

THE AUSTRALIAN TAKEOVERS PANEL: COMMERCIAL BODY OR QUASI-COURT?

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[One of the aims of recent reforms expanding the role of the Takeovers Panel was to inject legal and commercial specialist expertise into takeover dispute resolution. This article considers the extent to which this aim has been achieved. It examines the Panel's procedures, its composition in terms of legal background and the approach taken to decision-making. The article concludes that takeover disputes have overall been dealt with by the Panel in a way that is consistent with its role as a commercial body.]

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I INTRODUCTION

The Takeovers Panel ('Panel') has been the primary body responsible for resolving takeover disputes in Australia since the Corporate Law Economic Reform Program ('CLERP') reforms were implemented in March 2000.¹ Rather than being considered by the courts, disputes arising during a takeover bid are now dealt with by the Panel. The Panel determines whether actions such as takeover offers are 'unacceptable' in the circumstances. This determination is made according to the legal and policy criteria set out in the takeover provisions of the *Corporations Act 2001* (Cth) ('*Corporations Act*').²

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¹ The Panel reforms contained in the *Corporate Law Economic Reform Program Act 1999* (Cth) ('*CLERP Act*') are now reflected in pt 6.10 of the *Corporations Act 2001* (Cth).

² See *Corporations Act* ss 602, 657A, 659AA; see also below Part II. Prior to the CLERP reforms, the Panel had a similar jurisdiction in relation to unacceptable circumstances that could only be activated by the Australian Securities and Investments Commission ('ASIC'). The Panel was only used sparingly by ASIC, which led to arguments that its role should be expanded: see, eg, G F K Santow and George Williams, 'Taking the Legalism Out of Takeovers' (1997) 71 *Australian Law Journal* 749; John Green and Stephen Brent, 'Takeovers: Breathing More Life into the Corporations and Securities Panel' (1997) 15 *Company and Securities Law Journal* 319.

In establishing a new system of takeover regulation focused upon the Panel, the CLERP reforms had four key aims: to inject legal and commercial specialist expertise into takeover dispute resolution; to provide ‘speed, informality and uniformity’ in decision-making; to minimise ‘tactical litigation’; and to free up court resources.³ This article analyses whether the first aim has been achieved — namely, the extent to which the Panel is operating as a commercial body. This is a timely assessment given that the Panel has now exercised its new powers in 136 decisions over nearly five years.⁴

To determine the extent to which the Panel is operating as a commercial body, as opposed to a court, this article analyses the Panel’s decisions as well as the regulatory framework within which they have been made. The criteria used for this analysis include the balance achieved by the Panel between efficiency and fairness, its reliance upon policy and commercial factors rather than strict legal requirements, its willingness to facilitate negotiated outcomes rather than making determinative orders, and the legal qualifications and commercial experience of Panel members. None of these factors is by itself determinative (nor is the list exhaustive), but together they enable conclusions to be drawn about the extent to which the Panel is operating as a commercial body.

This article is divided into six parts. Part II sets out the key policy aims and legislative provisions underlying the Panel’s role since the CLERP reforms. Part III focuses upon the procedures adopted by the Panel, including the involvement of lawyers representing parties to proceedings. Part IV examines the backgrounds of Panel members and the Panel’s composition from March 2000 until November 2004. Part V analyses the approach taken by the Panel in its decision-making, including the form of the decisions, the sources used and the outcomes. Finally, Part VI considers the extent to which the Panel differs from a court in light of the aims of the CLERP reforms.

II LEGISLATIVE AND POLICY BACKGROUND

The context in which the Panel operates is an unusual hybrid of takeover law and policy. The Panel’s core role is to ensure that parties act in accordance with the purposes of the takeover provisions in Chapter 6 of the *Corporations Act*. These purposes are essentially to ensure that acquisitions of shares take place in an ‘efficient, competitive and informed market’ and that members of the target company or listed managed investment scheme have sufficient information and time to make a decision and a ‘reasonable and equal opportunity to participate in any benefits’ under a takeover bid.⁵ Although the Panel can also take into

³ CLERP, *Takeovers Proposals for Reform*, Paper No 4 (1997) 32.

⁴ All statistics in this article have been calculated as at 3 November 2004. The total of 136 decisions comprises each decision given a separate ATP citation: see Takeovers Panel, *Decisions* (2004) <<http://www.takeovers.gov.au/display.asp?ContentID=16#2000mnc>>. See also below n 99.

⁵ See *Corporations Act* s 602. The Panel may take into consideration any circumstances having an effect on the control of a company, and its jurisdiction extends to an acquisition of a substantial interest, a share capital reduction or a share buy-back: see *Corporations Act* s 657A(2)(a), pt 2J.1 divs 1, 2; *Re Village Roadshow Ltd [No 2]* [2004] ATP 12 (Unreported, Lumsden P,

account contraventions of the takeover requirements in the *Corporations Act*, its powers are limited in that it cannot require a person to comply with the legislation.⁶ Instead, it may make a declaration and any appropriate orders if it considers that the circumstances are unacceptable having regard to the purposes of Chapter 6, the other takeover provisions (including regulations and Panel rules), and any other matters it considers relevant.⁷ Parties to these proceedings and the Australian Securities and Investments Commission ('ASIC') can apply for review of a Panel decision by a Review Panel.⁸ In order to limit applications for Panel review to appropriate cases, however, the President of the Panel must consent to an application if the original Panel did not make an order or a declaration of unacceptable circumstances.⁹

A key element of the CLERP Panel reforms involved replacing the jurisdiction of the courts during a takeover bid and permitting only governmental authorities to commence court proceedings.¹⁰ As a result of the reforms, the orders that a court can make are limited where it determines that there has been a breach of the *Corporations Act* and the Panel has refused to make a declaration of unacceptable circumstances.¹¹ In this case, the court cannot unwind a transaction and can only make remedial orders involving the payment of money.¹² Matters can be referred to the Panel by the court when it is hearing proceedings relating to a Panel decision and the Panel can also refer questions of law to the court.¹³ The CLERP reforms have resulted in the Panel taking over responsibility for reviewing the decisions of ASIC when it exercises its exemption and modification powers during a takeover.¹⁴ This role is significant given ASIC's broad powers to change the operation of the takeover provisions in relation to individual companies or classes of cases,¹⁵ and was inserted into the legislation in order to provide greater consistency in takeover decision-making.

Photakis DP and D Byrne, 1 July 2004) [41]–[47] (esp fn 7 and [47]) (Lumsden P, Photakis DP and D Byrne).

⁶ *Corporations Act* ss 657A(2)(b), 657D(2). This limitation is designed to avoid the Panel exercising judicial power contrary to Chapter III of the *Constitution*, which separates judicial power from legislative and executive power: see *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *A-G (Cth) v Breckler* (1999) 197 CLR 83. Accordingly, the legislation provides for court enforcement of Panel orders and rules: *Corporations Act* ss 657F–657G, 658C(5)–(6).

⁷ *Corporations Act* ss 657A, 657D(2). Orders must not unfairly prejudice any person: see *Corporations Act* s 657D(1); Emma Armson, 'The Australian Takeovers Panel and Unfair Prejudice to Third Parties' (2004) 16 *Australian Journal of Corporate Law* 187.

⁸ *Corporations Act* s 657EA(1).

⁹ *Corporations Act* s 657EA(2).

¹⁰ *Corporations Act* s 659B(1). At the same time, any interested person was given standing to apply to the Panel under s 657C(2).

¹¹ *Corporations Act* s 659C(1).

¹² *Corporations Act* s 659C(2). Under s 659C(1), the court's jurisdiction is limited to determining whether there has been an offence or contravention, ordering a person to pay a penalty or compensation to another, or providing relief from liability or removing any procedural irregularity.

¹³ See *Corporations Act* ss 657EB, 659A; Takeovers Panel, *Rules for Proceedings 2001* (Cth) r 9.8 ('Panel Rules').

¹⁴ See *Corporations Act* ss 656A–656B. This role was previously undertaken by the Administrative Appeals Tribunal.

¹⁵ See *Corporations Act* s 655A.

There are multiple layers of regulation applying to the Panel and its proceedings. At the pinnacle are the legislative provisions in the *Corporations Act* and the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*'). The primary role of Division 2 of Part 6.10 of the *Corporations Act* is to set out the powers of the Panel in relation to its two key roles of ASIC review and the determination of unacceptable circumstances. Other legislative provisions contained in Part 10 of the *ASIC Act* govern the appointment of Panel members and give the Panel powers in relation to its conduct of proceedings (including offences committed by non-compliance). At the next level of importance are the more detailed regulations concerning Panel procedures in Part 3 of the *Australian Securities and Investments Commission Regulations 2001* (Cth) ('*ASIC Regulations*').¹⁶ The final level of regulation consists of the Panel's own procedural rules: the Takeovers Panel's *Rules for Proceedings* ('*Panel Rules*').¹⁷ Not surprisingly, the *Panel Rules* contain the greatest level of detail relating to the way in which Panel matters are conducted. Consistent with the aim of the CLERP Panel reforms, the *Panel Rules* seek to facilitate proceedings that are both efficient¹⁸ and fair.¹⁹ The policy underpinnings of takeover regulation are also reinforced by the requirement in the *Panel Rules* that any documents in a proceeding set out the relevant policy considerations.²⁰

III PANEL PROCEDURES

Like a court, the Panel determines disputes between parties and does so within an adversarial setting. However, the procedures followed by the Panel differ markedly from a court in how they deal with the need for both efficiency and fairness.

¹⁶ See *ASIC Act* s 195(2); *ASIC Regulations* r 14. The *ASIC Regulations* apply generally to ASIC review, unacceptable circumstances and Review Panel proceedings. This is established in the definition of an 'application' in *ASIC Regulations* r 15.

¹⁷ Available at Takeovers Panel, *Rules for Proceedings* (2004) <<http://www.takeovers.gov.au/display.asp?ContentID=754>>; see also *Corporations Act* s 658C(1); *ASIC Act* s 195(1). The *Panel Rules* are made by the President of the Panel in consultation with the other Panel members. They must be consistent with the *Corporations Act* and the *Corporations Regulations 2001* (Cth), and must take into account the policy aims of the takeover provisions: see *Corporations Act* s 658C(1)–(2). The *Panel Rules* were amended in June 2004, following the release of a Public Consultation Draft in April 2004: see Takeovers Panel, *Revised Procedural Rules* (2004) <<http://www.takeovers.gov.au/display.asp?ContentID=711>>. For the original version of the *Panel Rules*, see *Takeovers Panel Rules for Proceedings* (2001) Takeovers Panel <<http://www.takeovers.gov.au/display.asp?ContentID=548>>.

¹⁸ *Panel Rules* r 1.2 includes references to the desirability of resolving proceedings as 'quickly' and 'cost effectively' as possible and the need to ensure that proceedings do 'not unnecessarily delay' transactions. Moreover, Panel or ASIC decisions should be set aside only if this is 'appropriate' (this latter term recently replaced the original reference in the Rules requiring 'cogent reasons'): see above n 17. For example, the rule restricting publicity is based upon the view that publicity is likely to affect the quick and efficient resolution of matters: see *Panel Rules* r 12.

¹⁹ *Panel Rules* r 1.2 refers to the need for a 'reasonable basis of information' (this term recently replaced the original reference in the Rules requiring 'sufficient and reliable' information) and the opportunity to make submissions 'as required by the rules of procedural fairness': see above n 17.

²⁰ See *Panel Rules* rr 2.1(a)(viii), 4.1(c).

A Efficiency

Notwithstanding the detailed nature of the rules that apply to its proceedings, the Panel has a significant amount of flexibility in the way in which it performs its functions. For instance, members of a Panel constituted for the purposes of a particular matter (a ‘sitting Panel’)²¹ can vary or supplement the *Panel Rules*.²² Another important example of this flexibility is the Panel’s ability to accept undertakings instead of making formal orders.²³ It is clear from the Notes to the *Panel Rules* that parties are encouraged ‘to reach an agreed resolution to the matter wherever possible’²⁴ and that the Panel is generally willing to accept undertakings (in which case it would not normally make a declaration of unacceptable circumstances or orders).²⁵ Changes made to the *Panel Rules* in June 2004 state the Panel’s position even more explicitly, indicating that it seeks to avoid the need for formal decisions and orders.²⁶ Undertakings are also used by the Panel to ensure compliance with its rules on confidentiality and restrictions on publicising relevant issues in the media.²⁷

In keeping with a commercial focus, the Panel’s processes are designed to ensure the timely resolution of disputes.²⁸ Parties are given short deadlines, with two business days to respond to the issues set out by the Panel in its brief,²⁹ or one business day in the case of an interim order or submission not contained in an application.³⁰ Although the Panel can allow a conference for oral submissions, decisions are primarily based upon written submissions,³¹ and parties are limited

²¹ See *ASIC Act* s 184(2); *Panel Rules* r 15.1.

²² *Panel Rules* r 9.2. Changes to the *Panel Rules* in June 2004 strengthen this discretion through explicit references to the sitting Panel’s ability to waive or excuse non-compliance with the *Panel Rules*, or supplant the *Panel Rules* using its power to make directions under the *ASIC Act*, *ASIC Regulations* and *Panel Rules: Panel Rules* rr 1.5–1.6. For examples of the types of directions that the Panel can make, see Note to *Panel Rules* r 9.2.

²³ Such undertakings can only be withdrawn with the consent of the Panel and can be enforced by the court: see *ASIC Act* s 201A. They can be initiated either by the Panel or the party as set out in *Panel Rules* r 13.1. *Panel Rules* r 13.2 makes it clear that a proposed or accepted undertaking ‘does not imply any admission’ by the offering party. For examples of the types of undertakings accepted by the Panel, see below n 162.

²⁴ Notes to *Panel Rules* r 14.

²⁵ Notes to *Panel Rules* r 13.1.

²⁶ *Panel Rules* r 12.

²⁷ *Panel Rules* Appendix. Breaches of directions restricting publication of material before the Panel constitute offences with a possible term of imprisonment: see Notes to *Panel Rules* Appendix; *ASIC Act* ss 190(1), 200.

²⁸ This is consistent with the CLERP aims, which are reflected in the *ASIC Regulations* and *Panel Rules*: see above n 3 and accompanying text; *ASIC Regulations* rr 13, 16(2)(c); *Panel Rules* r 1.3.

²⁹ *Panel Rules* r 9.6(a); *ASIC Regulations* r 20(b). The same deadline applies to ASIC’s responses to applications for review of its decisions (*Panel Rules* r 5.3), the lodgment of notices of appearance in Panel proceedings (*Panel Rules* r 3.3) and applications for review of Panel decisions (*Corporations Regulations* r 6.10.01).

³⁰ *Panel Rules* r 9.6(b). In the context of requests for directions and applications for interim orders, the Panel indicates that one clear business day is the ‘usual minimum’ time that it expects to have to make a decision: see Note 2 to *Panel Rules* r 9.5; Note 1 to *Panel Rules* r 9.9; *Panel Rules* r 15.2. Any delay in an application for an interim order would be taken into account by the sitting Panel (or substantive President): see Note 2 to *Panel Rules* r 9.9. The Panel President is referred to in the *Panel Rules* as the ‘substantive President’ to distinguish the role from that of a sitting President: see Note 1 to *Panel Rules* r 2.7. See also below n 76 and accompanying text.

³¹ See *ASIC Regulations* rr 38(1)–(2), 39(2)–(3), 40; *Panel Rules* r 1.3(a), 10.

to one submission in rebuttal.³² Proceedings may also be limited or avoided if the Panel decides not to conduct proceedings,³³ if the Panel chooses to dismiss or disregard submissions that are ‘frivolous or vexatious’,³⁴ or if the President decides against approving an application for review of a Panel decision not involving a declaration or order.³⁵ Documents that can be sent electronically must be emailed to the Panel,³⁶ facilitating distribution to the sitting Panel and other parties. Changes to the *Panel Rules* in June 2004 provided greater flexibility in allowing the Panel to treat as lodged documents that are published or have been lodged in related proceedings.³⁷ The Panel can also divide up its brief, setting out the issues in more than one part so that it can refine later parts in light of the facts and issues in party submissions.³⁸ The efficient conduct of matters is further enhanced by the recent changes to the *Panel Rules* that set out the circumstances in which the Panel may agree to the expansion of existing proceedings to include related matters.³⁹ These changes also ensure that the Panel receives copies of public documents released by the bidder, target and listed companies, and substantial holders.⁴⁰

Restrictions on publicity applying to issues before the Panel are also based upon efficiency concerns, as they seek to encourage parties to provide complete (including confidential) information quickly and to avoid the adverse effect of ‘partial publicity’ on the market and on the positions taken by other parties.⁴¹ The prohibition on ‘media canvassing’ prevents parties from authorising the publication of a report during the Panel proceedings. This includes providing “‘background” information to journalists’ on the merits of the case, except for details of the proceedings and the broad nature of the alleged unacceptable circumstances and orders sought.⁴² Once the Panel has released its decision or reasons, a party can publish a statement based upon its own submissions or that accurately represents material from a Panel decision or media release.⁴³ The Panel considers these Rules to be directions under the *ASIC Act*, with breaches giving rise to an offence punishable by imprisonment.⁴⁴ To justify these restrictions, the Panel relies upon the fact that its proceedings are held in private⁴⁵ and

³² *ASIC Regulations* r 28(3); Note to *Panel Rules* r 9.6.

³³ See *ASIC Regulations* r 20(a); Note 5 to *Panel Rules* r 2.7.

³⁴ *Corporations Act* s 658A; *ASIC Regulations* rr 26–7. Subject to takeover policy and public interest considerations, the Panel will also generally consent to the withdrawal of an application if the parties agree: see *Panel Rules* r 14 and accompanying Note.

³⁵ Permission from the President is required for the review of such orders under *Corporations Act* s 657EA(2).

³⁶ *Panel Rules* rr 6.2, 6.3.

³⁷ *Panel Rules* rr 7.6, 7.8.

³⁸ *Panel Rules* r 9.11.

³⁹ *ASIC Regulations* r 16(1)(a); *Panel Rules* r 2.6.

⁴⁰ *Panel Rules* rr 5.4–5.9.

⁴¹ *Panel Rules* r 12.

⁴² *Panel Rules* rr 12, 12.1.

⁴³ *Panel Rules* rr 12.1, 12.2.

⁴⁴ See Note to *Panel Rules* r 12; *ASIC Act* ss 190(1), 200(2). This is a strict liability offence, which does not apply where a person has a reasonable excuse: *ASIC Act* s 200(2A), (2B).

⁴⁵ See *Panel Rules* rr 1.3(b), 10.3, 12.

thus that there is no public record or hearing against which any media statements can be tested.⁴⁶

While proceedings before the Panel are certainly efficient, they lack transparency and are far from what would be expected if the hearing were held before a court. The Panel's procedures are what might be expected of a more commercially-orientated body. Even so, the Panel is still accountable to the parties (and the public) through the giving of reasons for its decisions. It is also important that Panel decisions are subject to review by a Review Panel or the courts⁴⁷ and that the Panel is required to observe principles of procedural fairness in dealing with the parties before it.

B *Fairness*

A significant difference between the operation of the Panel and the court system is that the Panel is not bound by the rules of evidence.⁴⁸ In order to ensure that the efficiency of proceedings does not compromise fairness, however, the rules of procedural fairness apply where they are not inconsistent with the procedural requirements in the *ASIC Act* and *ASIC Regulations*.⁴⁹ A number of changes made to the *Panel Rules* in June 2004 also make explicit reference to the requirements of procedural fairness.⁵⁰

The central elements of procedural fairness in a matter before the Panel include the opportunity to make submissions⁵¹ and a fair process.⁵² These elements require that parties receive copies of documents from the Panel and other parties,⁵³ with recent changes to the *Panel Rules* noting the Panel's concern to ensure that certain parties do not receive an unfair advantage from time zone differences.⁵⁴ In another recent addition to the *Panel Rules* designed to promote fairness, a party will usually be allowed to provide a short response to an application in deciding whether to conduct proceedings.⁵⁵ The purpose is not to allow an argument on the merits of the application prior to the proceedings, but rather to provide a party with the opportunity to set out any relevant additional facts, conduct that it proposes to take and reasons why the Panel would be unable

⁴⁶ *Panel Rules* r 12.

⁴⁷ See *Corporations Act* s 657EA; *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 3, 5; *Judiciary Act 1903* (Cth) s 39B; *Constitution* s 75; *Re AMP Shopping Centre Trust [No 1]* (2003) 45 ACSR 496, 516 (Taylor P, Seabrook DP and R Ahern) ('AMP [No 1]').

⁴⁸ *ASIC Regulations* r 16(2)(a). See also *Panel Rules* r 7.

⁴⁹ *ASIC Act* s 195(4).

⁵⁰ See *Panel Rules* rr 1.2(e), 1.3, 7.6 (previously only applicable to r 7.6(a): see above n 17).

⁵¹ See *Corporations Act* ss 656B(3)–(4), 657A(4), 657D(1), (3). However, see below nn 117–19 and accompanying text.

⁵² Both of these elements are reflected in the object of the *Panel Rules* in r 1.2 and purposes in r 1.3, which were recently amended to explicitly refer to procedural fairness in the context of providing an opportunity to make submissions and the conduct of proceedings: see *Panel Rules* rr 1.2(e), 1.3.

⁵³ See, eg, *Corporations Act* s 657D(4); *Panel Rules* rr 2.2–2.5, 3.1(b), 5.11, 6.1, 9.9.

⁵⁴ See Note 1 to *Panel Rules* r 6.1; Note 2 to *Panel Rules* r 6.7.

⁵⁵ See *ASIC Regulations* r 20(a); Note 5 to *Panel Rules* r 2.7.

to consider the circumstances to be unacceptable.⁵⁶ This approach makes appropriate compromises in the context of an inevitable tension between the Panel deciding not to conduct proceedings in some cases and the parties' ability to fully address the submissions put forward by each side to the dispute. It also highlights the Panel's focus on the ability of parties to make undertakings that would resolve a matter without the need for proceedings to be conducted.⁵⁷

A number of procedural protections apply to Panel proceedings. In relation to evidentiary matters, the Panel recognises that it requires 'logically probative material, particularly if a factual matter is contested or would be discreditable to any person', and suggests that parties should provide supporting statements and documents before the Panel would make a finding in such cases.⁵⁸ A sitting Panel has coercive powers under which it can require witnesses to attend, produce documents, provide evidence on oath and answer questions (with penalties for non-compliance).⁵⁹ Although self-incrimination is not a reasonable excuse for non-compliance, an incriminating oral statement or signature on record is generally not admissible in criminal cases or proceedings involving a penalty.⁶⁰ The *ASIC Act* does, however, allow a lawyer to refuse to give information or produce a book based upon legal professional privilege.⁶¹ In the context of matters before the Panel, proposing or making an undertaking does not imply an admission.⁶² However, false or misleading representations made to the Panel or its Executive⁶³ may be used by the Panel, subject to the rules of procedural fairness.⁶⁴ Persons can request that confidential information be withheld from other parties or their legal representatives. In deciding whether to grant the request, the Panel weighs the importance of procedural fairness against the likelihood of, and adverse effects from, that party breaching the confidentiality requirements.⁶⁵

With respect to legal representation, the CLERP reforms sought to promote a commercial rather than a legalistic approach by inserting a requirement that a party obtain leave before it can be legally represented before the Panel.⁶⁶ The

⁵⁶ Examples of such reasons given by the Panel are a lack of jurisdiction, incontrovertible facts or conduct proposed by the party: see Note 5 to *Panel Rules* r 2.7.

⁵⁷ For statistics in relation to the Panel's use of this approach to date, see text following below n 162.

⁵⁸ *Panel Rules* r 7.

⁵⁹ See *ASIC Act* ss 192(1)–(5), 198; *ASIC Regulations* r 42, sch 1 form 3, *Panel Rules* r 7.7. There are also offences for giving false or misleading information or evidence, obstructing the Panel or one of its members, disrupting proceedings or breaching a direction restricting publication of material before the Panel: *ASIC Act* ss 190(1), 199, 200.

⁶⁰ *ASIC Act* s 68.

⁶¹ *ASIC Act* s 69.

⁶² *Panel Rules* r 13.2.

⁶³ See below n 75 and accompanying text.

⁶⁴ See *Panel Rules* r 7.6; *ASIC Act* s 199. For example, the Panel may wish to draw adverse inferences in relation to a submission provided by a person who has previously made a false or misleading representation.

⁶⁵ *Panel Rules* rr 8.2, 8.4–8.5.

⁶⁶ *ASIC Act* s 194. Prior to the *CLERP Act*, s 194(4) of the *Australian Securities Commission Act 1989* (Cth) provided that a person appearing before the Panel was entitled to have legal representation. *ASIC Act* s 195(3) provides that representation can be dealt with in regulations. At the time of writing, there was no such provision in the *ASIC Regulations*.

Panel Rules indicate that, as a matter of practice, leave is generally given for lawyers working on the transaction, although it may be limited to a specific purpose.⁶⁷ Of the 136 post-CLERP decisions, only 81 (60 per cent) contained a statement that leave had been granted for the parties to be represented, typically by their commercial solicitors. In 22 decisions (16 per cent), either the applications were withdrawn or the Panel declined to conduct proceedings. Another 16 decisions (12 per cent) included a reference to at least one of the parties' solicitors, without referring to their status in the proceedings. There has only been one matter in which senior counsel has been given leave to appear before the Panel.⁶⁸ It would appear, however, that the above statistics do not accurately represent the level of legal representation, as decisions do not always include a reference to the granting of consent. In an interview with a member of the Panel Executive, it was indicated that the level of legal representation had been higher than suggested by the first set of statistics above and that, as consent had never been refused outright, parties were legally represented except where they had decided to represent themselves.⁶⁹

Legal representation may enhance efficiency in facilitating Panel consideration of the relevant legal and takeover policy issues. The countervailing concerns are that the use of lawyers could result in similar approaches to those followed in litigation, where parties take opposing positions. This is in contrast to the Panel's approach of seeking to promote policy outcomes through negotiation with the parties.⁷⁰ It is difficult to test what, if any, effect the replacement of barristers with commercial solicitors has played in the processes and outcomes of Panel decisions. Nonetheless, the capacity for commercial solicitors to assist in facilitating a practical outcome based upon their knowledge of the underlying transactions and commercial interests of their clients means that this is likely to enable more efficient and commercially appropriate decision-making by the Panel.

IV MEMBERS

Appointments to the Panel are made by the federal government for renewable terms of up to five years.⁷¹ Members are appointed based upon their knowledge or experience in at least one of the fields of business, administration of compa-

⁶⁷ *Panel Rules* rr 11.1, 11.3. Originally, this limitation could only be applied to counsel and lawyers who were different from those working on the transaction. The June 2004 changes to the *Panel Rules* removed this sole reference to counsel in the rules and extended the discretion to apply the limitation to all lawyers. As before, parties would need to explain why they need different lawyers: *Panel Rules* r 11.2.

⁶⁸ *Re Email Ltd [No 3]* (2000) 18 ACLC 708 ('*Email [No 3]*').

⁶⁹ Interview with George Durbridge (Telephone interview, 12 July 2004). It should be noted, however, that an application has been refused in the context of deciding preliminary issues: see *Re Email [No 1]* [2000] ATP 3 (Unreported, Bennett P, 18 May 2000) ('*Email [No 1]*').

⁷⁰ See, eg, *Panel Rules* r 12.

⁷¹ *ASIC Act* ss 172(2), 175(1). The Governor-General makes appointments based upon nominations by the responsible federal Minister (currently the Treasurer) after receiving recommendations from the states: see *ASIC Act* ss 172(2), (4A)–(4B). The Panel consists of a minimum of five members, although it can have a fewer number for up to three months: *ASIC Act* s 172(1), (5). At least one member of the Panel must be nominated by a state or territory: *ASIC Act* s 172(4B).

nies, financial markets, financial products and services, law, economics and accounting.⁷² To date, appointments have only been made on a part-time basis⁷³ due to the desirability of attracting members with commercial expertise and because the Panel's workload varies depending upon the matters brought before it.⁷⁴ The Panel is also supported by a full-time Executive, which liaises with parties on issues and is the focal point for the receipt and distribution of documents.⁷⁵

The President of the Panel ('substantive President') — currently Mr Simon McKeon — plays a significant role in selecting the sitting Panel to determine a particular application.⁷⁶ Each sitting Panel comprises three members, with each designated as either 'sitting President', 'sitting Deputy President' or 'sitting Member'.⁷⁷ With only a few exceptions,⁷⁸ where there is a series of related proceedings to be determined by the Panel, the sitting Panels have comprised the same members. This enables a more efficient resolution of matters in light of the Panel's understanding of the existing factual background.

There have been 59 members of the Panel since the CLERP reforms, with 43 current members.⁷⁹ A significant number of these members have been trained as lawyers, with at least 42 (or 71 per cent) of all members having legal qualifications.⁸⁰ Of course, there are a number of members with legal qualifications who currently work in other capacities, such as in company administration or investment banks. This is reflected in the fact that, although 33 (77 per cent) of the current members have legal qualifications, only 19 (44 per cent) presently work in the legal field. These people comprise 14 solicitors, two judges, two barristers and an academic. The next largest groups are those involved in the administration of companies as company directors⁸¹ or company secretaries (nine or 21 per cent) and those working in investment or other banking (five or 12 per cent). Another five (or 12 per cent) work in a corporate advisory or investment role,

⁷² *ASIC Act* ss 172(4), (4A).

⁷³ Part-time appointments are permissible: *ASIC Act* s 172(3).

⁷⁴ See above n 3 and accompanying text. Remuneration and allowances must be paid: *ASIC Act* s 179. However, these are in the nature of an honorarium rather than the market rate that might be expected for the services of Panel members.

⁷⁵ See Takeovers Panel, *Contacts* (2004) <<http://www.takeovers.gov.au/display.asp?ContentID=15>>.

⁷⁶ See *ASIC Act* s 184. The substantive President also has the power to make an interim order alone: see *Corporations Act* s 657E; *Re Anaconda Nickel Ltd [No 10]* [2003] ATP 9 (Unreported, McKeon P, 14 June 2003) ('*Anaconda [No 10]*').

⁷⁷ See *ASIC Act* s 184(1), (3).

⁷⁸ See, eg, *Re Taipan Resources NL [No 8]* (2001) 38 ACSR 102; *Re Taipan Resources NL [No 9]* (2001) 38 ACSR 111 ('*Taipan [No 9]*'); *Re Skywest Ltd [Nos 1–2]* (2004) 50 ACSR 72 ('*Skywest [Nos 1–2]*').

⁷⁹ See Takeovers Panel, *About the Panel* (2004) <<http://www.takeovers.gov.au/display.asp?ContentID=6>>.

⁸⁰ This classification includes members who have Bachelor of Laws degrees, one with a Diploma of Laws and those admitted as solicitors or barristers.

⁸¹ There are eight members who are classified as company directors on the Panel's website: see *About the Panel*, above n 79.

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with four (or nine per cent) consultants and a representative from the New Zealand Takeovers Panel.⁸²

Interestingly, the three members who have participated in the most Panel decisions all have legal qualifications. They are Professor Ian Ramsay (26 matters), Mr Brett Heading (23 matters) and Mr Simon McKeon (21 matters). One of the reasons why Professor Ramsay heads this list is likely to be that, as an academic, he is less likely to be subject to the conflicts of interest that can affect other members who are employed by legal firms or investment banks.⁸³ The other (now former) academic member of the Panel, Dr Tro Kortian, was involved in a total of 11 matters over a comparatively shorter period.⁸⁴

As at 3 November 2004, there had been 136 decisions since the CLERP reforms, with 118 of those decisions made by a non-Review Panel and 18 made by a Review Panel. Table 1 below sets out the distribution of members with legal qualifications (who are classified as lawyers for ease of reference)⁸⁵ in all Panel decisions. Every matter to date has been decided by a sitting Panel with at least one lawyer. Nearly half of all decisions have had two lawyers and 26 per cent of sitting Panels were comprised entirely of lawyers. Unsurprisingly, the 18 Review Panel matters have had a higher concentration of lawyers, with over half having two lawyers and a similarly high number (39 per cent) solely comprising lawyers.

Table 1: Members on Sitting Panels with Legal Qualifications

Number of Lawyers	Non-Review Panel (Percentage)	Review Panel (Percentage)	All Decisions (Percentage)
3	28 (24%) ⁸⁶	7 (39%)	35 (26%)
2	50 (42%)	10 (56%)	60 (44%)
1	40 (34%)	1 (6%)	41 (30%)

It is clear that the sitting Panels are predominantly people with legal training. This is to be expected given that the primary role of the Panel is to resolve takeover disputes according to legislative requirements and the policy set out in the *Corporations Act*. The increased involvement of lawyers in Review Panel

⁸² See Takeovers Panel, 'Trans-Tasman Appointment to the New Zealand Takeovers Panel' (Press Release, 11 October 2001).

⁸³ Prospective and actual sitting Panel members are required to disclose potential conflicts of interest: *ASIC Act* s 185(1). Where a conflict of interest exists, the President's consent is required for that Panel member to participate in the matter: *ASIC Act* s 185.

⁸⁴ Dr Kortian's appointment ran for three years, whereas Mr Heading, Mr McKeon and Professor Ramsay are all in the group of the longest-serving Panel members since it was given its new role nearly five years ago.

⁸⁵ See above n 80 and accompanying text.

⁸⁶ This figure includes the decision in *Anaconda [No 10]* [2003] ATP 9 (Unreported, McKeon P, 14 June 2003), which was decided solely by the substantive President under *Corporations Act* s 657E.

matters is also understandable. These matters are likely to involve greater controversy, with either the initial Panel having made a declaration of unacceptable circumstances or an order,⁸⁷ or the President required to have granted consent for the Review to proceed.⁸⁸ This is also reflected in the fact that the two judicial members have only sat as the sitting President of a Review Panel.⁸⁹ Otherwise, the substantive President has been the sitting President of the most Review Panel matters (eight), followed by a former Panel member who has since been appointed to the bench, Justice Annabelle Bennett (three). The remaining persons who have been a sitting President of a Review Panel comprise some of the more experienced Panel members.⁹⁰ In any event, the Review Panel's role is

⁸⁷ *Re Pinnacle VRB Ltd [Nos 4 and 6]* (2001) 38 ACSR 564 ('Pinnacle [Nos 4 and 6]'); *Re Pinnacle VRB Ltd [No 10]* [2001] ATP 21a (Unreported, Micalizzi P, Ahern DP and A Lansley, 10 October 2001) ('Pinnacle [No 10]'); *Re Pinnacle VRB Ltd [No 11]* [2001] ATP 23 (Unreported, McKeon P, McCann DP and C Photakis, 11 October 2001) ('Pinnacle [No 11]'); *Re Anzoil NL [No 1]* [2002] ATP 19 (Unreported, Buys P, McCann DP and C Searle, 24 December 2002) ('Anzoil [No 1]'); *Re Anzoil NL [No 2]* [2002] ATP 21 (Unreported, Bennett P, Withnall DP and S Reid, 21 November 2002) ('Anzoil [No 2]'); *Re Anaconda Nickel Ltd [Nos 2–5]* [2003] ATP 4 (Unreported, Heading P, Kortian DP and P Scott, 14 July 2003) ('Anaconda [Nos 2–5]'); *Re Anaconda Nickel Ltd [Nos 6–7]* [2003] ATP 6 (Unreported, McKeon P, Gonski DP and I Ramsay, 7 February 2003) ('Anaconda [Nos 6–7]'); *Re Anaconda Nickel Ltd [Nos 16–17]* [2003] ATP 15 (Unreported, Heading P, Kortian DP and P Scott, 14 July 2003) ('Anaconda [Nos 16–17]'); *Re Anaconda Nickel Ltd [No 18]* [2003] ATP 18 (Unreported, McKeon P, Gonski DP and I Ramsay, 14 June 2003) ('Anaconda [No 18]'); *Re AMP Shopping Centre Trust [No 1]* (2003) 45 ACSR 496; *Re AMP Shopping Centre Trust [No 2]* (2003) 45 ACSR 524 ('AMP [No 2]'); *Re BreakFree Ltd [Nos 3–4]* (2003) 49 ACSR 337 ('BreakFree [Nos 3–4]'); *BreakFree Ltd [No 4]* (R) (2003) 22 ACLC 1165; *Re Skywest Ltd [No 3]* [2004] ATP 17 (Unreported, Heading P, Jolley DP and C Buys, 30 July 2004) ('Skywest [No 3]'); *Re Skywest Ltd [No 3]* (R) [2004] ATP 20 (Unreported, McKeon P, Hellicar DP and T Handicott, 31 August 2004) ('Skywest [No 3] (R)).

⁸⁸ See *Corporations Act* s 657EA(2); *Email [No 1]* [2000] ATP 3 (Unreported, Bennett P, 18 May 2000); *Re Email Ltd [No 2]* [2000] ATP 4 (Unreported, Heading P, Taylor DP and M Manning, 28 June 2000) ('Email [No 2]'); *Re Taipan Resources NL [No 10]* [2001] ATP 5 (Unreported, Byrne P, Rowe DP and M Burgess, 23 May 2001) ('Taipan [No 10]'); *Re Taipan Resources NL [No 11]* [2001] ATP 16 (Unreported, Bennett P, Cameron DP and I Ramsay, 26 June 2001) ('Taipan [No 11]'); *Re Namakwa Diamond Co NL [No 3]* [2001] ATP 12 (Unreported, Withnall P, Roche DP and C Photakis, 15 May 2001); *Re Namakwa Diamond Co NL [No 4]* [2001] ATP 15 (Unreported, McKeon P, Ramsay DP and E Alexander, 25 June 2001); *Re Pinnacle VRB Ltd [No 5]* (2001) 39 ACSR 43 ('Pinnacle [No 5]'); *Re Pinnacle VRB Ltd [No 8]* (2001) 39 ACSR 55 ('Pinnacle [No 8]'); *Re Bigshop.com.au Ltd* (2001) 39 ACSR 525 ('Bigshop [No 1]'); *Re Bigshop.com.au Ltd [No 2]* [2001] ATP 24 (Unreported, Austin J, Mordant DP and K Wood, 2 November 2001) ('Bigshop [No 2]'); *Re Normandy Mining Ltd [No 4]* (2002) 40 ACSR 474; *Re Normandy Mining Ltd [No 6]* [2001] ATP 32 (Unreported, Bennett P, M Tilley and T Rowe, 17 June 2002); *Re Brisbane Broncos Ltd [Nos 1–2]* (2002) 40 ACSR 459 ('Brisbane [Nos 1–2]'); *Re Brisbane Broncos Ltd [No 3]* [2002] ATP 3 (Unreported, McKeon P, Ramsay DP and C Buys, 9 April 2002); *Re Anaconda Nickel Ltd [No 8]* [2003] ATP 7 (Unreported, Heading P, Kortian DP and P Scott, 14 July 2003) ('Anaconda [No 8]'); *Re Anaconda Nickel Ltd [No 9]* [2003] ATP 8 (Unreported, McKeon P, Gonski DP and I Ramsay, 14 June 2003) ('Anaconda [No 9]'); *Re Anaconda Nickel Ltd [No 15]* [2003] ATP 17 (Unreported, Heading P, Kortian DP and P Scott, 14 July 2003) ('Anaconda [No 15]'); *Re Anaconda Nickel Ltd [No 19]* [2003] ATP 20 (Unreported, McKeon P, Gonski DP and I Ramsay, 14 June 2003) ('Anaconda [No 19]'); *Re National Can Industries [No 1]* (2003) 48 ACSR 409 ('National Can [No 1]'); *Re National Can Industries Ltd [No 1]* (R) (2003) 48 ACSR 409 ('National Can [No 1] (R)).

⁸⁹ *National Can [No 1]* (R) (2003) 48 ACSR 409 (Austin J); *Bigshop [No 2]* [2001] ATP 24 (Unreported, Austin J, Mordant DP and K Wood, 2 November 2001) (Austin J); *Pinnacle [No 8]* (2001) 39 ACSR 55 (Santow J).

⁹⁰ David Gonski (total 14 matters), Brett Heading (23), Michael Tilley (9) and Karen Wood (11). Of these, only Mr Tilley does not have legal qualifications, although the other two members of that Review Panel were legally trained: see *AMP [No 2]* (2003) 45 ACSR 524.

the same, with it being required to reconsider the matter as if it were the original Panel.⁹¹ In addition, as demonstrated in the following Part, the fact that members have legal training does not mean that they will necessarily adopt a legalistic, rather than a commercial, approach to decision-making.

V DECISION-MAKING

A Form

An important aspect of the Panel's work is the facilitation of public access to its decisions. Decisions are available electronically on the Panel's website, which also includes media releases, guidance notes and consultation drafts, the *Panel Rules*, annual reports and legislative resources.⁹² The Panel's decisions have usually conformed to the same broad framework, making it easier for its commercial audience to determine quickly the key aspects of the decision. One of the most useful elements is a succinct overview of the matter in the opening paragraph.⁹³ Another common feature has been a clear structure through the use of headings.⁹⁴ Decisions generally include, at the beginning, references to all Panel members,⁹⁵ the factual background and the application details; at the end appears the substantive decision itself, whether there has been legal representation,⁹⁶ and

⁹¹ See *Email [No 2]* [2000] ATP 4 (Unreported, Heading P, Taylor DP and M Manning, 28 June 2004) [4] (Heading P, Taylor DP and M Manning); *Pinnacle [No 8]* (2001) 39 ACSR 55, 64 (Santow J, Rowe DP, D Byrne); *Anzoil [No 2]* [2002] ATP 21 (Unreported, Bennett P, Withnall DP and S Reid, 21 November 2002) [9] (Bennett P, Withnall DP and S Reid); *National Can [No 1]* (2003) 48 ACSR 409, 414 (Lumsden P, Burgess DP and D Byrne); *BreakFree Ltd [No 4] (R)* (2003) 22 ACLC 1165, 1170 (Gonski P, McCann DP and R Ahern).

⁹² See *Takeovers Panel* (2004) Takeovers Panel <<http://www.takeovers.gov.au>>.

⁹³ This paragraph appears in bold and, except in a handful of decisions, also provides the outcome. Many of these exceptions are in early decisions (see, eg, *Re Infratil Australia Ltd* (2000) 18 ACLC 696 ('*Infratil [No 2]*'); *Email [No 3]* (2000) 18 ACLC 708; *Re Brickworks Ltd [No 2]* (2000) 18 ACLC 934; *Re St Barbara Mines Ltd* (2000) 18 ACLC 913), although it also applies to some later decisions that in effect replicate reasons already given in a media release (see *Re Richfield Group Ltd* [2003] ATP 41 (Unreported, Withnall P, Heading DP and I Lee, 20 November 2003) ('*Richfield*'); *Re Forest Place Group Ltd* [2004] ATP 3 (Unreported, Lansley P, Alexander DP and C Searle, 12 February 2004) ('*Forest Place*'); *Re Kaefer Technologies Ltd* [2004] ATP 8 (Unreported, Lumsden P, O'Bryan DP and R Ahern, 21 May 2004) ('*Kaefer*'). For other examples, see *Re Bigshop.com.au Ltd [No 3]* [2001] ATP 22 (Unreported, Heading P, Helligar DP and T Kortian, 22 October 2001); *Re Focus Technologies Ltd* [2002] ATP 8 (Unreported, Photakis P, Handicott DP and M McDonald, 30 May 2002); *Re St Barbara Mines Ltd [No 2]* [2004] ATP 13 (Unreported, McCleary P, Koster DP and I Lee, 2 July 2004) ('*St Barbara [No 2]*').

⁹⁴ A new format adopted since September 2003 generally uses the following headings (with subheadings in brackets) in the following order: 'The Proceedings'; 'The Panel and Process'; 'Factual Background (Parties and Chronology of Events)'; 'The Application (Orders Sought)'; 'Discussion'; 'Decision (Legal Representation and Costs)'.

⁹⁵ However, there are a few decisions that only refer to the sitting President (see *Email [No 1]* [2000] ATP 3 (Unreported, Bennett P, 18 May 2000); *Re Australian Liquor Group Ltd [No 2]* (2001) 39 ACSR 14; *Re Normandy Mining Ltd [No 2]* [2001] ATP 28 (Unreported, Gonski P, 18 February 2002); *BreakFree [No 2]* [2003] ATP 30 (Unreported, Farrell P, Cameron DP and M Helligar, 10 September 2003)) and others where the Panel Members are placed amongst other introductory text (see, eg, *Re Pinnacle VRB Ltd [Nos 9 and 9B]* (2001) 40 ACSR 56 ('*Pinnacle [Nos 9 and 9B]*').

⁹⁶ However, see above n 69 and accompanying text.

whether a costs order was made. Prior to recent changes in the format, a number of decisions had also included a summary of the reasons at the beginning.⁹⁷

From September 2003, a number of innovations were applied to the form of the decisions. One of the most useful was the adoption of a medium-neutral citation style for Panel decisions,⁹⁸ which has generally been applied consistently to make it easier to identify decisions.⁹⁹ The move to identifying Review Panel decisions in the title with a reference to the original decision is also helpful.¹⁰⁰ Another development assisting the accessibility of the decisions has been the introduction of catchwords, which identify the key issues, legislative provisions and other decisions referred to by the Panel in its reasons.¹⁰¹ Although it would not be appropriate for all decisions, the Panel has occasionally used a ‘Lexicon of Terms’ (or the simpler title of ‘Definitions Used’) to assist readers in referring to the paragraph where a term is explained.¹⁰²

The effect of one of the changes to the standard template is not clear. Just over half (19) of the 34 decisions since the new format was adopted include the statement that ‘[w]e adopted the Panel’s published Procedural Rules ... for the purposes of the Proceedings.’¹⁰³ It would appear that this statement is intended

⁹⁷ See, eg, *Pinnacle [No 8]* (2001) 39 ACSR 55; *Re Precious Metals Australia Ltd* (2002) 41 ACSR 546; *Re Colonial First State Trust Group [No 3]* [2002] ATP 17 (Unreported, Seabrook P, Wood DP and T Handicott, 11 December 2002); *Re Goodman Fielder Ltd* [2003] ATP 1 (Unreported, Atlas P, Tilley DP and M Micalizzi, 10 January 2003); *Re Austar United Communications Ltd* (2003) 45 ACSR 456; *AMP [No 2]* (2003) 45 ACSR 524. However, this could result in repetition and would not be necessary where the outcome is included in the opening paragraph and the issues clearly identified through headings in the body of the decision.

⁹⁸ See Takeovers Panel, ‘Medium Neutral Citation of Takeovers Panel Decisions’ (Press Release, 11 September 2003); *Decisions* (2004) Takeovers Panel <<http://www.takeovers.gov.au/display.asp?ContentID=16#2000mnc>>. Cf *Email [No 3]* (2000) 18 ACLC 708, fnn 7, 8 (Bennett P, Tilley DP and K Wood).

⁹⁹ For the exceptions, see *Pinnacle [No 10]* [2001] ATP 21 (Unreported, Micalizzi P, Ahern DP and A Lansley, 10 October 2001) and *Pinnacle [No 10]* [2001] ATP 21a (Unreported, Micalizzi P, Ahern DP and A Lansley, 10 October 2001) (published separately with a similar ATP citation); *BreakFree [Nos 3–4]* (2003) 49 ACSR 337 (combined reasons given different ATP citations).

¹⁰⁰ See *National Can [No 1] (R)* (2003) 48 ACSR 409; *BreakFree Ltd [No 4] (R)* (2004) 22 ACLC 1165; *Skywest [No 3] (R)* [2004] ATP 20 (Unreported, McKeon P, Hellicar DP and T Handicott, 31 August 2004). Although earlier decisions in relation to the affairs of the same company had been previously numbered chronologically according to the application order, the number of applications did not always reflect the number of decisions; for example, where applications were heard together (see, eg, *Anaconda [Nos 2–5]* [2003] ATP 4 (Unreported, Heading P, Kortian DP and P Scott, 14 July 2003); *Anaconda [Nos 16–17]* [2003] ATP 15 (Unreported, Heading P, Kortian DP and P Scott, 14 July 2003)) or where the application was withdrawn without a decision (for example, in the case of the *Pinnacle [No 1]* application).

¹⁰¹ However, the catchwords vary in their completeness (compare the decisions referred to in the catchwords with the actual reasons in, for example, *Re SSH Medical Ltd* [2003] ATP 32 (Unreported, Jolley P, Alexander DP and I Lee, 22 September 2003) (‘SSH’) and *National Can [No 1]* (2003) 48 ACSR 409).

¹⁰² See *Anaconda [Nos 2–5]* [2003] ATP 4 (Unreported, Heading P, Kortian DP and P Scott, 14 July 2003), Annexure C (Definitions); *BreakFree [Nos 3–4]* (2003) 49 ACSR 337, Annexure C (Lexicon of terms); *Re Village Roadshow Ltd* (2004) 22 ACLC 578, Annexure E (Lexicon of terms).

¹⁰³ *Re PowerTel Ltd [No 3]* [2003] ATP 28 (Unreported, Handicott P, Photakis DP and C Buys, 8 August 2003) [59] (Handicott P, Photakis DP and C Buys) (‘*PowerTel [No 3]*’). Although they do not adopt the standard format, the following decisions include a similar statement at the end of the reasons: *PowerTel [No 3]* [2003] ATP 28 (Unreported, Handicott P, Photakis DP and C Buys, 8 August 2003); *BreakFree [No 2]* [2003] ATP 29 (Unreported, Farrell P, Cameron DP and M Hellicar, 10 September 2003) [53] (Farrell P).

to indicate that the Panel has adopted the procedural rules without any changes.¹⁰⁴ Unfortunately, it is unclear what should be inferred from the absence of this statement in certain cases.¹⁰⁵

B Process

One of the key areas in which the focus of the Panel on the efficient resolution of matters differs from the courts is the Panel's emphasis on written instead of oral submissions. There has rarely been oral argument in the form of a Panel conference.¹⁰⁶ This is an important element of the Panel's ability to deal with matters quickly and efficiently in keeping with its commercial approach. The Panel has also taken the opportunity to deal with matters more effectively by considering issues arising from related matters in the one proceeding.¹⁰⁷ Another example is where, in a number of more recent matters, the Panel has released its decision in a media release and later published brief reasons that were substantially based on the release.¹⁰⁸

There are numerous examples of the Panel responding quickly to applications. The *Anaconda* matters, in particular, refer to the Panel considering matters the same day on which the application was received.¹⁰⁹ Other matters have been

¹⁰⁴ Such changes are permitted under the *Panel Rules* rr 1.5–1.6.

¹⁰⁵ It may be explicable in 12 decisions where the Panel declined to conduct proceedings or the proceedings were withdrawn: see, eg, *Re Grand Hotel Group* [2003] ATP 34 (Unreported, Scott P, Ramsay DP and S Reid, 13 October 2003) ('*Grand Hotel*'); *Re Novus Petroleum Ltd [No 2]* (2004) 50 ACSR 95 ('*Novus [No 2]*').

¹⁰⁶ See, eg, *Infratil [No 2]* (2000) 18 ACLC 696; *Email [No 3]* (2000) 18 ACLC 708; *Vincorp Wineries* (2001) 38 ACSR 584; *Pinnacle [No 5]* (2001) 39 ACSR 43; *Pinnacle [No 8]* (2001) 39 ACSR 55; *Pinnacle [Nos 9 and 9B]* (2001) 40 ACSR 56 (*[No 9B]*). In contrast to the references to legal representation, a member of the Panel Executive has indicated that wherever a conference has been held, it is indicated in the published reasons: Interview with George Durbridge (Telephone interview, 12 July 2004).

¹⁰⁷ See, eg, *Re Mildura Co-operative Fruit Company Ltd* [2004] ATP 5 (Unreported, McKeon P, Schultz DP and M Micalizzi, 8 March 2004) [2]–[3] (McKeon P, Schultz DP and M Micalizzi) ('*Mildura*'). For matters in which more than one application has been dealt with in one set of reasons, see *Brisbane [Nos 1–2]* (2002) 40 ACSR 459, 473 (Seabrook P, Byrne DP and P Young); *Anaconda [Nos 2–5]* [2003] ATP 4 (Unreported, Heading P, Kortian DP and P Scott, 14 July 2003); *Anaconda [Nos 6–7]* [2003] ATP 6 (Unreported, McKeon P, Gonski DP and I Ramsay, 7 February 2003); *Anaconda [Nos 16–17]* [2003] ATP 15 (Unreported, Heading P, Kortian DP and P Scott, 14 July 2003); *BreakFree [Nos 3–4]* (2003) 49 ACSR 337 (although on the latter decision, see above n 99 and accompanying text).

¹⁰⁸ See the opening paragraph in each of: *Richfield* [2003] ATP 41 (Unreported, Withnall P, Heading DP and I Lee, 20 November 2003); *Forest Place* [2004] ATP 3 (Unreported, Lansley P, Alexander DP and C Searle, 12 February 2004); *Kaefer* [2004] ATP 8 (Unreported, Lumsden P, O'Bryan DP and R Ahern, 21 May 2004); *St Barbara [No 2]* [2004] ATP 13 (Unreported, McCleary P, Koster DP and I Lee, 2 July 2004); *Re Rivkin Financial Services Ltd* [2004] ATP 14 (Unreported, McKeon P, Farrell DP and G Bradley, 19 July 2004) ('*Rivkin*'); *Re Kaefer Technologies Ltd [No 2]* [2004] ATP 16 (Unreported, Lumsden P, O'Bryan DP and R Ahern, 21 July 2004) ('*Kaefer [No 2]*'); *Re Lake Technology Ltd* [2004] ATP 18 (Unreported, McDonald P, McCleary DP and P Scott, 4 August 2004) ('*Lake Technology*') (although see above n 93 and accompanying text). In *Re Australian Leisure & Hospitality Group Ltd [No 2]* [2004] ATP 21 (Unreported, Alexander P, Seabrook DP and I Ramsay, 8 September 2004) ('*ALH [No 2]*'), the Panel expanded upon the reasons given in the Media Release (cf Takeovers Panel, 'Australian Leisure & Hospitality Group Limited 02 — Panel Declines to Commence Proceedings' (Press Release, 8 September 2004)).

¹⁰⁹ In *Anaconda [No 8]* [2003] ATP 7 (Unreported, Heading P, Kortian DP and P Scott, 14 July 2003) and *Anaconda [No 9]* [2003] ATP 8 (Unreported, McKeon P, Gonski DP and I Ramsay, 14 June 2003), the Panel met the same afternoon and morning respectively following applications at

conducted over the end-of-year holiday period.¹¹⁰ In contrast to where the Panel has noted that submissions have been provided in a very short time frame,¹¹¹ there are examples where conduct by parties has delayed proceedings.¹¹² There have also been concerns that the Panel has not been as swift in providing written reasons as it has been in releasing its decisions. Perhaps in response to these concerns, one of the features of the new format is the provision of the dates of both the decision and the accompanying reasons at the conclusion of the process. This provides transparency in the Panel's processes and an even greater incentive for Panel members to improve performance in this area.

On the other hand, the Panel recognises the effect that short time frames can have in the context of their decisions. In *Re Infratil Australia Ltd [No 1]*, the Panel noted a tension between conducting its proceedings in a timely manner as required by the *ASIC Regulations* and ensuring that shareholders received sufficient information about the takeover, with the Panel affirming the decision of ASIC in order to facilitate the latter.¹¹³ Similarly, after expressing its expectation that parties will seek an interim order at least five days before it is required, the *Re Taipan Resources NL [No 3]* Panel stated that 'in general the policy of the panel is that, the shorter the time available between an application and the need for a decision, the greater the threshold of alleged harm that an applicant must demonstrate.'¹¹⁴

The importance of procedural fairness has also been highlighted in Panel decisions. This issue was raised squarely in relation to the AMP Shopping Centre Trust matter, in which it was argued that the Panel had not observed procedural fairness in making orders against a person who was not a party to the proceedings.¹¹⁵ In rejecting this argument, the Panel set out the steps that it had taken, including advising the person of the consequences of not becoming a party.¹¹⁶ Fairness issues have also been raised in relation to the making of submissions. Responding to concerns that parties were making late submissions in order to

4:30 pm and 10:22 am: *Anaconda [No 8]* [2003] ATP 7 (Unreported, Heading P, Kortian DP and P Scott, 14 July 2003) [1], [3] (Heading P, Kortian DP and P Scott); *Anaconda [No 9]* [2003] ATP 8 (Unreported, McKeon P, Gonski DP and I Ramsay, 14 June 2003) [1], [3] (McKeon P, Gonski DP and I Ramsay). Due to time pressures in a related matter, the substantive President decided to deal with the matter using his power under *Corporations Act 2001* (Cth) s 657E and considered the application the same day: *Anaconda [No 10]* [2003] ATP 9 (Unreported, McKeon P, 14 June 2003) [3].

¹¹⁰ See, eg, *Re Taipan Resources NL [No 3]* (2000) 37 ACSR 173 ('*Taipan [No 3]*'); *Brisbane [Nos 1-2]* (2002) 40 ACSR 459, 473 (Seabrook P, Byrne DP and P Young).

¹¹¹ See, eg, *Re Ashton Mining Ltd* (2000) 36 ACSR 40, 47 (Heading P, Wood DP and D Byrne).

¹¹² See, eg, *Email [No 2]* [2000] ATP 4 (Unreported, Heading P, Taylor DP and M Manning, 28 June 2004) [50]-[52] (Heading P, Taylor DP and M Manning); *Email [No 3]* (2000) 18 ACLC 708, 725 (Bennett P, Tilley DP and K Wood); *Re Alpha Healthcare Ltd* [2001] ATP 13 (Unreported, Rich P, Schultz DP and J Seabrook, 27 July 2001) [84] (Rich P, Schultz DP and J Seabrook) ('*Alpha Healthcare*').

¹¹³ *Re Infratil Australia Ltd* [2000] ATP 1 (Unreported, Heading P, McCleary DP and J Seabrook, 9 May 2000) [22]-[28] (Heading P, McCleary DP and J Seabrook).

¹¹⁴ *Taipan [No 3]* (2000) 37 ACSR 173, 179 (McKeon P, Ramsay DP and D Byrne). For a discussion of the expected time periods currently set out under the Panel rules, see text following above n 28.

¹¹⁵ *AMP [No 1]* (2003) 45 ACSR 496, 516 (Taylor P, Seabrook DP and R Ahern).

¹¹⁶ *Ibid* 517 (Taylor P, Seabrook DP and R Ahern).

‘have the last word,’¹¹⁷ the Panel in *Re Email Ltd [No 2]* observed that it was ‘entitled to take a short time to assess the submissions’ as ‘[t]here is more to natural justice than simply allowing parties to make submissions: it also involves reading them with due attention.’¹¹⁸ Similar concerns were expressed when the Panel refused a request that a party be allowed to make confidential submissions in *Taipan [No 3]*:

In general, it is the panel’s policy not to accept submissions on the basis that they not be provided to the other parties other than in exceptional circumstances. The panel is concerned to ensure procedural fairness between the parties to an application. If the panel accepts confidential submissions and relies on those submissions in making its decision without allowing them to be seen or challenged by the other parties, this may open the panel’s decision to challenge on procedural fairness grounds.¹¹⁹

There are a number of significant differences between the role of the Panel and that of the courts. Many of these differences flow from the prohibition on the Panel exercising judicial power contrary to the *Constitution*.¹²⁰ Whereas the courts’ role includes enforcement of existing rights and obligations under the *Corporations Act*,¹²¹ the Panel determines whether there has been compliance with the policy underlying the takeover provisions and can remedy any deficiencies by creating ‘a new set of rights and obligations’.¹²² Consequently, the Panel’s focus is upon the effect of the circumstances before it on the control of the company, and upholding the purposes behind the takeover provisions,¹²³ rather than upon ensuring compliance with each of its technical requirements. This is also reflected in the Panel having more limited powers than a court.¹²⁴ However, in emphasising the limited function of the Panel in ensuring that takeovers are conducted ‘fairly and openly’, the *Re Pinnacle VRB Ltd [No 8]* Panel warned that it should not ‘attempt to replicate court processes’ and should avoid becoming ‘a second-rate court’ rather than a ‘first-rate commercial panel.’¹²⁵

Another important difference between the Panel and a court is that the Panel is not bound by the rules of precedent. This flows from the nature of the Panel as

¹¹⁷ *Email [No 2]* [2000] ATP 4 (Unreported, Heading P, Taylor DP and M Manning, 28 June 2004) [52] (Heading P, Taylor DP and M Manning).

¹¹⁸ *Ibid* [53] (Heading P, Taylor DP and M Manning).

¹¹⁹ *Taipan [No 3]* (2000) 37 ACSR 173, 182 (McKeon P, Ramsay DP and D Byrne).

¹²⁰ See above n 6. The Panel’s powers prior to the CLERP reforms were upheld by the High Court in *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 (*‘Precision Data’*), but have not been tested since.

¹²¹ This is subject to the restrictions contained in *Corporations Act* ss 659B(1), (4), 659C. See above nn 10–12 and accompanying text.

¹²² *Precision Data* (1991) 173 CLR 167, 191 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). See also *Pinnacle [No 8]* (2001) 39 ACSR 55, 63 (Santow J, Rowe DP and D Byrne); *AMP [No 2]* (2003) 45 ACSR 524, 533 (Tilley P, Wood DP and D Byrne).

¹²³ See *Corporations Act* ss 602, 657A.

¹²⁴ For example, the Panel cannot enforce its own orders or make orders relating to discovery or contempt, and participants in its proceedings do not have the same protections: see *Corporations Act* s 657G; *Pinnacle [No 8]* (2001) 39 ACSR 55, 66 (Santow J, Rowe DP and D Byrne).

¹²⁵ *Pinnacle [No 8]* (2001) 39 ACSR 55, 67 (Santow J, Rowe DP and D Byrne).

an administrative body that applies takeover policy to the circumstances before it, rather than determining existing rights and obligations according to the law.¹²⁶ It is therefore incongruous that a number of the decisions that have included catchwords since September 2003 have used terminology usually adopted in the reporting of court cases. By referring to other Panel decisions or court cases as having been ‘distinguished’,¹²⁷ ‘followed’,¹²⁸ ‘approved’,¹²⁹ or ‘applied’,¹³⁰ the catchwords published with the Panel reasons create the impression that a system of precedent is operating. The other terms used — namely ‘cited’,¹³¹ ‘refd’,¹³² (referred to) and ‘cons’,¹³³ (considered) — have a weaker effect but similar connotations. The use of the term ‘precedents’ in headings above text that discusses earlier Panel decisions in the *BreakFree [No 2]* decision also gives this impression, although it is arguable that the term is being used in a more general sense.¹³⁴ Similarly, rather than using the term ‘distinguish’, the *Re Bigshop.com.au Ltd [No 1]* Panel noted that the circumstances of a court case were ‘materially removed from the current matter’.¹³⁵

There are conflicting statements made with respect to precedent in *Re Pasmenco (admin apptd)*. This matter involved a decision to grant a novel exemption from the takeover provisions in the context of a voluntary administration.¹³⁶ The process of the decision itself is unique, being the only occurrence of dissenting reasons to date. Although this development does not appear to have had any practical impact on the decision-making of future Panels, it is likely that it would not be in the interests of efficient commercial decision-making for a practice of the use of dissenting opinions to emerge.¹³⁷ The majority and minority in

¹²⁶ See above nn 121–2 and accompanying text.

¹²⁷ *Re Trysoft Corporation Ltd* [2003] ATP 26 (Unreported, Pak-Poy P, Burgess DP and M Micalizzi, 3 July 2003) (*‘Trysoft’*).

¹²⁸ *Trysoft* [2003] ATP 26 (Unreported, Pak-Poy P, Burgess DP and M Micalizzi, 3 July 2003); *Rivkin* [2004] ATP 14 (Unreported, McKeon P, Farrell DP and G Bradley, 19 July 2004).

¹²⁹ *SSH* [2003] ATP 32 (Unreported, Jolley P, Alexander DP and I Lee, 22 September 2003); *Re QR Sciences Ltd* [2003] ATP 37 (Unreported, Jolley P, Micalizzi DP and T Kortian, 23 October 2003); *Re InvestorInfo Ltd* [2004] ATP 6 (Unreported, Taylor P, Scott DP and M Paganin, 22 April 2004) (*‘InvestorInfo’*).

¹³⁰ *BreakFree [No 2]* [2003] ATP 30 (Unreported, Farrell P, Cameron DP and M Hellicar, 10 September 2003); *InvestorInfo* [2004] ATP 6 (Unreported, Taylor P, Scott DP and M Paganin, 22 April 2004).

¹³¹ *Re Prudential Investment Co of Australia Ltd* (2003) 49 ACSR 147 (*‘Prudential’*); *BreakFree [Nos 3–4]* (2003) 49 ACSR 337; *InvestorInfo* [2004] ATP 6 (Unreported, Taylor P, Scott DP and M Paganin, 22 April 2004); *Rivkin* [2004] ATP 14 (Unreported, McKeon P, Farrell DP and G Bradley, 19 July 2004).

¹³² *Grand Hotel* [2003] ATP 34 (Unreported, Scott P, Ramsay DP and S Reid, 13 October 2003); *Richfield* [2003] ATP 41 (Unreported, Withnall P, Heading DP and I Lee, 20 November 2003).

¹³³ *Prudential* (2003) 49 ACSR 147; *Rivkin* [2004] ATP 14 (Unreported, McKeon P, Farrell DP and G Bradley, 19 July 2004).

¹³⁴ *BreakFree [No 2]* [2003] ATP 30 (Unreported, Farrell P, Cameron DP and M Hellicar, 10 September 2003) in headings above [29], [31].

¹³⁵ *Bigshop [No 1]* (2001) 39 ACSR 525, 538 (Heading P, Hellicar DP and T Kortian).

¹³⁶ *Re Pasmenco (admin apptd)* (2002) 41 ACSR 511 (*‘Pasmenco’*); Emma Armson, ‘Handing the Corporate Reins to Creditors: The Role of the Takeovers Panel in the Pasmenco Administration’ (2002) 25 *University of New South Wales Law Journal* 651.

¹³⁷ However, it was stated in the media release accompanying the decision that the drafting of the dissenting reasons had not delayed the finalisation of the reasons: see Takeovers Panel, ‘Panel Publishes Decision and Reasons in Pasmenco’ (Press Release, 26 April 2002) [8].

Pasminco had opposing views on whether the granting of the exemption resulted in a precedent that would need to be followed in future cases and, consequently, whether it was in effect implementing law reform. In arguing that it did, the dissenting reasons echoed ASIC's concerns that it would be 'creating a precedent which may not be easily distinguished' and noted that neither the person seeking the exemption nor the majority reasons had provided a basis to 'distinguish this from any future cases'.¹³⁸ Given the context of these statements, it is possible to argue that these terms were being used in a general sense rather than in the context of the strict application of a system of precedent. The contrasting majority reasons stated:

We do not intend this decision to be a watershed. We do not think that our decision will be tantamount to law reform by setting a precedent that ASIC and future panels will feel bound to follow. Rather, we expect ASIC and future Panels to decide whether it is appropriate to give exemptions on the basis of the specific facts in individual future cases.¹³⁹

While it seems unrealistic to expect that the decision would not provide a basis from which similar exemptions could be granted in the future, this statement reinforces the approach expected to be taken by each Panel to the circumstances before it.

Notwithstanding the non-applicability of precedent, it is appropriate that the Panel consider other decisions with similar circumstances in order that there be consistency in decision-making. This promotes the commercial aims of the Panel by allowing takeover transactions to take place in the context of a clear regulatory framework. Accordingly, the Panel has referred to court cases and, unsurprisingly with greater incidence over time, other Panel decisions that are relevant to its consideration of the issues involved. Of the Panel reasons to date,¹⁴⁰ only 25 per cent have not referred to either a court case or another Panel decision. A similar number (26 per cent) of decisions have referred only to related Panel or court proceedings concerning the same company. Some of the decisions not including case or Panel decision references instead refer to Panel policies or guidance notes.¹⁴¹ These can play a useful role in promoting a consistent approach by different Panels. In the context of setting out its approach as a Review Panel,¹⁴² the *Pinnacle [No 8]* Panel noted that although it was to take a

fresh look at the facts and the policy, not limited by the facts found, or the policy applied, at first instance ... in line with the panel's published policy on re-

¹³⁸ *Pasminco* (2002) 41 ACSR 511, 541 (Micalizzi DP).

¹³⁹ *Ibid* 514 (Byrne P and I Lee).

¹⁴⁰ See above n 4.

¹⁴¹ See, eg, *Pinnacle [Nos 4 and 6]* (2001) 38 ACSR 564, 569 (Micalizzi P, McBride DP and R Ahern) (policy on restraining dispatch of documents: *[No 4]*); *Re Sirtex Medical Ltd* [2003] ATP 22 (Unreported, Lansley P, Reid DP and L Elsing, 2 July 2003) (lock-up devices); *BreakFree [No 1]* [2003] ATP 29 (Unreported, Farrell P, Cameron DP and M Hellicar, 10 September 2003) (frustrating action).

¹⁴² See also above n 91 and accompanying text.

viewing decisions, a review panel will be slow to fail to follow any established policy that has been developed by the panel'.¹⁴³

On the other hand, there are some similarities between the approach taken by the Panel and that taken by courts. This partly flows from the fact that, like courts prior to the CLERP reforms, the Panel's role is to ensure that takeover policy is observed taking into account any contraventions of the legislation.¹⁴⁴ In examining legal and policy issues, the Panel may adopt reasoning comparable to that which would be undertaken by a court.¹⁴⁵ Panels have also undertaken a statutory interpretation role on a number of occasions,¹⁴⁶ as well as considering jurisdictional issues.¹⁴⁷ The awarding of costs is another function that the Panel has in common with courts. However, costs can only be awarded by the Panel where it has made a declaration of unacceptable circumstances.¹⁴⁸ To date, the Panel has directed that costs be paid in only four cases, which have involved delay by a party either in the course of proceedings¹⁴⁹ or in becoming a party to the proceedings,¹⁵⁰ or unmeritorious applications for review of Panel decisions.¹⁵¹

¹⁴³ See *Pinnacle [No 8]* (2001) 39 ACSR 55, 64 (Santow J, Rowe DP and D Byrne). The *Pinnacle [No 8]* Panel also noted that, where a policy is still in development, guidance may be sought from the Panel Executive 'as to the likely response of a future panel', but that such guidance 'cannot bind a future panel': at 57 (Santow J, Rowe DP and D Byrne).

¹⁴⁴ *Corporations Act* ss 602, 657A(1)–(3).

¹⁴⁵ See, eg, *Re Aulron Energy Ltd* [2003] ATP 31 (Unreported, Schultz P, Micalizzi DP and A McCleary, 22 September 2003) [94], [102] (Schultz P, Micalizzi DP and A McCleary); *Mildura* [2004] ATP 5 (Unreported, McKeon P, Schultz DP and M Micalizzi, 8 March 2004) [80]–[81] (McKeon P, Schultz DP and M Micalizzi).

¹⁴⁶ See, eg, *Pinnacle [Nos 9 and 9B]* (2001) 40 ACSR 56, 63 (Micalizzi P, Ahern DP and A Lansley); *PowerTel [No 3]* [2003] ATP 28 (Unreported, Handicott P, Photakis DP and C Buys, 8 August 2003) [33] (Handicott P, Photakis DP and C Buys); *Skywest [Nos 1–2]* (2004) 50 ACSR 72, 86ff (*[No 1]*) (Lansley P, Heading DP and C Buys).

¹⁴⁷ See, eg, *BreakFree [Nos 3–4]* (2003) 49 ACSR 337, 345 (Farrell P, Cameron DP and M Helli-car); *InvestorInfo* [2004] ATP 6 (Unreported, Taylor P, Scott DP and M Paganin, 22 April 2004) [55] (Taylor P, Scott DP and M Paganin).

¹⁴⁸ *Corporations Act* s 657D(1), (2)(d). The Panel has signalled the need for law reform to remedy this: see, eg, *Re Pinnacle VRB Ltd [No 2]* (2000) 36 ACSR 724, 730 fn 12 and accompanying text (McKeon P, Ramsay DP and R Ahern); *Pinnacle [No 5]* (2001) 39 ACSR 43, 54 fn 13 and accompanying text (Micalizzi P, McBride DP and R Ahern). In the *Taipan [No 11]* matter, the affected party was required to pay costs in accordance with an undertaking given prior to consent being granted for the review application: *Taipan [No 11]* [2001] ATP 16 (Unreported, Bennett P, Cameron DP and I Ramsay, 26 June 2001) [98]–[103] (Bennett P, Cameron DP and I Ramsay).

¹⁴⁹ *Pinnacle [Nos 4 and 6]* (2001) 38 ACSR 564, 567 (*[No 4]*) (Micalizzi P, McBride DP and R Ahern).

¹⁵⁰ *AMP [No 1]* (2003) 45 ACSR 496, 518 (Taylor P, Seabrook DP and R Ahern).

¹⁵¹ *Taipan [No 11]* [2001] ATP 16 (Unreported, Bennett P, Cameron DP and I Ramsay, 26 June 2001) [103] (Bennett P, Cameron DP and I Ramsay); *Pinnacle [No 11]* [2001] ATP 23 (Unreported, McKeon P, McCann DP and C Photakis, 11 October 2001) [66] (McKeon P, McCann DP and C Photakis). The *Pinnacle [No 11]* Panel also considered that the party's conduct had been contrary to a commercial solution: at [68] (McKeon P, McCann DP and C Photakis). See also *Guidance Note 9: Costs Order*, available at <<http://www.takeovers.gov.au/display.asp?ContentID=119>> (superseded); *Infratil [No 2]* (2000) 18 ACLC 696, 707 (Heading P, McCleary DP and J Seabrook); *Taipan [No 11]* [2001] ATP 16 (Unreported, Bennett P, Cameron DP and I Ramsay, 26 June 2001) [100] (Bennett P, Cameron DP and I Ramsay).

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C Outcomes

An examination of the Panel decisions to date demonstrates that the Panel seeks to obtain commercial outcomes where possible, rather than making declarations of unacceptable circumstances or orders. Table 2 sets out statistics on the outcomes of matters relating to unacceptable circumstances since the CLERP reforms (the table does not include the nine decisions that relate solely to review of an ASIC decision).¹⁵²

Table 2: Outcomes from Decisions on Unacceptable Circumstances

Outcome	Non-Review Panel (Percentage)	Result After Review Panel (Percentage)	All Decisions (Percentage)
Adjourned	1 (1%)	0	1 (1%)
Withdrawn	6 (6%)	0	6 (5%)
Declined proceedings	17 (16%)	1 (6%)	18 (14%)
Declined application	13 (12%)	2 (11%)	15 (12%)
Declined proceedings with undertakings	3 (3%)	0	3 (2%)
Declined application with undertakings	43 (39%)	3 (17%)	46 (36%)
Consent to vary undertaking	1 (1%)	0	1 (1%)
Interim orders	7 (6%)	3 (17%)	10 (8%)
Declaration	5 (5%)	3 (17%)	8 (6%)
Declaration and orders	13 (12%)	6 (33%)	19 (15%)
Total	109	18	127

Only 29 per cent of all Panel matters resulted in a declaration or orders. Many of these involved a breach of a technical requirement in the takeover provisions in Chapters 6 to 6C of the *Corporations Act*, such as relating to the 20 per cent

¹⁵² The outcomes of applications for review of ASIC decisions are only included where they are in combination with an unacceptable circumstances matter: *Re Colonial First State Property Trust Group [No 1]* (2002) 43 ACSR 143; *Anaconda [Nos 2–5]* [2003] ATP 4 (Unreported, Heading P, Kortian DP and P Scott, 14 July 2003); *National Can [No 1]* (2003) 48 ACSR 409.

takeover threshold,¹⁵³ substantial holding and beneficial ownership information,¹⁵⁴ statements on quotation¹⁵⁵ and consent for statements to be included in takeover documents.¹⁵⁶ Others resulted from circumstances including insufficient funding or disclosure,¹⁵⁷ unsubstantiated statements¹⁵⁸ or a false or misleading market contrary to the policy of ensuring an efficient, competitive and informed market under s 602(a) of the *Corporations Act*.¹⁵⁹ In making its decision, some Panels have emphasised the role of declarations of unacceptable circumstances in discouraging breaches of the takeover requirements and regulating market conduct in the future.¹⁶⁰ It is not surprising that the proportion of the Review Panel matters leading to a declaration or order is significantly higher, given that just under half of the Panel decisions had that outcome.¹⁶¹

¹⁵³ *Taipan [No 9]* (2001) 38 ACSR 111; *Anzoil [No 1]* [2002] ATP 19 (Unreported, Buys P, McCann DP and C Searle, 24 December 2002); *Anzoil [No 2]* [2002] ATP 21 (Unreported, Bennett P, Withnall DP and S Reid, 19 December 2002); *Anaconda [Nos 16–17]* [2003] ATP 15 (Unreported, Heading P, Kortian DP and P Scott, 14 July 2003); *Anaconda [No 18]* [2003] ATP 18 (Unreported, McKeon P, Gonski DP and I Ramsay, 12 May 2003); *Trysoft* [2003] ATP 26 (Unreported, Pak-Poy P, Burgess DP and M Micalizzi, 3 July 2003).

¹⁵⁴ *Re Cobra Resources Ltd* (2003) 45 ACSR 487 ('Cobra'); *Trysoft* [2003] ATP 26 (Unreported, Pak-Poy P, Burgess DP and M Micalizzi, 3 July 2003); *Re Village Roadshow Ltd* (2004) 22 ACLC 578.

¹⁵⁵ *Pinnacle [Nos 9 and 9B]* (2001) 40 ACSR 56 (*[No 9B]*).

¹⁵⁶ *Mildura* [2004] ATP 5 (Unreported, McKeon P, Schultz DP and M Micalizzi, 8 March 2004).

¹⁵⁷ *Pinnacle [Nos 4 and 6]* (2001) 38 ACSR 564; *Taipan [No 10]* [2001] ATP 5 (Unreported, Byrne P, Rowe DP and M Burgess, 23 May 2001); *Taipan [No 11]* [2001] ATP 16 (Unreported, Bennett P, Cameron DP and I Ramsay, 26 June 2001); *Cobra* (2003) 45 ACSR 487.

¹⁵⁸ *Re Namakwa Diamond Co NL [No 2]* [2001] ATP 9 (Unreported, Withnall P, Roche DP and C Photakis, 15 May 2001).

¹⁵⁹ *Re Realestate.com.au Ltd* (2001) 37 ACSR 218; *Pinnacle [No 10]* [2001] ATP 21a (Unreported, Micalizzi P, Ahern DP and A Lansley, 10 October 2001); *Pinnacle [No 11]* [2001] ATP 23 (Unreported, McKeon P, McCann DP and C Photakis, 11 October 2001); *Re Ranger Minerals Ltd* (2002) 43 ACSR 91; *Anaconda [No 19]* [2003] ATP 20 (Unreported, McKeon P, Gonski DP and I Ramsay, 14 June 2003); *Cobra* (2003) 45 ACSR 487; *BreakFree [Nos 3–4]* (2003) 49 ACSR 337.

¹⁶⁰ See, eg, *BreakFree [Nos 3–4]* (2003) 49 ACSR 337, 364 (Farrell P, Cameron DP and M Helli-car); *Mildura* [2004] ATP 5 (Unreported, McKeon P, Schultz DP and M Micalizzi, 8 March 2004) [51] (McKeon P, Schultz DP and M Micalizzi). For examples of statements on the importance of particular requirements, see *SSH* [2003] ATP 32 (Unreported, Jolley P, Alexander DP and I Lee, 22 September 2003) [40]ff (Jolley P, Alexander DP and I Lee); *Novus [No 2]* (2004) 50 ACSR 95, 101 (Withnall P, Seabrook DP and T Handicott).

¹⁶¹ See *Pinnacle [Nos 4 and 6]* (2001) 38 ACSR 564 (*[No 4]*); *Taipan [No 10]* [2001] ATP 5 (Unreported, Byrne P, Rowe DP and M Burgess, 23 May 2001); *Taipan [No 11]* [2001] ATP 16 (Unreported, Bennett P, Cameron DP and I Ramsay, 26 June 2001); *Pinnacle [No 10]* [2001] ATP 21a (Unreported, Micalizzi P, Ahern DP and A Lansley, 10 October 2001); *Pinnacle [No 11]* [2001] ATP 23 (Unreported, McKeon P, McCann DP and C Photakis, 11 October 2001); *Anzoil [No 1]* [2002] ATP 19 (Unreported, Buys P, McCann DP and C Searle, 24 December 2002); *Anzoil [No 2]* [2002] ATP 21 (Unreported, Bennett P, Withnall DP and S Reid, 21 November 2002); *Anaconda [Nos 2–5]* [2003] ATP 4 (Unreported, Heading P, Kortian DP and P Scott, 14 July 2003); *Anaconda [Nos 6–7]* [2003] ATP 6 (Unreported, McKeon P, Gonski DP and I Ramsay, 7 February 2003); *Anaconda [Nos 16–17]* [2003] ATP 15 (Unreported, Heading P, Kortian DP and P Scott, 14 July 2003); *Anaconda [No 18]* [2003] ATP 18 (Unreported, McKeon P, Gonski DP and I Ramsay, 14 June 2003); *Re AMP Shopping Centre Trust [No 1]* (2003) 45 ACSR 496; *Re AMP Shopping Centre Trust [No 2]* (2003) 45 ACSR 524 ('AMP [No 2]'); *BreakFree [Nos 3–4]* 49 ACSR 337; *BreakFree [No 4] (R)* (2003) 22 ACLC 1165; *Skywest [No 3]* [2004] ATP 17 (Unreported, Heading P, Jolley DP and C Buys, 30 July 2004); *Skywest [No 3] (R)* [2004] ATP 20 (Unreported, McKeon P, Helli-car DP and T Handicott, 5 August 2004).

Of the remaining matters alleging unacceptable circumstances, 38 per cent were dismissed with either formal undertakings under s 201A of the *ASIC Act* or as a result of disclosures or other action acceptable to the Panel.¹⁶² It is also notable that a substantial number of matters (16 per cent in total, including two per cent with undertakings) were dealt with prior to the Panel conducting proceedings, supporting the emphasis of the Panel on the efficient resolution of applications. These statistics reflect the Panel's approach in seeking to negotiate an outcome consistent with takeover policy, rather than relying upon its coercive powers under the *Corporations Act*. This is evidenced in a number of Panel decisions, for example, where the Panel has noted that cooperation by the parties has facilitated a sensible outcome¹⁶³ or encouraged parties to resolve issues with ASIC.¹⁶⁴ The approach adopted in *Re Skywest Ltd [Nos 1–2]*¹⁶⁵ is a particularly good example of the Panel's focus on using its role to facilitate negotiations between the parties. In the course of that matter, the Panel encouraged the parties to negotiate for around a week on issues set out by the Panel.¹⁶⁶ This resulted in offers to resolve some of the issues, allowing the Panel to use these compromises as a 'starting point' and to concentrate on the remaining points of contention.¹⁶⁷

VI CONCLUSION

The CLERP Panel reforms are founded upon a desire to move away from a court-based system of dispute resolution during a takeover. This article has examined this change by focusing on the extent to which the Panel operates as a commercial body rather than a court. In essence, the Panel is not a court in either form or substance. Some of the key differences are that it comprises part-time members still working in commercial roles and has its own processes that have

¹⁶² Both of these latter categories are represented under the 'with undertakings' categories in Table 2. Examples of such undertakings include the provision of a supplementary bidder's statement (see, eg, *Re Novus Petroleum Ltd* (2004) 22 ACLC 436, 437 (Withnall P, Reid DP and C Buys) (Annexure A); *Skywest [Nos 1–2]* (2004) 50 ACSR 72, 90 (*No 1*) (Lansley P, Heading DP and C Buys) (Annexure A)), disclosures in other documentation sent to target shareholders (see, eg, *Email [No 3]* (2000) 18 ACLC 708, 722, 724 (Bennett P, Tilley DP and K Wood); *Re Great Mines Ltd* (2004) 49 ACSR 53, 54 (Photakis P, McDonald DP and S Withers) (Annexure A)), repayment of or waiving the right to receive a break free in certain circumstances (see, eg, *Re Ausdoc Group Ltd* (2002) 42 ACSR 629, 641 (Tilley P, Ramsay DP and L Elsing) (Annexures B and C); *National Can [No 1]* (2003) 48 ACSR 409, 411 (Lumsden P, Burgess DP and D Byrne) (Annexures A and B)) and not proceeding with transactions that may have the effect of frustrating a takeover bid prior to obtaining shareholder approval (see, eg, *Pinnacle [No 5]* (2001) 39 ACSR 43, 46, 52, 54 (Micalizzi P, McBride DP and R Ahern)). See Emma Armson, 'The Frustrating Action Policy: Shifting Power in the Takeover Context' (2003) 21 *Company and Securities Law Journal* 487.

¹⁶³ See, eg, *Alpha Healthcare* [2001] ATP 13 (Unreported, Rich P, Schultz DP and J Seabrook, 27 July 2001) [71], [88]–[89] (Rich P, Schultz DP and J Seabrook); *Re Anaconda Nickel Ltd [No 11]* [2003] ATP 10 (Unreported, Heading P, Kortian DP and P Scott, 14 July 2003) [6] (Heading P, Kortian DP and P Scott); *Re Anaconda Nickel Ltd [No 14]* [2003] ATP 13 (Unreported, Heading P, Kortian DP and P Scott, 14 July 2003) [6] (Heading P, Kortian DP and P Scott).

¹⁶⁴ See, eg, *Breakfree [No 2]* [2003] ATP 30 (Unreported, Farrell P, Cameron DP and M Hellicar, 10 September 2003) [42] (Farrell P, Cameron DP and M Hellicar).

¹⁶⁵ (2004) 50 ACSR 72.

¹⁶⁶ *Ibid* 79 (*No 1*) (Lansley P, Heading DP and C Buys).

¹⁶⁷ *Ibid* 80 (*No 1*) (Lansley P, Heading DP and C Buys).

been designed to respond to each matter in short time frames. The Panel's procedures and outputs are also highly accessible to its commercial readership through the distribution of reasons and media releases on its website and the adoption of a standard format for reasons that make it easier to identify the outcome and key issues. More importantly, the Panel has adopted an approach based upon seeking outcomes through negotiation between the parties rather than enforcement of the legislation through declarations and orders. This is reflected in the fact that 38 per cent of Panel matters since the CLERP reforms have been dismissed in light of undertakings made by the parties.

On the other hand, the Panel operates within a legal framework to ensure compliance with legislative provisions (even if it also does so by having reference to policy criteria). Around three-quarters of its members also have legal training and it is not surprising that Panel reasoning often reflects a strong legalistic approach to problem solving. This is reinforced by the fact that Panel decisions may be subject to review by a Review Panel or the courts. Although it must decide a matter before it by applying takeover policy considerations, the Panel may also have regard to other relevant court and Panel decisions. While not bound by a system of precedent, it is appropriate that the Panel seeks to develop a measure of stability and certainty in its decision-making to promote both fairness and efficiency for market participants.

Based upon the approach of the Panel to date, it can be said that one of the central aims of the CLERP reforms — the injection of legal and commercial specialist expertise into takeover dispute resolution — has been successfully achieved. Since March 2000, takeover disputes have been dealt with by the Panel in a way that is consistent with its overall role as a commercial body. This has been a difficult task. It has meant resolving commercial issues in an adversarial setting, involving short time frames and in the context of technical takeover law combined with general policy criteria. The challenge for the Panel will be to continue to achieve its commercial objectives while adopting some of the features of the courts that are necessary for its role.