000.

Professor Ramsay writes in the book about the establishment of the Corporations and Securities Panel and how that Panel was widely regarded as unsuccessful. He writes about the processes for that Panel, and how it could only act on a referral from the Australian Securities Commission.

From 1991 to 2000, the Commission referred only four matters to that Panel.

In contrast, in Professor Ramsay's words, 'when we examine the second half of the Panel's existence, the comparison is stark'.

Since its revitalisation in 2000, the Takeovers Panel has decided more than 300 matters and is now a highly regarded feature of Australia's framework for takeovers regulation.

Michael Hoyle's chapter provides a nice overview of the new arrangements that were put in place in 2000. He outlines the five broad areas where significant changes were made to the Panel.

These changes included declaring the Panel as the principal forum for takeovers disputes, opening up access to the Panel, and no longer allowing court proceedings to be brought in relation to a takeover bid until after the end of the bid period.

And what a difference these changes have made.

In a 2006 stakeholder assessment report commissioned by the Panel, more than three-quarters of respondents commented favourably or very favourably on the way the Panel has reached fair decisions, improved the speed of dispute resolution, and reduced tactical litigation.

This is an important endorsement. Prior to 2000, takeovers were often embroiled in tactical litigation.

Bruce Dyer and Marie McDonald write about the extensive use of tactical litigation during the 1980s and 1990s. They write how the standard response to a hostile offer was to closely scrutinise the

bidder's Part A statement in order to find an arguable basis for a breach of requirements and to seek a temporary injunction pending a final determination by the court.

This use of tactical litigation was wasteful and denied shareholders the opportunity to decide the outcome of an offer.

It generated a great deal of criticism about the takeovers process, and even the courts acknowledged that there was a pattern of tactical litigation, designed simply to buy time rather than for the benefit of shareholders.

In response, the Takeovers Panel was designed to provide a faster, more efficient, and less costly forum for dealing with takeovers disputes.

The Explanatory Memorandum for the CLERP Act summarised the objectives of the changes to the Panel in the following terms:

'[These changes] will allow takeover disputes to be resolved as quickly and efficiently as possible by a specialist body comprised of takeover experts, so that the outcome of the bid can be resolved by the target shareholders on the basis of its commercial merits. Other benefits of an effective panel for dispute resolution include the minimisation of tactical litigation and the freeing up of court resources to attend to other priorities.'

And the evidence shows that the Panel has achieved this goal.

In addition to improved stakeholder feedback, the chapter by Emin Altiparmak, Jemima O'Callaghan, Jerome Santamaria and Jon Webster presents statistics to show that disputes have been resolved more quickly and efficiently.

Between 2005 and 2009, half of the applications to the Takeovers Panel were decided in less than 12 days and the publication of the decision was then made within the following 18½ days.

And, of course, there have been some high profile examples of where the time taken to make a decision has been exceptionally quick.

The Panel showed great efficiency and an ability to adapt to commercial timing constraints in the Qantas Airways Limited proceedings, and the review of that decision, in 2007. The matter, and the review, were received and considered by the Panel over the course of a single weekend.

The Important Role of the Takeovers Panel

The Takeovers Panel is important for the Australian economy.

Takeovers are an integral part of the operation of equity markets and in turn the economy.

The benefits of good takeovers regulation are improved corporate efficiency and enhanced management discipline. And it builds trust in markets - protecting the rights of shareholders in a company that is the subject of a takeover gives our shareholders confidence and trust in the system.

From 2000 to 2009, about half of the applications made to the Panel had 'insufficient information' as their basis.

We all know that markets do not work well on 'insufficient information'.

Alison Lansley and Kate Johnson cover the issue of disclosures in their chapter, in addition to the issues of lock-up devices and rights issues.

Given that misleading and inadequate disclosure has been the subject of many Takeovers Panel decisions, the Panel has considered a wide range of disclosure issues arising from all transaction stages, as well as outside the transaction.

Alison and Kate state that the Panel has '...shown a willingness to remedy deficient disclosure in an aggressive manner...' and that '...the quality of disclosure, particularly in areas focused on by the Panel, has improved over the past several years'.

The Panel has also dealt with a number of other important issues that are central to the operation of equity markets. These include break fees, frustrating action, equity derivatives, broker handling fees, and the control effect of rights issues and derivatives.

The Panel currently has on issue 17 guidance notes that provide policy guidance to the market on unacceptable circumstances in control transactions.

The Takeovers Panel is clearly making a significant positive contribution to the functioning of our markets and our economy.

The Panel of the Future

The Panel has come a long way since the early days of the Corporations and Securities Panel.

It has taken its revitalisation seriously, and in the process it has evolved.

Part of this evolution has been in response to judicial decisions.

Emma Armson examines in her chapter the key court judgments: the two Glencore judgments, the High Court decision in Alinta which upheld the constitutionality of the Panel and the CEMEX judgments.

In Alinta, Justice Kirby stated that:

Certainly, it was open to the Federal Parliament to conclude that the nature of takeovers disputes was such that they required, ordinarily, prompt resolution by decision-makers who enjoyed substantial commercial experience and could look not only at the letter of the Act but also at its spirit, and reach outcomes according to considerations of practicality, policy, economic impact, commercial and market factors and the public interest.

It may have been this judgment that cemented the confidence of the Panel that Michael Hoyle writes about in his chapter.

He compares the Panel homepage in 2000 with its current homepage, and he notes that the only quote currently contained on the site is that of Justice Kirby from the Alinta decision.

Michael writes that the Panel no longer sees itself as a test for the business community. It has met and passed its major challenges.

And it is in the final chapter of the book that this is reaffirmed.

Rodd Levy and Neil Pathak consider how the Takeovers Panel has fulfilled its mandate and outline proposals to enhance the role of the Panel.

They consider that a possible jurisdictional reform is to transfer the supervisory role of schemes of arrangements from the courts to the Takeovers Panel.

This is a significant endorsement of the success of the Panel. It is only when people are satisfied that they recommend giving you further responsibilities and call for you to play an even greater role.

The Government appreciates this policy debate. However, I do have to say that I agree with Kathy's reported comments that the implications of broadening the Panel's role would need to be carefully thought through.

Conclusion

Simon McKeon writes in the foreword of the book that the Panel shows '...how a particular market-based community accepted the challenge thrown to it by the Federal Government to assume responsibility for its own reform.'

While much of the success of the Takeovers Panel can be attributed to its new revitalised framework, its success has also been contingent on the people; many of whom are here tonight.

The specialist nature of the Panel has been an important element of its credibility and efficiency. The Panel consists of expert practitioners who are able to make informed decisions that reflect their experiences.

Starting with 12 members, the Panel has now grown to 53 part-time members. And it supported by the six dedicated people that make up the Panel executive.

It is the capability and dedication of the Panel members and executive that have played a critical role in the success of the Panel.

I would particularly like to acknowledge Simon McKeon, who led the Panel over its first decade, and Kathy Farrell who accepted the role of President last year.

And I would like to congratulate Professor Ramsay, and the other contributors, on this book.

The book documents the successes of the Panel and the challenges it has confronted. It is important for the Panel in considering its beginnings, its evolution and its future.

It is also important more broadly. It teaches us lessons about the right structures for government bodies and just what is possible when the Government works with both the public and private sectors.

I ask you to join with me in congratulating Professor Ramsay and the other contributors on this book.