

CLERPing the Panel

Paper given to the Panel Members 10 November 1999

A. SOME HISTORY

1 Two years ago, one could fairly say:

“The Corporations and Securities Panel, used three times in seven years, remains ineffectual in curbing tactical litigation. With powers inadequate and design fundamentally flawed, the Panel has failed its promise, despite the standing of its appointees. It should be reconstituted ... That demands rule-making power and a broad principled approach based on the culture of the London City Panel ...”;

“Taking the Legalism out of Takeovers” by Santow and Williams (1997) 71 ALJ 749.

2 The legalism remains, even if, as I hope, the courts now are doing a pretty good job. Indeed because the new Panel will be exerting new powers, legalism in the Panel’s early and testing stages may be greater than with the courts; witness the *Wesfi* and *Precision Data* litigation. Last month, the CLERP legislation passed the Senate setting up a new Panel with new powers, operative from March of next year. While falling short of the ideal in some aspects, the new Panel represents a major advance on the hobbled Panel of the present. The Government should be congratulated for its courage. That the old Panel has recently performed as well as it has, most notably with the *Wesfi* decision, is a tribute to those that have had to grapple with its high hurdles for access and legalistic statutory procedures. What I want to do to-day is sketch some of the problems with which the new Panel will have to grapple, where its powers will be tested. In doing so I point to some critical points if success is to be achieved. In this paper, I distinguish the post March 2000 Panel as “the new Panel” and term the present Panel “the old Panel”.

B. THE EMPEROR'S NEW CLOTHES - ASPIRATION AND REALITY

3 On 22 March 1999, just a year from the time the new Panel is to commence, Peter Lee, Deputy Director General, UK Panel on Takeovers and Mergers, gave evidence before the Joint Committee on Corporations and Securities. The most important thing he said was this: “If you are going to have a Panel system, it is incredibly important that it is given as much power as possible to be the ultimate referee in dealing with takeover bids as they move along. ... I think it should have all conceivable powers to do this job properly and be able to make decisions upon which people can act.”

4 In our earlier ALJ paper, we pointed to the convergence between Australia’s statutory Panel and the inevitable statutory underpinning required by EU directives for the London City Panel, replacing its present consensual base. The new Panel has still to be fully clothed — the devil will lie in the detailed regulations still to be promulgated. It will be critical for the Panel’s success that it shape them appropriately.

5 When one turns to the expanded powers of the new Panel what do we find?

(a) An expanded remit - new s657A

6 In the last tranche of amendments made in October this year, the Government at last faced up to a fundamental anomaly. If the courts are to be ousted by a privative clause during the time a bid is extant, the Panel has to be able to fill the vacuum. (Interestingly, courts remain in sole charge of Schemes of Arrangement — contrast the London City Panel’s shared involvement.) To leave the Panel simply with the power to deal with breach of the Eggleston Principles would have created a gaping hole. Attached is a point by point comparison between the new Panel’s powers and the old. The power is to declare circumstances unacceptable “in relation to the affairs of a company” (widely defined in s53 of the *Corporations Law*, made to apply if necessary by regulation). The Panel needs to decide that the circumstances are unacceptable having regard to their effect on:

- control of that company, or another company (a limiting term which does not include a company incorporated outside the jurisdiction), or

- an acquisition of a substantial interest in that company, or another company, or
- because they constitute or give rise to a breach of Chapter 6, 6A, 6B or 6C.

7 In simple terms, the new Panel cannot only deal with unacceptable circumstances by reference to the purposes inhering in the four Eggleston Principles (no longer does there need to be a “breach of one of the Eggleston Principles) but it can also deal with contraventions of the black letter law of Chapter 6, 6A, 6B and 6C. Furthermore, the Panel only has jurisdiction in the non-black letter law context, principally Eggleston, where the circumstances have an effect on control or (now) potential control. Thus exclusive reliance in that context is no longer placed on an acquisition or proposed acquisition being by a person of a “substantial interest” in the company — though that is likely to remain the main test.

8 The final liberation is that the new Panel may make a declaration where it considers that doing so “is not against the public interest” after taking into account any policy considerations that the Panel considers relevant. That is the only threshold requirement for breach of the black letter law. The old Panel has to determine that such declaration was positively in the public interest, a higher hurdle. That was fatal to making any declaration in *Re ASC and John Fairfax Holdings Ltd* (1997) 25 ACSR 441, the case on synthetics used by BIL in Fairfax, though there were other obstacles.

The Panel’s Discretion

9 What the new Panel must have regard to in making such a declaration is widened to include not only the four (modified) Eggleston Principles, being the “purposes of this chapter set out in s602”, but also

- (a) the other provisions of chapter 6,
- (b) Panel rules made under the new rule-making power, and
- (c) any matters specified in regulations made pursuant to s195(2)(c) of the *ASIC Act* — essentially any matters which the legislature chooses to add as matters to be taken into account by the Panel when making a decision in the course of an inquiry.

The legislature could, if it wished, hog-tie the Panel by unduly prescriptive regulations.

- 10 That expanded scope of what the Panel must have regard to will indubitably circumscribe the exercise of its discretion, because a Panel decision will be capable of being attacked if it fails to take into account what it must. Panels post March 2000 will be forced to tick off, legalistically, each of the matters it obligatorily had to take into account — woe-betide the Panel that forgets one of them.

(b) The Privative Clause - new s659B read with s659AA

- 11 These clauses insofar as they purport to keep courts out of dealing with takeover disputes albeit for a limited period and not totally (ASIC is an exception) are probably privative clauses, though there is an argument to the contrary. The Government has disregarded the criticisms made of the privative clause in terms of its effectiveness, save that it has wisely encouraged the courts in two respects to refrain from intervention, at least until well after the event. The first is in stating as an object that the Panel is to be “the main [but not exclusive] forum for resolving takeover disputes about a takeover bid until the bid period has ended” (s659AA). The second is by inserting a power under s657EB to refer a decision to the Panel for review under the new provisions for internal Panel reviews contained in s657EA. But for such provision, the court (post-*Wakim* (1999) 73 ALJR 839 likely to be the Supreme Court) asked to enforce a Panel order might be tempted to revisit the whole basis of the new Panel’s decision itself. With this power to remit, if the court feels the Panel may have got it wrong, it can remit back to the new Panel for the Panel to deal with the matter by way of internal Panel review — in effect an internal appeal. The court may more readily enforce the Panel’s order once satisfied both as to the Panel’s jurisdiction and in a broad sense, as to its approach overall including the minimal procedural fairness required, knowing that it is able to remit if necessary — or knowing that parties had the opportunity to seek internal review. The internal appeal mechanism for the London Panel is one of the reasons why the courts have respected the Panel’s jurisdiction and not intervened in the United Kingdom.
- 12 Reverting to the privative clause and its effectiveness, an early issue is whether Victoria will do what is necessary to oust the jurisdiction of its Supreme Court, by doing what it has to do by way of manner and form under the *Constitution Act* 1975, s18(2A) and s85.

That requires specific legislation to overcome the constitutional entrenchment of the Supreme Court's jurisdiction in Victoria. It may be a matter of some political sensitivity for a minority government, given criticisms levelled against the previous government's use of privative clauses. But if Victoria alone permits takeover litigation in its Supreme Court during a bid, that will undermine the whole Panel scheme. However, its Supreme Court may be expected to be sensitive to the legislative intent in s659AA and be sparing in its interventions, just as *R v Panel on Take-Overs & Mergers; Ex parte Datafin plc* [1987] QB 815; [1987] 2 WLR 699; [1987] 1 All ER 564 exemplifies in the United Kingdom.

13 Other issues concerning the privative clause include the following:

- (a) It will be observed that ASIC is not precluded from bringing an action in the courts during the period a bid is open. It will be a test of ASIC's willingness to let the Panel be the main forum for resolving disputes about a takeover bid as to whether ASIC commences court proceedings, possibly at a time when there are parallel proceedings before the Panel. That possibility would in turn lead to potential conflict between the Panel determination, if the Panel presses ahead with an enquiry also, which now can be instigated not only by ASIC but other interested parties. The Panel might elect not to do so, if it were of the view that it would be against the public interest for two bodies to be dealing with essentially the same dispute at the same time. The court on the other hand cannot decline jurisdiction.
- (b) In many cases there will neither a takeover bid nor initially a proposed takeover bid. Yet a transaction may occur which would contravene Chapter 6 of the *Corporations Law*. In those cases, again the court and the Panel will have overlapping jurisdiction. Clearly if a bid later eventuates or for that matter a proposed takeover bid, the court "may" (it has a discretion) stay any pre-existing court proceedings until the end of the bid period (there being no impediment to private litigants in having commenced those proceedings, with no bid proposed). In exercising its discretion, the court will be reminded of s659AA as to the object of making the Panel the main forum for resolving takeover disputes.

- (c) The Panel is a Commonwealth body such that each member is “an officer of the Commonwealth”; see *Re Cram* (1987) 163 CLR 117 at 131, even though its jurisdiction extends outside the ACT so as to depend on State legislation. That makes the Panel unavoidably amenable to the High Court’s jurisdiction under s75(v) of the Constitution under which a writ of mandamus or prohibition or an injunction may lie against the Panel’s officers. Likewise that jurisdiction extends to the Federal Court by remittal under s44 of the *Judiciary Act* 1903. The Federal Court’s original jurisdiction is conferred by s39B of the *Judiciary Act* 1903 though the validity of its jurisdiction may be tested by the decision on cross-vesting (*Re Wakim; ex parte McNally* (1999) 73 ALJR 839. Thus if the Federal Court has no jurisdiction over Chapter 6, absent pendant jurisdiction, can it have jurisdiction over the Panel’s determination in relation to Chapter 6, insofar as dependant on state legislation for jurisdiction? Interestingly, the High Court accepted, post-*Wakim*, that the Federal Court had jurisdiction under s39B in *Attorney General v Oates* [1999] HCA 35; see transcript of proceedings on 17 June 1999.

There may also be future constitutional argument as to whether, by expanding the Panel’s jurisdiction to each State by the relevant State application laws, the Panel is thereby or pro tanto no longer a validly formed Commonwealth body, in that its extended jurisdiction to the States could not be founded upon the Territories power. Nonetheless, the Attorney-General, the Hon Daryl Williams, MP, has announced that the Government will introduce Commonwealth legislation in response to the High Court’s decision which (he hopes) will ensure that the Federal Court can continue to review the lawfulness of decisions made by Commonwealth bodies and officers exercising powers under State laws: Media Release 24 August 1999.

- (d) The legislature has chosen not to use the drafting technique encouraged by *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598 to overcome the court’s traditional strict construction of privative clauses; that is to say, widening the jurisdiction of the Panel so as by a more benevolent judicial construction preventing the resultant act of the Panel from being held a nullity. However,

there may wisdom in not adopting this approach. This is because the possibility of such judicial review by the High Court and Federal Court was one of the indicia relied upon by the High Court in *Attorney General v Breckler & Ors* (1999) 163 ALR 576, as pointing to the absence of an impermissible exercise of judicial power. This was in the case of *Superannuation Complaints Tribunal*, though it must be conceded that the Tribunal was amenable to a wider scope of review by way of direct appeal to the Federal Court.

- (e) There will be a question as to whether review by the Commonwealth of Panel decisions under the ADJR legislation has been effectively excluded in the ACT; elsewhere there is no decision of an administrative character under a *Commonwealth* “enactment”, as is necessary for ADJR review.
- (f) It would however appear that AAT review has been now excluded; note the comments by Bruce Dyer “A Revitalised Panel” in (1998) 16 C & SLJ 261 at 277 (to whom I express my indebtedness for sight of a subsequent draft paper by him on the new Panel). Compare now the later form of the legislation amending s1317C via Schedule 3 item 370 inserting new paras (ga), (gb) and (gc).

Summing up

- 14 It may be that the object stated in s659AA and the Panel’s own competence, once established, will encourage the courts to leave matters to the Panel, without in particular injunctive intervention, as much as a matter of discretion than necessarily for lack of jurisdiction. But the Panel will have to earn its reputation as the London Panel has, if courts are to take that course — more especially when it comes to enforcement of Panel orders, where the court must be involved. The scope of s659B will itself be a matter of argument for future cases and further elucidation is best left for them.

C. CONSTITUTIONALITY OF PANEL

- 15 Clearly enough, the Panel cannot enforce its own orders and continues to have, as a pre-condition for its intervention, recourse to the general criterion of the public interest — that is to say policy considerations. Both of these features were relied upon in *Precision Data Holdings Ltd v Wills* (1992) 173 CLR 167 as support for the conclusion

that the Panel was not exercising judicial power impermissibly. There are however other features of the new Panel which may be seized upon in any future constitutional challenge. First, no longer is it that ASIC alone can institute proceedings before the Panel, though that was not considered a major factor. Second, the Panel, correctly from a policy point of view, but weakening its position from a constitutional viewpoint, now has jurisdiction to deal with contraventions of Chapter 6 though premised on the Panel being satisfied, as I have said, that its intervention is not contrary to the public interest. This means that the Panel is not constrained to dealing only with contravention of the Eggleston Principles, a feature which emphasised the broad policy considerations which were the basis of its jurisdiction and which in turn militated against any exercise of judicial power. Third, the privative clause ousts judicial review, if effective, but not for constitutional reasons, the High Court and Federal Court in the manner and to the extent I have described.

- 16 Indeed since the recent decision in *Re Governor; ex parte Eastman* (1999) 73 ALJR 1324, it has been established that a court formed under the Territories Power is not subject to Chapter 3 of the Constitution since it is not exercising judicial power *of the Commonwealth*. It may thus follow that if the Panel were exercising judicial power it is only exercising State and Territory judicial power, and thus it would not come within the strict separation of powers doctrine applicable to federal courts. Whether indeed the Panel can be said to be formed under the Territories Power (relying on the indication in s174(2) of the *ASIC Act*) is a question itself not beyond doubt; see the argument in *Precision Data* (at 169-179) and the discussion by Santow and Williams *op cit* at 756-7 which recommended a more explicit recourse to the Territories Power, though unavoidably still depending upon State legislation to extend the operation of the Panel into each State.

D. RULE-MAKING POWER - Section 658C

- 17 It is clear that the Panel does not have unconstrained rule-making power. First, the president in exercising that power after consultation with members of the Panel must not make rules inconsistent with the Law or the Regulations. Second, the powers are limited to rules which clarify or supplement the operation of the provisions of Chapter 6.

Finally, a president must consider the Eggleston Principles being the guiding purposes of the Chapter set out in s602.

- 18 Inconsistency carries with it the notion of repugnancy and contrariety, though here in the context of a constraint upon the executive arm of Government exercising legislative power rather than in the context of Commonwealth/State relations. Thus it may be possible for example to clarify by rule that synthetics such as were used in the Merrill Lynch/BIL/John Fairfax case are to be treated as if they involved the acquisition of a relevant interest in securities. The argument to the contrary would be open that such an extension was not merely clarificatory or supplementary but was inconsistent with Chapter 6, as going against the fundamental notion of the definition of “security”, despite synthetics being a means of achieving the same economic effect. No doubt there will be an early test of the scope of the rule-making power once exercised. Nonetheless it is a valuable addition to the Panel’s powers, crucial as it has been for the success of the London Panel and that in South Africa and Ireland. It may be that if the Panel establishes its credentials over the next few years, a less constrained rule-making power will be conferred.
- 19 There is also potential for the rule-making power effectively to pre-empt any exemption or modification that ASIC might otherwise make; see s658B which provides that if there is an inconsistency between the rule and an exemption or modification, the rule prevails to the extent of the inconsistency. That might be said to short-circuit any appeal from an ASIC exemption or modification to the Panel. On the other hand, the Panel’s wider power of rule-making may get over the difficulties if the *DB Management Pty Ltd v ASIC* (1999) 162 ALR 91 decision remains and is not reversed in the current appeal to the High Court. Thus if the power to give exemptions or modifications under s730 of the *Corporations Law* does not extend to the compulsory acquisition of property, such a constraint may not apply to the exercise of the rule-making power.
- 20 There may, as George Durbridge of ASIC has said, be difficulty in the absence of an ASIC exempting or modificatory power from Panel rules; the Panel can always revoke or amend its rule, though with some delay compared to modification. Perhaps the Panel rule might itself build in its own scope for giving Panel consent, as if by way of exemption, working co-operatively with ASIC as it should.

E. LEGALISM OF PANEL'S PROCEDURES

- 21 Under the new regime, legal representation will require the consent of the Panel. Furthermore, there is much to be said for repealing the existing regulations under the *ASIC Act* and allowing the Panel to make its own rules for the conduct of its proceedings, as it currently can do subject to any regulation and the *ASIC Act*. That would avoid the kind of frustration that was experienced in the Merrill Lynch/BIL/John Fairfax Panel referral expressed by that Panel. Certainly that degree of formality involving the issuance of a brief, to be circulated to the parties and then the formality of formal submissions is quite antithetical to the way the London Panel works and in particular to a speedy resolution of takeover disputes. Reading between the lines, one might draw a similar conclusion from the recent Wesfi Panel referral. That *Precision Data* generated seven separate actions and most recently the Wesfi Panel referral six, shows the propensity of parties to want to test the Panel as strenuously as possible, particularly when they fear an adverse decision. However, while the new Panel can expect similar testing, that may ultimately prove a source of greater assurance and certainty if the challenges are resolved in the Panel's favour and in favour of the legislative intent of the new provisions.
- 22 Finally, internal Panel appeals themselves will need to be dealt with by new regulations. It will be crucial to make sure that those regulations in turn ensure that the appeal procedure achieves the level of informality as well as rigour and fairness which will be crucial to the Panel establishing its reputation. The courts will be far readier to respect a Panel which shows that it can exercise its now much wider powers in a way which wins the respect of the commercial community. The Eggleston Principles, retained as they are at the commencement of Chapter 6, are important guidelines but must evolve in their practical application with the times. But the Panel's greatest problem will be to establish a consistent approach, when conflicts will result in lack of continuity in Panel membership. It is here that Panel appeals may be able to achieve an overall approach leading to consistency for later referrals.

G F K Santow
10 November 1999

Old test

Section 732. Occurrence of unacceptable circumstances

(1) For the purposes of this Part, unacceptable circumstances shall be taken to have occurred if, and only if:

- (a) the shareholders and directors of a company did not know the identity of a person who proposed to acquire a substantial interest in the company; or
- (b) the shareholders and directors of a company did not have a reasonable time in which to consider a proposal under which a person would acquire a substantial interest in the company; or
- (c) the shareholders and directors of a company were not supplied with enough information for them to assess the merits of a proposal under which a person would acquire a substantial interest in the company; or
- (d) the shareholders of a company did not all have reasonable and equal opportunities to participate in any benefits, or to become entitled to participate in any benefits, accruing, whether directly or indirectly and whether immediately or in the future, to any shareholder or to any associate of a shareholder, in connection with the acquisition, or proposed acquisition, by any person of a substantial interest in the company; or
- (e) a company carries out, or proposes to carry out, a buy-back that is unreasonable having regard to:
 - (i) the effect of the buy-back on the control of that company or of another company; and
 - (ii) the fact that the disclosure and other procedural safeguards of this Chapter do not apply to the buy-back because of section 632A; or
- (f) a company reduces its share capital, or proposes to reduce its share capital, in a way that is unreasonable having regard to its effect on the control of that company or another company; or
- (g) a company acquires, or proposes to acquire, a relevant interest in at least 5% of its voting shares and the acquisition is unreasonable having regard to its effect on the control of that company or another company.

(2) Paragraph (1)(d) may be satisfied because of:

- (a) actions of the person acquiring, or proposing to acquire, the substantial interest; or
- (b) actions of the directors of the company, including actions that caused the acquisition not to proceed, or that contributed to it not proceeding.

New test

Section 657A. Declaration of unacceptable circumstances

(1) The Panel may declare circumstances in relation to the affairs of a company to be unacceptable circumstances. Without limiting this, the Panel may declare circumstances to be unacceptable circumstances whether or not the circumstances constitute a contravention of a provision of this Law.

(2) The Panel may only declare circumstances to be unacceptable circumstances 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 this Chapter or of Chapter 6A, 6B or 6C.

The Panel may only make a declaration under this subsection, or only decline to make a declaration under this subsection, if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant.

(3) In exercising its powers under this section, the Panel:

- (a) must have regard to:
 - (i) the purposes of the Chapter set out in section 602; and
 - (ii) the other provisions of this Chapter; and
 - (iii) the rules made under section 658C; and
 - (iv) the matters specified in regulations made for the purposes of paragraph (195(3)(c) of the *Australian Securities and Investments Commission Act 1989*

(b) may have regard to any other matters it considers relevant.

In having regard to the purpose set out in paragraph 602(1)(c) in relation to an acquisition, or proposed acquisition, of a substantial interest in a company, body or scheme, the Panel must take into account the actions of the directors of the company or body or the responsible entity for a scheme (including actions that caused the acquisition or proposed acquisition not to proceed or contributed to it not proceeding).

A declaration of unacceptable circumstances:

comparison of old test and new test

Old Panel test: s 732	New Panel test: s 657A
<ul style="list-style-type: none"> • exhaustive test prescribing particular circumstances: <ul style="list-style-type: none"> i. 732(1)(a): did not know identity of acquirer of interest in company ii. 732(1)(b): did not have reasonable time to consider proposal iii. 732(1)(c): did not have enough information to assess merits of proposal iv. 732(1)(d): did not have, so far as practicable, reasonable and equal opportunity to participate in benefits under (proposed) acquisition v. 732(1)(e): unreasonable buy-back having regard to its effect on control of the company or another company and fact that s 632A prevented disclosure and other procedural safeguards applying vi. 732(1)(f): unreasonable share capital reduction having regard to effect on control of company or another company vii. 732(1)(g): company's unreasonable acquisition or proposed acquisition of relevant interest in at least 5% of its shares having regard to effect on control of that company or another company 	<ul style="list-style-type: none"> • broad discretion to consider effect of circumstances on control, potential control or acquisition, proposed acquisition of substantial interest in the company or another company 657A(2)(a) • unacceptable where contravention of provision of Chapters 6, 6A, 6B, 6C: 657A(2)(b) • unacceptable circumstances need not constitute a contravention of a provision of the CL: 657A(1) • Panel must take into account target directors' actions including actions causing not to proceed to acquisition or proposed acquisition of a substantial interest in the target (or another company): 657A(3) • Panel must have regard to: <ul style="list-style-type: none"> (a) the purposes of Ch 6 namely: <ul style="list-style-type: none"> (aa) that acquisition of control takes place in an efficient, competitive and informed market (bb) purposes derived from the equivalent of (i) to (iv) opposite (Eggleston Principles) and from the absence of appropriate procedures being followed as a preliminary to compulsory acquisition (b) other provisions of Ch 6 (c) Panel rules made by it under s 658C, and (d) matters stated in ASIC regulations that Panel is required to take into account: 657A(3)(a)

<ul style="list-style-type: none"> • “substantial interest” : 732(1)(a)(b)(c)(d) 	<ul style="list-style-type: none"> • “substantial interest”: 657A(2)(b)
<ul style="list-style-type: none"> • “proposal” : 732(1)(b),(c) 	
	<ul style="list-style-type: none"> • “control or potential control” : 657A(2)(a)(i)
<ul style="list-style-type: none"> • “acquisition or proposed acquisition ... of a substantial interest”: 732(1)(d) 	<ul style="list-style-type: none"> • “acquisition or proposed acquisition ... of a substantial interest”: 657A (2)(a)(ii)
<ul style="list-style-type: none"> • declaration must be “in the public interest” after taking account of policy considerations in s 731 and any others which are relevant: 733(3) 	<ul style="list-style-type: none"> • declaration (or declining to declare) must be “not against the public interest” after taking account of any policy considerations the Panel considers relevant: 657A(2)