

**RESEARCH REPORT**

**THE TAKEOVERS PANEL -  
AN EMPIRICAL STUDY**

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The Takeovers Panel – An Empirical Study

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# I TAKEOVERS PANEL

## A Introduction

The Takeovers Panel is the primary forum for resolving disputes about a takeover bid while the takeover is underway.<sup>1</sup> This paper reports the results of an empirical study of the Takeovers Panel. The paper commences with an overview of the history and operation of the Panel. This is followed in Part II by an outline of the methodology and scope of the study. Part III contains the result of the study.

## B History

The Takeovers Panel was established in March 2000 by the *Corporate Law Economic Reform Program Act 1999*. It succeeded the relatively ineffective Corporations and Securities Panel, which received only a small number of referrals during its operation.<sup>2</sup> The Corporations and Securities Panel operated from 1991 to 1999. During this time it made only four decisions. It was expected that a rejuvenated Panel would be able to facilitate resolutions to takeovers disputes more rapidly, informally and cost-effectively than the courts. The legislature therefore put in place a number of mechanisms to enable the Panel to replace the courts as the principal forum for the resolution of takeovers disputes under the *Corporations Act 2001* (Cth) ('the Act'). The Panel was equipped with a far wider range of powers than its predecessor, and the Act largely removed the rights of parties to commence litigation in the courts before the end of a takeover bid.

## C Panel Composition

When hearing applications, the Panel is constituted by three of its members. Panel members are appointed by the Governor-General on the recommendation of the Minister

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<sup>1</sup> Takeovers Panel. *Annual Report 2004 – 2005*, 2005, viii.

<sup>2</sup> Nicole Calleja, *The New Takeovers Panel – A Better Way?* (CCH and Centre for Corporate Law and Securities Regulation, The University of Melbourne, 2002) 5. Unlike the Takeovers Panel, whose powers are enlivened by applications from interested persons, the Corporations and Securities Panel could only adjudicate in matters referred to it by the Australian Securities Commission. For analysis of the Takeovers Panel since the March 2000 changes, see E Armson "Models for Takeover Dispute Resolution: Australia and the UK" (2005) 5 *Journal of Corporate Law Studies* 401; A Dignam, "The Takeovers Panel, the Market Efficiency Principle and the Market for Corporate Control – An Empirical Study" (2005) 23 *Company and Securities Law Journal* 58, E Armson, "An Empirical Study of the First Five Years of the Takeovers Panel" (2005) 27 *Sydney Law Review* 665; E Armson, "The Australian Takeovers Panel: Commercial Body or Quasi – Court?" (2004) 28 *Melbourne University Law Review* 565; R Cross, "The Takeovers Panel Three Years On: Should we Ever go Back to the Courts?" (2003) 21 *Company and Securities Law Journal* 367; E Armson "The Frustrating Action Policy: Shifting Power in the Takeover Context" (2003) 21 *Company and Securities Law Journal* 487; E Walsh, "Judging the Takeovers Panel" (2002) 20 *Company and Securities Law Journal* 435; B Mescher, "Powers of the Takeovers Panel and Their Effect Upon ASIC and the Court" (2002) 76 *Australian Law Journal* 119.

under the *ASIC Act 2001* (Cth). The membership includes takeovers experts from a number of occupations and fields, including professionals from law, business and finance. After receiving each application, the Panel President selects the three members comprising each sitting Panel, which is responsible for hearing a matter and making a determination.

## **D Jurisdiction and Panel Powers**

Broadly speaking, the Panel is empowered to adjudicate on certain matters concerning takeovers under Chapters 6 and 6A of the Act or conduct that is alleged to have contravened provisions of those Chapters (as well as Chapters 6B or 6C). The day-to-day administration of the takeovers regulations remains the responsibility of the Australian Securities and Investments Commission (ASIC). The Panel's jurisdiction does not extend to schemes of arrangement, which are regulated by Chapter 5. In one matter, the Panel declined to commence proceedings on exactly this basis.<sup>3</sup>

The Panel is expressly required, within reasonable limits, to ensure that its proceedings are:

- fair and reasonable;
- conducted with a low degree of formality; and
- conducted in a timely manner.<sup>4</sup>

The Panel's powers are set out in Chapter 6 of the Act and summarised in the following sections.

### **1 Declaration of Unacceptable Circumstances**

The primary power of the Panel is its ability to make a declaration of unacceptable circumstances.<sup>5</sup> The Panel may make a declaration upon application under s 657C by the bidder, the target, ASIC, or any other person whose interests are affected by the relevant circumstances.<sup>6</sup>

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<sup>3</sup> *St Barbara Mines Limited and Taipan Resources NL*.

<sup>4</sup> *ASIC Regulations*, r 13.

<sup>5</sup> *Corporations Act 2000* (Cth) s 657A.

<sup>6</sup> *Corporations Act 2000* (Cth) s 657C(2).



The Panel may make a s 657A declaration if it determines that the circumstances either involve a contravention of a provision of Chapters 6, 6A, 6B or 6C,<sup>7</sup> or unacceptably affect the control of a company, or the acquisition of a substantial interest in a company.<sup>8</sup> In exercising this power, the Panel must have regard to the purposes of Chapter 6, set out in s 602.<sup>9</sup> The Panel is also required to consider whether a declaration of unacceptable circumstances is against the public interest.<sup>10</sup>

Section 602 includes the principles that takeovers take place in an efficient, competitive and informed market (s 602(a))(*‘efficient, competitive and informed market’*) and that an appropriate procedure is followed as a preliminary to compulsory acquisition of voting shares under Part 6A.1 (s 602(d))(*‘appropriate procedures’*). The remaining purposes are:

- that shareholders and directors of the company know the identity of any person who proposes to acquire a substantial interest in the company (s 602(b)(i))(*‘knowledge of identity’*);
- that shareholders and directors of the company have a reasonable time to consider the proposal (s 602(b)(ii)) (*‘reasonable time for consideration’*);
- that shareholders and directors of the company are given enough information to enable them to assess the merits of the proposal (s 602(b)(iii)) (*‘sufficient information’*); and
- that shareholders all have a reasonable and equal opportunity to participate in any benefits accruing to shareholders through any takeover proposal (s 602(c))(*‘equal opportunity principle’*).

## 2 Review of ASIC Decisions

Under s 656A, the Panel may review decisions made by ASIC pursuant to either s 655A or s 673. Upon application by any person whose interests are affected,<sup>11</sup> the Panel may

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<sup>7</sup> *Corporations Act 2000* (Cth) s 657A(2)(b)

<sup>8</sup> *Corporations Act 2000* (Cth) s 657A(2)(a).

<sup>9</sup> *Corporations Act 2000* (Cth) s 657A(3).

<sup>10</sup> *Corporations Act 2000* (Cth) s 657A(2).

<sup>11</sup> *Corporations Act 2000* (Cth) s 656A(2).

affirm, vary, or set aside an ASIC decision.<sup>12</sup> Where it has set aside an ASIC decision, the Panel may make a decision in substitution or remit the matter to ASIC.<sup>13</sup>

### **3 Internal Panel Review**

The Panel may also review a prior decision of the Panel upon application by ASIC or a party to the original proceedings.<sup>14</sup> Where the original decision was neither a s 657A declaration nor an order under s 657D or s 657E, an application for review may only proceed with the consent of the Panel President.<sup>15</sup>

### **4 Orders**

Section 657D empowers the Panel to make orders to protect the rights or interests of affected persons or to ensure that a takeover proceeds efficiently, or orders as to costs if a declaration of unacceptable circumstances has been made. Section 657E empowers the Panel to make interim orders of a similar nature in the absence of a declaration, although such orders can only remain in effect for a maximum of two months.<sup>16</sup> Interim orders are typically sought with urgency by the applicant and it is the Panel's policy to make its decisions with respect to interim orders applications as soon as is practicable.

## **E Information About the Panel**

The Panel publishes its decisions and its reasons for decisions on its website. The decisions are referred to by a matter name – derived from the name of the target entity – and where there has been more than one matter relating to the same target entity, a number to distinguish the matter from others in the same series, for example *Taipan Resources (No 10)*.

There may be more than one set of published reasons relating to each matter, since a matter may consist of one or more applications relating to the same set of circumstances. A single matter for example may deal with both an application by the target company for interim orders restraining dispatch of the bidder's statement and an application for a

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<sup>12</sup> *Corporations Act 2000* (Cth) s 656A(3)(a)-(c).

<sup>13</sup> *Corporations Act 2000* (Cth) s 656A(5).

<sup>14</sup> *Corporations Act 2000* (Cth) s 657EA(1).

<sup>15</sup> *Corporations Act 2000* (Cth) s 657EA(2).

<sup>16</sup> *Corporations Act 2000* (Cth) s 657E(1).

declaration of unacceptable circumstances and final orders. Consequently, the Panel sometimes publishes its decision and reasoning relating to the interim orders application earlier than and separately from the reasons for the unacceptable circumstances decision. Conversely, the Panel in several instances published its written reasons for these matters (each involving a separate application) in the same document, presumably because there was such an overlap between the facts and submissions material for each application that it was more efficient to join the written reasons. This study nevertheless treats those situations as though the written reasons for each matter had been published separately.

The Panel publishes media releases to notify the public of policy and procedural matters, new Panel appointments, the outcome of recent Panel hearings and to announce the posting of documents on its website.

## **II THE STUDY**

### **A Objectives**

This study provides insight how and with what degree of effectiveness the Panel has operated since its rejuvenation in 2000. It aims to ascertain:

- the popularity of the Panel as a resolution mechanism for takeovers disputes;
- the nature of applications being made;
- the profile of parties to Panel proceedings, including whether the applicant is a bidder, target, ASIC, shareholder or other entity, and the industry and market capitalisation of public, listed parties;
- the nature of Panel decisions, and the preparedness of the Panel to exercise its powers;
- the time taken for the Panel to dispose of applications for interim orders;
- the time taken for the Panel to finally dispose of all other applications and publish its reasons;
- the grounds forming the basis for parties' submissions and Panel determinations; and
- the role in Panel reasoning of the policy objectives set out in s 602.

## **B Method and Scope**

Much of the raw data for the study was obtained from the written reasons documents posted on the Panel's website, covering 153 separate matters over a period between 2 May 2000 to 5 January 2005.<sup>17</sup> Appendix A lists all of the applications relevant to the study and Appendix B provides a description of the data sources.

Four of the documents dealt only with an application for interim orders in matters where applications for other remedies were on foot but addressed by the Panel in subsequent written reasons.<sup>18</sup>

## **III RESULTS**

### **A Panel Applicants - Who Makes Applications?**

Between 2000 and 2002, significantly more bidders than targets made applications to the Panel, and shareholders only made a small number of applications: 42 or 55% of the 76 applicants were bidders, 23 or 30% of applicants were targets, and only 4 or 5% of applicants were shareholders. However this changed in 2003 and 2004, when 23 or 30% of the 77 applicants were bidders and 24 or 31% of applicants were targets. Applications by shareholders increased significantly to make up 33% of applications.

Across the study period, a consistently small percentage of applications was made by ASIC (5%). A summary of all types of applicant across the study period is set out in Chart 1.

Four matters involved applications by entities that did not fall into the usual categories. In *Ballarat Goldfields NL*, the application was made by a bidder, RFC Corporate Finance Limited, acting as the agent of a shareholder. *Isis Communications Limited* concerned an application by the directors of Radly Pty Ltd, an Isis shareholder. The administrators of Pasmenco applied to the Panel for review of an ASIC decision in *Pasmenco Limited (Administrators Appointed)*. The *Mildura Co-operative Fruit Company* involved applications by both the bidder and target.

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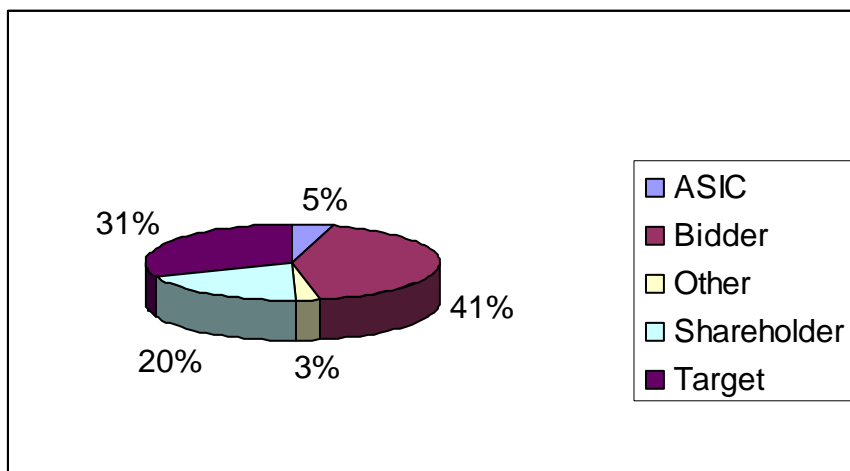
<sup>17</sup> The beginning of the period is marked by the date on which the rejuvenated Panel received its first application. As at 31 July 2006 the Panel had published 189 decisions.

<sup>18</sup> *Email Limited 003/00*; *Pinnacle VRB Limited (No 10)*; *Australian Liquor Group Limited*; *Bigshop.com.au Ltd (No 3)*.

**Table 1 - Type of Applicant by Year**

Year <sup>19</sup>	ASIC	Bidder	Target	Shareholder	Other	
2000	1	10	7	1	0	
2001	2	25	5	2	0	
2002	1	7	11	1	3	
2003	1	18	12	15	0	
2004	2	5	12	11	1	
<b>TOTAL</b>	<b>7</b>	<b>65</b>	<b>47</b>	<b>30</b>	<b>4</b>	<b>153</b>

**Chart 1 – Summary of Type of Applicant**



## **B Panel Applications**

### **1 Type of Application – Remedy Sought**

The most popular remedy sought by applicants in Panel proceedings was a declaration of unacceptable circumstances, which was the subject of an application in 40% of matters. The next most popular remedy was a combined application for a declaration of unacceptable circumstances and interim orders, making up 33% of applications. This means that 73% of all applications sought declarations of unacceptable circumstances. The Panel was asked to exercise its review powers in 20% of matters and only 5% of matters involved an application for interim orders only.

<sup>19</sup> Year determined by date of application.

Three matters involved applications that did not fall into the usual categories. *Anaconda Nickel Limited 04* involved a combined application under ss 656A, 657A, 657D and 657E; and *Anaconda Nickel Limited 06* involved a combined application under ss 657E and 657EA. *Anaconda Nickel Limited 13* involved an application under s 201A(2) of the *Australian Securities and Investments Commission Act 2001* (Cth) for consent to vary the undertaking given to the Panel in *Anaconda Nickel Limited 08*.

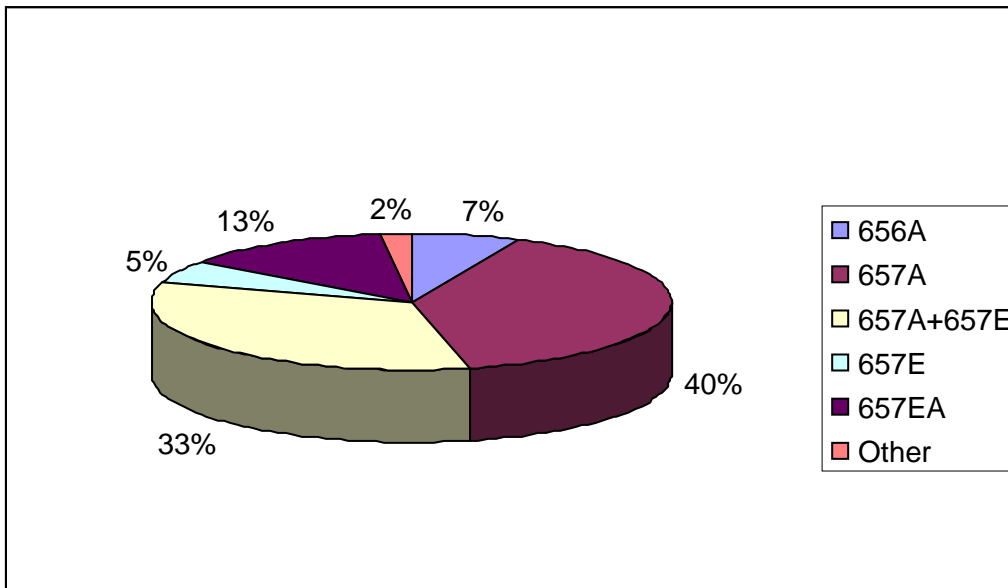
**Table 2 - Application Type**

<b>Year<sup>20</sup></b>	<b>Declaration of unacceptable circumstances and final orders (ss 657A, 657D)</b>	<b>Review of ASIC decision (s656A)</b>	<b>Declaration, final orders and interim orders (ss657A, 657D, 657E)</b>	<b>Review of Panel decision (s657EA)</b>	<b>Interim orders only (s657E)</b>	<b>Other</b>	
<b>2000</b>	7	3	7	1	1	<b>0</b>	
<b>2001</b>	10	1	14	7	2	<b>0</b>	
<b>2002</b>	6	3	10	3	1	<b>0</b>	
<b>2003</b>	21	3	9	7	3	<b>3</b>	
<b>2004</b>	17	0	11	2	1	<b>0</b>	
<b>TOTAL</b>	<b>61</b>	<b>10</b>	<b>51</b>	<b>20</b>	<b>8</b>	<b>3</b>	<b>153</b>

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<sup>20</sup> Year determined by date of application.

**Chart 2 - Summary by Application Type**



## **2 Type of Application – Takeover or Other Matter**

One hundred and twenty-nine of the 153 matters involved a formal takeover bid for a public Australian company. One hundred and eighteen of the 129 public company targets were listed public companies. As noted above, the Panel may declare circumstances to be unacceptable if it appears to the Panel that the circumstances:

- (a) are unacceptable having regard to the effect of the circumstances on:
  - (i) the control, or potential control, of the company or another company; or
  - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company; or
- (b) are unacceptable because they constitute, or give rise to, a contravention of a provision of Chapter 6, 6A, 6B or 6C.

This means that some applications to the Panel involve matters other than a formal takeover bid. Those matters not involving a formal takeover bid generally involved allegations of impropriety, either constituted by a failure to make a formal bid, or in contexts where no takeover bid was being made.

**Table 3 – Matters not Involving a Formal Takeover Bid**

<b>Matter</b>	<b>Basis of application</b>
<i>Aliquot Asset Management Limited</i>	Appointment of additional directors to give board representation to a large shareholder.
<i>Anaconda Nickel 02</i>	Underwriting of rights issue by an existing shareholder leading to potential change of control.
<i>Anzoil NL</i>	Allegation that certain shareholders associated for the purposes of appointment of directors.
<i>Anzoil NL 02</i>	Review of <i>Anzoil NL</i> .
<i>Data and Commerce Limited</i>	Underwriting of rights issue potentially leading to substantial shareholding.
<i>Focus Technologies Limited</i>	Transfer of options and interests representing 32.9% of voting shares without shareholder ratification.
<i>Grand Hotel Group</i>	Insufficient information provided to unit holders meeting to decide whether to change the responsible entity.
<i>Investor Info Limited</i>	Underwriting of rights issue potentially leading to substantial shareholding.
<i>Kaefer Technologies Limited and Kaefer Technologies Limited 02</i>	Company put into administration to allow major shareholder to purchase, rather than major shareholder making formal takeover offer.
<i>Lachlan Farming Limited</i>	Underwriting of rights issue potentially leading to substantial shareholding.
<i>Pasminco Ltd (Administrators Appointed)</i>	Application by administrators of Pasminco Limited to allow the company to enter into arrangements with creditors.
<i>Phosphate Resources Limited</i>	Share buyback and rights issue underwritten by major shareholder leading to substantial change in shareholding by major shareholder from 19.9% to 39.6%.
<i>Precious Metals Limited</i>	Underwriting of rights issue potentially leading to substantial shareholding.
<i>QR Sciences Limited</i>	Shareholders not entitled to the same percentage shareholdings before and after a rights issue.



<i>Richfield Group Limited</i>	Alleged association regarding control of the Richfield board.
<i>Rivkin Financial Services Limited</i>	Non-disclosure of pre-existing relationships between parties.
<i>St Barbara Mines Ltd and Taipan Resources NL</i>	Scheme of arrangement between St Barbara Mines Ltd and Taipan Resources NL.
<i>St Barbara Mines Ltd 02</i>	Substantial change in shareholding following rights issue.
<i>The Gribbles Group Limited</i>	Failure to comply with substantial shareholding disclosure requirements.
<i>Trysoft Corporation Limited</i>	Failure to comply with substantial shareholding disclosure requirements.
<i>Village Roadshow Limited</i>	Failure to respond to tracing notice.
<i>Village Roadshow Limited 02 and Village Roadshow Limited 03</i>	Substantial change in shareholding following on-market buy-back.

### **3 Result by Application Type**

The Panel formally made a total of 21 declarations of unacceptable circumstances over the period studied, including 16 accompanied by final orders. It varied or set aside a decision by ASIC or by the Panel on 10 occasions. It exercised its power to grant interim orders on 20 occasions.

#### ***Declaration of Unacceptable Circumstances***

The Panel made 21 declarations of unacceptable circumstances. In 21 of the s 657A applications the Panel refused to commence proceedings. In 63 of these applications the Panel conducted proceedings but refused the application. However, 32 applications for declarations of unacceptable circumstances were refused but only after the Panel accepted undertakings from parties or otherwise negotiated a settlement to the dispute. In such matters, the Panel often indicated that circumstances were likely to be unacceptable but for the making of undertakings, and that it would be prepared to exercise its more formal powers if undertakings were not received.

**Table 4 – Results of s 657A Applications**

Refusal to conduct proceedings	Proceedings stayed	Application refused	Application refused – undertakings/ settlement	Declaration with orders	Declaration no orders	Application withdrawn	No of applications
21	2	31	32	16	5	5	112

***Section 656A Review of ASIC Decision***

In four of the ten applications for review of an ASIC decision the Panel varied or set aside the original decision.

**Table 5 – Results of s 656A Applications**

ASIC decision affirmed	ASIC decision varied	ASIC decision overturned	No of applications
6	1	3	10

***Section 657EA Review of Panel Decision***

Section 657EA provides for internal Panel reviews of earlier decisions. Such applications can be made by a party to the proceedings in which the earlier decision was made or by ASIC. Six or 30% of the 20 applications under s 657EA were successful. In three matters the Panel affirmed the decision under review but made a new declaration of unacceptable circumstances and final orders. In one matter, the Panel affirmed the decision under review but accepted revised undertakings.

**Table 6 – Results of s 657EA Applications**

Panel decision affirmed	Panel decision varied	Panel decision overturned	Panel decision affirmed – new declaration and orders/ revised undertaking	Refusal to conduct proceedings	No of applications
8	3	3	4	2	20

***Interim Orders – s 657A&E, s 657E***

Interim orders were granted in 16 (27%) of the 59 matters in which they were the subject of an application.

The Panel on a number of occasions affirmed the policy on interim orders articulated by the review Panel in *Email Limited (No 4)*.<sup>21</sup> In that matter, the Panel stated that:

in making an interim order, the Panel needs to consider whether unacceptable circumstances exist or would develop if the order was not made, and weigh the burden of the interim order against the mischief which would occur if the order was not made. In weighing those factors, the Panel must bear in mind that it has the power, and will have the opportunity, to make orders designed to rectify any defects in the relevant bid or in the disclosure concerning it, after a full consideration of the facts and issues. Not every mischief, however, can be overcome after it has arisen.<sup>22</sup>

Interim orders were explicitly refused in 17 or 29% of those matters in which they were sought. On 18 occasions (31%) the Panel did not make interim orders either explicitly or implicitly on the basis of undertakings received in the proceedings.

**Table 7 – Results of s 657E Applications<sup>23</sup>**

Granted	Refused	Refused-undertakings	Refusal to conduct proceedings/ application withdrawn	Proceedings stayed	Refused – final orders instead	
16	17	18	6	1	1	59

### ***Interim Orders – s 657EA***

Usually the Panel is only entitled to make an interim order under s 657E upon application under s 657C. However, when conducting a review of an earlier Panel decision under s 657EA the Panel has the same power to make a declaration under s 657A or an order under ss 657D or 657E as it has when it is considering an application under s 657C.<sup>24</sup> Therefore, the study recorded all interim orders decisions flowing from s 657EA applications.

<sup>21</sup> See, eg, *Taipan Resources (No 3)* [26]

<sup>22</sup> *Email Limited (No 4)* [6].

<sup>23</sup> Consisting of applications for interim orders alone under s 657E, and combined applications under ss 657A, 547D and 657E.

<sup>24</sup> *Corporations Act 2000* (Cth) s 657EA(4).

The Panel made interim orders in four of the 20 s 657EA matters. *Pinnacle VRB Limited (No 6)* was the only matter in the study in which the Panel explicitly exercised its power under s 657D(3) to revoke interim orders. The Panel decision under review, *Pinnacle VRB Limited (No 4)*, included interim orders preventing Reliable Power’s bid for Pinnacle VRB Limited from proceeding. The review Panel affirmed the original decision but, having satisfied itself that Reliable had addressed elements of its bid likely to result in unacceptable circumstances, revoked the interim orders and allowed Reliable’s bid to proceed.

**Table 8 – Interim Orders Decisions in s 657EA Applications**

Granted	Refused	Refused-undertakings	Refusal to conduct proceedings	Proceedings stayed	Revoked	Not discussed	
4	0	0	2	0	1	13	20

***Final Orders***

The Panel also made declarations with final orders in 16 of the 112 s 657A applications. The Panel also made orders as to costs in several matters. The Panel has on various occasions interpreted s 657D as permitting the Panel to make orders as to costs only following a declaration of unacceptable circumstance.<sup>25</sup> In two of the matters involving costs orders, the Panel had earlier made a declaration of unacceptable circumstances. In *Pinnacle VRB Limited (No 6)* it ordered Reliable, who had applied for review of an earlier unfavourable decision, to pay the party and party costs of the parties in the earlier proceedings because it had hindered an efficient conclusion of that matter by failing to produce sufficient evidence. Similarly in *Pinnacle VRB Limited (No 11)*, the review Panel ordered the applicant, Vanteck, to pay the party-party costs on the basis that it had advanced no material grounds for review of the original decision in *Pinnacle VRB Limited (No 10)*.

Table 9 summarises the nature of final orders made in each of the s 657A applications in which a declaration was made.

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<sup>25</sup> See, eg, *Online Advantage Limited*, [69].

**Table 9 - Nature of Final Orders in Matters Involving a Declaration of Unacceptable Circumstances**

<b>Matter</b>	<b>Nature of Final Orders</b>
<i>Pinnacle VRB Limited (No 9b)</i>	<ul style="list-style-type: none"> <li>• order that bidder apply for quotation on ASX;</li> <li>• orders allowing shareholders to withdraw acceptances under bid offer; and</li> <li>• order that bidder extend its bid.</li> </ul>
<i>Ranger Minerals Limited</i>	<ul style="list-style-type: none"> <li>• order that bidder retract and correct various public statements;</li> <li>• order cancelling all contracts resulting from acceptances after the date on which a misleading letter was received; and</li> <li>• order extending the bid period.</li> </ul>
<i>Taipan Resources (No 9)</i>	<ul style="list-style-type: none"> <li>• orders requiring that unlawfully-acquired shares in target vest in ASIC to be held on trust for sale; and</li> <li>• orders requiring ASIC to sell those shares on specified terms.</li> </ul>
<i>Pinnacle VRB Limited (No 4)</i>	<p>Orders stopping Reliable's bid:</p> <ul style="list-style-type: none"> <li>• cancelling all offers made by Reliable to shareholders of Pinnacle;</li> <li>• requiring Reliable to notify ASX of these changes; and</li> <li>• prohibiting Reliable from acquiring a further interest in Pinnacle shares as a result of offers made or acceptances received under the bid.</li> </ul>
<i>Pinnacle VRB Limited (No 10)</i>	<ul style="list-style-type: none"> <li>• orders requiring bidder to reverse acceptances which had been mistakenly made by a broker purportedly on behalf, but in fact against the wishes, of shareholders.</li> </ul>
<i>Ballarat Goldfields NL</i>	<ul style="list-style-type: none"> <li>• Panel prevented payment by target under an unacceptable break fee agreement with bidder, by ordering target not to issue shares under that agreement; and</li> <li>• orders allowing for sufficient time for disclosure and consideration of competing bid proposals.</li> </ul>
<i>Anzoil NL</i>	<ul style="list-style-type: none"> <li>• order restricting associated parties that had acquired an interest in target from exercising some of the rights attaching to their shares; and</li> <li>• orders that target not put before a meeting of shareholders any resolution to appoint or remove a director on the requisition or nomination of any of the associated parties.</li> </ul>
<i>TrySoft Corporation Limited</i>	<ul style="list-style-type: none"> <li>• order that agreements were terminated in full with immediate effect;</li> <li>• order that options granted with approval from the shareholders were suspended until a new meeting of fully informed shareholders ratified the grant of options.</li> </ul>
<i>Cobra Resources Limited</i>	<ul style="list-style-type: none"> <li>• order that bidder not proceed with the bid, and not make or announce any other bid before bidder had lodged a fresh bidder's statement with ASIC and received confirmation from ASIC that it was acceptable.</li> </ul>
<i>AMP Shopping Centre Trust 01</i>	<ul style="list-style-type: none"> <li>• order that AMP Henderson Global Investors (as Responsible Entity of AMP</li> </ul>

	<p>Shopping Centres Trust), AMP Life and the other parties to relevant Co-Owners' Agreements in relation to shopping centres, not exercise, nor purport to exercise, any pre-emptive rights in relation to shopping centres in which AMP Shopping Centre Trust owns interests, solely because of a change of Responsible Entity.</p>
<i>Village Roadshow Limited</i>	<ul style="list-style-type: none"> <li>• order that the shares held by parties failing to respond to tracing notices (and therefore who had refused to disclose the beneficial owners of the shares) be vested in ASIC pending their sale by an independent stockbroker through a bookbuild process, with no one purchaser being allocated more than 1%; and</li> <li>• order that target must not put any resolutions to members for a period of 6 weeks or until the shares are sold (as ASIC's policy is not to vote any shares vested in it).</li> </ul>
<i>Anaconda Nickel Limited 16</i>	<ul style="list-style-type: none"> <li>• order that unlawfully-acquired shares be vested in ASIC and that ASIC appoint a broker to sell them under a bookbuild to persons not associated with any of the parties.</li> </ul> <p>Note: orders not implemented because bidder immediately applied for a review of the decision.</p>
<i>Anaconda Nickel Limited 17</i>	As for <i>Anaconda Nickel Limited 16</i> .
<i>Emperor Mines Limited 01</i>	<ul style="list-style-type: none"> <li>• orders for a modification to the shortfall facility so that the underwriter (also a shareholder) would not participate in any shortfall until all other shareholders had;</li> <li>• orders for an extension of the rights issue timetable to allow Emperor shareholders to receive and consider information;</li> <li>• order for a 2-year freeze on any increased voting power arising from the rights issue that the underwriter would otherwise be able to exercise at a shareholders' meeting; and</li> <li>• order for a 1 month period for the underwriter to dispose of "unacceptable shares", at any price the underwriter could achieve, with half of the profits going to the target.</li> </ul>
<i>Skywest Limited 03</i>	<ul style="list-style-type: none"> <li>• order that the bid be stopped from proceeding with all acceptances under the bid;</li> <li>• order that certain target security holders who sold their securities to the bidder may cancel those sales;</li> <li>• order that bidder not to dispose of its target securities until the earliest of certain dates;</li> <li>• order that during the period of restriction upon bidder disposing of its securities in the target, bidder may not make or publicly propose a takeover bid in relation to target unless agreed by target; and</li> <li>• order that bidder pay the reasonable costs of target.</li> </ul>

<p><i>Skywest Limited 04</i></p>	<ul style="list-style-type: none"> <li>• order that all offers made by bidder during the bid to acquire 2005 options be revoked;</li> <li>• order that all contracts under which bidder acquired 2005 options, and contracts arising from acceptances of the bid by such option holders are avoided;</li> <li>• order that bidder not entitled to participate in target's rights issue in respect of shares subject to void transactions;</li> <li>• order that bidder and target rectify the share and option registers;</li> <li>• order that target notify in writing each of the 2005 option offerees of the Panel's decision and the orders made;</li> <li>• order that bidder must not enter into, or discuss agreements in relation to any offers to acquire or any tenders to sell 2005 options during the remainder of the bid and 4 months after without approval by the Panel;</li> <li>• order that bidder extend the bid so that 2005 offerees have sufficient time to consider whether or not to accept the bid after receiving notification of the Panel's decision;</li> <li>• order that bidder refrain from entering into any communications with target security holders in relation to the bid or offers for any other target securities unless they are in writing; and</li> <li>• order that bidder pay target's costs.</li> </ul>
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## **C Grounds**

In order to provide further insight into the grounds for applications and for decisions of the Panel, the first 72 decisions of the Panel were examined in more detail. These decisions were made in the period 2000-2002. In 37, or over half, of the 72 matters, the Panel:

- either established that a ground(s) justified an exercise of its substantive powers or strongly indicated that a ground(s) would have been established justifying the exercise of its formal powers had the parties not either made undertakings or otherwise negotiated a settlement; or
- although indicating that grounds for exercising its powers had been established, took no formal action because circumstances had rendered formal remedies unnecessary.

Table 10 identifies the key grounds or factors to which the Panel must have regard when considering a s 657A application.<sup>26</sup> The factors are derived principally from the list of purposes in s 602. The table displays the number of times a particular ground was either relied on by parties in their submissions, or raised by the Panel and discussed at reasonable length in the written reasons. It compares this with the number of matters in which the Panel indicated that the factor was, by itself or in combination with other factors, sufficient to justify the exercise of its formal powers, whether or not it actually did so.

The ground most frequently raised in submissions of parties or discussed by the Panel in its written reasons was s 602(b)(iii) – *sufficient information*. Panel jurisprudence indicates that this ground is available where conduct by parties results in inadequate or deficient disclosure to shareholders concerning material aspects of a bid proposal<sup>27</sup> and where misstatements and misleading communications materially affect shareholders’ decisions to accept or decline offers under a bid.<sup>28</sup> Although there would appear to be considerable overlap between this policy and s 602(a) *informed market*, in *Australian Liquor Group* the Panel provides some explanation of how s 602(a) operates more broadly than s 602(b)(iii) to include circumstances in which the lack of information does not affect shareholders, but affects other actors in the market. The Panel stated that:

[its] powers are not limited to protecting shareholders other than a bidder, and unacceptable circumstances may exist, although the only person adversely affected by a lack of information in relation to a bid is the bidder. The issue [under s 602(a)] is whether the *market* is informed, not whether any particular participant is informed.<sup>29</sup>

The factor least frequently forming the basis for parties’ submission was s 602(d) *appropriate procedures in relation to compulsory acquisition*, having been raised by parties in only two matters.

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<sup>26</sup> Although s 656A does not explicitly refer to the factors to which the Panel must have regard, the Panel generally frames its s 656A decisions by reference to those same purposes. Section 656A applications for the relevant period are therefore included in the table.

<sup>27</sup> Eg *Namakwa Diamond Company (No 2)*

<sup>28</sup> Eg *Pinnacle VRB Limited (No 2)*.

<sup>29</sup> *Australian Liquor Group Limited*, [20] (emphasis added).



Section 602(b)(ii), *reasonable time to consider bid*, was relied upon to support an application during only seven of the 72 Panel proceedings studied, and formed a basis for a Panel decision once only, in *Online Advantage Limited*. Notably however, the Panel in its written reasons for that decision did not address this ground in depth, other than to state that the impugned transactions contravened each and every one of the principles laid out in paragraphs 602(a), (b) and (c). No declaration was made in that matter after undertakings were received.

The factor most commonly cited by the Panel as a basis for its decisions was s 602(a) *generally* (21 matters), where the Panel concluded that the impugned conduct breached the general policy underlying this paragraph but did not identify which, if any, of the paragraph's components were particularly relevant. This was closely followed by s 602 (b)(iii), *enough information to assess merits of bid*. In 19 matters the Panel identified this as a basis for its decision.

Twenty six matters involved submissions or issues that did not fit neatly into one of the principal grounds set out in s 602. On seven occasions the Panel based its decision, in whole or in part, on grounds falling outside the specific provisions of s 602.

**Table 10 - Grounds Raised in Submissions and Forming Basis for Panel Decisions (sample of 72 decisions)**

<b>Ground</b>	<b>No of times raised in submissions or discussed by Panel</b>	<b>No of matters in which Panel indicated that the ground was relevant to its decision</b>	<b>Success rate</b>
<b>602(a) or 602 Generally</b>	34	21	62%
<b>602(a) Efficient market</b>	9	5	55%
<b>602(a) Competitive market</b>	6	2	33%
<b>602(a) Informed market</b>	15	4	26%
<b>602(b)(i) S/H knowledge of identity of bidder</b>	4	3	75%
<b>602(b)(ii) Reasonable time to consider merits of bid</b>	7	1	14%

<b>602(b)(iii) Enough information to assess merits of bid</b>	41	19	46%
<b>602(c) Reasonable and equal opportunity to participate in benefits of bid</b>	22	9	41%
<b>602(d) Appropriate procedure followed for compulsory acquisition</b>	2	1	50%
<b>Contravention of Corporations Act (not including a provision in s 602)</b>	40	10	25%
<b>Other</b>	26	7	27%

Listed below are the ten decisions (of the 72 decisions examined in detail) in which the Panel found a contravention or likely contravention of the *Corporations Act*. The provision most commonly the subject of decisions that the Act had been contravened was s 636 (content of bidder's statement), appearing five times. A breach of s 606 (prohibition on certain acquisitions) was found to have occurred in two matters, *Taipan Resources (No 9)* and *Anzoil NL*. The Panel made a declaration of unacceptable circumstances in both instances.

**Table 11 - Matters Involving a Contravention of the Corporations Act  
(sample of 72 decisions)**

<b>Matter Name</b>	<b>Relevant Section</b>	<b>Result of Application</b>
<i>Infratil 02/00</i>	636(1)(g)	<p>Panel concluded that the bidder's statement did not comply with s 636 (which requires a bidder's statement where securities are offered as consideration under the bid to contain the information as would be required by s 713 in a prospectus) because it did not contain or was not accompanied by copies of annual reports, half-yearly reports and continuous disclosure documents.</p> <p>The Panel however accepted an enforceable undertaking from the bidder to provide additional documents to the target's shareholders.</p>

<i>Email Limited 03/00</i>	636(1)(g), 710 and 713	<p>The Panel rejected the submission that the bidder Smorgon had contravened s 621(3), but found that the bidder's statement as lodged was unmistakably and materially defective in compliance with s 710, and by consequence contravened s 636(1)(g).</p> <p>The Panel decided it had no basis to make a declaration if the bidder sent to target shareholders the bidder's statement with the changes and additional information requested by the Panel.</p>
<i>Brickworks Limited (No 2)</i>	636(1)(m) 713	<p>The Panel concluded that the bidder GPG should have disclosed the source of funding to purchase the shares forming consideration for the bid offers, indicating a contravention of s 636(1)(m).</p> <p>The Panel also stated that, had the bid proceeded, a strong argument could be made that the bidder should have provided such information as it had about Soul Pattinson and the effects of the bid on that company, along the lines of s 713.</p> <p>The Panel decided not to make a declaration or orders largely because the bid had failed.</p>
<i>Realestate.com.au Limited</i>	631(2)	<p>The Panel decided that unacceptable circumstances resulted from an announcement by the bidder. While not explicitly finding that s 631(2) had been breached, the Panel concluded that the bidder's conduct either:</p> <ul style="list-style-type: none"> <li>• breached s 631(2); or</li> <li>• defeated the policy of s 602,</li> </ul> <p>noting that contravention of the Act is not necessary for the making of a declaration.</p>
<i>Taipan Resources (No 9)</i>	606	<p>The Panel determined that St Barbara (who was behind a proposal competing with the bid by Troy) committed a breach of s 606 which could not be characterised as minor or 'technical'.</p> <p>The Panel made a declaration of unacceptable circumstances.</p>
<i>Pinnacle VRB Limited (No 4)</i>	636(1)(f)	<p>The Panel found that the disclosure by Reliable did not comply with s 636(1)(f). The contravention constituted one of the grounds for the declaration of unacceptable circumstances made by the Panel.</p>
<i>Taipan Resources (No 10)</i>	631(1)	<p>The Panel was satisfied that St Barbara had contravened s 631(1) by making offers for partly paid Taipan shares that were substantitally less favourable than the offers originally proposed by St Barbara in its announcement.</p>

		St Barbara adequately remedied this problem and the Panel declined to make a declaration on this basis. The Panel ultimately made a declaration based the bidder's failure to adequately disclose the nature of the funding arrangements for its bid.
<i>Pinnacle VRB Limited (No 6)</i>	636(1)(f)	The review Panel affirmed the No 4 Panel's finding and found that the supplementary bidder's statement did not meet the requirements of s 636(1)(f).
<i>Pinnacle VRB Limited (No 9b)</i>	625(3)	ASIC submitted that the bidder, Vanteck, had acted contrary to the principles upon which s 625(3) were predicated. The Panel decided that it did not need to make a decision on the interpretation of s 625(3) as a matter of law, but made a declaration on the basis that Vanteck's conduct went against the spirit of the takeover rules and the policy underlying s 625(3).
<i>Anzoil NL</i>	606	Two shareholders of Anzoil contravened s 606 by entering into an agreement and acting in concert for the purposes of determining the composition of Anzoil's board. The Panel made declaration of unacceptable circumstances, since the conduct involved actual and contemplated contraventions of Chapter 6.

## **D Timing**

### **1 Time For Panel To Make Decisions in Relation to Applications**

The Panel reached its decisions relatively quickly, averaging slightly more than 17 calendar days<sup>30</sup> to decide an application after receiving it. As noted below, the median time taken to reach a decision was 14 days. *Focus Technologies Limited* was the biggest outlier in the data, involving a period of 132 days between the application date and the decision date. The Panel ultimately declined to commence proceedings in that matter, stating that there was no urgent basis for intervention by the Panel, a rationale perhaps also explaining the long delay before the Panel reached its decision. The nine matters in which the Panel took over fifty days to reach a decision are listed in the table below. In a number of these matters, the reason for the time taken to reach a decision was that the Panel was waiting for a party to the proceedings to provide additional information to it.

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<sup>30</sup> Calendar days, rather than business days, were selected as the appropriate unit, since the sitting Panel continues to operate over weekends and holidays where necessary.

**Table 12 - Decisions Taking More Than 50 Days**

<b>Matter</b>	<b>Time Taken to Decision</b>
<i>Focus Technologies Limited</i>	132 days
<i>Taipan Resources (No 11)</i>	67 days
<i>Online Advantage Limited</i>	64 days
<i>Pasminco Limited (Administrators Appointed)</i>	62 days
<i>BreakFree Limited 03</i>	61 days
<i>Realestate.com.au Ltd</i>	54 days
<i>Pinnacle VRB Limited (No 5)</i>	52 days
<i>EPHS Limited</i>	52 days
<i>BreakFree Limited 04(R)</i>	51 days

The median time taken to reach a decision of 14 days better reflects the Panel's efficiency, since this statistic largely removes the effect of outliers.

**Table 13 - Time Taken to Dispose of Application – All Matters**

<b>Average Time For Panel to Dispose of Application</b>	17.11 days
<b>Median Time For Panel to Dispose of Application</b>	14 days

The median time taken by the Panel to reach a decision whether to grant or refuse an interim orders application (or accept undertakings in lieu of such orders) was five days. Applications for interim orders were disposed of more quickly than all other categories of application, followed by applications for review of an ASIC decision (median 6 days), applications for a declaration of unacceptable circumstances (median 14 days) and review of a Panel decision (median 18 days).

**Table 14 – Time Taken to Decide Unacceptable Circumstances Application**

<b>Average Time for Panel to Decide Unacceptable Circumstances Application</b>	18.3 days
<b>Median Time for Panel to Decide Unacceptable Circumstances Application</b>	14 days

**Table 15 - Time Taken to Decide s 656A Review of ASIC Decision Application**

<b>Average Time for Panel to Decide Review of ASIC Decision Application</b>	12.1 days
<b>Median Time for Panel to Decide Review of ASIC Decision Application</b>	6 days

**Table 16 - Time Taken to Decide Interim Orders Application (where Date Published)**

<b>Average Time for Panel to Decide Interim Orders Application (or accept undertakings in lieu of such orders)</b>	9 days
<b>Median Time for Panel to Decide Interim Orders Application (or accept undertakings in lieu of such orders)</b>	5 days

**Table 17 - Time Taken to Decide s 657EA Review of Panel Decision Application**

<b>Average Time for Panel to Decide Review of Panel Decision Application</b>	20.6 days
<b>Median Time for Panel to Decide Review of Panel Decision Application</b>	18 days

The Panel took longer to publish its decisions than it did to reach them. The average time between the date on which an application was finally determined and the date on which the Panel published written reasons on its website was 50.6 days, roughly seven weeks. The median time to publication was 33 days. The longest wait between a Panel decision and the posting of written reasons occurred in *Goodman Fielder Limited 02* (301 days), *Anzoil NL 02* (259 days), *SA Liquor Distributors Ltd* (226 days), and *Normandy Mining Limited (No 6)* (181 days).

**Table 18 - Time Taken For Panel To Publish Reasons Following Decision<sup>31</sup>**

<b>Average Time for Panel to Publish Reasons</b>	50.6 days
<b>Median Time for Panel to Publish Reasons</b>	33 days

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<sup>31</sup> Includes decisions in which Panel published separate reasons in the case of interim orders.

## **E Profile of Entities Involved by Market Capitalisation and Company Type**

In order to provide insight into the types of companies involved in matters before the Panel, market capitalisation data was obtained for listed public company bidders and targets involved in the first 72 decisions of the Panel. These decisions were made in the period 2000–2002.

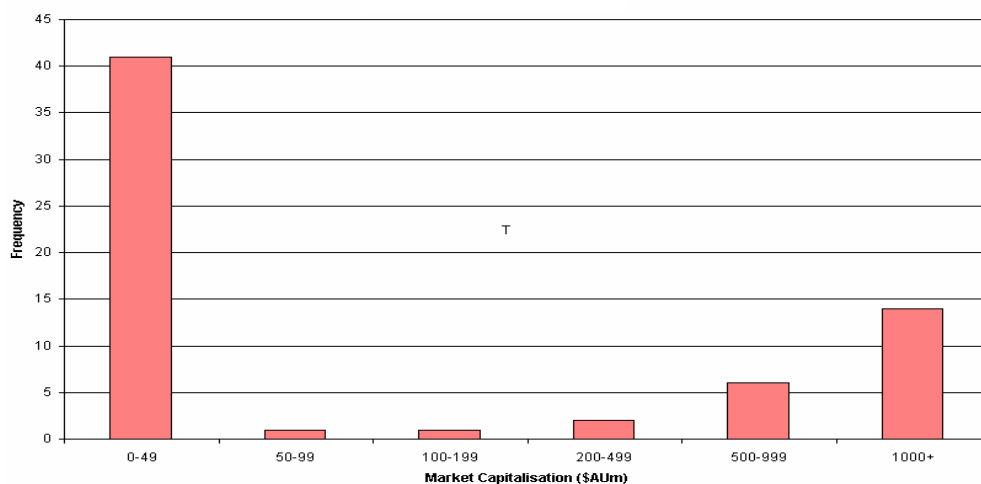
**Table 19 - Market Capitalisation of Listed Companies Involved in Panel Proceedings (sample of 72 decisions)**

<b>Entity</b>	<b>Median Market Capitalisation (AU\$)</b>	<b>Average Market Capitalisation (AU\$)</b>
<b>Listed Public Company Bidders</b>	31m	442.6m
<b>Listed Public Company Targets</b>	26.8m	620.8m
<b>Listed Public Company Rival Bidders</b>	427.1m	602.3m
<b>Listed Public Company Applicants</b>	30.4m	443.0m

### **1 Targets**

The average market capitalisation of publicly listed targets (for the sample of 72 decisions of the Panel) was \$620.8m (roughly the mean market capitalisation of all ASX listed companies), with a considerably lower median capitalisation of \$26.8m. The largest target company was Normandy Limited, reaching a peak market capitalisation of \$4101.7m on 14 January 2002. Since Normandy Mining Limited featured in seven matters over the study period it tended to skew the mean market capitalisation figure considerably. The median provides a much more representative picture of the size of targets involved in Panel proceedings and indicates that the Panel has provided an attractive forum for parties to small-scale takeovers. Notably, 41 matters (for the sample of 72 decisions of the Panel) involved targets with a market capitalisation lower than \$50m.

**Figure 1 – Market Capitalisation – Publicly Listed Targets (sample of 72 decisions)**



## 2 Bidders

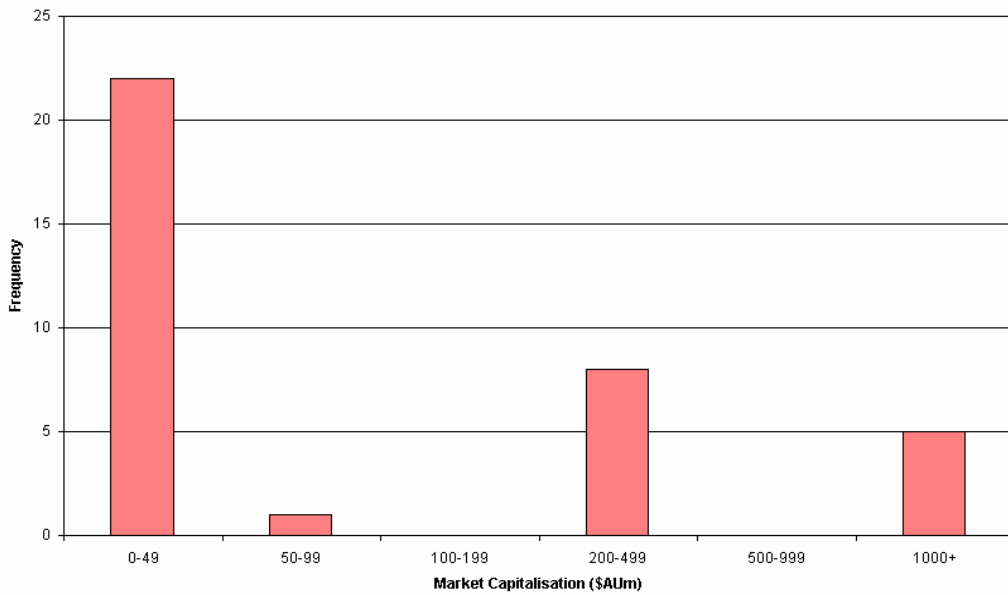
Forty three of the 66 bidders involved in Panel proceedings (for the sample of 72 decisions of the Panel) were public companies. Seven of the 43 public companies were unlisted and 36 were listed.<sup>32</sup> The median market capitalisation of publicly listed bidders involved in Panel applications (for the sample of 72 decisions) was only slightly higher than that of targets, at \$31m. Again, 22, or over half of the listed bidders had a market capitalisation lower than \$50m. Both statistics support the observation that the Panel provides a forum attractive to some of the smaller entities listed on the ASX.

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<sup>32</sup> As noted earlier, some applications to the Panel do not involve a formal takeover bid.



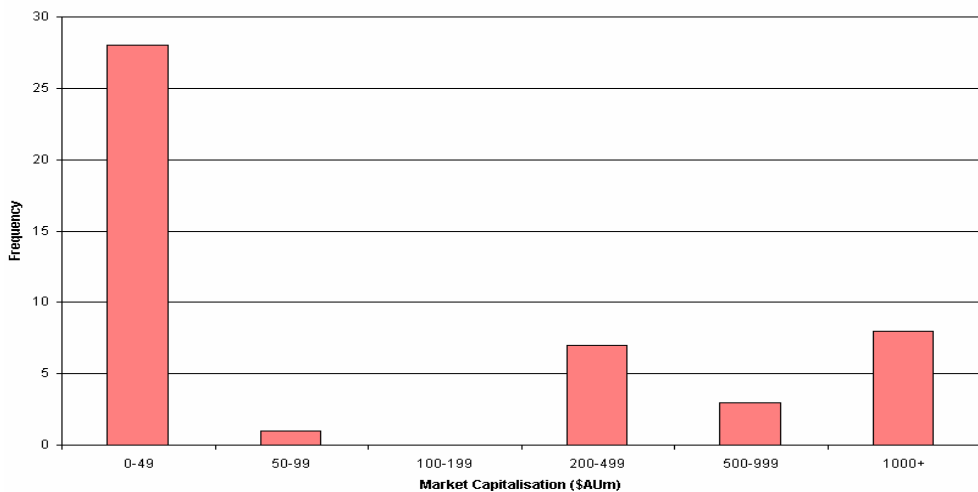
**Figure 2 – Market Capitalisation –Publicly Listed Bidders (sample of 72 decisions)**



### 3 Applicants

For the sample of 72 decisions of the Panel, 51 of the 72 applicants were public companies, 47 of which were listed at the time they made the application. The mean and median market capitalisation of publicly listed applicants was \$443m and \$30.4m respectively. Twenty eight of the 47 listed applicants had a market capitalisation lower than \$50m. Twelve applicants were incorporated overseas.

**Figure 3– Market Capitalisation–Publicly Listed Applicants (sample of 72 decisions)**

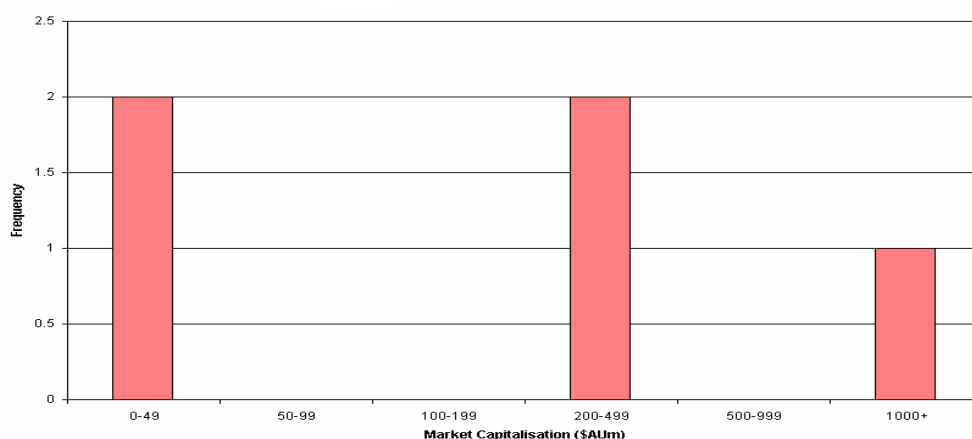


#### 4 Rival Bidders

For the sample of 72 decisions of the Panel, 17 of these matters involved rival bidders. Eleven of these 17 rival bidders were public companies and five of the 17 were publicly listed companies.

The market capitalisation data for rival bidders is derived from a very small sample size, since only five matters concerned the conduct of a listed rival bidder. The average market capitalisation of rival bidders was \$602.3m and the median \$427.1m. Because of the small sample size, this data should be treated cautiously.

**Figure 4 – Market Capitalisation – Publicly Listed Rival Bidders (sample of 72 decisions)**



#### F Profile of Entities Involved by GICS Industry Classification

In order to provide additional insight into the types of companies involved in matters before the Panel, industry classification data was obtained for companies involved in the first 72 decisions of the Panel. These decisions were made in the period 2000-2002. The Global Indices Classification Standard (GICS) was used for this purpose.

The most striking feature of the industry classification data is the domination of Panel proceedings by companies operating in the materials sub-sector. 58% of bidders, 43% of targets and 57% of applicants belonged to the materials sub-sector. Within this sub-sector, companies involved in mining operations formed the highest proportion.

The only other sub-sectors in which significant numbers of parties to Panel proceedings operated were capital goods (to which 17% of targets belonged), real estate (14% of bidders), software and services (11% of bidders), and consumer durables and apparel (9% of targets). Excluding applicants from the materials sector, Panel applicants represented a wide variety of industries, with no sub-sector other than materials representing more than 10% of the total applicants.

**Table 20- Bidders— Publicly Listed  
(sample of 72 decisions)**

<b>Bidder Industry Classification</b>	<b>Number</b>
Materials	21
Transportation	2
Media	0
Retailing	0
Energy	0
Real estate	5
Diversified Financials	0
Consumer Durables and Apparel	0
Software and Services	4
Health Care Equipment & Services	1
Capital Goods	2
Food Beverage and Tobacco	1
<b>TOTAL</b>	<b>36</b>

**Table 21 - Targets – Publicly Listed  
(sample of 72 decisions)**

<b>Target Industry Classification</b>	<b>Number</b>
Materials	28
Transportation	3
Media	2
Retailing	3
Energy	0
Real estate	1
Diversified Financials	4
Consumer Durables and Apparel	6
Software and Services	2

Health Care Equipment & Services	1
Capital Goods	11
Food Beverage and Tobacco	4
	<b>65</b>

**Table 22 - Applicants – Publicly Listed**  
(sample of 72 decisions)

<b>Applicant Classification</b>	<b>Number</b>
Materials	27
Transportation	2
Media	0
Retailing	0
Energy	1
Real estate	3
Diversified Financials	2
Consumer Durables and Apparel	2
Software and Services	3
Health Care Equipment & Services	1
Capital Goods	3
Food Beverage and Tobacco	3
	<b>47</b>

## IV CONCLUSION

The study considered 153 matters decided by the Takeovers Panel over a period between May 2000 and January 2005. For some of the analysis, 72 decisions of the Panel were examined in greater detail. These 72 decisions were made in the period 2000-2002. Some of the key results of the study are the following:

- Panel applications were made predominantly by bidders (42% of all applications). Targets made 31% of all applications;
- ASIC and shareholders made comparatively few applications;

- Of the 153 matters, 129 involved a formal takeover bid for a public Australian company. One hundred and eighteen of the 129 public companies were listed public companies;
- the most popular remedy sought by applicants was a declaration of unacceptable circumstances under s 657A (73% of all applications) – some of these applications also involved applications for interim orders;
- the Panel declared circumstances to be unacceptable 21 times. In 21 of the s 657A applications the Panel refused to commence proceedings. In 63 of these applications the Panel conducted proceedings but refused the application. However, 32 applications for declarations of unacceptable circumstances were refused but only after the Panel accepted undertakings from the parties or otherwise negotiated a settlement to the dispute;
- the Panel set aside or varied prior Panel decisions and decisions by ASIC on 10 occasions;
- the Panel made interim orders in 16 (27%) of the 59 matters in which interim orders were sought;
- the Panel took a median time of 14 days to decide applications, although it took a median time of only five days to reach decisions concerning interim orders;
- the Panel took a median time of 33 days to publish written reasons following each decision;
- the ground most frequently discussed in the submissions of parties or in the written reasons of the Panel was s 602(b)(iii) *sufficient information*;
- the factor least frequently forming the basis for parties' submissions was s 602(d) *appropriate procedures*, having been raised by parties in only two matters;
- the factor most commonly cited by the Panel as a basis for its decision was s 602(a) *generally*, where the Panel concluded that the impugned conduct breached the general policy underlying this paragraph but did not identify which, if any, of the paragraph's components were particularly relevant. This was closely followed by s 602(b)(iii), *enough information to assess the merits of bid*;
- the provision most commonly the subject of decisions that the Act had been contravened was s 636 (content of bidder's statement);
- Panel proceedings were dominated by companies with a small market capitalisation (less than \$50 million); and

- Panel proceedings were dominated by companies operating in the materials sub-sector. 58% of bidders, 43% of targets and 57% of applicants belonged to the materials sub-sector. Within this sub-sector, companies involved in mining operations formed the highest proportion.

## V APPENDIX A

Matter	Type of application	Application date
<i>Email Limited 03/00</i>	657A+657E	12/05/2000
<i>Infratil 02/00</i>	657A	2/05/2000
<i>Infratil Australia Ltd 001/00</i>	656A	1/05/2000
<i>Email Limited 004/00</i>	657EA	17/05/2000
<i>Email Limited 003/00</i>	657A	12/05/2000
<i>Brickworks (No 1)</i>	657A	4/08/2000
<i>Advance Property Fund</i>	657A	18/09/2000
<i>Ashton Mining Ltd</i>	657A+657E	30/09/2000
<i>St Barbara Mines Ltd and Taipan Resources NL</i>	657A+657E	27/09/2000
<i>Brickworks Ltd (No 2)</i>	657A	5/09/2000
<i>Taipan Resources NL</i>	657E	11/10/2000
<i>Taipan Resources (No 2)</i>	657A	26/10/2000
<i>Pinnacle VRB Ltd (No 2)</i>	657A+657E	16/10/2000
<i>Taipan Resources (No 6)</i>	656A	8/12/2000
<i>Taipan Resources (No 5)</i>	656A	4/12/2000
<i>Taipan Resources (No 4)</i>	657A+657E	29/11/2000
<i>Taipan Resources (No 3)</i>	657A+657E	16/11/2000
<i>Taipan Resources (No 7)</i>	657A+657E	15/12/2000
<i>Realestate.com.au Ltd</i>	657A	30/11/2000
<i>Pinnacle VRB Ltd (No3)</i>	656A	25/01/2001
<i>Taipan Resources (No 8)</i>	657A+657E	5/02/2001
<i>Taipan Resources (No 9)</i>	657A+657E	13/02/2001
<i>Pinnacle VRB (No 7)</i>	657A	30/04/2001
<i>Pinnacle VRB Ltd (No 4)</i>	657A+657E	15/03/2001
<i>Taipan Resources (No 10)</i>	657A+657E	27/02/2001
<i>Namakwa Diamond Company NL (No 2)</i>	657A+657E	30/03/2001
<i>Pinnacle VRB Ltd (No 6)</i>	657EA	10/04/2001
<i>Namakwa NL (No 3)</i>	657A	9/05/2001
<i>Namakwa (No 1)</i>	657A+657E	26/03/2001
<i>Pinnacle VRB (No 5)</i>	657A+657E	2/04/2001
<i>Pinnacle VRB Ltd (No 8)</i>	657EA	23/05/2001
<i>Namakwa NL (No 4)</i>	657EA	15/05/2001
<i>Vincorp Wineries Limited</i>	657A+657E	28/02/2001
<i>Taipan Resources (No 11)</i>	657EA	30/03/2001
<i>Australian Liquor Group Ltd</i>	657A+657E	12/07/2001
<i>Alpha Healthcare Ltd</i>	657A	3/05/2001
<i>Australian Liquor Group Ltd</i>	657A+657E	12/07/2001
<i>Bigshop.com.au Ltd</i>	657A+657E	13/09/2001
<i>Pinnacle VRB Ltd (No 10)</i>	657E	26/09/2001
<i>Pinnacle VRB Ltd (No 10)</i>	657A+657E	26/09/2001
<i>Bigshop.com.au Ltd (No 3)</i>	657E	5/10/2001
<i>Bigshop.com.au Ltd (No 2)</i>	657EA	5/10/2001
<i>Pinnacle VRB Ltd (No 9b)</i>	657A	28/09/2001
<i>Pinnacle VRB Ltd (No 9)</i>	657A	21/09/2001

<b>Matter</b>	<b>Type of application</b>	<b>Application date</b>
<i>Pinnacle VRB Ltd (No 11)</i>	657EA	8/10/2001
<i>Normandy Mining Ltd</i>	657A+657E	22/11/2001
<i>Normandy Mining Ltd (No 4)</i>	657A	27/11/2001
<i>Brisbane Broncos (No 1)</i>	657A	19/12/2001
<i>Brisbane Broncos (No 2)</i>	657A	24/12/2001
<i>Normandy Mining Limited (No 3)</i>	657A	28/11/2001
<i>Normandy Mining Limited (No 5)</i>	657A+657E	4/12/2001
<i>Normandy Mining Limited (No 2)</i>	657A	27/11/2001
<i>Normandy Mining Limited (No 7))</i>	657A+657E	14/01/2002
<i>Precious Metals Limited</i>	657A+657E	6/03/2002
<i>Brisbane Broncos (No 4)</i>	656A	31/01/2002
<i>Brisbane Broncos (No 3)</i>	657EA	10/01/2002
<i>Pasminco Ltd (Administrators Appointed)</i>	656A	19/02/2002
<i>Ballarat Goldfields NL</i>	657A+657E	26/04/2002
<i>Focus Technologies Limited</i>	657A	25/01/2002
<i>Normandy Mining Limited (No 6)</i>	657EA	13/12/2001
<i>EPHS Limited</i>	657A+657E	17/06/2002
<i>Ausdoc Group Limited</i>	657A	14/06/2002
<i>Online Advantage Limited</i>	657A	8/07/2002
<i>AurionGold Ltd</i>	657A+657E	5/08/2002
<i>Isis Communications Limited</i>	657A	27/06/2002
<i>Ranger Minerals Ltd</i>	657A	20/06/2002
<i>Colonial First State Property Trust Group (s 657A)</i>	657A+657E	30/08/2002
<i>Colonial First State Property Trust Group (s656A)</i>	656A	30/08/2002
<i>Colonial First State Property Funds II</i>	657E	23/09/2002
<i>Colonial First State Property Trust Group (No 3)</i>	657A+657E	24/09/2002
<i>Winepros Limited</i>	657A+657E	18/10/2002
<i>Anzoil NL</i>	657EA	29/10/2002
<i>Goodman Fielder Limited</i>	657A+657E	30/12/2002
<i>Equity-1 Resources</i>	657A	9/12/2002
<i>Goodman Fielder Ltd (No 3)</i>	657A	19/02/2003
<i>Anzoil NL 02</i>	657EA	25/11/2002
<i>S.A Liquor Distributors</i>	657A+657E	10/12/2002
<i>Anaconda Nickel Limited 01</i>	657A+657E	21/01/2003
<i>Phosphate Resources Limited</i>	657A	2/01/2003
<i>Anaconda Nickel Limited 02</i>	657A	28/01/2003
<i>Anaconda Nickel Limited 03</i>	657A	29/01/2003
<i>Anaconda Nickel Limited 04</i>	656A, 657A, 657C, 657E	29/01/2003
<i>Anaconda Nickel Limited 05</i>	657A+657E	30/01/2003
<i>Goodman Fielder Limited 02</i>	657A+657E	20/01/2003
<i>Anaconda Nickel Limited 06</i>	657EA + 657E	6/02/2003
<i>Anaconda Nickel Limited 07</i>	657EA	6/02/2003
<i>Anaconda Nickel Limited 08</i>	657A	7/02/2003
<i>Anaconda Nickel Limited 09</i>	657EA	11/02/2003
<i>Anaconda Nickel Limited 10</i>	657E	11/02/2003
<i>Anaconda Nickel Limited 11</i>	657E	12/02/2003
<i>Anaconda Nickel Limited 12</i>	656A	13/02/2003



<b>Matter</b>	<b>Type of application</b>	<b>Application date</b>
<i>Anaconda Nickel Limited 13</i>	201A(2) ASIC Act	13/02/2003
<i>Anaconda Nickel Limited 14</i>	657E	13/02/2003
<i>Anaconda Nickel Limited 16</i>	657A+657E	21/02/2003
<i>Anaconda Nickel Limited 17</i>	657A+657E	21/02/2003
<i>Austar United Communications Limited</i>	657A	28/02/2003
<i>Anaconda Nickel Limited 15</i>	657A+657E	20/02/2003
<i>Anaconda Nickel Limited 18</i>	657EA	11/03/2003
<i>Aliquot Asset Management Limited</i>	657A	22/04/2003
<i>Anaconda Nickel Limited 19</i>	657EA	11/04/2003
<i>AMP Shopping Centre Trust 01</i>	657A	10/04/2003
<i>Sirtex Medical Limited</i>	657A	17/04/2003
<i>Cobra Resouces Limited</i>	657A	16/05/2004
<i>AMP Shopping Centre Trust 02</i>	657EA	13/05/2003
<i>PowerTel 01</i>	657A	26/06/2003
<i>TrySoft Corporation Limited</i>	657A	10/06/2003
<i>PowerTel 02</i>	657A	10/07/2003
<i>PowerTel 03</i>	657A	30/07/2003
<i>BreakFree Limited</i>	657A	11/07/2003
<i>BreakFree Limited 02</i>	656A	4/09/2003
<i>AuIron Energy Limited</i>	657A+657E	10/09/2003
<i>SSH Medical Limited</i>	657A+657E	1/09/2003
<i>Selwyn Mines Limited</i>	657A	9/09/2003
<i>Grand Hotel Group</i>	657A+657E	30/09/2003
<i>National Can Industries 01</i>	657EA	20/10/2003
<i>Prudential Investment Company of Aust</i>	656A	3/10/2003
<i>QR Sciences Limited</i>	657C	13/10/2003
<i>BreakFree Limited 03</i>	657A	12/09/2003
<i>BreakFree Limited 04</i>	657A	10/10/2003
<i>National Can Industries 01(R)</i>	657A	19/10/2003
<i>Richfield Group Limited</i>	s657A	21/11/2003
<i>BreakFree Limited 04(R)</i>	657EA	28/10/2003
<i>Great Mines Limited</i>	657D(2)	9/12/2003
<i>Novus Petroleum Limited</i>	657A+657E	6/01/2004
<i>Forest Place Group Limited</i>	657A	7/01/2004
<i>Village Roadshow Limited</i>	657A+657E	23/01/2004
<i>The Mildura Co-operative Fruit Coy</i>	657A+657E	27/01/2004
<i>Investor Info Limited</i>	657A	11/03/2004
<i>Data &amp; Commerce Limited</i>	657A	30/04/2004
<i>Kaefer Technologies Limited</i>	657A	12/05/2004
<i>Novus Petroleum Limited 02</i>	657A	19/05/2004
<i>Skywest Limited</i>	657A+657E	7/05/2004
<i>Skywest Limited 02</i>	657A	11/06/2004
<i>Village Roadshow Limited 02</i>	657A+657E	15/06/2004
<i>St Barbara Mines Limited 02</i>	657A	29/06/2004
<i>Rivkin Financial Services Limited</i>	657A	9/07/2004
<i>The Gribbles Group Limited</i>	657E	9/07/2004
<i>Kaefer Technologies Limited 02</i>	657A	12/07/2004

<b>Matter</b>	<b>Type of application</b>	<b>Application date</b>
<i>Skywest Limited 03</i>	657A+657E	5/07/2004
<i>Lake Technology Limited</i>		22/07/2004
<i>Australian Leisure and Hospitality Group</i>	657A	20/07/2004
<i>Skywest Limited 03(R)</i>	657EA	3/08/2004
<i>Australian Leisure and Hospitality Group 02</i>	657A	27/08/2004
<i>Village Roadshow Limited 03</i>	657A	17/09/2004
<i>Pacific Energy Limited</i>	657A	14/09/2004
<i>Emperor Mines Limited 01</i>	657A+657E	29/09/2004
<i>Australian Leisure and Hospitality Group 03</i>	657A+657E	18/10/2004
<i>Skywest Limited 04</i>	657A+657E	11/10/2004
<i>Emperor Mines Limited 01</i>	657EA	29/09/2004
<i>Crescent Gold Limited</i>	657A	26/10/2004
<i>Health Communications Network Ltd</i>	657A	16/11/2004
<i>General Property Trust</i>	657A+657E	3/12/2004
<i>Lachlan Farming Limited</i>	657A+657E	22/12/2004

## APPENDIX B

### Appendix B – Description of Data Sources

Data	Source	Notes
<b>Matter Name</b>	Written Reasons	
<b>Application Date</b>	Panel Media Release	The application date was taken to be the date on which the Panel received the application. Where the relevant Media Release did not specify the application date, the application date was taken from the written reasons. Failing that, the application date was taken to be the date on which the Media Release was posted.
<b>Decision Date</b>	Panel Media Release	Where the relevant Media Release did not specify the decision date, the decision date was taken from the written reasons if provided. Failing that, the decision date was taken to be the date on which the Media Release announcing the decision was posted.
<b>Publication Date</b>	Panel Media Release	Where the publication date was not specified by the Media Release, it was taken to be the date on which the Media Release announcing the publication of the decision was posted.
<b>Identity of Applicant</b>	Written Reasons	The applicant was categorised as one of the following: target, bidder, ASIC, shareholder, or other.
<b>Application Type</b>	Written Reasons. The Panel's website also lists the application type beside each matter name.	<p>Applications were categorised as one of the following:</p> <ul style="list-style-type: none"> <li>• 656A (Review of ASIC decision)</li> <li>• 657A (Declaration of Unacceptable Circumstances. This application type was typically accompanied by an application for final orders under 657D.)</li> <li>• 657A+657E (Declaration of Unacceptable Circumstances <i>and</i> Interim Orders)</li> <li>• 657EA (Review of Panel decision)</li> <li>• 657E (Application for Interim Orders only)</li> </ul> <p>Technically, applications for s 657A declarations are made pursuant to s 657C.</p>
<b>Grounds overview</b>	Written Reasons	Summary of the facts and the material arguments raised by parties and of the issues raised by the Panel in its discussion of the application(s).
<b>Grounds raised in submissions by the parties or by</b>	Written Reasons	Those grounds that were addressed by the Panel in their written reasons were sorted into the following categories, based around the s 602 list of purposes:

Data	Source	Notes
<b>the Panel</b>		<ul style="list-style-type: none"> <li>• <i>s 602(a) efficient market;</i></li> <li>• <i>s 602(a) competitive market;</i></li> <li>• <i>s 602(a) informed market;</i></li> <li>• <i>s 602(a) generally</i> – this residual category caught all references by the Panel generally to the principle that takeovers occur in an efficient, competitive and informed market where no specific reference was made to any of the principle’s individual components listed above;</li> <li>• <i>s 602(b)(i) knowledge of identity;</i></li> <li>• <i>s 602(b)(ii) reasonable time to consider;</i></li> <li>• <i>s 602(b)(iii) sufficient information;</i></li> <li>• <i>s 602(c) equal opportunity principle;</i></li> <li>• <i>s 602(d) appropriate procedures;</i></li> <li>• <i>breach of the Corporations Act and if so, which section;</i> and</li> <li>• <i>other</i></li> </ul> <p>It was difficult to ascertain which of the possible Ch 6 grounds parties relied upon during their written and oral submissions. Submissions to Panel proceedings are confidential, and the only documents publicly available are the Panel’s final written reasons. Consequently the study simply identified those grounds that were discussed at reasonable length in the final written reasons, even where it was unclear whether they were raised by parties in submissions or raised by the Panel itself.</p>
<b>Decision Summary</b>	Written Reasons	A summary of the decision and the grounds forming the basis for the Panel decision
<b>Grounds Forming the Basis for Panel Decision</b>	Written Reasons	<p>The study identified the grounds forming the basis or ratio decidendi of those decisions in which the Panel:</p> <ul style="list-style-type: none"> <li>• made a declaration of unacceptable circumstances or exercised any of its substantive powers; or</li> <li>• although not formally exercising its powers, indicated that it would have been prepared to do so in the absence of undertakings by the party(s) or other countervailing circumstances (such as a bid period lapsing).</li> </ul> <p>The grounds forming the basis for the decision were sorted into the following categories:</p> <ul style="list-style-type: none"> <li>• <i>s 602(a) efficient market;</i></li> </ul>

Data	Source	Notes
		<ul style="list-style-type: none"> <li>• <i>s 602(a) competitive market;</i></li> <li>• <i>s 602(a) informed market;</i></li> <li>• <i>s 602(a) generally;</i></li> <li>• <i>s 602(b)(i) knowledge of identity;</i></li> <li>• <i>s 602(b)(ii) reasonable time to consider;</i></li> <li>• <i>s 602(b)(iii) sufficient information;</i></li> <li>• <i>s 602 (c) equal opportunity principle;</i></li> <li>• <i>s 602 (d) appropriate procedures;</i></li> <li>• <i>breach of the Corporations Act and if so, which section;</i></li> <li>and</li> <li>• <i>other.</i></li> </ul>
<b>Interim Orders</b>	Written Reasons	<p>Whether or not interim orders, where sought, were:</p> <ul style="list-style-type: none"> <li>• granted;</li> <li>• refused; or</li> <li>• refused – undertakings (although the Panel was satisfied that interim orders were warranted it received undertakings from the relevant party making the grant of interim orders unnecessary),</li> </ul> <p>and at what date an interim orders determination was made.</p> <p>The study also recorded the date on which interim orders made at an earlier stage were revoked.</p>
<b>Final Orders</b>	Written Reasons	The form recorded whether or not final orders were made, and where they were, provided a brief description.
<b>Nature of Decision</b>	Written Reasons	<p>Decision types were categorised as follows;</p> <ul style="list-style-type: none"> <li>• Refusal to conduct proceedings;</li> <li>• Declaration with orders;</li> <li>• Declaration no orders;</li> <li>• Declaration no orders -- undertakings;</li> <li>• ASIC decision affirmed;</li> <li>• ASIC decision varied</li> <li>• ASIC decision overturned</li> <li>• Panel decision affirmed</li> <li>• Panel decision varied</li> <li>• Panel decision overturned</li> <li>• Interim Orders granted</li> </ul>

Data	Source	Notes
		<ul style="list-style-type: none"> <li>• Interim Orders only (ie the matter is not finally disposed of by this decision)</li> <li>• Application refused – undertakings (covering matters in which the Panel was prepared to exercise its formal powers --for example by making a declaration – but received undertakings from a party satisfying the Panel that a formal decision was not required);</li> <li>• Application refused;</li> <li>• Proceedings stayed; or</li> <li>• Proceeding stayed – undertakings.</li> </ul>
<b>Profile of Parties Involved in Panel proceedings</b>		
<b>Name</b>	Written Reasons	
<b>Nature of Party Involvement in Proceedings</b>	Written Reasons	<p>Each party to the Panel proceeding was categorised as one of the following:</p> <ul style="list-style-type: none"> <li>• target;</li> <li>• bidder;</li> <li>• ASIC;</li> <li>• shareholder;</li> <li>• rival bidder; or</li> <li>• other.</li> </ul> <p>The term ‘rival bidder’ refers to a bidder, not being an applicant, whose conduct formed the subject of a complaint by a bidder applicant. For example, in <i>Normandy Mining (No 3)</i> AngloGold, the bidder making the application, complained that a competing bidder, Newmont, deterred competition in the market for control of Normandy by entering into a break fee agreement with Normandy in which Normandy agreed <i>inter alia</i> to pay a fee to Newmont if its board failed to recommend Newmont’s bid. Accordingly, Newmont was recorded as a ‘rival bidder.’</p>
<b>Public/Private/NL company?</b>	ASIC Company Search website	<p><a href="http://www.search.asic.gov.au/cgi-bin/gns030c">http://www.search.asic.gov.au/cgi-bin/gns030c</a></p> <p>Where the target or other entity was a unit trust, the study treated the responsible entity, which was usually listed and whose market capitalisation was therefore obtainable, as if it were the target or other entity, respectively.</p>
<b>ASX listed?</b>	ASX website, and if not	< <a href="http://www.asx.com.au/asx/research/CompanyInfo.jsp">http://www.asx.com.au/asx/research/CompanyInfo.jsp</a> >

<b>Data</b>	<b>Source</b>	<b>Notes</b>
	listed currently, then Delisted Company search	< <a href="http://www.delisted.com.au">http://www.delisted.com.au</a> >
<b>ASX code</b>	SIRCA Company Search	< <a href="http://www.sirca.org.au/cgi-bin/affiliate/searchAsxCODE.pl">http://www.sirca.org.au/cgi-bin/affiliate/searchAsxCODE.pl</a> >
<b>Industry Classification</b>	Downloaded CSV file from ASX website for entities listed at the time of research. For all other entities, the nature of their business and the relevant GICS industry group was determined from either the written reasons or a general web search.	This study adopts the Global Industry Classification Standard (GICS) used by the Australian Stock Exchange. Each entity is categorised as belonging to one of the thirteen industry groups listed by the GICS.
<b>Market Capitalisation</b>	Research Request to SIRCA	Market capitalisation of all publicly listed entities was provided as at the date of application. The figures are accurate to the nearest \$100 000.