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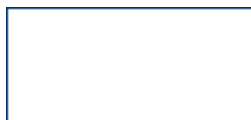
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Panel-beaten on takeovers

By Alex Boxsell

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THE FUTURE operation of the Takeovers Panel is under question despite last week's Melbourne University report that sang the body's praises.

The new Takeovers Panel, established in 2000, was heralded in the report by the University of Melbourne's Centre for Corporate Law and Securities Regulation as a much faster, cheaper and more effective version of its predecessor.

Yet the Federal Court's recent decision in *Glencore* may taint what the report describes as a "quick and efficient adjudicator of takeover disputes, with few of its decisions being the subject of applications for review".

Minter Ellison's head of mergers and acquisitions, James Philips, said the *Glencore* decision may cause changes to the way the Panel operates, which could lessen its effectiveness as an alternative to the courts.

"It potentially means that the Panel's going to be a bit more legalistic and a bit slower, which will dilute some of the benefits from the panel system," he said.

The Takeovers Panel operates as the first point for review of takeover disputes while takeovers are proceeding. Yet *Glencore* may now affect the way parties that anticipate grounds for judicial review of the Panel's decision approach proceedings at the Panel stage, Philips said.

"What [parties] might do is look to conduct themselves in the Panel proceedings in such a way that they see themselves as setting themselves up for a subsequent challenge before the Federal Court."

The Panel's decision in *Glencore* was overturned by the Federal Court because it held it to be an invalid exercise of judicial powers that were outside the scope of the Panel's authority.

The main issue was "whether the panel had properly jumped over each of the hurdles before reaching the decision, which the Act requires it to jump over," Philips said.

Though the constitutional validity of the Panel was highlighted as a concern in the report, the decision in *Glencore* alluded to a positive review in this instance. "There were some obiter comments in one of the judgements on that question, which were favourable to the Panel," Philips said.

Philips conceded that the report was correct in painting the Panel as a fast and reasonable vehicle of dispute resolution. "The new panel has been highly effective in achieving quick and usually sensible resolutions of takeover disputes," he said.

While the report evaluated the Panel's decisions between 2000 and 2005, the second of the two-part *Glencore* decision was only passed in March 2006, which Philips believes would

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substantially influence any determination of the Panel's effectiveness.

The report said that since its inception in 2000, the new Panel had passed 189 decisions as of 31 July 2006. This compared favourably with only four decisions of the old Panel between 1991 and 1999. Philips believes the old Panel was ineffective as "it never really got going because of problems with the way it was constituted".



The Panel is empowered to give declarations of unacceptable circumstances in takeover disputes. Under the legislation, the original party to the proceedings or ASIC can apply for a review by the Panel of an earlier decision.

The report said that only 13 per cent of applications to the Panel concerned a review of an earlier decision. This "suggests that in most cases, people don't want to seek a review, which suggests that in most cases they consider the outcome is likely to stick on review", Philips said.

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