The Australian Takeovers Panel: An Effective Forum for Dispute Resolution?

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Abstract

The Australian Takeovers Panel (‘the Panel’) has been the primary forum for resolving takeover disputes since reforms to Australian corporate law on 13 March 2000. This thesis makes a sustained scholarly contribution to the evaluation of takeover regulation under Australian corporate law by analysing the extent to which the Panel has been an effective forum for dispute resolution. The thesis addresses two overarching research questions, namely to determine the criteria that should be used to measure the effectiveness of the Panel in resolving takeover disputes and the extent to which the Panel has satisfied these criteria. The work in the thesis is original and is based on a detailed evaluation of the Panel’s decisions from 13 March 2000 to 30 June 2016. It is the first major academic study of the Panel since it became the primary forum for resolving takeover disputes.

Chapter 1 provides an explanation of the key concepts relevant to the analysis in the thesis, explains the research questions and methodology used to answer them, and sets out the structure of the thesis. Chapter 2 informs the assessment of the effectiveness of the Panel in the thesis by analysing the policy goals underlying the historical development of Australian takeover regulation and the establishment of the Panel and its predecessors. Chapter 3 examines the historical development of the Panel on Takeovers and Mergers (‘UK Panel’), which is the key comparator for the Australian Panel for the purposes of establishing the criteria to be applied to determine the effectiveness of the Panel. It concludes that the three objectives for the UK Panel, namely speed, flexibility and certainty, can be used as the criteria to be applied to the Australian Panel to determine its effectiveness.

Chapter 4 assesses the speed of Panel decision-making based on an empirical analysis of the timing of the announcement of Panel decisions and publication of the reasons. It concludes that the Panel has achieved a strong form of speed overall. Chapter 5 assesses flexibility of Panel decision-making based on procedural and substantive flexibility. It concludes that the Panel has achieved a strong form of flexibility overall. Chapter 6 assesses the certainty of Panel decision-making based on consistency and finality of decision-making. It concludes that the Panel has achieved a medium to strong form of
certainty overall. Given this, Chapter 7 concludes that the Panel has provided an effective forum for dispute resolution in light of the aims of the CLERP reforms.
Declarations

This thesis comprises only my original work towards the PhD. Due acknowledgement has been made in the text to all other material used. The thesis is fewer than the maximum word limit in length, exclusive of tables, maps, bibliographies and appendices.

Emma Jane Armson
Preface

The following Chapters (together with parts of the introductory material in Part I of Chapter 1) have been published in the following refereed journals, with the benefit of reviewer comments and editorial assistance by journal editors:


Chapter 3 has also received the benefit of comments from the book editors for a chapter entitled ‘Assessing the Performance of Takeover Panels: A Comparative Study’ in a book on Comparative Takeover Regulation to be published by Cambridge University Press. Chapter 4 has been accepted for publication as an article entitled ‘Speed in Decision-Making: An Assessment of the Australian Takeovers Panel’ in the Company and Securities Law Journal, and has benefited from detailed reviewer comments.
Acknowledgments

I am indebted to my supervisors, Professor Ian Ramsay and Associate Professor Paul Ali, for the high quality of their supervision in relation to the thesis. Their insightful comments, attention to detail, timely responses and support for my work have been particularly appreciated.

I would also like to thank the referees and editors for their comments and editorial assistance in relation to the parts of the thesis that have been published or accepted for publication. In particular, I appreciated the invitation by Associate Professors Umakanth Varottil and Wan Wai Yee from the National University of Singapore and Singapore Management University respectively to participate in their conference and book project on Comparative Takeover Regulation. This allowed me to receive valuable input at the conference that they hosted in Singapore in 2015.

In addition, I would like to thank members of the Panel Executive, particularly Allan Bulman, in making statistical information available to me for the purposes of the thesis. Many thanks are also due to Bruce Dyer and Karolina Ksieczak for their comments in relation to Chapter 4.

Finally, I wish to thank George Williams for his insights and support over so many years. I could not have done the thesis without this and the forbearance of my family and friends.
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Chapter 1 – Introduction

This thesis makes a sustained scholarly contribution to the evaluation of takeover regulation under Australian corporate law. It achieves this by analysing the extent to which the Australian Takeovers Panel (‘the Panel’) has been an effective forum for dispute resolution since it became the primary forum for resolving takeover disputes during a takeover bid on 13 March 2000. The thesis addresses two overarching research questions, namely to determine the criteria that should be used to measure the effectiveness of the Panel in resolving takeover disputes and the extent to which the Panel has satisfied these criteria. The work in the thesis is original and is based on a detailed evaluation of the Panel’s decisions from 13 March 2000 to 30 June 2016. It is the first major academic study of the Panel since it became the primary forum for resolving takeover disputes.

There are three parts to this introductory chapter. Part I sets out the regulatory context, particularly focusing on takeovers, the relevant legislative provisions and the role of the Panel. This introductory material provides an explanation of the key concepts relevant to the analysis in the thesis. The research questions are discussed in detail in Part II of this Chapter. Part III explains the methodology used to answer these research questions and sets out the structure of the thesis.

I REGULATORY CONTEXT

There are three sections in this Part. The first section sets out the players involved in a takeover and the key conflicts of interest arising in the takeover context. In the second section, there is an overview of how the conduct of parties involved in a takeover is currently regulated under the takeover provisions in the Corporations Act 2001 (Cth) (‘Corporations Act’). The takeover provisions in the Corporations Act regulate how a takeover is conducted, rather than deciding whether the takeover should proceed on
A takeover is one of the key ways in which the control of a company can change.\(^2\) It involves the purchaser (‘bidder’) acquiring the shares in the company (‘target’) directly from its shareholders (‘target shareholders’). Whether the bidder succeeds in obtaining control of the target will depend on whether sufficient numbers of target shareholders accept the bidder’s takeover offer, which is made to them individually. Takeovers play a critical role in corporate governance. This is because the threat of a takeover resulting in replacement of the company’s existing management provides a strong incentive for the directors to ensure that the company is operating efficiently.\(^3\) It has been observed that the stock (or capital) market provides an ‘objective standard of managerial efficiency’.\(^4\)

Accordingly, if a company’s shares are performing poorly on the stock market, this is commonly considered to be an indication of poor management and makes the company an attractive target for a takeover.\(^5\) This assumes that the capital market is operating

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2 The other key examples are the removal of management at shareholder meetings, and the consensual merger of two entities: see, eg, ibid; Henry G Manne, ‘Mergers and the Market for Corporate Control’ (1965) 73 *Journal of Political Economy* 110, 114.


5 See, eg, Daniel R Fischel, ‘Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers’ (1978) 57 *Texas Law Review* 1, 5; Henry G Manne,
efficiently, namely that prices ‘fully reflect’ all available information (including that concerning managerial performance). Henry Manne identified another market operating in this context, which he referred to as the ‘market for corporate control’. This market performs the function of allowing control of a company to shift to those who can manage corporate assets most profitably.

Takeovers give rise to a number of conflicting interests between the parties involved. One of the clearest examples is the opposing aims of the bidder and the target shareholders in relation to the price paid for the shares and the amount of information provided by the bidder. The directors of the target (‘target directors’) will also have a conflict of interest as they are likely to lose their positions if the takeover succeeds, assuming that one of the aims of the takeover is to install more efficient management.


9 Other rationales for takeovers include the creation of synergies in combining different businesses and the exploitation of particular assets in the target: see, eg, John C Coffee Jr,
The target directors will be particularly concerned if the takeover is proceeding without their support (in a ‘hostile’ bid).

Another significant source of conflict results from the fact that the bidder will usually pay a premium in addition to the market value of the shares to obtain control of the company (‘control premium’). There is considerable debate concerning who should be entitled to the control premium. Although it has been argued that it is a corporate asset, the debate usually focuses on the differing interests of the target shareholders. On the one hand, it is considered that those shareholders who have sufficient shares to deliver control to the bidder should be entitled to receive the premium. It is argued that any change in control of the target could benefit the remaining shareholders where it results in improved management. In addition, it would be in the interests of the bidder to reduce its costs by contracting with the least number of target shareholders required to achieve its objective. On the other hand, it is argued that the non-controlling or ‘minority’ shareholders should be able to receive an equal share of the control premium by selling their shares to the bidder at the same price.


B   Takeover Provisions

The conflicts discussed in the above section give rise to questions as to the extent investors should be protected and whether disclosure requirements are needed to ensure that the market for corporate control is properly informed. This explains much of the reasoning behind regulating the conduct of takeovers. For example, it has been observed that the development of the hostile bid from the 1950s in the United Kingdom (‘UK’) led to concerns about ‘unequal treatment of shareholders, the provision of inadequate information, the inadequacy of shareholder remedies, asset-stripping activities by bidders, and gradually the identification of the social costs of some takeovers’. Many of these concerns are reflected in the purposes or ‘spirit’ underpinning the takeover provisions in ch 6 of the Corporations Act. These purposes are to ensure that acquisitions of control take place in an ‘efficient, competitive and informed market’, target shareholders and directors are given enough information and a reasonable time to assess the merits of certain proposed acquisitions, target shareholders are afforded a ‘reasonable and equal opportunity to participate’ in any benefits under the proposal (‘equal opportunity principle’), and an appropriate procedure is followed prior to the use of the compulsory acquisition provisions.16


16 Corporations Act 2001 (Cth) s 602. Paragraphs 602(b) and (c) originate from the Company Law Advisory Committee, Parliament of New South Wales, Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and Takeovers (1969).
Australian takeover regulation is based upon a takeover prohibition preventing certain acquisitions that would result in any person’s voting power increasing above a 20 per cent threshold (‘takeover prohibition’). This prohibition is supported by a series of technical provisions designed to regulate control over certain companies and managed investment schemes, which can be obtained through indirect power over voting and associations between persons. There is also a requirement to disclose substantial holding information where a person and associated persons exceed a 5 per cent threshold, and the ability to trace beneficial ownership in listed companies and managed investment schemes. Once a person reaches a 90 per cent threshold, there are provisions allowing them to compulsorily acquire the remaining shares, and requiring them to offer to buy out those shares following a takeover bid.

There are a number of exceptions to the takeover prohibition. For example, many acquisitions are conducted with the support of the target company through a scheme of arrangement. Such schemes are binding on all target shareholders if they are approved under a process requiring court orders and a resolution passed by target shareholders representing a majority of the number of shareholders voting and at least 75 per cent of

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17 Corporations Act 2001 (Cth) s 606(1).
18 These are indirect investments such as unit trusts, in which investors’ contributions are pooled to produce financial benefits from a scheme over which investors do not have day-to-day control: see ibid s 9 (‘managed investment scheme’). However, for the purposes of simplicity, this thesis will focus generally on companies subject to the takeover provisions in the Corporations Act.
19 See ibid pt 1.2 div 2 (especially ss 12(2)(c), 15), ss 608, 610.
20 The disclosure requirements apply when they reach the 5 per cent threshold, to movements of at least 1 per cent after that, when falling below the threshold and if the person makes a takeover bid: see ibid ss 9 (‘substantial holding’), 671B.
21 Ibid pt 6C.2.
22 Different tests apply depending on whether the person has made a takeover bid or whether they are exercising the general compulsory acquisition power: see ibid ch 6A, especially ss 661A, 662A, 664A.
23 See ibid ss 606(1A), 611.
24 Ibid s 611 (item 17).
the votes cast.\textsuperscript{25} Other examples include acquisitions approved by disinterested target shareholders,\textsuperscript{26} where a person with voting power of at least 19 per cent does not increase their holding in the target more than 3 per cent in the 6 month period before the acquisition,\textsuperscript{27} and acquisitions under a rights issue that makes offers to all existing target shareholders on equal terms and meets certain other requirements.\textsuperscript{28}

The key exception to the takeover prohibition applies to the acceptance of offers under a takeover bid that complies with requirements designed to ensure that all shareholders of the target company receive equal offers, and have sufficient information and time to make their decision.\textsuperscript{29} There are two types of takeover bids, with the most prevalent involving offers being sent individually to each shareholder (‘off-market bids’) and the other resulting from an announcement of the bid to the relevant stock market (‘market bids’).\textsuperscript{30} One of the key reasons for the prevalence of off-market bids is the ability of the bidder to make offers subject to a wide range of conditions, including satisfaction of any regulatory hurdles imposed by other legislation.\textsuperscript{31}

A series of procedural requirements apply to both types of takeover bid, which focus on the disclosure of information in a bidder’s statement and target’s statement that are sent

\textsuperscript{25} Ibid s 411, especially s 411(4); Tony Damian and Andrew Rich, \textit{Schemes, Takeovers and Himalayan Peaks: The Use of Schemes of Arrangement to Effect Change of Control Transactions} (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 3\textsuperscript{rd} ed, 2013).

\textsuperscript{26} \textit{Corporations Act 2001} (Cth) s 611 (item 7).

\textsuperscript{27} Ibid s 611 (item 9).

\textsuperscript{28} Ibid s 611 (item 10). See also s 611 (item 13).

\textsuperscript{29} Ibid ss 611 (item 1), 612.

\textsuperscript{30} See ibid ss 616, 633, 635.

\textsuperscript{31} See, eg, \textit{Competition and Consumer Act 2010} (Cth) s 50, pt VII div 3; \textit{Foreign Acquisitions and Takeovers Act 1975} (Cth) ss 5 (‘foreign person’), 9, 18. However, certain conditions are prohibited including those setting a maximum acceptance level, allowing discrimination between persons accepting offers and turning on the bidder’s or their associate’s opinion: see \textit{Corporations Act 2001} (Cth) pt 6.4 div 4.
to target shareholders and the relevant regulatory bodies. The bidder’s statement must contain all information that is material to the target shareholder’s decision whether to accept the offer, in addition to prescribed matters including the bidder’s identity and its intentions for the target, disclosure concerning funding and the consideration offered, and details of benefits given and non-cash amounts paid in relation to target shares up to four months before the bid. Similarly, the target’s statement must disclose all information that target shareholders ‘and their professional advisers would reasonably require to make an informed assessment whether to accept the offer’. It must also contain a recommendation by each director of the target on whether or not to accept the offer, or reasons why no recommendation is made. A statutory liability regime establishes a right to recover damages from certain people involved in the making of the disclosure documents where loss results from misleading or deceptive statements or omissions. This is tempered by the ability to update and correct documents through supplementary statements and defences based on a lack of knowledge, withdrawal of consent or reasonable reliance on information from a person who is not an employee or agent. As the corporate and securities law regulator, the Australian Securities and

32 See Corporations Act 2001 (Cth) pt 6.5, especially ss 633, 635. The relevant regulatory bodies are the corporate law regulator, namely the Australian Securities and Investments Commission, and the market operator (typically ASX Ltd).

33 Ibid s 636(1).

34 Ibid s 638(1). This reflects the disclosure requirement for prospectuses in s 710(1) (see also s 636(1)(g)). An independent expert’s report on whether the takeover offers are ‘fair and reasonable’ is also required to accompany the target’s statement where the bidder’s voting power in the target is at least 30 per cent, the bidder is a director of the target or the bidder and target have a common director: s 640.

35 Ibid s 638(3).

36 See ibid ch 6B, especially ss 670A–670B. There is also a criminal offence where such statements or omissions are ‘materially adverse’ from the point of view of the target shareholder: see Corporations Act 2001 (Cth) ss 670A(3), 1311(3), 1312, sch 3 item 226; Crimes Act 1914 (Cth) s 4AA.

37 Corporations Act 2001 (Cth) pt 6.5 div 4.

38 Ibid s 670D.
Investments Commission (‘ASIC’) monitors market developments, brings actions to enforce the law and makes decisions regarding exemptions and modifications of the provisions relating to takeovers, compulsory acquisitions and information about ownership.  

C Takeovers Panel

The Panel was established in its original form in 1991. This early Panel only had the limited role of enforcing the purposes underlying the takeover provisions in the corporations legislation at that time. That is, in addition to breaches of the law being brought before the courts, the regulator had the power to apply to the Panel for a declaration that unacceptable circumstances had occurred where a takeover did not comply with those purposes. For the first decade of the Panel’s operation, this power

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40 Originally called the Corporations and Securities Panel, the Panel was renamed in 2001: see Takeovers Panel, ‘New Name for the Takeovers Panel’ (Media Release, TP01/87, 11 October 2001).

41 These purposes were reflected in the concept of ‘unacceptable circumstances’, which only existed at that time if the shareholders and directors of the target company did not have enough information (including the identity of the proposed acquirer) or a reasonable time to consider the proposal, or if the shareholders did not have reasonable and equal opportunities to participate in any benefits in connection with the proposed acquisition: Corporations Law s 732(1).

42 Ibid s 733(1). In making its decision, the Panel was also required to take into account the public interest and the desirability of acquisitions taking place in an ‘efficient, competitive and informed market’: at ss 731, 733(3)(b). Applications were originally made by the Australian Securities Commission, which was renamed the Australian Securities and Investments Commission by the Financial Sector Reform (Amendments and Transitional Provisions) Act 1998 (Cth) sch 1 items 1, 7.
was only exercised in four cases. This led to calls for the Panel’s powers to be expanded in light of the successful operation of the Panel on Takeovers and Mergers (‘UK Panel’).

On 13 March 2000, the role of the Australian Panel was transformed by the reforms under the Corporate Law Economic Reform Program (‘CLERP reforms’), which were implemented by the Corporate Law Economic Reform Program Act 1999 (Cth) (‘CLERP Act’). This resulted in the Panel replacing the previous role of the courts in becoming the primary forum for resolving takeover disputes in the context of corporate law. The CLERP reforms relating to the Panel were designed to inject legal and commercial specialist expertise into takeover dispute resolution and provide ‘speed, informality and uniformity’ in decision-making. This would also have the effect of minimising ‘tactical litigation’ and freeing up court resources. The UK Panel was the key overseas body cited in support of the CLERP reforms based on its ‘reputation for

45 These reforms were implemented in light of the policy aims set out in the preceding proposals paper: see Commonwealth Treasury, Corporate Law Economic Reform, Proposals for Reform, No 4, Takeovers – Corporate Control: A Better Environment for Productive Investment (Canberra, 1997), 7–8. See also Corporations Act 2001 (Cth) s 659AA.
46 Corporations Act 2001 (Cth) s 659AA.
48 Ibid.
promptness and effectiveness’. It was also noted that the UK had the greatest volume of takeover activity in Europe. In addition, the UK Panel has provided a model for a number of other Takeover Panels around the world, including in Hong Kong, Ireland, New Zealand and South Africa. For these reasons, the UK Panel is the most important comparator for the Australian Panel in this thesis for the purposes of establishing the criteria to be applied to determine the effectiveness of the Panel.

As a result of the CLERP reforms, parties are required to apply to the Panel instead of the courts in relation to takeover disputes during the bid period. The Panel cannot act on its own motion and only decides applications by persons whose interests are affected by the relevant circumstances or decision. First, applications can be made for the Panel to exercise its key role of making declarations of unacceptable circumstances under sub-s 657A(2) of the Corporations Act. Such a declaration can be made where it appears to the Panel that the circumstances are unacceptable either (a) having regard to their effect on the control of, or an acquisition of a substantial interest in, a company, (b) in relation to a company in light of the purposes of the takeover provisions, or (c) because they are likely to give rise to a contravention of the provisions on takeovers, compulsory acquisitions, takeover rights and liabilities, substantial shareholdings or tracing beneficial ownership. The Panel’s power to make a declaration of unacceptable circumstances must be exercised having regard to the purposes of the takeover provisions.

50 Ibid.
51 These are the Takeovers and Mergers Panel in Hong Kong, the Irish Takeover Panel, The Takeovers Panel in New Zealand and The Takeover Regulation Panel in South Africa.
52 See Corporations Act 2001 (Cth) ss 657C, s 659AA, 659B.
53 Ibid ss 657C(2); 656A(2).
54 See ibid ss 602A, 657A(1)–(3).
55 See ibid ss 602, 657A(3)(a)(i).
Second, parties can apply for interim or final orders relating to circumstances alleged or found to be unacceptable respectively.\(^{56}\) With the exception of orders directing a person to comply with the legislation,\(^{57}\) the Panel can make the same broad range of orders as a court including restraining the exercise of voting rights, directing the disposal of shares, and vesting shares in ASIC.\(^{58}\) Third, an application can be made for an internal Panel (‘Review Panel’) to review a Panel decision relating to its powers to make a declaration of unacceptable circumstances and orders.\(^{59}\) Finally, an application can be made to the Panel to review ASIC decisions concerning its exemption and modification powers in relation to the *Corporations Act* provisions on takeovers, substantial shareholdings and beneficial ownership.\(^{60}\)

Applications to the Panel are decided by three members (‘Sitting Panel’),\(^ {61}\) who are chosen from a current total of 45 part-time members.\(^ {62}\) Members are appointed by the Federal Government based on their commercial and legal expertise.\(^ {63}\) The Panel relies

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\(^{56}\) Ibid ss 657C, 657D, 657E. In contrast to final orders, interim orders can be made irrespective of whether a declaration or application for a declaration has been made and consequently only apply for up to two months: at ss 657D(1), 657E(1).

\(^{57}\) Ibid s 657D(2). This limitation is designed to avoid the Panel exercising judicial power contrary to Chapter III of the Constitution: see, eg, *A-G (Cth) v Breckler* (1999) 197 CLR 83. The High Court has upheld the constitutionality of the Australian Panel following the CLERP reforms: see *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542.

\(^{58}\) See *Corporations Act 2001* (Cth) ss 9 (‘remedial order’), 657D(2) (cf s 1325A(1)). The Panel’s orders must not ‘unfairly prejudice any person’: at s 657D(1).

\(^{59}\) Ibid s 657EA(1).

\(^{60}\) Ibid ss 655A, 656A, 673.

\(^{61}\) See *Australian Securities and Investments Commission Act 2001* (Cth) s 184(1).


\(^{63}\) Appointments are based on members’ knowledge or experience in at least one of the fields of business, administration of companies, financial markets, financial products and services, law, economics and accounting: *Australian Securities and Investments Commission Act 2001* (Cth) s 172(4).
on less formal procedures than a court.\textsuperscript{64} There is an internal Panel review process for unacceptable circumstances matters, with the Review Panel comprising another three members of the Panel and having similar powers to the original Panel.\textsuperscript{65} The President of the Panel (‘Panel President’) must consent to an application for review if the decision is not to make a declaration of unacceptable circumstances, interim orders or final orders.\textsuperscript{66}

In order to make the Panel the primary forum for resolving takeover disputes,\textsuperscript{67} the legislation defers the ability of persons other than ASIC and governmental authorities to apply to the court in relation to a takeover bid until the end of the takeover bid period.\textsuperscript{68} Although the courts and Panel can have overlapping jurisdiction,\textsuperscript{69} the Panel will generally decline to conduct proceedings if the matter is before the courts.\textsuperscript{70} Applications for judicial review of Panel decisions can be made to the High Court under s 75(v) of the \textit{Australian Constitution} during the takeover bid,\textsuperscript{71} and subsequently in the Federal Court.\textsuperscript{72} The continuing role of the courts presents a significant challenge to the

\textsuperscript{64} See below Section A (under the heading ‘2 Powers and Process’) in Part III of Chapter 5.

\textsuperscript{65} See \textit{Corporations Act} 2001 s 657EA; \textit{Australian Securities and Investments Commission Act} 2001 (Cth) s 184. Panel decisions are also subject to review by the courts: see \textit{Administrative Decisions (Judicial Review) Act} 1977 (Cth) ss 3, 5; \textit{Judiciary Act} 1903 (Cth) s 39B; \textit{Australian Constitution} s 75.

\textsuperscript{66} \textit{Corporations Act} 2001 (Cth) s 657EA(2).

\textsuperscript{67} Ibid s 659AA.

\textsuperscript{68} Ibid s 659B. The court’s powers under the Act are also limited where the Panel has refused to make a declaration of unacceptable circumstances: see ibid s 659C.

\textsuperscript{69} See, eg, \textit{Lionsgate Australia Pty Ltd v Macquarie Private Portfolio Management Ltd} (2007) 240 ALR 385, 396–8 (Austin J).

\textsuperscript{70} \textit{Re Taipan Resources NL (No 2)} (2000) 36 ACSR 704, 709–10.

\textsuperscript{71} See also \textit{Corporations Act} 2001 (Cth) s 659B(5); \textit{Judiciary Act} 1903 (Cth) s 39B.

\textsuperscript{72} See \textit{Administrative Decisions (Judicial Review) Act} 1977 (Cth) ss 3, 5.
operation of the Panel, which seeks to minimise tactical litigation and instead allow shareholders to decide upon the merits of a takeover bid.\textsuperscript{73}

II \hspace{1em} RESEARCH QUESTIONS

There are two overarching research questions addressed in this thesis. The first of these is to determine the criteria that should be used to measure the effectiveness of the Panel in resolving takeover disputes. The second question is the extent to which the Panel has satisfied these criteria. To answer these research questions, the thesis analyses the policy goals underlying the development of Australian takeover regulation and the establishment of the Panel and its predecessors. It then examines the objectives for the UK Panel, which is the key comparator for the Australian Panel for the purposes of establishing the criteria to be applied to determine the effectiveness of the Panel. Based on this historical and comparative analysis, the thesis evaluates whether the three objectives for the UK Panel, namely speed, flexibility and certainty, can be used as the criteria to be applied to the Australian Panel to determine its effectiveness. Finally, the thesis assesses the extent to which the Panel’s decision-making from 13 March 2000 to 30 June 2016 has met these criteria.

These two research questions are addressed using the methodology set out in Part III below. The thesis focuses on the effectiveness of the Panel’s decision-making against the expectations of an administrative process, rather than against a different (court-based) system. Accordingly, the thesis does not compare the Panel’s operations to the litigation conducted in the courts prior to the CLERP reforms or consider whether the Panel-based system is better than the previous court-based system. These and other research questions relating to takeovers lie outside the scope of this thesis. For example, it does not analyse issues concerning the application of regulatory theory, the costs and benefits of takeovers and the extent to which the market for corporate control is efficient. Similarly, the thesis does not examine questions arising from the impact of

takeovers in other contexts, such as in relation to market competition, foreign investment policy or particular industries, such as banking and insurance.

The thesis makes a sustained scholarly contribution to the evaluation of takeover regulation under Australian corporate law through its focus on the effectiveness of the Panel. It is timely to conduct this research given that the Panel has been undertaking the role of resolving takeover disputes in place of the courts for over fifteen years. In the period from 13 March 2000 to 30 June 2016, the Panel published 405 separate decisions relating to transactions having an important economic impact. The level of takeover activity in Australia is substantial compared to the relative size of its economy, with Australia ranking fifth in the world (behind the United States, China, UK and Germany) in the level of announced merger and acquisition transactions during 2016.74 Consequently, the role played by the Panel in the regulation of takeovers has the potential to have a significant effect upon Australian investors and the economy generally.

The work in the thesis is original and is based on a detailed analysis of the Panel’s decisions from 13 March 2000 to 30 June 2016. Much of the current literature comprises articles on the Panel in response to particular legal, policy and practical issues arising from its operations. For example, there have been numerous articles concerning empirical studies in relation to the Panel’s operations,75 its frustrating action policy,76 the role of the courts,77 and judicial review of Panel decision-making.78

Although there have also been a handful of articles examining the success of the Panel, these were predominantly written within a few years after the Panel reforms in 2000. Three monographs have been published in relation to the Panel. The first was written by Nicole Calleja, which examined the Panel’s achievements in the first 18 months of its new role. Calleja found that the Panel ‘appears to have had a positive impact’. However, she noted that the new Panel had only been operating for around 18 months.

81 Ibid 107.
and consequently concluded that ‘any definitive pronouncement about its success or otherwise is premature’. 82

Two edited books have also been published in relation to the Panel’s work in its first decade. The first book was edited by Professor Ian Ramsay, 83 which included a chapter entitled ‘An Assessment of the Work of the Takeovers Panel during the Past Decade’. 84 This chapter predominantly focused on statistics relating to the frequency, types and outcomes of Panel applications and Guidance Notes, 85 with comparatively less analysis relating to the timeliness, 86 commerciality, 87 informality, 88 review, 89 and consistency of Panel decision-making. 90 The concluding chapter in this book also discussed the speed and informality, 91 as well as the uniformity, 92 of Panel decisions. In addition, the introductory chapter by Professor Ramsay examined whether the Panel has been

82 Ibid.
83 Ian Ramsay (ed), The Takeovers Panel and Takeovers Regulation in Australia (Melbourne University Press, 2010).
85 Ibid 98–125.
88 Ibid 131–3.
89 Ibid 133–4.
90 Ibid 135–6.
92 Ibid 217.
successful, and discussed the reasons for this. These reasons included the timeliness of decisions, and its less legalistic approach to takeover dispute resolution.

The final book comprised a collection of conference papers edited by Professor Jennifer Hill and Dr R P Austin. This book contained papers on the Panel’s performance and prospects from a legal and policy perspective, as well as a commercial one. The papers included discussion of the timeliness, certainty, principles-based

96 Ibid 26–9.
97 Jennifer Hill and R P Austin (eds), The Takeovers Panel After 10 Years (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2011).
approach\textsuperscript{102} and consistency of Panel decision-making.\textsuperscript{103} Although the above publications have made an important contribution to our knowledge of the Panel, this thesis is the first major academic study of the Panel since it replaced the role of the courts on 13 March 2000.

III METHODOLOGY AND STRUCTURE

The thesis addresses the research questions identified in Part II above using four key methods. First, there is a doctrinal analysis of the underlying legislative framework, secondary literature and decisions of the Panel. Second, the thesis conducts a comparative analysis focusing on the development and operations of the UK Panel. As discussed above, the UK Panel is the most important comparator for the Australian Panel for the purposes of establishing the criteria to be applied to determine the effectiveness of the Panel and has the objectives of speed, flexibility and certainty. Third, empirical work is conducted in relation to the speed with which the Australian Panel makes decisions and provides the reasons for its decisions. Finally, case studies are undertaken in the context of assessing the extent to which there is flexibility and certainty in Panel decision-making.

Chapter 2 provides a detailed context for the analysis of the research questions in the thesis, by examining the development of Australian takeover regulation to inform the assessment of the effectiveness of the Panel. It builds upon the introductory outline of the current takeover provisions in this Chapter, by evaluating the key drivers for legislative change through an examination of the history of the legislation and events leading to the establishment of the Panel. Chapter 2 accordingly analyses the objectives underlying the legislation and the Panel as it has developed over time. It then evaluates


\textsuperscript{103} Ibid 180.
the significant tensions underpinning the legislative principles, particularly the occasionally diverging aims of promoting efficiency in the market for corporate control and providing shareholder protection. Developments in the regulatory approach are also examined, with a particular focus on the tension between providing certainty through the operation of legislative provisions and the flexibility resulting from the increasing use of regulatory discretions. Finally, the Chapter examines the factors leading to the shift from a court-based approach to takeover dispute resolution to decision-making by a non-judicial Panel.

Chapter 3 addresses the first research question, namely determining the criteria that should be used to measure the effectiveness of the Panel in resolving takeover disputes. The Chapter starts with an analysis of the development of the UK Panel, which is the key comparator for the Australian Panel for the purposes of establishing the criteria to be applied to determine the effectiveness of the Panel. It focuses on the four key stages of the UK Panel, namely the factors leading to its establishment, the effect of court cases in relation to applications for judicial review of UK Panel decisions, legislative changes to give the UK Panel a statutory basis and the impact of amendments made by the Panel to the UK takeover rules in 2011. The first stage highlights the unique context in which the UK Panel was established, which is significant for the purposes of the subsequent comparison with the aims of the CLERP reform in Australia. The second stage demonstrates the rationale for the general approach of judicial restraint in relation to judicial review of UK Panel decisions. This is consistent with the aim of minimising tactical litigation, which is relevant to both the Australian and UK Panels. The Chapter then conducts a comparative analysis of the operations of the Australian and UK Panels, in order to determine whether the three key objectives for the UK Panel, namely speed, flexibility and certainty, can be applied to the Australian Panel.

The remaining Chapters address the second research question, namely the extent to which the Panel has satisfied the criteria identified in Chapter 3. Chapter 4 focuses on the criterion of speed in decision-making. This is assessed using an empirical analysis of the time periods between the dates of each application to the Panel, the announcement of its decision and the publication of the Panel’s reasons for the decision. The methodology adopted to assess speed includes an analysis of the elements of the
regulatory framework affecting the Panel’s ability to meet the speed criterion. It also examines how the timing of Panel decision-making has been affected by judicial review. Different levels of speed that could be achieved by the Panel in its decision-making are quantified and placed on a spectrum taking into account varying levels of conformance with these standards. The assessment is consequently conducted in light of what are considered to be strong, medium and weak forms of speed in decision-making.\textsuperscript{104} This analysis takes into account the timing goals for courts and other tribunals making decisions relating to corporate and takeover matters, which are used as benchmarks for the speed of the Panel’s decisions.

Chapter 5 assesses the extent to which the Panel’s decision-making meets the criterion of flexibility. Flexibility in this context is evaluated using two elements, namely procedural and substantive flexibility. Procedural flexibility is determined by the powers given to the Panel, its procedures and the expertise of its members. Substantive flexibility involves the extent to which the Panel demonstrates flexibility in exercising its decision-making powers, and is assessed using a case study examining the Panel’s establishment and development of its frustrating action policy.\textsuperscript{105} Similar to the methodology adopted for the speed criterion discussed above, flexibility is assessed in light of what are considered to be strong, medium and weak forms of achievement of both procedural and substantive flexibility.

Chapter 6 analyses the extent to which the Panel’s decision-making meets the certainty criterion. Certainty is evaluated using two elements, namely in relation to the consistency and finality of Panel decisions. The first element of consistency is assessed using a case study analysis of Panel decisions relating to the application of ASIC’s

\textsuperscript{104} This is similar to the approach adopted in relation to the efficient capital market hypothesis, in which different forms of efficiency reflect the extent to which information is reflected in market prices: see, eg, Eugene Fama, ‘Efficient Capital Markets: A Review of Theory and Empirical Work’ (1970) 25 Journal of Finance 383, 383.

\textsuperscript{105} For the most recent version of this policy, see Takeovers Panel, \textit{Guidance Note 12 – Frustrating Action} (1 December 2016).
policy on statements providing ‘truth in takeovers’.\textsuperscript{106} Second, the element of finality is assessed through an analysis of the impact of judicial review on Panel decision-making. Similar to the methodology adopted for the other criteria, certainty is assessed in light of what are considered to be strong, medium and weak forms of achievement of both consistency and finality.

To conclude, Chapter 7 assesses whether the Panel is an effective forum for dispute resolution. This assessment is based on the Panel’s achievements in relation to the criteria of speed, flexibility and certainty from 13 March 2000 to 30 June 2016.

\textsuperscript{106} Australian Securities and Investments Commission, Regulatory Guide 25, Takeovers: False and Misleading Statements (22 August 2002).
Chapter 2 – Development of Australian Takeover Regulation

I INTRODUCTION

This Chapter provides a detailed context for the analysis of the research questions in the thesis by examining the development of Australian takeover regulation over time. The Chapter informs the assessment of the effectiveness of the Panel by analysing the history of the regulation to provide the context in which the Panel was established. It builds upon the introductory outline of the current takeover provisions in the previous Chapter, by examining the drivers for legislative change and the competing rationales for takeover regulation. This Chapter also analyses developments in the regulatory approach, particularly in relation to the use of discretionary powers and the way that takeover disputes are resolved.

Takeovers were initially subject to self-regulation in Australia through disclosure requirements imposed by the Associated Stock Exchanges.107 These requirements formed the basis of Australia’s first corporate takeover legislation, which was introduced by the states from 1961.108 Starting with only a handful of provisions,109 the takeover provisions now in chs 6–6C of the Corporations Act form the basis of a complex regulatory regime. Since 1981, the legislation has been supplemented by a regulatory power to exempt persons from and modify the operation of the takeover


109 See, eg, Companies Act 1961 (NSW) ss 6, 46–7, 184, sch 10. See also Companies Act 1961 (Qld); Companies Act 1962 (SA); Companies Act 1962 (Tas); Companies Act 1961 (Vic); Companies Act 1961 (WA); Companies Ordinance 1962 (ACT); Companies Ordinance 1962 (NT).
provisions.\textsuperscript{110} There has also been a shift towards the resolution of takeover disputes by non-judicial bodies. In 1991, the regulator was given the power to apply to the Corporations and Securities Panel (‘CSP’) for orders where it considered circumstances to be unacceptable based on the principles underlying the legislation, even if the letter of the law had been complied with.\textsuperscript{111} The CLERP reforms expanded the role of the CSP in 2000 by allowing any interested party to apply and limiting the ability to commence court proceedings during a takeover.\textsuperscript{112} The CSP was subsequently renamed the Takeovers Panel in 2001.\textsuperscript{113}

Part II of the Chapter examines the forces driving each of the key events in the development of Australian takeover regulation. In particular, it analyses the different rationales given for the introduction of the successive takeover laws in Australia from 1961. Part III evaluates the significant themes and tensions underpinning the development of this legislation. These relate to the policy aims of the legislation, the regulatory approach adopted and the mechanisms for takeover dispute resolution. Part IV concludes with some final observations regarding these developments and the challenges that they present.

\section*{II HISTORICAL DEVELOPMENT}

This Part analyses the key developments in the history of Australian takeover regulation, with a particular focus on the drivers for the legislation and its legislative objectives. The first four sections focus on developments relating to the initial takeover


\textsuperscript{111} See \textit{Corporations Law} ss 732–4.

\textsuperscript{112} See ibid pt 6.10 div 2 sub-div B, especially ss 657C, 659AA–659C. These provisions were replicated in the \textit{Corporations Act 2001} (Cth).

\textsuperscript{113} See Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) 193; \textit{Financial Services Reform Act 2001} (Cth) s 3, sch 3 items 1–4; Takeovers Panel, ‘New Name for the Takeovers Panel’ (Media Release, TP01/087, 11 October 2001).
provisions in the Uniform Companies Acts (‘UCA’). Sections A to C analyse the implementation of the UCA, the pivotal recommendations in the Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and Takeovers (‘Eggleston Report’)\(^{114}\) and the amendments resulting from the Eggleston Report respectively. Section D examines the subsequent report on Australian Securities Markets and their Regulation (‘Rae Report’).\(^{115}\)

The UCA were followed by the Companies (Acquisition of Shares) Act 1980 (Cth) (‘CASA’), which operated as a takeover code through legislation applying CASA in each jurisdiction.\(^{116}\) Section E analyses the developments preceding CASA, its legislative requirements as introduced and the impact of amendments to CASA. The following regime was set out in s 82 of the Corporations Act 1989 (Cth) (‘Corporations Law’) and is examined in Section F. Section G evaluates the impact of the CLERP reforms, with the subsequent developments analysed in Section H.

### A Uniform Companies Acts (1961-2)

Takeover legislation was first implemented in Australia in the UCA, which were enacted for each state and territory in 1961–62.\(^{117}\) The analysis in this Chapter will

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\(^{117}\) See *Companies Act 1961* (NSW); *Companies Act 1961* (Qld); *Companies Act 1962* (SA); *Companies Act 1962* (Tas); *Companies Act 1961* (Vic); *Companies Act 1961* (WA); *Companies Ordinance 1962* (ACT); *Companies Ordinance 1962* (NT). This followed a Commonwealth Parliamentary Committee report recommending constitutional reform to allow federal company law in light of pessimism about the chances of state uniform legislation being implemented and
focus primarily on the New South Wales (‘NSW’) legislation, which led the way in introducing the pivotal concept of a ‘relevant interest’ in subsequent reforms to the legislation in 1971. In his Second Reading Speech for the Companies Bill 1961 (NSW), the Minister for Justice noted the ‘spectacular increase’ in the number of takeover offers in preceding years and concluded that the techniques adopted had resulted in shareholders facing pressure to make a decision with inadequate time and information. To remedy this, the Minister stated the need for the ‘widest possible disclosure’ by the bidder. He also noted that the Bill contained a ‘comprehensive code for the protection of the target shareholders’ based on ‘existing stock exchange regulations … and regulations approved by the Board of Trade’ under the Prevention of Fraud (Investments) Act 1958 (UK). The twin goals of disclosure and investor protection were listed as the first two purposes of the legislation as a whole, namely:

(1) to provide for the more effective disclosure of the affairs of companies in the interests of shareholders, creditors and the community at large; [and] (2) to provide for the greatest measure of protection to the investing public without unduly hampering commercial operations …

Compact by today’s standards, the UCA takeover provisions comprised a handful of sections and schedules covering 15 pages in the NSW legislation. The provisions applied to offers by the offeror corporation (now referred to as the bidder) for all of the shares (or of a particular class of shares) of a company (‘full bid’) or for a proportion of those shares (‘partial bid’) in certain situations. First, the provisions applied to a


118 See below Section C in Part II of this Chapter.


120 Ibid 2598.

121 Ibid 2597.

122 Ibid 2591.

123 See Companies Act 1961 (NSW) ss 6, 46–7, 184, sch 10.
‘scheme’ involving a full bid in relation to the shares of the offeree corporation (now referred to as the target).\textsuperscript{124} Second, the provisions applied to a scheme involving a partial bid, where the shares to be acquired and any already held by the bidder and any related corporations gave the right to control the exercise of at least one-third of the voting power of the target at a general meeting.\textsuperscript{125} The primary function of the \textit{UCA} provisions was to ensure that certain information was disclosed to the target and its shareholders by complying with the checklist of requirements in sch 10.\textsuperscript{126} This information was required to be provided within set time frames.\textsuperscript{127} It was an offence to fail to comply with these requirements, with the bidder or target and each of its officers who were in default liable to a penalty.\textsuperscript{128} In addition, the bidder and its directors were liable to compensate an accepting target shareholder for losses resulting from any untrue statement, or wilful non-disclosure of material known to be material, in the bidder’s

\textsuperscript{124} Ibid s 184(1) (definition of ‘take-over scheme’ para (a)).

\textsuperscript{125} Ibid s 184(1) (definition of ‘take-over scheme’ para (b)). Under s 6(5) of this Act, companies were related if they were a holding company or subsidiary of the other, or subsidiaries of the same holding company.

\textsuperscript{126} For the bidder, these disclosures involved details relating to any conditions attaching to the offer, the bidder and its holdings in the target, the consideration payable, any payments to or arrangements with target directors, any known material change in the financial position of the target since the balance sheet was last presented to the shareholders, and market or sale prices for target shares prior to the scheme: ibid sch 10 pts A–B. This also included the provision of financial reports similar to that required for a prospectus if the consideration included shares as payment: at sch 10 pt B cl 1(d)(i), sch 5 pt II cls 20, 23. The target was required to disclose information relating to whether its board of directors had made a recommendation regarding acceptance, its directors’ holdings in the target and their current intentions concerning the offer, any payment or agreement between the bidder and target directors relating to the scheme, sale prices for target shares (if not listed) prior to the scheme and whether there had been any material change in the financial position of the target since the balance sheet was last presented to the shareholders: at sch 10 pt C.

\textsuperscript{127} Target companies received 14 to 28 days’ notice of the scheme and were required to provide their statement within 14 days, and bidders were required to give notice of when offers were made and keep offers open for at least one month: ibid ss 184(2), (3), (5), sch 10 pt A cl 1.

\textsuperscript{128} The maximum penalty was imprisonment for three months or a fine of £500: ibid s 184(6).
disclosure statement. This could also lead to an offence committed by a person authorising or causing the issue of such a deficient statement by the bidder.

B  

**Eggleston Report (1969)**

The first major review of the uniform companies legislation was conducted by the Company Law Advisory Committee (‘Eggleston Committee’), which was appointed by the Standing Committee of Attorneys-General in 1967. The Committee was named after its chairman, Sir Richard Eggleston, who was a former judge, and also comprised a private sector lawyer and accountant. Significantly, its terms of reference focused on shareholder protection, in light of a series of corporate crashes in the 1960s that had resulted in substantial losses for small investors. Accordingly, the terms of reference were:

To enquire into and report on the extent of the protection afforded to the investing public by the existing provisions of the Uniform Companies Acts and to recommend what additional provisions (if any) are reasonably necessary to increase that protection.

The Eggleston Report in 1969 has had a lasting impact on Australian takeover law. This is perhaps surprising given that the Committee deliberated on these issues for only

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129 Ibid ss 46(1), 184(7).
130 Ibid ss 47(1), 184(7). The maximum penalty was imprisonment for one year and/or a fine of £1000: at s 47(1).
134 Company Law Advisory Committee, Parliament of New South Wales, *Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and*
a month over the Christmas period. In its report, the Committee set out the following principles (the ‘Eggleston principles’), which have become a cornerstone of our system of takeover regulation:

We agree with the general principle that if a natural person or corporation wishes to acquire control of a company by making a general offer to acquire all the shares, or a proportion sufficient to enable him to exercise voting control, limitations should be placed on his freedom of action so far as is necessary to ensure:

(i) that his identity is known to the shareholders and directors;
(ii) that the shareholders and directors have a reasonable time in which to consider the proposal;
(iii) that the offeror is required to give such information as is necessary to enable the shareholders to form a judgment on the merits of the proposal and, in particular, where the offeror offers shares or interests in a corporation, that the kind of information which would ordinarily be provided in a prospectus is furnished to the offeree shareholders;
(iv) that so far as is practicable, each shareholder should have an equal opportunity to participate in the benefits offered.

These principles provide a broad conception of shareholder protection in the context of a takeover. The first three principles are fundamental in aiming to provide an informed market in which target shareholders are selling their shares and reasonable time in which to make their decision. The Committee was also concerned to ensure that


shareholders knew which person(s) were in the position to determine the future of the company through their voting power. They consequently recommended the introduction of a requirement to disclose substantial shareholdings for interests giving control over voting power at a 10 per cent threshold, consistent with the figure that was applicable in the UK and United States at the time.\textsuperscript{137} Indeed, ensuring that a market is informed is one of the foundations of any properly performing market mechanism.\textsuperscript{138} It was also a key driver for the introduction of disclosure based requirements for takeovers in the \textit{UCA}.

A key focus of the \textit{Eggleston Report} was to close loopholes in relation to the operation of the existing disclosure provisions. This led to a number of significant recommendations for legislative change, the most important of which was to lower the threshold at which the takeover provisions applied to a partial bid from one-third to 15 per cent of the voting power at a general meeting.\textsuperscript{139} This recommendation was based on the Committee’s view that any person aiming for control of a parcel of at least 15 per cent is likely to be seeking control of the company itself, and that there was no disadvantage to setting the figure at 15 per cent rather than an intermediate level between 15 per cent and one-third.\textsuperscript{140} Other recommendations included closing loopholes by applying the provisions to natural persons making takeover offers and to persons who make a joint offer.\textsuperscript{141} Another significant abuse identified in the report was “‘[f]irst come first served’ invitations”, in which a broker could invite target shareholders to make offers to sell their shares at a certain price and indicate that the first offers would be accepted up to a particular percentage of the company’s share

\textsuperscript{137} Ibid 5.


\textsuperscript{140} Ibid.

\textsuperscript{141} Ibid 8, 10. Cf \textit{Colonial Sugar Refining Co Ltd v Dilley} (1967) 116 CLR 445, affd \textit{Blue Metal Industries Ltd v Dilley} (1969) 117 CLR 651.
This raised concerns that such invitations could be made without identifying the buyer, and placed pressure on shareholders to make a quick decision without the information required under the UCA, as they did not know whether the buyer would accept offers above the nominated percentage. Consequently, the Committee recommended that the definition of an ‘offer’ be extended to include an invitation to make an offer.

The fourth Eggleston principle of ‘equal opportunity’ has had a far-reaching influence, arguably further than was originally intended. It is clear that this principle of ensuring that target shareholders have an equal opportunity to participate in the benefits on offer was a key factor in the Eggleston Committee’s desire to stamp out the practice of ‘first come first served’ invitations discussed above. The Committee emphasised that such invitations would inevitably lead to inequality between the target shareholders as many would not become aware of the invitation in time to make an offer. However, it is clear that the Committee did not consider that the equal opportunity principle required all shareholders to receive an offer once the bidder reached a certain threshold. Instead, it concluded that the bidder should be able to make one or more share purchases on the stock market irrespective of whether they have already acquired control.

Three specific situations involving equal opportunity were identified in the *Eggleston Report*. First, it was noted that the law already dealt partly with the concern that non-

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143 Ibid.
144 Ibid 9.
145 Ibid 9. However, there was criticism of the Committee’s approach at that time. For example, in relation to ‘first come first served’ bids, see John R Peden, *Control of Company Take-Overs* (Law Book, 1970) 18–19, 31–2.
accepting shareholders not be left as a small minority where the offer is to purchase all or a high proportion of the shares.\textsuperscript{147} Second, the Eggleston Committee concluded that a bidder should pay to those who have already accepted any increase in price obtained by one or more of the remaining shareholders.\textsuperscript{148} Finally, the report considered the suggestion that, where a bidder is seeking only a proportion of the total shareholding in a partial bid, every shareholder should be able to accept the offer for that proportion of their shareholding.\textsuperscript{149} Although later implemented in 1986,\textsuperscript{150} the Eggleston Committee concluded that the suggested rule would involve ‘great difficulties’ and that ‘it is impossible to secure complete equality in this respect’.\textsuperscript{151} In doing so, the Committee recognised that the existing law did not require an offer to be made to all shareholders or entitle them to dispose of an equal proportion of their shares.\textsuperscript{152}

The Eggleston Committee made it clear that it did not wish to discourage bids where the safeguards to protect shareholders were observed.\textsuperscript{153} It accordingly recommended legislative amendments to ensure ‘as far as practicable’ that compliance could not be avoided.\textsuperscript{154} However, the Committee recognised that legislative changes dealing with problems arising from the existing provisions would not be the end of the matter:


\textsuperscript{149} Ibid.

\textsuperscript{150} See below Section E (under the heading ‘3 Subsequent Amendments’) in Part II of this Chapter.


\textsuperscript{152} Ibid.

\textsuperscript{153} Ibid 7.

\textsuperscript{154} Ibid.
if we had felt ourselves able to take a more leisurely approach to the subject, we would have wished to compile a draft embodying all the recommendations in this report. Even then, we would expect that situations which we had not envisaged would arise, and that loopholes would be found which would require further legislative treatment. The problems relating to take-overs are complex and difficult, and while it is unlikely that a perfect solution can be found, our recommendations, if adopted, will in our view add substantially to the protection and equitable treatment of shareholders and should be effective to deal with those abuses which have come to our attention.\textsuperscript{155}

\textbf{C \hspace{1cm} 1971 Amendments to UCA}

Reforms flowing from the \textit{Eggleston Report} were implemented in the various states and territories from 1971.\textsuperscript{156} As a result of these amendments, the takeover and substantial shareholding provisions swelled to 58 pages in the NSW legislation, just under four times its size in 1961.\textsuperscript{157} The Second Reading Speech for the draft legislation acknowledged that the takeover code was ‘both experimental and highly technical’, having no known ‘counterpart elsewhere in the world’.\textsuperscript{158} The level of technicality employed was explained as a response to growing complexity in the business world and sophisticated ways of avoiding the law, with the legislation needing to become ‘increasingly sophisticated as it closes the loopholes’.\textsuperscript{159} The 1971 amending legislation had been criticised on the basis that it placed ‘undue emphasis [on] the protection of investors to the exclusion of other facets of company law’.\textsuperscript{160} In response, the Second Reading Speech emphasised the need for the company as a legal form to have the

\begin{footnotesize}
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\item \textsuperscript{155} Ibid 15.
\item \textsuperscript{156} See, eg, \textit{Companies (Amendment) Act 1971} (NSW).
\item \textsuperscript{157} See \textit{Companies Act 1961} (NSW) ss 6A, 69A–69N, 180A–180Y, sch 10.
\item \textsuperscript{158} New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 9 September 1971, 916 (John Waddy).
\item \textsuperscript{159} Ibid 911.
\item \textsuperscript{160} Ibid 910.
\end{itemize}
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community’s confidence and that it was important that protection of the public be given first priority given corporate collapses in the early 1960s.\textsuperscript{161}

The 1971 legislation implemented the important changes foreshadowed in the \textit{Eggleston Report}. For example, it introduced disclosure requirements for substantial shareholdings at the level of 10 per cent,\textsuperscript{162} applied the takeover provisions to natural persons,\textsuperscript{163} and reduced the threshold for acquisitions to which the takeover provisions applied to partial bids from one-third to 15 per cent of voting power at a general meeting.\textsuperscript{164} The key concepts of a person being ‘entitled’ to ‘voting shares’ (including interests held by their ‘associates’) were also introduced to capture control over voting,\textsuperscript{165} with NSW becoming the first jurisdiction to implement the term ‘relevant interest’.\textsuperscript{166} To avoid the

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\item[\textsuperscript{161}] Ibid 911.
\item[\textsuperscript{162}] \textit{Companies Act 1961} (NSW) pt IV div 3A, especially s 69C.
\item[\textsuperscript{163}] See ibid ss 180A(1) (definition of ‘offeror’), 180C(1), (3).
\item[\textsuperscript{164}] Ibid s 180C(2)(a).
\item[\textsuperscript{165}] See ibid ss 5(1) (definition of ‘voting share’), 6A(6), 180A(5)–(8), 180D. Similar to the current law, the definition of ‘voting share’ excluded shares for which voting rights were limited to specific situations, instead applying to ordinary shares with an entitlement to vote at general meetings: see s 5(1) (definition of ‘voting share’); \textit{Corporations Act 2001} (Cth) s 9 (definition of ‘voting share’).
\item[\textsuperscript{166}] See, eg, \textit{Companies Act 1961} (NSW) ss 6A, 126–7, 180A(5), 180D(2)(b), pt IV div 3A; A G Hartnell, ‘Relevant Interests – “Control” in the Eighties’ (1988) 6 \textit{Company and Securities Law Journal} 169, 169–70. For the purposes of applying the 15 per cent threshold, a person’s voting power was calculated by reference to the votes attached to voting shares to which a person was entitled, also taking into account voting shares subject to certain offers or invitations made by the person or associated persons within the previous four months: \textit{Companies Act 1961} (NSW) ss 180C(2)(a), 180D(1)(b). A person was entitled to shares in which they and their associates had a relevant interest: at s 180A(5). Relevant interests comprised the power to control the exercise of the right to vote relating to the share or exercise control over its disposal, and took into account informal arrangements (whether or not enforceable): at ss 6A(1)(c), (2)–(3). A person was also deemed to have the same powers as a body corporate where, for example, they and/or their associates held at least 15 per cent of the votes attached to the voting shares in that body corporate: at s 6A(5). The person’s associates were defined to include related corporations,
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difficulties identified with ‘first come, first served’ invitations,\textsuperscript{167} new provisions were introduced to apply to the making of invitations that were modelled on the disclosure requirements for offers.\textsuperscript{168} Other significant reforms included requiring increases in consideration to be paid to shareholders who had already accepted the offer,\textsuperscript{169} and making it an offence to announce an offer that was not intended or could not be performed.\textsuperscript{170} The Supreme Court was also granted wide powers to make orders for non-compliance with the takeover provisions on the application of the Commission\textsuperscript{171} or target.\textsuperscript{172} This included the power to restrain the transfer of shares, cancel contracts, and direct a person to do (or restrain from doing) an act to secure compliance with the provisions.\textsuperscript{173} In exercising these powers, the Court was required to be satisfied that the order would not ‘unfairly prejudice any person’.\textsuperscript{174} It also had the power to excuse a person in the case of ‘inadvertence, mistake or circumstances beyond [their] control’.\textsuperscript{175}

Three changes in the 1971 legislation attracted particular controversy, and were referred to in the Second Reading Speech. The first related to arguments that the Court’s power to order a sale of shares for non-compliance with the substantial shareholding

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  \item and bodies corporate and individuals accustomed to act in accordance with the person’s directions: at ss 6A(6), 6(5).
  \item See above Section B in Part II of this Chapter.
  \item \textit{Companies Act 1961} (NSW) ss 180C(3)–(4), (6).
  \item Ibid s 180L(4).
  \item Ibid s 180Q.
  \item This was the Corporate Affairs Commission in New South Wales: see, eg, H A J Ford, \textit{Principles of Company Law} (Butterworths, 1974) 3 n 1. For an explanation of the functions of the Corporate Affairs Commission, see Bernard Mees and Ian Ramsay, ‘Corporate Regulators in Australia (1961–2000): From Companies’ Registrars to ASIC’ (2008) 22 \textit{Australian Journal of Corporate Law} 212, 223–5.
  \item \textit{Companies Act 1961} (NSW) s 180R.
  \item Ibid.
  \item Ibid s 180T(1).
  \item Ibid s 180S.
\end{itemize}
provisions was ‘excessively punitive’.\textsuperscript{176} Second, there was controversy in relation to reforms to liability arising out of misleading takeover disclosure documents. There were particular concerns raised about applying criminal and civil liability to bidders where their statement contained false or misleading statements or omissions that were ‘material’ (rather than based on an ‘untrue statement’ or ‘wilful non-disclosure’), and requiring the defence to establish that a material non-disclosure was unintentional or not known to be material.\textsuperscript{177} Finally, the most significant controversy surrounded the specific exclusion from the takeover requirements of offers made in the ordinary course of trading on the stock exchange.\textsuperscript{178} Indeed, the Second Reading Speech referred to suggestions that this ‘may provide a gap in the Act through which all the remaining provisions of the part could be avoided’,\textsuperscript{179} and noted that the NSW Attorney-General would be watching this position carefully after the new provisions commenced.\textsuperscript{180} In defence of the new exception, the speech referred to concerns raised by members of the Eggleston Committee that the bidder would be forced out of the market if they were required to pay the same amount to all accepting shareholders that they pay for on-market purchases.\textsuperscript{181} This conclusion was based on the importance of a free market:

\begin{quote}
 it is generally recognised that where an offeror has announced his intention of making an offer to shareholders generally, it is unfair for him to offer a special
\end{quote}

\textsuperscript{176} New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 9 September 1971, 915 (John Waddy). See also \textit{Companies Act 1961} (NSW) s 69N, especially para (1)(e).

\textsuperscript{177} See New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 9 September 1971, 919–20 (John Waddy); \textit{Companies Act 1961} (NSW) s 180J.

\textsuperscript{178} \textit{Companies Act 1961} (NSW) s 180C(7).

\textsuperscript{179} New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 9 September 1971, 918 (John Waddy).

\textsuperscript{180} Ibid 918–19.

\textsuperscript{181} R M Eggleston, Company Law Advisory Committee, \textit{Memorandum on Take-Over Bids and Stock Exchange Purchases} (29 June 1970). This memorandum was drafted by the Chairman with the agreement of another Eggleston Committee member (the other member was absent overseas, but agreed with the general conclusion): at [15]. See also New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 9 September 1971, 918 (John Waddy).
inducement to a particular shareholder or group of shareholders. These considerations do not apply to stock market transactions, in which the market is available to everyone. In the light of our views as to the important function which the market performs while a takeover offer is current, and the desirability of freedom in that market, we recommend that the existing draft be adhered to.\(^\text{182}\)

**D  Rae Report (1974)**

The Senate Select Committee on Securities and Exchange (‘Rae Committee’) was appointed to consider whether a national securities and exchange commission should be established to deal with improper practices relating to public company shares, including stock price manipulation and insider trading.\(^\text{183}\) In the *Rae Report* in 1974, the Committee recommended that the Federal Government implement national companies and securities legislation and establish a national regulatory body for the securities market.\(^\text{184}\) In making this recommendation, it considered that there should be legislative action to pursue ‘two broad, sometimes conflicting, objectives of national policy’, namely:

(i) The first is to maintain, facilitate and improve the performance of the capital market in the interests of economic development, efficiency and stability.

(ii) The second is to ensure adequate protection of those who invest in the securities of public companies and in the securities market.\(^\text{185}\)

\(^{182}\) R M Eggleston, Company Law Advisory Committee, *Memorandum on Take-Over Bids and Stock Exchange Purchases* (29 June 1970) [13]. See also at [4]–[6].


\(^{184}\) Ibid 16.14–16.15.

\(^{185}\) Ibid 16.15.
In answering the question whether national securities market regulation should be left essentially to self-regulatory or non-government bodies, the Rae Committee considered the operation of the UK Panel (which it referred to as the ‘City Panel’).\textsuperscript{186} The Committee concluded that ‘we do not believe that a body modelled on the City Panel provides the answer to the need in Australia for an effective regulatory body’.\textsuperscript{187} However, the Committee’s reasoning emphasised that it came to this conclusion in relation to a panel regulating the securities markets more generally. First, the Committee pointed out that the UK Panel was only concerned with the limited function of scrutinising takeovers and mergers.\textsuperscript{188} Second, it considered that a body without legislative investigatory powers or the power to apply government sanctions would not deal successfully with matters involving ‘inquiry into fraud or abuse’.\textsuperscript{189} Indeed, the Committee observed ‘an element of wishful thinking’ by merchant bankers that establishing such a panel would ‘remove the need for a government regulatory body’.\textsuperscript{190}

Finally, the Committee noted ‘the Australian market [was] far more dispersed’ than the City of London in which the UK Panel operated and that the public interest needed protection by a government body ‘not dominated by sectional interests’.\textsuperscript{191} In summary, the Committee was ‘convinced that self-regulatory bodies such as the City Panel are not the whole answer to the problem of the regulation of the Australian securities market’.\textsuperscript{192} However, it was recognised that self-regulatory bodies were useful in complementing a government body, setting out and enforcing broad standards of

\textsuperscript{186} Ibid 16.7.

\textsuperscript{187} Ibid 16.8. It also noted criticisms of the UK Panel, including that its rules were ‘too vague’ and decisions ‘may depend on its members’ personal views of business morality’: ibid 16.7–16.8.

\textsuperscript{188} Ibid 16.8.

\textsuperscript{189} Ibid 16.8–16.9.

\textsuperscript{190} Ibid 16.9.

\textsuperscript{191} Ibid.

\textsuperscript{192} Ibid 16.12 (emphasis added).
behaviour for its members, and performing detailed and routine tasks such as market surveillance.¹⁹³

E Companies (Acquisition of Shares) Codes (1981)

1 Preceding Developments

The effectiveness of the 1971 amendments was particularly called into question as a result of the Victorian Supreme Court decision in *Cumming Smith & Co Ltd v Westralian Farmers Co-operative Ltd*.¹⁹⁴ In that case, it was found that acquisitions totalling 50.6 per cent of the target company did not breach the *Companies Act 1961* (Vic), primarily on the basis that they did not constitute an ‘offer’ or ‘invitation’ within the meaning of the Act.¹⁹⁵ Kaye J observed that ‘many provisions’ of the legislation were ‘capable of circumvention by selection of forms of expression used when making an offer and when extending an invitation, or by timing the despatch of an offer or invitation’.¹⁹⁶ This meant that the interests of the target and investors were ‘at risk because of the ease with which control of a target company might be wrested by means which would appear to defeat the policy of the legislation’.¹⁹⁷ The legalistic approach adopted in this decision also prompted commentators to question whether the situation would improve under the subsequent legislation.¹⁹⁸

¹⁹⁴ [1979] VR 129.
¹⁹⁶ Ibid 162. Examples provided included delaying the making of a subsequent offer by a further day and by extending an invitation to offer shares for acquisition to another member.
¹⁹⁷ Ibid. It had previously been observed that the corresponding provisions in New South Wales were ‘to a large extent ineffective, a trap for the unwary, and a temptation for the ingenious’: David Block, ‘Does the New Take-Over Legislation Achieve its Objective?’ (1973) 1 *Australian Business Law Review* 236, 236.
On 22 December 1978, the Commonwealth and the states agreed to establish the first co-operative scheme underpinning corporate regulation in Australia. This resulted in the introduction of the Company Takeovers Bill 1979 (Cth) into the Federal Parliament on 20 November 1979. The provisions in this Bill were amended in light of public consultation and reintroduced as the Companies (Acquisition of Shares) Bill 1980 (Cth) on 2 April 1980. In light of concerns with the delay in this process, Queensland, Western Australia and South Australia passed interim legislation modelled on the original Commonwealth Bill, which operated before the commencement of the new co-operative scheme.

2 Legislative Framework

Commencing on 1 July 1981, CASA introduced many of the elements of our current takeover regulatory framework. First, the substance of the law was determined at the

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199 See National Companies and Securities Commission Act 1979 (Cth) s 3(1) (definition of ‘agreement’) sch 1.


201 See Company Take-Overs Act 1979 (Qld); Company Take-Overs Act 1979 (WA); Company Take-Overs Act 1980 (SA). Curiously, the Queensland legislation lowered the threshold at which the takeover prohibition applied from the 20 per cent level adopted elsewhere to 12.5 per cent. The Second Reading Speech noted that this was considered to be ‘a more realistic figure’, although it was stressed that Queensland would ‘adopt entirely’ the uniform legislation when it was passed by the Federal Parliament: Queensland, Parliamentary Debates, Legislative Assembly, 6 December 1979, 2363–4 (William Lickiss).
federal level, in consultation with the states and territories. Second, the National Companies and Securities Commission (‘NCSC’) became the first federal body responsible for administering corporate and securities law. However, the NCSC did not operate as a truly national regulator, as it delegated administrative responsibilities to state and territory authorities. Third, the legislation gave the regulator the power to exempt persons from and modify the operation of the law. In exercising these powers, the regulator was required to have regard to both ensuring that the Eggleston principles were complied with and the desirability that acquisitions take place in an ‘efficient, competitive and informed market’ (the ‘Masel principle’). The Second Reading Speech by the Minister for Business and Consumer Affairs reinforced the importance of these matters, and set out the philosophy underlying the CASA provisions:

Although varying views have been expressed as to the extent to which the freedom of bidders should be controlled, the new code seeks to close loopholes in the present legislation and to improve the effectiveness of the existing controls. We do not wish to discourage the making of takeover bids in cases in which there are adequate safeguards for the protection of shareholders. The new code seeks to ensure that, as far as practicable, those safeguards will now be observed in all takeovers. I see this code as an assistance to efficient and

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202 However, unlike the current law, the takeover code operated in each jurisdiction through legislation applying CASA. For an outline of the basic elements of the co-operative scheme, see Commonwealth, Parliamentary Debates, House of Representatives, 27 August 1980, 804–5 (Ransley Garland).

203 National Companies and Securities Commission Act 1979 (Cth) s 5(1).

204 Commonwealth, Parliamentary Debates, House of Representatives, 2 April 1980, 1634 (Ransley Garland).

205 Companies (Acquisition of Shares) Act 1980 (Cth) ss 57–8.

206 Ibid s 59. The author of this principle has been identified as Leigh Masel in his role as Chairman elect of the NCSC, in an article written by one of its inaugural Commissioners: see Tony Greenwood, ‘In Addition to Justin Mannolini’ (2000) 11 Australian Journal of Corporate Law 308, 311.
economically viable takeover activity. The code will promote investor confidence and encourage an informed and efficient market in securities.207

Many of the key substantive reforms contained in the CASA takeover provisions have continued to the present day. Of these, the most significant was the introduction of a general prohibition on acquisitions that would entitle a person to increase above 20 per cent or between 20 and 90 per cent of the voting shares in a company.208 The 20 per cent threshold was considered appropriate as it would ‘in most cases’ occur before the point at which control had passed.209 This prohibition was then made subject to a series of exceptions.210 These included the existing exceptions for the making of offers under a takeover scheme in accordance with the takeover provisions,211 for acquisitions in companies with 15 or fewer members and for larger proprietary companies where all of the members consented.212 There were also two key exceptions introduced in CASA, with the first allowing ‘gradual’ (or creeping) acquisitions of not more than three per cent in each six months.213 The aim of this provision was to impose a six-month freeze,214 enabling control to ‘pass slowly enough for the people involved to make informed decisions’.215 Second, CASA included a novel procedure for making takeover announcements on the floor of the stock exchange, under which the bidder(s) could

207 Commonwealth, Parliamentary Debates, House of Representatives, 2 April 1980, 1635 (Ransley Garland).
208 Companies (Acquisition of Shares) Act 1980 (Cth) ss 11(1)–(2). This prohibition also extended to invitations under s 11(3) of the Act.
209 Explanatory Memorandum, Companies (Acquisition of Shares) Bill 1980 (Cth) 27.
210 Companies (Acquisition of Shares) Act 1980 (Cth) ss 12–17.
211 Ibid ss 16, 18–31.
212 Ibid s 13(1).
213 Commonwealth, Parliamentary Debates, House of Representatives, 2 April 1980, 1635 (Ransley Garland).
214 Explanatory Memorandum, Companies (Acquisition of Shares) Bill 1980 (Cth) 36.
215 Ibid 27. This exception required that the ‘relevant person’, whose entitlement would otherwise have breached the 20 per cent threshold, be entitled to not less than 19 per cent for the six months prior to the acquisition: Companies (Acquisition of Shares) Act 1980 (Cth) s 15.
make an unconditional offer to acquire all shares in that class for a period of a month.\footnote{See \textit{Companies (Acquisition of Shares) Act 1980} (Cth) ss 17, 32–4. See especially at s 17(2).} Significantly, the previous general exception that had allowed unlimited on-market purchases was replaced by a new provision only allowing the bidder to make such purchases where they had offered to acquire all of the target shares under a takeover scheme or announcement.\footnote{See ibid ss 13(3), (5); Explanatory Memorandum, \\textit{Companies (Acquisition of Shares) Bill 1980} (Cth) 32–4.} An earlier version of the provision would have provided an exception where the takeover scheme involved an offer for at least 20 per cent of the target company’s shares, but this was abandoned in light of criticism that ‘this could allow market raids leaving a large number of small shareholders locked in’.\footnote{Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 2 April 1980, 1635 (Ransley Garland).}

Other important changes were designed to place controls on target company management to ‘restrict the use of unreasonable defence tactics’.\footnote{Ibid.} This included granting the Supreme Court power to invalidate unfair or unconscionable agreements between the target company and its officers, or to require payments or benefits to be repaid.\footnote{See \textit{Companies (Acquisition of Shares) Act 1980} (Cth) s 50; Explanatory Memorandum, \\textit{Companies (Acquisition of Shares) Bill 1980} (Cth) 79–80.} Such tactics were also considered to include ‘wilful non-disclosure’ by target directors.\footnote{Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 2 April 1980, 1635 (Ransley Garland).} To address this concern, \textit{CASA} extended the criminal and civil liability provisions to apply to the target (as well as bidders) in relation to their disclosure statements for takeover schemes and announcements.\footnote{See \textit{Companies (Acquisition of Shares) Act 1980} (Cth) ss 16–17, 22, 32, 44. See especially at ss 44(1)–(3), (11)–(13).} It also included a general disclosure test (in addition to the existing checklist of matters) requiring the disclosure of any information that was material to the target shareholder’s decision whether or not to accept the offer, where the information was known to the relevant person(s) and had
not previously been disclosed to those shareholders. The Supreme Court was given broad powers in relation to breaches of the takeover code, including an ability to excuse non-compliance due to inadvertence. These were subject to a requirement that the Court not make orders if satisfied that it would ‘unfairly prejudice any person’. This included the power to make orders as necessary to protect the interests of a person affected by a takeover scheme or arrangement, such as requiring the bidder or target company to supply specified information to target shareholders, restraining the exercise of voting power in the target, and directing the disposal of target shares or vesting them in the NCSC.

One of the most significant (and controversial) reforms was the power given to the NCSC to declare an acquisition of, or other conduct in relation to, shares to be unacceptable. The NCSC had the power to make a declaration where a person acquired shares or engaged in conduct in relation to shares in circumstances where:

- (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;
- (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;
- (c) the shareholders and directors of a company were not supplied with sufficient information to enable them to assess the merits of a proposal under which a person would acquire a substantial interest in the company; or

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223 See ibid sch 1 pt A item 4(f), pt B item 2(k), pt C item 4(f), pt D item 2(j).
224 See ibid ss 45–9.
225 Ibid s 48(1).
226 Ibid s 49(1).
227 Ibid s 47(1).
228 Ibid s 60.
(d) the shareholders of a company did not all have equal opportunities to participate in any benefits accruing to shareholders under a proposal under which a person would acquire a substantial interest in the company.229

Where the NCSC had made such a declaration, the Supreme Court could either reverse the NCSC’s decision or make certain orders.230 The NCSC could only make a declaration where it was satisfied that one of the Eggleston principles had not been complied with.231 That is, unlike for its exemption and modification powers, the NCSC was not required to take into account the desirability of an ‘efficient, competitive and informed market’ in its decision on whether to make a declaration in relation to an unacceptable acquisition or unacceptable conduct.232 This omission is surprising given that the Explanatory Memorandum emphasised that the purpose of the NCSC’s power to make a declaration was ‘to discourage activities which would frustrate the aims of the code’.233

3 Subsequent Amendments

There was significant criticism of both the complexity and length of the CASA provisions, and the NCSC’s implementation of its powers.234 The provisions in relation

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229 Ibid s 60(7). See also 60(1).
230 Ibid ss 60(1)–(2). In the case of an unacceptable acquisition, these orders include restraining the exercise of voting or disposal of the shares, directing the disposal of shares or ordering that the exercise of voting or other rights be disregarded: at s 45(1). For unacceptable conduct, the Court could make such orders to protect the rights of any person affected or ensure that the takeover proceeds as far as possible as if the conduct had not occurred: at ss 60(3)–(4).
231 Ibid s 60(7).
232 Ibid s 59.
233 Explanatory Memorandum, Companies (Acquisition of Shares) Bill 1980 (Cth) 85. However, this is arguably consistent with the process surrounding the creation of the Masel principle.
234 See, eg, Elaine Hutson, ‘Regulation of Corporate Control in Australia: A Historical Perspective’ (1998) 7 Canterbury Law Review 102, 108–10; Bernard Mees and Ian Ramsay,
to the NCSC’s powers were narrow in a number of respects, but convoluted in others,
particularly in its creation of different types of declarations and orders.235 There were
consequently a number of amendments made to the provisions. For example, in 1982
the NCSC was given a period of 90 days (rather than 14 days) to make a declaration of
an unacceptable acquisition or unacceptable conduct, and the power to make its own
orders following a declaration.236 Significantly, the statement of the Eggleston
principles for the purposes of both declarations was also amended to require target
shareholders to have ‘reasonable’, in addition to ‘equal’, opportunities to participate in
the benefits under the proposal.237 In addition, the NCSC’s powers to make a
declaration of unacceptable conduct were expanded in 1983 to apply prior to the
commencement of a takeover scheme or announcement.238

In debating the 1983 amending legislation, the Hon John Spender QC MP (Member for
North Sydney) lamented the growth of the takeover legislation.239 He concluded that

235 In light of concerns about the drafting, a plain English rewrite of the Code was produced by
the Victorian Law Reform Commission (including Mr Leigh Masel), in consultation with
Professor Robert Eagleson (University of Sydney, Department of English) and a number of
expert consultants: see Victorian Law Reform Commission, Plain English and the Law, Report
No 9 (1987) 2, 5. See also the Plain English Rewrite Takeovers Code: at Appendix 2.
236 See Statute Law (Miscellaneous Amendments) Act (No 1) 1982 (Cth) s 132. This involved yet
another variation on the list of orders, including allowing orders restraining the disposal or
acquisition of certain shares or the exercise of voting rights in those shares, and directing a
corporation not to issue shares or register a share transfer: Companies (Acquisition of Shares) Act
1980 (Cth) s 60A(1).
237 See Statute Law (Miscellaneous Amendments) Act (No 1) 1982 (Cth) s 132.
238 See Companies and Securities Legislation (Miscellaneous Amendments) Act 1983 (Cth) s 17.
This amendment also resulted in the Eggleston principles being repeated in both ss 60(1) and (3)
of the Companies (Acquisition of Shares) Act 1980 (Cth), instead of in one subsection as
previously (in s 60(7)).
239 Commonwealth, Parliamentary Debates, House of Representatives, 30 November 1983,
3034 (John Spender).
this ‘overregulation’ had resulted from implementing systems that sought to ‘cover all possible situations … in preference to seeking to establish simpler and more flexible systems’.\(^\text{240}\) The Member also emphasised three key deficiencies of a court-administered code, in contrast to the speed and flexibility of the Code on Takeover and Mergers operating in the United Kingdom (‘UK Code’).\(^\text{241}\) The first of these deficiencies was inflexibility in operation, particularly given that courts deal with the law rather than whether conduct infringes its ‘spirit’.\(^\text{242}\) Second, it was argued that court-administered codes were bound to be more technical, as the law needed to be updated to defeat new tactics.\(^\text{243}\) Finally, although courts could move swiftly in urgent cases, their structure, rules and procedures meant that they could not ‘match the speed that could reasonably be expected under an efficiently administered code that was similar in essential respects to the [UK] code’.\(^\text{244}\)

Instead, the Member for North Sydney proposed that legislation be drafted using general propositions or rules where possible, with interpretation left to the courts, and that ‘extra-judicial procedures aimed at providing quick, cheap and flexible answers’ be employed in commercial areas such as takeovers.\(^\text{245}\) Although the Minister for Trade noted the conclusion in the *Rae Report* that the UK Panel model would not be effective in the Australian context, he acknowledged that there was ‘a great deal of merit’ in what had been said by Mr Spender:

> There is a problem with over-regulation. It leads to a great deal of litigation. Every technical point is taken, and this is a problem. But I am reminded that clause 132 of the Bill provides for the courts to interpret this legislation having regard to the provision now in section 15AA of the Acts Interpretation Act; in

\(^4\) Ibid 3035.

\(^1\) Ibid.

\(^2\) Ibid.

\(^3\) Ibid.

\(^4\) Ibid.

\(^5\) Ibid 3036.
other words, to interpret this legislation having regard to its purpose. If the courts are able to adopt a commercial approach it may be possible to get legislation in more general terms and then, as … suggested, leave it to the courts’ interpretation.\textsuperscript{246}

The Companies and Securities Law Review Committee (CSLRC) subsequently delivered two important reports relating to the CASA provisions.\textsuperscript{247} In its first report on the takeover threshold, the CSLRC was not convinced that the 20 per cent threshold was inappropriate and concluded that ‘[t]he efficiency of the market and the legitimate expectations of shareholders seem, for the time being, to be sufficiently and properly protected’.\textsuperscript{248} The CSLRC’s second report related to partial takeover bids, which at that time could be made for either a specified proportion of each shareholder’s holding (‘proportional bid’) or for all or part of their holding up to a specified maximum percentage of the company’s capital (‘pro rata bids’).\textsuperscript{249} The principal concern relating to pro rata bids was that they placed pressure on target shareholders to accept an offer irrespective of its merits due to concerns that they would be left behind in the minority if they did not.\textsuperscript{250} Accordingly, the CSLRC recommended that partial bids be confined

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\textsuperscript{246} Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 30 November 1983, 3041 (Lionel Bowen, Minister for Trade).
\textsuperscript{247} The CSLRC was established under an agreement between the Commonwealth and state governments to assist the Ministers in those governments responsible for corporate law, comprising the Ministerial Council for Companies and Securities, by researching and advising on law reform relating to companies and securities industry regulation: \textit{National Companies and Securities Commission Act 1979} (Cth) s 3(1), sch 1 cl 21.
\textsuperscript{249} \textit{Companies (Acquisition of Shares) Act 1980} (Cth) s 16.
to proportional bids and that bidders be prohibited from including conditions that placed a maximum limit on the number of shares that they would accept. These changes were included in amendments made to the CASA provisions in 1986. The report on partial bids also preceded the introduction of a general prohibition on escalation agreements within six months before a takeover bid, where a benefit is paid in connection with the purchase of target shares by reference to the consideration to be paid under the takeover bid. In contrast, the CSLRC had only recommended that a person be prohibited from making a partial bid if it resulted in an obligation to provide a payment under a pre-existing escalation agreement. It is also interesting to note that the CSLRC’s discussion paper on partial bids had sought comments on whether the following principle should be enshrined in the legislation alongside the Eggleston principles: ‘that as far as reasonably practicable the value of any premium for control should be at all times proportionately vested in each voting share’.


252 See Companies and Securities Legislation Amendment Act 1986 (Cth) s 6; Explanatory Memorandum, Companies and Securities Legislation Amendment Bill 1986 (Cth) 13, 14.


254 Companies and Securities Law Review Committee, Parliament of Australia, Partial Takeover Bids (Report) (1985) [73]. Although the CSLRC noted the inequitable effects of escalation agreements, as they allow some (typically institutional) shareholders to sell their shares before the bid at a price eventually reflecting the bid price, the Committee did not consider it appropriate to recommend their prohibition: at [72]–[73].

CSLRC concluded that it would be inappropriate to make such a recommendation given a lack of consensus in the commercial community on this issue.  

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Corporations Law (1991)

On 1 January 1991, the takeover provisions were transferred into ch 6 of the Corporations Law. This followed an unsuccessful attempt by the Federal Government to implement national legislation, which was struck down by the High Court on constitutional grounds. The Corporations Law was consequently founded on a co-operative scheme similar to that underpinning earlier CASA provisions. Given that the highest priority at the time was to implement a national regulatory regime, the new legislation mostly re-enacted the previous requirements. The key reforms in the context of the takeover provisions involved the regulator no longer checking (or pre-vetting) disclosure statements, profit forecasts and asset valuations during a takeover, only allowing the regulator to issue notices to trace the beneficial ownership in shares and a consequential decrease in the threshold for substantial shareholding notices from 10 per cent to 5 per cent. There were also changes to the structure of the provisions in light of suggestions in a report by the Victorian Law Reform Commission. However, the basic framework of the takeover provisions was retained:

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258 The Corporations Law was contained in s 82 of the Corporations Act 1989 (Cth), which applied in the Australian Capital Territory. It operated as the law of each of the states and the Northern Territory through application legislation in those jurisdictions.
260 Ibid 2994.
261 Ibid.
Any comprehensive review of the takeovers legislation would involve the question whether the basic Eggleston principles underlying the code are still appropriate (in particular the concept that each voting share in a company has attached to it an equal proportion of the value of any premium for control). Given the timing considerations, it is not practicable to give the subject the rigorous analysis it warrants or to engage in adequate public consultation before introduction of the initial legislation. A comprehensive review of the basic approach of the takeovers legislation could follow the commencement of the Commonwealth scheme.262

With the introduction of the new co-operative scheme, the Explanatory Memorandum accompanying the Corporations Legislation Amendment Bill 1990 (Cth) emphasised that the regulatory framework needed (amongst other things) to promote efficiency, while ensuring that shareholder interests and those of the broader community were protected.263 The application of the Eggleston principles was considered by a Parliamentary Committee report on Corporate Practices and the Rights of Shareholders (‘Lavarch Report’) not long after the new legislative regime was enacted.264 In the context of considering the equal opportunity principle implemented in s 731(d) of the Corporations Law, Professor Robert Baxt gave evidence that questioned the ‘uncritical acceptance of the proposition that all shareholders in a company have to be treated equally in the context of their shareholding’.265 In particular, Professor Baxt argued that,

262 Explanatory Memorandum, Corporations Bill 1988 (Cth) 15. Interestingly, this statement of the effect of the equal opportunity principle reflects the wording previously rejected by the CSLRC (although its recommendation to allow only proportional bids arguably achieved a similar result).

263 Explanatory Memorandum, Corporations Legislation Amendment Bill 1990 (Cth) 11.

264 As its full title suggests, the Lavarch Report resulted from an inquiry into the impact of particular corporate practices impacting on shareholder rights, including the adequacy of controls necessary to protect shareholders (particularly minority shareholders): see House Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Corporate Practices and the Rights of Shareholders (1991) xv.

265 Ibid 59.
provided ‘meaningful disclosure’ is given by a person who is in a position to control the company, there is no reason why that person should not be able to extract a premium for the ‘special market shares’ that they hold.\footnote{Ibid.}

The Commonwealth Treasury also commented on the difficulty of providing an economic rationale for the equal opportunity principle and that large shareholdings may be accorded a higher value in the market place due to their ‘special significance’ in relation to control of the company.\footnote{Ibid 60.} However, the Acting Secretary to the Treasury emphasised that ‘[n]evertheless, considerable emphasis is given in Australian law to ensuring that all shareholders are offered an equal price for their shares in takeovers’.\footnote{Ibid.} The \textit{Lavarch Report} concluded that the Committee had not been persuaded that it would be in the interests of holders of small share parcels to remove the equal opportunity provision in s 731(d), and that there was no justification for amending the provision.\footnote{Ibid 62.} However, it also found that, although the regulation of takeovers was in the interests of shareholders generally by ensuring that they receive adequate information in relation to their decision on whether to sell their shares, ‘the time and resources involved, in the recent past, in the administration of the takeover code would seem to be disproportionate to the objectives sought to be achieved’.\footnote{Ibid.}

The new legislative regime in the \textit{Corporations Law} implemented two significant changes to the regulatory framework. First, it heralded the first truly national corporate and securities law regulator, the Australian Securities Commission (‘ASC’).\footnote{See \textit{Australian Securities Commission Act 1989} (Cth) ss 1, 7.} This avoided the inefficiencies that had resulted from the delegation of the NCSC’s functions to its state and territory counterparts, and instead allowed resources to be provided to a
single body.\textsuperscript{272} It also increased the accountability of the regulator by making it accountable to a single Minister and subject to parliamentary scrutiny.\textsuperscript{273}

Second, the NCSC’s power to make declarations in relation to unacceptable conduct in the context of a takeover was transferred into a new body, the CSP.\textsuperscript{274} The Explanatory Memorandum accompanying the Corporations Bill 1988 (Cth) explained that the CSP was established to overcome criticism that the NCSC had been ‘acting as prosecutor, judge and jury’.\textsuperscript{275} Interestingly, it was envisaged that cases involving unacceptable conduct would ‘amount to about five per year’,\textsuperscript{276} and that the CSP could be given further functions if it proved to be ‘an effective means of hearing a large number of adjudicative hearings’.\textsuperscript{277} Confusingly, the subsequent detailed explanation of the provisions in relation to unacceptable acquisitions and conduct was based incorrectly on the ASC having the power to make the declaration and orders, without referring to the CSP.\textsuperscript{278} The explanatory material accompanying the Australian Securities Commission Bill 1988 (Cth) then indicated that the responsible Minister would direct the CSP to

\textsuperscript{272} Explanatory Memorandum, Corporations Bill 1988 (Cth) 7–8. This led to a revised role for the renamed Ministerial Council for Corporations, which did not have the power to direct the regulator: Cf National Companies and Securities Commission Act 1979 (Cth) s 3(1) (definition of ‘Ministerial Council’) sch 1 cl 22(1)(f). The Council was instead consulted on legislative changes in relation to the securities and futures related matters for which the Commonwealth has sole legislative responsibility (including takeovers), and was given the power to approve changes on other company law matters: see Commonwealth Attorney-General’s Department, Corporations Legislation Amendment Bill (No 2) 1991, Draft Legislation and Explanatory Paper (1991) [7]–[8].


\textsuperscript{274} Australian Securities Commission Act 1989 (Cth) s 171.

\textsuperscript{275} Explanatory Memorandum, Corporations Bill 1988 (Cth) 18.

\textsuperscript{276} Ibid 18–19.

\textsuperscript{277} Ibid 19.

perform the ASC’s function of declaring conduct unacceptable.\textsuperscript{279} However, this was corrected in subsequent amendments to these explanatory documents.\textsuperscript{280}

In a Parliamentary Committee report on the legislative package (‘\textit{Edwards Report}’),\textsuperscript{281} the Committee was evenly divided on whether there should be changes to the CSP reforms. With the Chairman’s casting vote, the majority was persuaded by the NCSC’s argument that its investigative and adjudicative powers over unacceptable conduct regulated market conduct more effectively through integrating litigation and investigation.\textsuperscript{282} Accordingly, the majority recommended that the Corporations Bill 1988 (Cth) be amended to give the ASC the power to make declarations in relation to unacceptable acquisitions or conduct, and that the CSP should instead have the role of reviewing the declaration and deciding upon any appropriate orders.\textsuperscript{283} In recommending against such a change, the dissenting members considered that the publicised referral of matters by the ASC to the CSP would have ‘an equivalent impact upon market operations’ as the NCSC’s powers had.\textsuperscript{284} The dissenting report also cited the ‘overwhelming weight of evidence’ given by the business community in support of the CSP’s new powers and its members’ ‘fundamental objection’ to a body being ‘both

\begin{itemize}
\item \textsuperscript{279} Explanatory Memorandum, Australian Securities Commission Bill 1988 (Cth) 110–11. This paragraph had the heading ‘Cl. 175: Certain functions and powers may be vested in Panel’, whereas cl 175 of the Bill as it was introduced into Parliament related to a Panel member’s term of office: at 110; Australian Securities Commission Bill 1988 (Cth) cl 175.
\item \textsuperscript{282} Ibid 163.
\item \textsuperscript{283} Ibid 163–4.
\item \textsuperscript{284} Ibid 219.
\end{itemize}
prosecutor and jury when other equally effective and convenient alternative mechanisms’ were available.285

Notwithstanding the majority view in the Edwards Report, the Corporations Law gave the CSP the power to make a declaration that unacceptable circumstances had occurred in relation to an acquisition of shares or as a result of conduct by a person in relation to a company’s shares or affairs.286 This power could only be enlivened on the ASC’s application, where it appeared to the ASC that such unacceptable circumstances had or may have occurred.287 As a general rule, the ASC was given 60 days after the acquisition or conduct to make its application, with the CSP having a further 30 days to make any declaration.288 Before making a declaration, the CSP was required to conduct an inquiry giving each person to whom the declaration related an opportunity to make submissions.289 The CSP was also required to be satisfied that it was in the public interest to make the declaration, having regard to the policy factors taken into account by the ASC in exercising its exemption and modification powers and any other matters considered relevant.290 Significantly, this meant that the CSP was required not only to have regard to the Eggleston principles, but also the desirability of acquisitions taking place in an ‘efficient, competitive and informed market’.291 Where the CSP made a declaration, it could make similar orders to those available to the Court under CASA, except for an order vesting shares in the regulator.292 The CSP also had the power to

286 Corporations Law s 733(3).
287 Ibid s 733(1).
288 Ibid ss 733(2), (4). This reflected the 90-day period previously given to the NCSC: see Statute Law (Miscellaneous Amendments) Act (No 1) 1982 (Cth) s 132.
289 Corporations Law s 733(5).
290 Ibid s 733(3). As in the case of court orders under CASA, the Panel could not make an order if it was satisfied that it would ‘unfairly prejudice any person’: at s 734(7).
291 Corporations Law s 731.
292 See Corporations Law s 734(2); Companies (Acquisition of Shares) Act 1980 (Cth) s 60(4). The list of possible CSP orders also included those that had been available to the NCSC under s 60A(1) of the latter Act.
make interim orders, and the ASC could apply for a court order where a person contravened a final order of the CSP. Similar to the current Panel, members of the CSP were appointed based on their professional experience in fields such as business, the administration of companies and law.

During the nearly 10 years of its operation, the CSP only made decisions in relation to four matters. The first matter led to an unsuccessful constitutional challenge in the High Court. This initial matter demonstrated that the CSP’s processes could be used to delay proceedings, undermining its intended role as a ‘peer review group body which would be able to come to quick decisions on matters relating to takeovers to ensure that participants in a takeover and affected shareholders were able to make decisions on the basis of full information’. In particular, the CSP’s structure and procedures were ‘found to be ineffective’ as its hearing powers did not dissuade ‘time wasting litigation between the parties’, natural justice requirements impeded ‘quick commercial decisions’, the CSP’s jurisdiction did not extend to conduct by target directors and it could not enforce undertakings by parties in its proceedings. Consequently, legislative amendments in 1995 allowed the CSP to adopt an ‘inquisitorial role’ by

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293 See Corporations Law ss 733A, 733B, 735(2)–(3). Sections 733A and 733B were inserted subsequently to make it clear that the CSP had the power to make such orders: Explanatory Memorandum, Corporations (Unlisted Property Trusts) Amendment Bill 1991 (Cth) 1, 3, 5–6.
294 Corporations Law s 736. The remedial orders available to the Court included the power to vest shares in the ASC: at s 613(1)(e).
295 The key difference was the addition of the field of ‘financial products and financial services’ in the later legislation: see Australian Securities and Investments Commission Act 1989 (Cth) s 172(4); Australian Securities and Investments Commission Act 2001 (Cth) s 172(4).
298 Explanatory Memorandum, Corporations Legislation Amendment Bill 1994 (Cth) 58.
299 Ibid.
conducting an expeditious inquiry on the facts based on written submissions, and avoid hearings involving ‘time consuming’ oral argument and witness evidence.\textsuperscript{300}

Similarly, the procedural fairness requirements applicable were clarified in the \textit{Australian Securities Commission Regulations 1990} (Cth) to ensure that the CSP was not bound by the rules of evidence, but was instead required to act ‘as fairly and reasonably’, ‘with as little formality, and in ‘as timely a manner’ as permitted by the regulatory requirements and a proper consideration of the matter.\textsuperscript{301} The Explanatory Memorandum accompanying the Bill implementing the 1995 changes made it clear that the CSP was not required to behave like a court and that it had a ‘wide discretion to control its processes’, including the number of witnesses called.\textsuperscript{302} However, the Bill’s attempt to remove the operation of the rules of natural justice was diluted during its passage through Parliament, with the substituted provision applying the rules of procedural fairness to the extent that they are not inconsistent with the legislation or regulations.\textsuperscript{303} There were also other reforms designed to allow the CSP to make ‘speedy commercial decisions’.\textsuperscript{304} These reforms included allowing the CSP to make enforceable undertakings, presuming that inquiries would be held in private, and

\footnotesize{\textsuperscript{300} Ibid 59. A key focus of the amendments was to replace references to the Panel conducting hearings, and instead focus on its inquiries: see \textit{Corporations Legislation Amendment Act 1994} (Cth) sch 4 pt 1.

\textsuperscript{301} See \textit{Australian Securities Commission Regulations 1990} (Cth) reg 16(2); \textit{Australian Securities Commission Act 1989} (Cth) s 195(1), as amended by \textit{Corporations Legislation Amendment Act 1994} (Cth) sch 4 pt 1 item 20.

\textsuperscript{302} Explanatory Memorandum, Corporations Legislation Amendment Bill 1994 (Cth) 64–5.


\textsuperscript{304} Explanatory Memorandum, Corporations Legislation Amendment Bill 1994 (Cth) 68, 69.}
removing a party’s previous entitlement to have a hearing, be represented by a legal adviser and to refer any question of law arising to the Court.\textsuperscript{305}

There were also a number of amendments to the definition of ‘unacceptable circumstances’ under the \textit{Corporations Law}. At the start, the CSP inherited the same bases for making a declaration as applied to the NCSC with only a few minor exceptions.\textsuperscript{306} That is, the existence of unacceptable circumstances was defined solely by reference to the Eggleston principles.\textsuperscript{307} The most significant difference under the \textit{Corporations Law} was the requirement that target shareholders and directors be supplied with ‘enough information’ to assess the proposal’s merits, instead of the CASA requirement of ‘sufficient information’.\textsuperscript{308}

In 1995, the jurisdiction of the CSP was expanded to allow it to make a declaration based on the equal opportunity principle due to the actions of target company directors, including where those directors’ actions caused or contributed to the acquisition not proceeding.\textsuperscript{309} This amendment was designed to capture defensive tactics defeating the ‘spirit’ of the takeover provisions, including ‘illegitimate spoiling action’, and ‘defensive or frustrative actions’ removing minority shareholders’ opportunity to

\textsuperscript{305} See \textit{Australian Securities Commission Act 1989} (Cth) ss 189(1), 191(2), 194, 196(1), 201A, as amended by \textit{Corporations Legislation Amendment Act 1994} (Cth) sch 4 pt 1 items 8, 11, 18–9, 21, 30; Explanatory Memorandum, Corporations Legislation Amendment Bill 1994 (Cth) 61–3, 67.

\textsuperscript{306} See \textit{Companies (Acquisition of Shares) Act 1980} (Cth) s 60(7).

\textsuperscript{307} \textit{Corporations Law} s 732 originally provided that unacceptable circumstances were taken to have occurred ‘if, and only if’ circumstances based on non-compliance with the Eggleston principles existed. However, unlike the NCSC, the CSP was required to take into account the criteria of an ‘efficient, competitive and informed market’: see \textit{Companies (Acquisition of Shares) Act 1980} (Cth) s 59; \textit{Corporations Law} s 731.

\textsuperscript{308} See \textit{Companies (Acquisition of Shares) Act 1980} (Cth) ss 60(1), (3); \textit{Corporations Law} s 732(1).

\textsuperscript{309} \textit{Corporations Law} s 732(2).
participate in the benefits of the takeover. Additional bases for a declaration were subsequently included as a result of the rewrite of the share buy-back and share capital provisions resulting from the Corporations Law Simplification Program. That is, to counterbalance reforms making it easier to undertake such transactions, the CSP was given the power to make a declaration relating to unacceptable circumstances where a buy-back, capital reduction or company’s acquisition of at least five per cent of its voting shares was unreasonable having regard to its effect on the control of any company. Further amendments to the CSP’s jurisdiction were proposed under the Simplification Program, but this Program was subsequently replaced by the Corporate Law Economic Reform Program (CLERP) following a change in Federal Government.

G CLERP Reforms (2000)

The Policy Framework Paper outlining the agenda for the CLERP reforms stated that the objective was to ‘promote business and market activity … by enhancing market efficiency and integrity and investor confidence’. Three of the key principles

310 Explanatory Memorandum, Corporations Legislation Amendment Bill 1994 (Cth) 68–9.
312 Corporations Law ss 732(1)(e)–(g). For a discussion of these provisions, see Re Village Roadshow Ltd (No 2) [2004] ATP 12 [41]–[47].
313 The Simplification Task Force proposed expanding the definition of unacceptable circumstances to include changes in control of a company, irrespective of whether there was an acquisition of a substantial interest: Corporations Law Simplification Task Force, Attorney-General’s Department (Cth), Takeovers: Proposal for Simplification (1996) 8. It also sought comments on the possible extension of the CSP’s jurisdiction concerning the conduct of target directors and whether any person with an interest in a takeover should be able to apply to the CSP: at 19–20.
314 Commonwealth Treasury, Corporate Law Economic Reform Program Policy Framework (1997) 1. Similar comments were made in the Second Reading Speech for the Corporate Law
underlying these reforms were market freedom (while recognising that business regulation can enhance market integrity and efficiency), investor protection and information transparency. Disclosure was considered to have a key role in promoting both efficiency and integrity in the market, by allowing rational investment decision-making and encouraging investment through increased confidence in the market. These principles were reinforced in the 1997 paper setting out the CLERP takeover reform proposals (‘CLERP 4 Paper’), which focused on the three themes of market efficiency and confidence, competition issues and reducing transaction costs.

First, in relation to market efficiency and confidence, the CLERP 4 Paper found that the requirements in the Eggleston principles to disclose sufficient information (including the bidder’s identity) and allow reasonable time to consider the proposal were needed to address informational imbalances between the bidder and target shareholders. It concluded that the costs of this disclosure were ‘clearly outweighed by the benefits of facilitating an efficient market and protecting investors’. Similarly, the CLERP 4 Paper found that ‘investor confidence [was] a crucial feature of [an] efficient financial market’. However, it was considered that investors (especially retail investors) would be less likely to buy shares if they may be disadvantaged if left as a minority after a change in control. Consequently, the CLERP 4 Paper found that the equal opportunity principle not only provided fairness, but also encouraged investor

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316 Ibid.
319 Ibid 10.
320 Ibid.
321 Ibid 11.
confidence by giving minority shareholders an opportunity to sell their shares to a buyer at the same price as the controlling shareholder.322

The CLERP 4 Paper also noted that the UK Code was similarly based on providing disclosure of relevant information and equal treatment for shareholders.323 Despite the potential costs of the equal opportunity principle,324 it was proposed that the principle be retained on the basis that it promoted investor and market confidence (with potential risks to our market’s reputation if it were to be removed), and that any costs could be offset by gains in other areas (such as the proposed introduction of the mandatory bid rule).325 Accordingly, it was found that, ‘[i]n the absence of strong evidence to the contrary, it would appear that the potential benefits of the [equal opportunity] principle exceed the potential costs’.326 Second, in order to promote competitive and regulatory neutrality, it was proposed that the takeover provisions apply to federal, state and territory governments and their business enterprises,327 that the provisions also apply to listed managed investment schemes,328 and that the scheme of arrangement provisions

322 As a result, any premium paid above the market price of the shares is shared amongst all shareholders: ibid.
323 Ibid 12. This was the jurisdiction that most closely resembled the approach in the Eggleston principles: at 12–13.
324 It was recognised that the equal opportunity principle could allow minority shareholders to ‘free-ride’ on the efforts of the controlling shareholders by allowing them to capture some of the premium paid for control of a large shareholding. This could have the result of either the same premium being distributed amongst all shareholders (resulting in a lower premium paid to all), or higher costs for the bidder if the price reflecting the value of the control parcel is paid to all shareholders (reducing its incentives to make a takeover and thus the corresponding impact on managerial behaviour): ibid 15.
325 Ibid 16.
326 Ibid.
327 Ibid 54–6.
328 Ibid 45–7. The CLERP 4 Paper also contained proposals to allow a simple majority of unit holders to be able to remove the managers of a listed managed investment scheme and approve acquisitions of the manager or the management rights for the scheme: at 47–50.
in pt 5.1 of the *Corporations Law* continue to be allowed as an alternative to the takeover provisions.³²⁹

Finally, the *CLERP 4 Paper* proposed three key reforms in order to reduce transaction costs, namely introducing a mandatory bid procedure, implementing new compulsory acquisition powers and expanding the role of the CSP.³³⁰ Comments were sought on whether a mandatory bid rule should be introduced to allow an acquisition to exceed the 20 per cent threshold provided it was immediately followed by the announcement of a mandatory takeover bid.³³¹ It was proposed that the mandatory bid be made for all of the outstanding shares, be at a price at least matching the highest price paid by the bidder in the preceding four months, include cash consideration as an alternative and not be subject to any conditions.³³² The mandatory bid proposal came with a significant potential cost, namely the ‘possible adverse impact on a competitive market for corporate control by reducing the opportunity for auctions for control’.³³³ However, the *CLERP 4 Paper* identified the potential benefits as including increasing certainty regarding bid outcomes, lowering bid costs and discouraging defensive behaviour by target directors.³³⁴ In relation to compulsory acquisition, the *CLERP 4 Paper* proposed two new powers to allow a person who has acquired overwhelming ownership of either a class of securities or all of the securities of the company to achieve 100 per cent control of that class or company.³³⁵ The primary policy goal was to facilitate the market

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³²⁹ Ibid 52–3.
³³⁰ Ibid 1–3.
³³¹ Ibid 19, 23.
³³³ Ibid 21.
³³⁴ Ibid 21–2.
³³⁵ Ibid 29–31. This was applied to a person who, either alone or with a related body corporate, had full beneficial interests in at least 90 per cent of the class of securities or, in the case of the whole company, of all of the securities in the company (by value) together with voting power of at least 90 per cent: see *Corporations Law* ss 664A(1)–(3).
efficiency gains arising from 100 per cent control, while at the same time providing shareholder protection through rules preventing acquisitions at an unfair value.\textsuperscript{336}

The CLERP reforms expanding the role of the CSP have been the most significant in terms of their impact on the operation of the takeover provisions. In essence, these reforms involved a reconstituted Panel replacing the courts as the ‘primary forum for resolving takeover disputes’ during a takeover bid, by allowing all interested parties to make applications to the Panel and limiting the involvement of the courts during that time.\textsuperscript{337} The UK was the key overseas jurisdiction cited in support of this approach.\textsuperscript{338} The advantages of ‘an effective panel for dispute resolution’ were considered to be:

- specialist expertise, with representation from industry as well as specialist lawyers;
- speed, informality and uniformity in decision making;
- the minimisation of tactical litigation; and
- the freeing up of court resources to attend to other priorities.\textsuperscript{339}

This approach was designed to avoid the tactical use of litigation to disrupt the bid, in light of concerns that courts may not be able to deal with the matter effectively in the time available.\textsuperscript{340} In contrast, the Panel was expected to ‘bring greater understanding and expertise to takeover disputes’ and to ‘be well placed to act with speed in every case

\textsuperscript{336} See Commonwealth Treasury, \textit{Corporate Law Economic Reform, Proposals for Reform, No 4, Takeovers – Corporate Control: A Better Environment for Productive Investment} (Canberra, 1997) 27–9; \textit{Corporations Law} s 664F (especially sub-s (3)).

\textsuperscript{337} Commonwealth Treasury, \textit{Corporate Law Economic Reform, Proposals for Reform, No 4, Takeovers – Corporate Control: A Better Environment for Productive Investment} (Canberra, 1997) 41. See also \textit{Corporations Law} ss 659AA–659C.


\textsuperscript{339} Ibid 32.

\textsuperscript{340} See ibid 35.
and to apply uniform standards’.

The CLERP 4 Paper also noted criticism of certain court decisions based on the view that ‘they set the standards of disclosure at an unrealistically high level’. However, the fact that litigation often highlighted inadequacies in bidders’ disclosure documents demonstrated that a dispute resolution mechanism was needed to ensure compliance with the law. The overall aim of the reforms was for the inevitable disputes in hostile bids ‘to be resolved as quickly and efficiently as possible’ to allow the outcome of the bid to be resolved by target shareholders ‘on the basis of its commercial merits’.

Except for the mandatory bid rule, the CLERP takeover reforms were implemented with the commencement of the CLERP Act on 13 March 2000. The CLERP Act also incorporated the rewriting of the takeover provisions that was undertaken as part of the Simplification Program, including addressing anomalies that had been identified by the Legal Committee of the Companies and Securities Advisory Committee in its 1994 report. Some of the more significant changes involved only applying the takeover

341 Ibid 37.
342 Ibid 36.
343 Ibid.
344 Ibid.
345 Although the mandatory bid rule was included in the Corporate Law Economic Reform Program Bill 1998 (Cth), it was abandoned by the Government as it was not supported by the non-government parties at the time (namely the Australian Labor Party and the Australian Democrats): see Commonwealth of Australia, Government Response to the Report of the Parliamentary Joint Committee on Corporations and Securities on the Mandatory Bid Rule (2000). The report was tabled in the Senate and the House of Representatives on 9 November 2000.
provisions to unlisted companies with more than 50 members, introducing a new concept of ‘voting power’ measured by the number of votes attached to voting shares rather than the number of those shares, and extending the maximum offer period from 6 to 12 months.

In addition, there was a raft of changes designed to harmonise the disclosure and liability regimes for the fundraising and takeover provisions, with regard had to ‘the desirability of avoiding the inclusion of information that would provide a basis for engaging in litigation with a view to frustrating a bid’. The new provisions placed a greater reliance on general disclosure tests, with the bidder’s statement offering securities as consideration required to contain the same material that would be included in a prospectus and the requirements for a target’s statement replacing the previous checklist with a general disclosure test based on the fundraising provisions. Civil liability arose from a bidder’s and target’s statement containing misleading or deceptive

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347 Corporations Law s 606(1)(a). Prior to the CLERP Act, the takeover provisions in the Corporations Law did not apply to companies with 15 members or less, or larger proprietary companies provided their members consented in writing to the provisions not applying: at s 619(1).

348 Corporations Law s 610. Cf Corporations Law ss 609, 615 (prior to the CLERP Act).

349 Corporations Law s 624(1). Cf Corporations Law s 638(3) (prior to the CLERP Act).

350 Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 49. The reforms also involved bringing the procedural rules for off-market bids (previously takeover schemes) and market bids (previously takeover announcements) into line where possible, including replacing the separate disclosure statements for each type of bid with a single bidder’s statement and target’s statement: see Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 46; Corporations Law ss 636(1), 638(1); Corporations Law s 750 (prior to the CLERP Act).

351 See Corporations Law ss 636(1)(g), 638(1), 710(1). For example, a target’s statement was required to contain information known to the target’s directors that shareholders and their professional advisors would reasonably require and expect to make an informed assessment concerning whether to accept the takeover offer: at s 638(1). Cf Corporations Law s 750 pts B, D (prior to the CLERP Act).
statements and omissions (including if a new circumstance arose subsequently),\textsuperscript{352} with criminal liability applied where such matters were material from the point of view of target shareholders.\textsuperscript{353} A supplementary bidder’s or target’s statement was also introduced to remedy such deficiencies.\textsuperscript{354} Defences to civil and criminal liability operated where the person did not know of the misleading or deceptive statement, omission or new circumstance, if they reasonably relied on a person other than their director, employee or agent, or if they withdrew their consent to the relevant statement.\textsuperscript{355}

The \textit{CLERP Act} also consolidated the purposes of the takeover provisions in ch 6 into one provision. Accordingly, s 602 of the \textit{Corporations Law} provided that:

The purposes of this Chapter are to ensure that:

(a) the \textit{acquisition of control} over:

(i) the voting shares in a listed company, or an unlisted company with more than 50 members; or

(ii) the voting shares in a listed body; or

\textsuperscript{352} \textit{Corporations Law} s 670A(1). Under s 670B, liability attached to the bidder or target and its directors for any such contraventions (subject to certain exceptions for directors not present or voting against the adoption of the statement): at s 670B(1) items 1–3, 6–7. Other persons were liable with their consent relating to the statement or if they were involved in the contravention: at s 670B(1) items 10–11.

\textsuperscript{353} Ibid s 670A(3).

\textsuperscript{354} See ibid ss 643–4; Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 50.

\textsuperscript{355} \textit{Corporations Law} s 670D. To prevent these defences being sidestepped through the use of the general misleading and deceptive conduct provisions in s 995 of the \textit{Corporations Law}, s 12DA of the \textit{Australian Securities and Investments Commission Act 1989} (Cth) and s 52 of the \textit{Trade Practices Act 1974} (Cth), the operation of these provisions was excluded in relation to takeover documents contravening s 670A: see \textit{Corporations Law} s 995(2A)(a); \textit{Australian Securities and Investments Commission Act 1989} (Cth) s 12DA(1A).
(iii) the voting interests in a listed managed investment scheme;

*takes place in an efficient, competitive and informed market*; and

(b) the holders of the shares or interests, and the directors of the company or body or the responsible entity for the scheme:

(i) *know the identity of any person who proposes to acquire a substantial interest* in the company, body or scheme; and

(ii) *have a reasonable time* to consider the proposal; and

(iii) *are given enough information* to enable them to assess the merits of the proposal; and

(c) as far as practicable, the holders of the relevant class of voting shares or interests all have a *reasonable and equal opportunity to participate in any benefits accruing to the holders* through any proposal under which a person would acquire a substantial interest in the company, body or scheme; and

(d) an *appropriate procedure is followed as a preliminary to compulsory acquisition* of voting shares or interests or any other kind of securities under Part 6A.1.356

This was the first time that the Masel principle of an ‘efficient, competitive and informed market’ was given equal prominence to the Eggleston principles as an overarching goal of the takeover provisions. The basis upon which the Panel could make a declaration of unacceptable circumstances was also expanded beyond the previous list of the Eggleston principles and unreasonable share capital transactions.357 Instead, the power to make a declaration was enlivened if it appeared 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

356 *Corporations Law* s 602 (emphasis added). This is the same wording as in the current version of s 602 in the *Corporations Act 2001* (Cth).

357 Cf *Corporations Law* s 732(1) (prior to the *CLERP Act*).
(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 [ch 6] or of Chapter 6A, 6B or 6C. 358

The Panel was given broad powers to make remedial orders similar to a court, in order to protect the interests of persons affected by the circumstances and ensure the proposed takeover proceeded as far as possible in a way that it would have had the unacceptable circumstances not occurred. 359 In order to avoid parties commencing litigation in order to defeat the purposes of the Panel reforms, a privative clause was inserted to delay court proceedings in relation to a takeover bid until after the end of the bid period. 360 Similarly, the Court’s powers under the Corporations Law were in essence limited to determining liability and ordering payment compensation, so that the transaction could not be unwound where the Panel had refused to make a declaration. 361 In order to

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358 *Corporations Law* s 657A(2).

359 This was subject to the exception that it could not direct a person to comply with the law: ibid s 657D(2). The exception was required in order to avoid the Panel exercising judicial power contrary to ch III of the *Australian Constitution*: see, eg, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *A-G (Cth) v Breckler* (1999) 197 CLR 83. This was also the reason why the legislation relied on court enforcement of Panel orders: see *Corporations Law* s 657G.

360 This was subject to an exception for government authorities and the corporate law regulator, which was renamed the Australian Securities and Investments Commission on 1 July 1998: see *Corporations Law* s 659B; *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth) sch 1 cls 7–8. It was recognised that this did not affect the jurisdiction of the High Court under s 75 of the *Australian Constitution*: see *Corporations Act 1989* (Cth) s 59A(4); *Corporations Act 2001* (Cth) s 659B(5). This is because the High Court’s jurisdiction under s 75 is constitutionally entrenched: see, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; Bruce Dyer, ‘Intersections Between Corporate Law and Administrative Law’ in Judith S Jones and John McMillan (eds), *Public Law Intersections: Papers Presented at the Public Law Weekend – 2000 & 2001* (Centre for International and Public Law, 2003) 19, 29–30.

361 *Corporations Law* s 659C.
minimise tactical litigation, challenges to ASIC decisions in relation to takeovers were also excluded from review by the Administrative Appeals Tribunal (‘AAT’). The Panel was instead given the jurisdiction to review ASIC takeover exemption and modification decisions.

H Post-CLERP Developments

There were two important legislative developments in 2001. First, Australia was finally given a single national regulatory regime for corporate and securities law on 15 July with the commencement of the Corporations Act. However, this did not involve any substantive policy changes to the law. Second, the name of the Panel was changed from the CSP to the Takeovers Panel on 27 September, to more accurately reflect the

362 See ibid s 1317C(ga)–(gc); Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 39.

363 This applied to decisions relating to substantial holding and beneficial ownership information during a takeover bid and relating to the takeover provisions generally: see Corporations Law s 656A. However, the provision enabling internal Panel reviews (which was inserted during the passage of the Corporate Law Economic Reform Program Bill 1998 (Cth) through Parliament) only applied to Panel decisions relating to unacceptable circumstances: see, eg, Corporations Law s 657EA; Supplementary Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 8–9; Michael Hoyle, ‘An Overview of the Role, Functions and Powers of the Takeovers Panel’ in Ian Ramsay (ed), The Takeovers Panel and Takeovers Regulation in Australia (Melbourne University Press, 2010) 39, 67–8.

364 This was enabled by the states referring to the Commonwealth the power to enact and amend the Corporations Act 2001 (Cth) and Australian Securities and Investments Commission Act 2001 (Cth), in response to High Court decisions undermining the constitutional foundations of the Corporations Law scheme: see Explanatory Memorandum, Corporations Bill 2001 (Cth) 7–8.

365 See Explanatory Memorandum, Corporations Bill 2001 (Cth) 5; Explanatory Memorandum, Australian Securities and Investments Commission Bill 2001 (Cth) 5.
Panel’s role. The next significant changes to the legislation occurred in 2007, in light of the first judicial review proceedings affecting Panel decisions following the CLERP reforms (‘Glencore cases’). The Glencore cases invalidated the Panel’s declarations and orders, and generated substantial concerns that the Panel’s jurisdiction had been interpreted too narrowly for it to perform its role effectively.

Accordingly, a number of legislative changes were made in 2007 to remove many of the limitations placed on the Panel’s decision-making in the Glencore cases. There were three key amendments to the Panel’s power to make a declaration of unacceptable circumstances in s 657A of the Corporations Act. First, the precondition to this power in s 657A(2)(a) was amended to make it clear that it is the role of the Panel to satisfy itself as to the effect or likely effect of the relevant circumstances. Second, a new paragraph (b) was inserted in s 657A(2) to provide an additional basis upon which the Panel can make a declaration. Significantly, the new s 657A(2)(b) empowers the Panel to make a declaration if it appears to the Panel that the circumstances ‘are otherwise unacceptable … having regard to the purposes of [ch 6] set out in section 602’. Finally, the old s 657A(2)(b) became s 657A(2)(c) and now includes references to both the past and future tense in relation to the circumstances constituting or giving rise to a

366 See Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) 193; Financial Services Reform Act 2001 (Cth) s 3, sch 3 items 1–4; Takeovers Panel, ‘New Name for the Takeovers Panel’ (Media Release, TP01/087, 11 October 2001).
369 See Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 1–2.
370 See Corporations Amendment (Takeovers) Act 2007 (Cth) sch 1 items 3–4; Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 1–2.
371 A new definition of ‘substantial interest’ was also inserted at this time: see Corporations Act 2001 (Cth) s 602A.
372 Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 5.
373 See also ibid.
contravention of the relevant provisions of the *Corporations Act*. In addition, the Panel’s power to make orders in s 657D(2)(a) was transformed to allow an ‘en globo’ (or collective) assessment of loss if the Panel is satisfied that the rights of ‘a group of persons’ have been affected. This section was also amended to allow the Panel to protect any rights or interests of affected persons and not just those affected by the relevant circumstances.

In a crucial test for the CLERP reforms, the Panel survived a constitutional challenge in *Attorney-General (Cth) v Alinta Ltd* (‘Alinta’). The High Court in *Alinta* reversed a Full Federal Court decision, which had prevented the Panel from exercising its power to make a declaration of unacceptable circumstances based upon a contravention of the *Corporations Act* for eight months. This uncertainty was removed by the High Court in December 2007, when it published its unanimous orders in support of the constitutional validity of the Panel. The reasons of Kirby J in *Alinta* provided the following endorsement of the Panel’s new role:

> it was open to the Federal Parliament to conclude that the nature of takeovers disputes was such that they required, ordinarily, prompt resolution by decision-makers who enjoyed substantial commercial experience and could look not only at the letter of the Act but also at its spirit, and reach outcomes according to

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374 See ibid 5–6.


376 See Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 6.

377 (2008) 233 CLR 542. The High Court had previously confirmed the constitutionality of the CSP in *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 190–2 (The Court).


considerations of practicality, policy, economic impact, commercial and market factors and the public interest.\textsuperscript{380}

III THEMES AND TENSIONS

This Part evaluates the significant themes and tensions underpinning the development of Australian takeover regulation. The first section analyses the principles underlying the legislation, which involve the occasionally diverging aims of promoting efficiency in the market for corporate control and providing shareholder protection. Second, developments in the regulatory approach are examined, with a particular focus on the tension between providing certainty through the use of legislative provisions and the increasing use of regulatory discretions. The final section analyses these earlier themes in the context of takeover dispute resolution. In particular, this section examines the factors leading to the shift from a court-based approach to decision-making by a non-judicial Panel.

A Policy Goals

The above analysis of the historical development of Australian takeover legislation demonstrates clearly that there are two main goals underlying the provisions, namely promoting the efficiency of the market for corporate control and providing shareholder protection. Investor protection was a key reason for the introduction of the original \textit{UCA} provisions, although there was also concern that commercial operations were not ‘unduly’ hampered.\textsuperscript{381} Although market efficiency was not an explicit goal, the \textit{UCA} provisions were also designed to improve the effectiveness of disclosure.\textsuperscript{382} The \textit{Eggleston Report} had a similar emphasis on shareholder protection, with the Committee

\textsuperscript{380} Ibid 562.

\textsuperscript{381} New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 16 November 1961, 2591 (Norman Mannix).

\textsuperscript{382} See above Section A in Part II of this Chapter.
tasked with examining the extent to which the UCA provided protection to investors and recommending any necessary improvements.\(^{383}\)

As a result, it is not surprising that the Eggleston principles that have since become the cornerstone of the takeover provisions focus on shareholder protection. However, the efficiency of both the capital market and the market for corporate control has been given an increasing emphasis in the legislation and related materials over time. This process started in 1974, with the Rae Report recognising improving capital market performance as a counterpart to investor protection in its twin policy objectives for companies and securities regulation.\(^{384}\) Similarly, the Second Reading Speech for CASA in 1980 considered that the new takeover code would provide appropriate shareholder protection, while facilitating investor confidence and an informed and efficient securities market.\(^{385}\)

CASA introduced the first takeover provisions that included statements of the principles underlying the law. Of these, the Eggleston principles were given greater emphasis, as they formed the sole basis upon which the NCSC could exercise its new power to declare acquisitions or conduct to be unacceptable. CASA also introduced the Masel principle, which set out the legislative aim of ‘ensuring that the acquisition of shares in companies takes place in an efficient, competitive and informed market’.\(^{386}\) However, this was only included as a factor that the NCSC needed to take into account, in addition to the Eggleston principles, when making its exemption and modification decisions. The

\(^{383}\) See above Section B in Part II of this Chapter.

\(^{384}\) See above Section D in Part II of this Chapter.

\(^{385}\) See Commonwealth, Parliamentary Debates, House of Representatives, 2 April 1980, 1635 (Ransley Garland). See also the Formal Agreement between the Commonwealth, the states and the Northern Territory made on 22 December 1978 underpinning the regulatory regime: National Companies and Securities Commission Act 1979 (Cth) s 3(1) (definition of ‘agreement’) sch 1 recital A. This is also consistent with the explanatory material accompanying the legislation implementing the Corporations Law: see above Section F in Part II of this Chapter.

\(^{386}\) Companies (Acquisition of Shares) Act 1980 (Cth) s 59.
rewriting of the takeover legislation in 2000 with the CLERP reforms finally placed the Masel principle on an equal footing with the Eggleston principles.\textsuperscript{387}

Given the importance of the Masel principle, it is unfortunate that the intended meaning of this phrase was not clearly set out in the materials accompanying the legislation when it was introduced in 1981.\textsuperscript{388} Instead, the Explanatory Memorandum only restated the Masel and Eggleston principles that the NCSC was required to take into account in exercising its exemption and modification powers, and noted at the end that the provision was ‘based on the general principles set out in the report of the Eggleston Committee’.\textsuperscript{389} Although discussing the equal opportunity principle, the CSLRC commented in 1985 that ‘in the light of the frequent calls for takeover legislation to be observed in accordance with its spirit and intent as well as detailed rules, it would be highly desirable for the fundamental purposes of the legislation to be specified clearly as a guide to interpretation’.\textsuperscript{390} However, there is little commentary on the meaning of an ‘efficient, competitive and informed market’ in the context of acquisitions of control.\textsuperscript{391} One of the inaugural Commissioners of the NCSC has noted that the

\textsuperscript{387} See above Section G in Part II of this Chapter.

\textsuperscript{388} On the other hand, this gives both ASIC and the Panel flexibility in applying s 602 in the exercise of their discretionary powers: see \textit{Corporations Act 2001} (Cth) ss 655A(2), 657A(3)(a)(i).


introduction of the Masel principle signalled a ‘change from the purely equity lawyers’ approach’ that characterised the Eggleston principles,\(^{392}\) to the ‘economic analysis of law which has since become fashionable’.\(^{393}\)

Based on economic principles, an efficient market is one in which prices ‘fully reflect’ all available information.\(^{394}\) This can be applied to the market for corporate control, which involves the buying and selling of shares in the context of a takeover. The _CLERP 4 Paper_ concluded that an efficient market relies on the interconnected elements of competition and information.\(^{395}\) In a takeover, competition is considered to promote ‘the efficient allocation of capital by providing an opportunity for the bidder offering the highest price for the company’s shares to acquire its assets’.\(^{396}\) Similarly, it was concluded that an efficient market relies on the ability of investors to make

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393 Ibid 310.


395 For the purposes of this analysis, it was assumed that information was ‘freely available and costless’: Commonwealth Treasury, _Corporate Law Economic Reform, Proposals for Reform, No 4, Takeovers – Corporate Control: A Better Environment for Productive Investment_ (Canberra, 1997) 8. However, tensions exist between these principles as the costs of information can also be viewed as impeding a competitive market: see, eg, Rebecca Langley, ‘Information Access Denied … Is the Australian Takeovers Market Really “Efficient, Competitive and Informed”?’ (2009) 27 _Company and Securities Law Journal_ 344, 352.

informed decisions.\textsuperscript{397} Of the three limbs of the Masel principle, the requirement to have an ‘informed market’ is the easiest to apply and is consistent with the disclosure elements of the Eggleston principles.\textsuperscript{398} The \textit{CLERP 4 Paper} indicates that a ‘competitive market’ is intended to involve an auction to allow the bidder paying the best price to succeed, although this principle would not appear to be immutable given the proposal to remove an auction in certain circumstances for the purposes of the (subsequently abandoned) mandatory bid rule.\textsuperscript{399} Although it is referred to in many Panel decisions,\textsuperscript{400} there is little guidance on how the ‘efficient market’ limb might be applied on its own in the takeover context.\textsuperscript{401} Instead, general reference is often made to the ‘efficient, competitive and informed market’ without analysing its separate limbs.\textsuperscript{402} As a result, some commentators have argued that the Masel principle has not been applied correctly in certain Panel decisions.\textsuperscript{403}

\textsuperscript{397} Ibid.
\textsuperscript{398} For examples of the application of this limb, see Takeovers Panel, \textit{Guidance Note 1 – Unacceptable Circumstances} (21 September 2010) 9–10 (Examples 1–2, 4–5, 7, 9–10).
\textsuperscript{399} See above Section G in Part II of this Chapter. For examples of the application of this limb, see Takeovers Panel, \textit{Guidance Note 1 – Unacceptable Circumstances} (21 September 2010) 9–10 (Examples 3, 12); Takeovers Panel, \textit{Guidance Note 7 – Lock-up Devices} (11 February 2010) 3, 7.
\textsuperscript{401} Of the examples of possible unacceptable conduct based on the Masel principle in \textit{Guidance Note 1}, the only example that could perhaps be attributed to an ‘efficient market’ is the ‘failure to issue consideration securities’: see Takeovers Panel, \textit{Guidance Note 1 – Unacceptable Circumstances} (21 September 2010) 10 (Example 6). However, the Panel decision cited in relation to this issue only refers once to an ‘efficient, competitive and informed market’: see \textit{Re Colonial First State Property Trusts Group (No 3)} [2002] ATP 17 [25].
While the meaning of the Eggleston principles was set out more clearly than the Masel principle at the outset given their greater level of specificity, the reach of some of those principles has changed over time. The first three Eggleston principles relate to disclosure and require the proposed acquirer of a substantial interest to disclose their identity, give reasonable time for consideration of the proposal and provide enough information for its merits to be assessed (‘disclosure principles’).\(^{404}\) Although the last two of these disclosure principles were implicit in the takeover provisions that were originally enacted in the \textit{UCA}, the first disclosure principle was implemented later in the 1971 amendments responding to the \textit{Eggleston Report}. Since then, the disclosure principles have essentially remained the same, and the important role that they play in takeover regulation has not been called in question. In contrast, the remaining Eggleston principle (which requires target shareholders to have a reasonable and equal opportunity to participate in the benefits arising from a proposed acquisition of a substantial interest) has had an increasing impact since its inception. It has also withstood numerous calls for its removal,\(^ {405}\) and survived review in both the \textit{Lavarch Report} and CLERP reforms.\(^ {406}\) However, a proposal to add to the principle by vesting a proportion of the control premium in each voting share did not receive sufficient support.\(^ {407}\)

At the outset in 1969, the Eggleston principles were prefaced with the statement that these limitations should apply if a person ‘wishes to acquire control of a company by

\footnotesize{\(^{404}\) \textit{Corporations Act} 2001 (Cth) s 602(b).


\(^{406}\) See above Sections F and G in Part II of this Chapter.

making a general offer’ to acquire all of a company’s shares or a proportion sufficient to exercise voting control.\textsuperscript{408} This is consistent with the Eggleston Committee’s view that on-market transactions should remain outside the reach of the takeover provisions given the importance of market freedom, which was reflected in a specific exclusion for on-market transactions in the 1971 amendments following the \textit{Eggleston Report}.\textsuperscript{409} These demonstrate the Eggleston Committee’s conception of the equal opportunity principle did not extend to requiring all target shareholders to receive a takeover offer at the same price. As a result, the key requirement at that time was to comply with the \textit{UCA} disclosure requirements. These disclosure requirements applied when making offers for either a full bid, or a partial bid if it would result in the bidder and any related corporations being able to control the exercise of at least one-third of the voting power of the target.

\textit{CASA} transformed the takeover provisions in 1981 by prohibiting all acquisitions beyond a 20 per cent threshold, and requiring takeover offers to be made to all shareholders unless another exemption was available. This entrenched the position of the equal opportunity principle in the takeover regulatory regime, and was supplemented by provisions requiring target shareholders to receive equivalent consideration compared both to each other and transactions within a four month period beforehand.\textsuperscript{410} In 1995, the application of the equal opportunity principle was expanded to allow the CSP to make declarations relating to unacceptable circumstances based on target directors’ actions that contributed to a takeover offer not proceeding. This reinforced the modern interpretation of the principle as providing an opportunity for all shareholders to participate in the benefits under a proposed takeover offer.


\textsuperscript{409} See above Section C in Part II of this Chapter.

\textsuperscript{410} See, eg, \textit{Companies (Acquisition of Shares) Act 1980} (Cth) ss 16(2)(b), (g), 17(2), (6).
One of the significant challenges for takeover regulation is the ‘sometimes conflicting’ nature of the objectives of market efficiency and shareholder protection.\textsuperscript{411} The tension underlying these two aims was explicitly recognised in an introductory document released under the Corporate Law Economic Reform Program (‘CLERP’). This document included the following in the action plan for takeovers: ‘determining how regulation can best achieve an appropriate balance between facilitating efficient management and control of organisations while ensuring that shareholders are adequately protected’.\textsuperscript{412} Similarly, the \textit{CLERP 4 Paper} stated that the proposed reforms sought ‘to remove regulatory impediments to an efficient market for corporate control subject to ensuring a sound investor protection regime’.\textsuperscript{413} On the one hand, both objectives are satisfied by disclosure requirements that result in both an ‘informed market’ from a market efficiency perspective and provide investor protection by allowing target shareholders to make informed decisions.\textsuperscript{414} The \textit{CLERP 4 Paper} also argued that providing shareholder protection improved investor confidence, with the latter ‘attracting the capital necessary for ensuring the liquidity required for an efficient capital market’.\textsuperscript{415}

On the other hand, there is a fundamental concern that the costs imposed by the regulatory regime provide disincentives for takeovers, and consequently affect the market for corporate control by undermining the incentives for management to improve their performance. This particularly applies to the costs of making a takeover offer to all shareholders arising from the equal opportunity principle. However, the above historical


\textsuperscript{413} Commonwealth Treasury, \textit{Corporate Law Economic Reform, Proposals for Reform, No 4, Takeovers – Corporate Control: A Better Environment for Productive Investment} (Canberra, 1997) 5.

\textsuperscript{414} \textit{Corporations Act 2001} (Cth) ss 602(a)–(b).

analysis suggests that, although the equal opportunity principle would appear to be on less secure foundations, the Eggleston principles are now embedded in the Australian takeover regulatory framework. As a result, the focus of recent suggestions for reform has been to reduce transaction costs flowing from the operation of the legislation, rather than implementing wholesale reform of the provisions.\(^\text{416}\) Given this, it could be argued that the CSLRC was prescient in its observation in 1985 that ‘[u]ltimately considerations of equity or fairness must have priority over those of mere price efficiency if there were an irreconcilable conflict between the two’.\(^\text{417}\)

The apparent primacy of the principles of shareholder protection over those relating to market efficiency is reflected in the development of the takeover provisions. In light of their concern to avoid significant shareholder losses, legislators have continued to add layers of regulation to ensure that investors are properly protected. Reviews of the legislation by Parliamentary Committees and other bodies have similarly focused on whether the law achieves this purpose. This is evident even in the context of the most recent proposals under CLERP, which was specifically designed to focus on economic principles. However, the legislature has also elevated the market efficiency goals in the Masel principle so that they are now on equal footing with the investor protection aims of the Eggleston principles. It remains for ASIC and the Panel to reconcile any conflict in the application of these purposes underlying the takeover provisions in their decision-making.

**B Regulatory Approach**

This section analyses the drivers for and implications of the increased use of regulatory discretions in Australian takeover regulation. One of the key factors has been the inability of the legislation to account for every situation, notwithstanding the fact that it


has become more detailed over time. In the first 20 years following the introduction of takeover legislation in Australia, there was exponential growth in the size and complexity of the provisions. Initially starting at 15 pages of NSW legislation in 1961, the takeover provisions grew to 58 pages following the 1971 amendments resulting from the *Eggleston Report*. Although it is difficult to draw exact comparisons given differences in pagination with the federal legislation in CASA, the new code was roughly three times the size of the state legislation that came before it. At each stage of amendment, the materials accompanying the legislation recognised its increasing complexity, but considered this necessary to combat the use of loopholes that continued to emerge following each amendment. Indeed, the inevitability of new loopholes arising was emphasised in the *Eggleston Report*.418

The CASA provisions implemented a number of significant changes that could be viewed as an attempt to break the previous cycle of successive legislative amendments following the creation of loopholes. First, CASA strengthened the regulatory position by applying a general prohibition on acquisitions beyond the 20 per cent threshold, and placing the onus on parties to come within the exceptions. Second, the legislation relied on two new regulatory discretions, namely the NCSC’s powers to exempt persons from the legislation and/or modify its operation, and to declare acquisitions or conduct to be unacceptable.419 Importantly, the discretions were founded upon ensuring compliance with the purposes of the legislation, namely the Eggleston and Masel principles.420 Although these discretionary powers are now split between ASIC and the Panel respectively, each of these essential features originating from CASA are replicated in the current legislation.421

419 *Companies (Acquisition of Shares) Act 1980* (Cth) ss 59–60.
420 However, the Masel principle only applied in the context of the NCSC’s exemption and modification powers: see above Section E (under the heading ‘2 Legislative Framework’) in Part II of this Chapter.
421 See *Corporations Act 2001* (Cth) ss 606, 655A, 657A.
necessary to establish mechanisms that allow conflicts to be resolved by other decision-makers.428

ASIC and the Panel currently have significant discretion over the way that the takeover legislation operates in practice. In particular, ASIC’s ability to rewrite the legislation, typically done for classes of persons (in ‘class orders’), gives it an unusual legislative role.429 For example, ASIC has made numerous class orders responding to anomalies in the legislation arising since it was rewritten in the CLERP Act, which have been addressed by ASIC instead of the Parliament.430 Both ASIC and the Panel make their decisions in the context of the tension between the Masel and Eggleston principles.

There is also uncertainty concerning the meaning of the key concept of a ‘substantial interest’.431 This term determines both when the Eggleston principles apply and the Panel’s jurisdiction to make a declaration of unacceptable circumstances applies based on the effect of certain acquisitions.432 A definition of ‘substantial interest’ was first inserted into the legislation in s 602A by the 2007 amendments resulting from the Glencore cases.433 However, s 602A merely refutes the court’s interpretation of this term, which had required it to involve a ‘relevant interest’ under the legislation, or an

431 Corporations Act 2001 (Cth) s 602A.
432 Ibid ss 602(b), 657A(2)(a)(ii).
433 Ibid s 602A.
interest in or right in relation to voting shares. As a result, the provision does not provide any guidance as to what would be sufficient to establish a substantial interest, but instead provides the Panel with the flexibility to determine if an interest meets this threshold. The Explanatory Memorandum accompanying the 2007 amendments emphasised that the new definition was intended to ‘ensure that the term “substantial interest” is broad enough to encompass new and evolving instruments and developments in takeovers and to deter avoidance of the purposes of the takeovers law.’

The increasing use of regulatory discretions in takeover regulation over time raises tensions between allowing flexibility in the operation of the provisions and providing certainty for business. Consistent with the above analysis, general principles and propositions can be used to avoid the difficulty that regulation can become too complex if it needs to account for every situation. However, the effective use of such principles relies on a clear statement of the purpose of the legislation. In addition, the uncertainty arising from the use of such discretions can itself create problems. This is reflected in the following concerns raised by Ron Brierley about the system introduced in CASA:

We’ve got 150 pages of the most complex legislation to work with, but whatever we come up with out of that, the NCSC can still say it is unacceptable. You might as well have a one-line Act saying that whatever the NCSC thinks is right is what applies.

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435 Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 5.
436 This can also lead to ‘over-regulation’ and further amendments in light of litigation on technical points: see above Section E (under the heading ‘3 Subsequent Amendments’) in Part II of this Chapter.
438 *Australian Financial Review*, 4 August 1981, 60, cited in Quentin Digby, ‘The Principal Discretionary Powers of the National Companies and Securities Commission under the
These concerns reflect the increasing complexity of the takeover legislation as a result of the amendments since it was first introduced in 1961. This has resulted primarily from the legislators’ attempts to close up loopholes in order to provide shareholder protection. Although it could be argued that the introduction of the regulatory discretions in CASA has arrested the expansion of the takeover legislation, this has also led to the need for the regulators to issue numerous regulatory guides and guidance notes. However, it is important that ASIC and the Panel provide guidance on how they will exercise their discretions in order to minimise uncertainty. The rewriting of the takeover legislation with the implementation of the CLERP reforms similarly removed many of the difficulties with the drafting of the provisions, but also led to a new set of anomalies. This history demonstrates that Parliament cannot legislate effectively to deal with all situations, particularly in light of market innovations, and that other mechanisms are needed. The challenge will continue to be to achieve an appropriate balance between flexibility and clarity in the application of the regulatory discretions under the takeover provisions.


C \textit{Dispute Resolution}

This section evaluates the rationales for the transformation of the Australian system of takeover dispute resolution from one based on court decisions to the current Panel regime. Legislators did not start debating the appropriate body to decide takeover disputes until after many years’ experience with the operation of the takeover provisions. The question whether Australia should have a body modelled on the UK Panel was first considered by federal parliamentary members in the \textit{Rae Report} in 1974. This was rejected primarily on the basis that such a body was not appropriate to be the general securities market regulator, although it was recognised that such self-regulatory bodies could play a useful complementary role to a government regulator.\textsuperscript{442} The Ministerial Council for Companies and Securities, comprising the responsible federal and state Ministers, also decided against the introduction of a takeovers panel in meetings in 1979.\textsuperscript{443}

There was further debate on this issue in the Federal Parliament in response to the 1983 amendments to \textit{CASA}, where an Opposition Member pointed out a number of deficiencies with the court-based system compared to the UK Panel and suggested that a non-judicial body be used in the area of takeovers. Despite acknowledging merit in these comments, the Government instead relied upon the \textit{Rae Report}’s conclusion on the UK Panel and highlighted the introduction of a provision allowing the courts to interpret \textit{CASA} having regard to its purpose.\textsuperscript{444} The establishment of the CSP in 1991 to decide matters involving unacceptable circumstances (in addition to court enforcement of the \textit{Corporations Law}) provided an important first step, as it transferred the power to decide such matters from the government regulator to a peer-review body. This

\textsuperscript{442} See above Section D in Part II of this Chapter.


\textsuperscript{444} See above Section E (under the heading ‘3 Subsequent Amendments’) in Part II of this Chapter.
provided the foundation upon which the jurisdiction of the Panel was expanded to replace the role of the courts under the CLERP Act in 2000.

To a large extent, the arguments set out in the CLERP 4 Paper for having the Panel decide takeover matters instead of the courts echo earlier concerns raised in relation to the previous court-based system. The key rationales given for the CLERP Panel reforms related to the advantages of its approach to decision-making (namely ‘speed, informality and uniformity’) and minimising tactical litigation.\footnote{Commonwealth Treasury, \textit{Corporate Law Economic Reform, Proposals for Reform, No 4, Takeovers – Corporate Control: A Better Environment for Productive Investment} (Canberra, 1997) 32.} Speed has been used consistently as a justification for decision-making by a panel instead of a court, being referred to both prior to the existence of the CSP and as one of the main reasons for legislative amendments to its processes in 1995.\footnote{See above Sections E (under the heading ‘3 Subsequent Amendments’) and F in Part II of this Chapter.} While the meaning of ‘informality’ in decision-making is not explained in the CLERP 4 Paper, it could be argued that this is used in contrast to the formality of decision-making by a court. There are a number of features of the Panel that relate to this criterion, each of which could be viewed as reflecting its ability to adopt a ‘commercial approach’.\footnote{See, eg, Commonwealth, Parliamentary Debates, House of Representatives, 30 November 1983, 3041 (Lionel Bowen, Minister for Trade).} It is clear that the informality criterion relates to the Panel’s use of informal procedures.\footnote{The CLERP 4 Paper notes the desirability of Panel proceedings being conducted ‘as informally as is consistent with providing parties with a fair hearing and the expeditious resolution of the matter’: Commonwealth Treasury, \textit{Corporate Law Economic Reform, Proposals for Reform, No 4, Takeovers – Corporate Control: A Better Environment for Productive Investment} (Canberra, 1997) 39–40.}

Three other key features of the Panel may be drawn from the CLERP 4 Paper and the earlier debate on this issue. First, it could be expected that a commercial approach would flow from the specialist expertise of Panel members, given their professional
experience in fields such as business, the administration of companies and law. Second, the Panel makes its decisions based on the ‘spirit’ as well as the letter of the law, with the application of the principles underlying the takeover provisions allowing greater flexibility in outcomes. Third, as a result, it could be argued that the Panel should adopt an approach that is less technical, and avoids ‘excessive’ legalism in proceedings. This is in contrast to concerns raised in the CLERP 4 Paper that court decisions had set disclosure standards ‘at an unrealistically high level’. High Court judges have also observed that courts are ‘ill-adapted’ to making decisions based on policy considerations. The concepts of speed and informality discussed above form the essence of the characteristics of the Panel identified by Kirby J in the High Court’s 2008 decision in Alinta.

In contrast, the issue of uniformity in takeover decision-making did not feature explicitly in the debate prior to the CLERP reforms. It was considered in the CLERP 4 Paper that ‘the different approaches taken by different judges can encourage tactical litigation which might not be profitable before a tribunal applying a single standard’. On the other hand, it was proposed that an appeal division of the Panel would ‘provide

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449 See ibid 32; Australian Securities and Investments Commission Act 2001 (Cth) s 172(4).
451 Ibid 38.
452 Ibid 40.
453 Ibid 36.
appropriate protection against erroneous decisions and facilitate uniform standards’.\(^{457}\) This recognises the possibility of some degree of non-uniformity in Panel decision-making. Finally, the minimisation of tactical litigation has also become more of a legislative focus since the implementation of the CSP. This is explicable perhaps on the basis that, prior to that time, it was expected that litigation was a necessary part of ensuring that both takeovers and the regulators proceeded in a way that was consistent with the takeover provisions.\(^{458}\) Consequently, it was not until ‘time wasting litigation’ started to undermine the operation of the CSP that it became a concern for the legislature.\(^{459}\) The concern at that time, later echoed in the CLERP reforms, was to allow the Panel to make decisions so that target shareholders could decide whether to accept the takeover on an informed basis.\(^{460}\) This was expanded upon in the *CLERP 4 Paper* to include the ability to free up courts for other matters.\(^{461}\)

Takeover dispute resolution has evolved significantly since the introduction of the legislation in 1961. As discussed above, the key motivations for change have been the desire to improve the speed of decision-making and to adopt a more commercial approach. In this respect, the UK Panel that was established in 1968 has been considered to be an effective role model.\(^{462}\) However, a non-judicial decision maker was initially rejected in the 1970s, partly based on concerns that the UK approach would not

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\(^{457}\) Ibid 40. The concept of an appeal division was replaced with a Review Panel comprising three different members to the Panel originally making the decision, with the Review Panel undertaking administrative review by remaking the decision: see *Corporations Act 2001* (Cth) s 657EA; *Australian Securities and Investments Commission Act 2001* (Cth) s 184.

\(^{458}\) However, the Minister for Trade noted in 1983 that ‘over-regulation’ had led to ‘a great deal of litigation’: see Commonwealth, Parliamentary Debates, House of Representatives, 30 November 1983, 3041 (Lionel Bowen, Minister for Trade).

\(^{459}\) Explanatory Memorandum, Corporations Legislation Amendment Bill 1994 (Cth) 58.

\(^{460}\) See ibid.


\(^{462}\) Ibid 36.
operate successfully in the Australian context. The difficulties encountered by the NCSC in exercising its powers over unacceptable circumstances provided an opening for a peer review body to be introduced to make these decisions. However, the fact that only the regulator could apply to the CSP led to further calls for a model similar to the UK Panel to be adopted.\footnote{See generally Justice G F K Santow and George Williams, ‘Taking the Legalism out of Takeovers’ (1997) 71 Australian Law Journal 749.} This was finally implemented with the CLERP reforms in 2000. The transformation from a court-based system to the Takeovers Panel has consequently been slow and cautious.

IV CONCLUSION

Since takeover legislation was introduced in Australia in 1961, there have been important legislative changes around the beginning of each subsequent decade leading up to the most recent significant package of reforms in 2000. Complexity in the legislation increased particularly in the first half of this time period, with a cycle of amendments responding to loopholes leading to further amendments. In 1983, the Government recognised that this had led to ‘over-regulation’ and much litigation, in contrast to the ‘commercial approach’ that it sought.\footnote{Commonwealth, Parliamentary Debates, House of Representatives, 30 November 1983, 3041 (Lionel Bowen, Minister for Trade).} Of the legislative reforms since then, some of the most significant changes involved the introduction of the CSP in 1991 and its transformation in the CLERP reforms in 2000 to replace the courts in resolving takeover disputes. Although the drafting of the takeover provisions was simplified at the same time as the latter reforms, the basic framework of the provisions is otherwise similar to the takeover code introduced by CASA in 1981.

Consistent with the UCA’s key aims of disclosure and investor protection in 1961, the primary focus of the takeover provisions has been on ensuring that shareholders in the target company are properly protected. This was reinforced in the review of the UCA in the Eggleston Report in 1969. The Eggleston Report has had an enduring impact on the
takeover provisions, with the resulting Eggleston principles designed to provide appropriate disclosure, time and equality between shareholders becoming its key touchstone. Although the equal opportunity principle arguably now operates more broadly than the Eggleston committee had originally intended, its crucial importance in the takeover regulatory framework was confirmed in 1997 in the context of the CLERP reform proposals.

In contrast, the aim of the Masel principle to ensure an ‘efficient, competitive and informed market’ has become more prominent in legislative developments over time. Initially only taken into account in the context of the regulator’s decisions on takeover exemptions and modifications, the Masel principle was given equal status to the Eggleston principles as a key purpose of the takeover provisions under the CLERP reforms in 2000. While the Eggleston principles form the basis of many of the substantive requirements in the current legislation, the Masel principle is relied on frequently in Panel decisions. Accordingly, notwithstanding the tension between these two principles and their development over time, they both continue to play a fundamental role in the operation of Australian takeover regulation.

Over the same time period, takeover law has transformed from relying solely on black letter law to becoming a hybrid system based on detailed legislation and regulatory discretions. It has been argued that such a hybrid approach is ‘possibly the best system’. This has corresponded with a shift away from takeover dispute resolution by the courts to the Panel. Both of these changes have provided greater flexibility in administering the legislation. In particular, this allows ASIC to provide exemptions from and modifications to the takeover provisions where the application of the law is

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465 See, eg, Corporations Act 2001 (Cth) ss 621(3), 623(1), 633(1), 636(1), 638(1)–(3).
466 See above Section A in Part III of this Chapter.
not appropriate in the particular circumstances, taking into account the purposes underlying the takeover provisions. 468

Similarly, the Panel applies the same purposes in making declarations of unacceptable circumstances to ensure that the ‘spirit’ of the takeover provisions is complied with. This allows the Panel to adopt a less technical approach, consistent with the broad aim of it adopting a ‘commercial’ approach in its decision-making. However, this flexibility also has the potential to create uncertainty for market participants, particularly when the Panel first applies new policies. Other difficulties arise from the potential conflict between the operation of the Masel and Eggleston principles, and the possibility of challenges to Panel decisions through the judicial review process.

Chapter 3 – Criteria for Effectiveness of Takeover Panels

I  INTRODUCTION

This Chapter addresses the first research question in the thesis, namely determining the criteria that should be used to measure the effectiveness of the Panel in resolving takeover disputes. The UK Panel is the key comparator for the Australian Panel for the purposes of establishing the criteria to be applied to determine the effectiveness of the Panel, as it was the key overseas body cited in support of the CLERP reforms based on its ‘reputation for promptness and effectiveness’. Accordingly, the Chapter focuses on the historical development and operations of the UK Panel, and conducts a comparative analysis of the Australian and UK Panels. This historical and comparative analysis informs the subsequent determination of the criteria used to assess whether the Australian Panel is operating effectively.

Part II of the Chapter examines four key stages in the development of the UK Panel. These stages relate to the establishment of the UK Panel, court decisions concerning applications for judicial review of Panel decisions, legislative changes to give the Panel a statutory basis and the impact of amendments made by the Panel to the UK takeover rules in 2011. Part III then conducts a comparative analysis of the way that the UK and Australian Panels operate and assesses the implications for the Australian Panel of developments in the UK since the CLERP reforms. Part IV analyses the applicability of the UK Panel objectives of speed, flexibility and certainty to the Australian Panel and examines issues arising from their application. Part V concludes by answering the first research question and setting out the criteria to be applied in order to assess the effectiveness of the Australian Panel.

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II DEVELOPMENT OF UK PANEL

This Part analyses the development of the UK Panel, with a focus on four key stages. The first two stages examine the factors leading to the establishment of the UK Panel and the impact of judicial review decisions on its decisions. These stages preceded the CLERP reforms and are important in explaining the reason for the design of the takeover regulatory framework in the UK and the distinctive way that its Panel operates. In particular, the first stage highlights the unique context in which the UK Panel was established, which is significant for purposes of the subsequent comparison with the CLERP reform aims in Australia. The second stage demonstrates the rationale for the general approach of judicial restraint in relation to review of UK Panel decisions. This is consistent with the aim of minimising tactical litigation, which is relevant to both the Australian and UK Panels.

The remaining two stages occurred after the CLERP reforms and focus on legislative changes to give the Panel a statutory basis and the impact of the amendments made by the Panel to the UK Code taking effect on 19 September 2011 (‘the 2011 Amendments’). The implementation of the statutory basis for the UK Panel placed it on a more similar footing to the Australian Panel. Finally, the 2011 Amendments involved significant controversy. Although the Australian Panel does not have a similar role in determining the content of the detailed takeover regulatory requirements, these amendments are analysed for two reasons. This is because the amendments are the most significant changes to the UK takeover rules in recent times, and are also important in terms of considering any impact on the reputation of the UK Panel as an effective body.470

A Establishment of UK Panel in 1968

1 Driving Forces

Takeover regulation in the UK was first introduced following the emergence of hostile takeover bids in the 1950s.\textsuperscript{471} Hostile bids were initially met with opposition from the Government and Bank of England, with the latter warning banks and insurance companies in the City of London not to lend money for such purposes in the mid-1950s.\textsuperscript{472} There was also uncertainty surrounding the extent to which the directors of the target company could deter unwelcome bids. The conduct of the target directors in the context of the proposed takeovers of Savoy Hotel Ltd in 1953,\textsuperscript{473} and especially British

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\textsuperscript{472} These lending restrictions were relaxed in 1958 in light of a change in Government policy: see Andrew Johnston, ‘Takeover Regulation: Historical and Theoretical Perspectives on the City Code’ (2007) 66 Cambridge Law Journal 422, 431.

\textsuperscript{473} In that case, an inspector was appointed by the UK Board of Trade to investigate whether the target directors had breached their fiduciary duties in transferring a key corporate asset to another company in order to prevent any bidder from changing its use. Although the report concluded that the action was invalid, it was conceded that there was no legal authority for this view and the report did not have the force of law: Andrew Johnston, ‘Takeover Regulation: Historical and Theoretical Perspectives on the City Code’ (2007) 66 Cambridge Law Journal 422, 429–30; John Armour, Jack B Jacobs and Curtis J Milhaupt, ‘The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework’ (2011) 52 Harvard International Law Journal 219, 234; John Armour and David A Skeel Jr, ‘Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of US and UK Takeover Regulation’ (2007) 95 Georgetown Law Journal 1727, 1757–8.
Aluminium Ltd from 1958, led to calls for takeover regulation. In light of this, there were concerns that ‘heavy-handed government action against takeover bids was imminent’.

In response to these concerns, the Governor of the Bank of England set up a conference to discuss a code of conduct for takeover bids. The conference was attended by

474 Faced with two rival bids, the target board rejected one and agreed to the other, issuing new shares comprising one third of the target. Shareholders were only informed of these actions after the rejected bidder decided to make an offer directly to shareholders. The board granted a substantial dividend increase, which increased the share price and fuelled shareholder concerns about the earlier share issue at the lower price. Shareholders sold their stock, which was purchased by rival bidder and enabled it to obtain control: see John Armour and David A Skeel Jr, ‘Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of US and UK Takeover Regulation’ (2007) 95 Georgetown Law Journal 1727, 1758. See also John Armour, Jack B Jacobs and Curtis J Milhaupt, ‘The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework’ (2011) 52 Harvard International Law Journal 219, 235–6.

475 The only statutory provisions in operation at that time were the Prevention of Fraud (Investments) Act 1958 (UK), which required a person distributing takeover documents to be licensed or exempted under the Act. See also Peter Frazer, ‘The Regulation of Takeovers in Great Britain’ in John C Coffee Jr et al, Knights, Raiders and Targets: The Impact of the Hostile Takeovers (Oxford University Press, 1988) 436.


representatives of the Bank, Stock Exchange and bodies representing clearing banks, accepting and issuing houses, insurance companies and investment trusts. As a result, the ‘Notes on Amalgamations of British Businesses’ (‘the Notes’) were published on 31 October 1959 by a number of City institutions at the suggestion of the Bank of England. This was the first system of self-regulation of takeovers adopted in the UK, and had a significant influence on the UK Code that followed. The Notes were based on four principles, with the first two requiring ‘no interference with the free market’ in company shares, and that the target shareholders decide whether or not to sell their shares. To ensure this was a ‘considered’ decision, the third principle required target directors to provide ‘all relevant information … in a suitable form and at the right time’. Finally, the fourth principle required ‘every effort … to avoid disturbance in the normal price level of shares until the relevant information has been made


479 The Notes were prepared by the Issuing Houses Association, in cooperation with the Accepting Houses Committee, the Association of Investment Trusts, the British Insurance Association, the Committee of London Clearing Bankers and the London Stock Exchange: ‘Text of City’s Memorandum on Take-over Bids’, The Financial Times, 31 October 1959, 7. These bodies were referred to as the ‘City Working Party’: The City Code on Take-overs and Mergers, 27 March 1968, 1. See also Andrew Johnston, ‘Takeover Regulation: Historical and Theoretical Perspectives on the City Code’ (2007) 66 Cambridge Law Journal 422, 432.


482 The procedure following the principles also required the target board to give its views on the offer’s merits to its shareholders: see ‘Text of City’s Memorandum on Take-over Bids’, The Financial Times, 31 October 1959, 7.
available’. The procedural elements of the Notes emphasised that offers would generally be made for all of the company’s shares, and that if a partial bid could be justified in ‘some very exceptional case’ it should be made on a pro rata basis. It was also contemplated that three weeks would be an adequate time for offers to be open and that the bidder should provide a statement of its general intentions regarding the ‘future conduct of the company and its effect upon employees’.

The Jenkins Committee was appointed in November 1959 to consider directors’ duties and shareholders’ rights in a takeover bid, in light of Opposition criticism of Government policy and calls for a statutory body to regulate takeovers. Its report has had an important influence on takeover regulation, notwithstanding that many of its recommendations were not implemented. One of the key abuses identified by the Committee focused on target directors diverting company assets to uses objectionable to shareholders. However, its recommendation that there be a statutory provision requiring shareholder approval for a disposal of the whole (or substantially the whole) of the company’s business or assets was not adopted. Other recommendations

483 Ibid.
484 If partial bid acceptances exceeded what the bidder required, they were required to be scaled back proportionately: ibid.
485 Ibid. See also Report of the Company Law Committee, Cmd 1749 June 1962 [267].
489 Ibid [119]–[122]. At that time, the Stock Exchange’s Memorandum on Acquisitions ‘required publicity for substantial acquisitions and disposals amounting to 15 per cent or more of the company’s assets’: Andrew Johnston, ‘Takeover Regulation: Historical and Theoretical Perspectives on the City Code’ (2007) 66 Cambridge Law Journal 422, 434 n 59.
supported existing requirements in the Notes relating to disclosure of adequate information to shareholders, including the bidder stating its intentions regarding the company’s business and employees.\textsuperscript{490} The report also approved many of the rules conducting the regulation of takeovers in the \textit{Licenced Dealers (Conduct of Business) Rules 1960}.\textsuperscript{491} Most significantly, the Jenkins Committee recommended that the Board of Trade be empowered to make statutory instruments implementing further takeover regulation.\textsuperscript{492} 

It has been observed that the threat of regulation by statutory instrument as recommended by the Jenkins Committee provided an incentive for revisions to the Notes in 1963,\textsuperscript{493} and ultimately the introduction of the UK Code in 1968.\textsuperscript{494} There were also concerns that the Notes were being ignored increasingly in the context of the high

\textsuperscript{490} However, the Jenkins Committee rejected the argument that the bidder’s statement of intent should be contained in statute and considered that it was not appropriate for company law to deal with problems caused by takeovers for employees: Report of the Company Law Committee, Cmnd 1749 June 1962 [267]; Andrew Johnston, ‘Takeover Regulation: Historical and Theoretical Perspectives on the City Code’ (2007) 66 \textit{Cambridge Law Journal} 422, 435.


\textsuperscript{492} Report of the Company Law Committee, Cmnd 1749 June 1962 [272].


\textsuperscript{494} The 1963 revisions to the Notes included the introduction of a requirement that increased offers be extended to target shareholders who had already accepted: see Andrew Johnston, ‘Takeover Regulation: Historical and Theoretical Perspectives on the City Code’ (2007) 66 \textit{Cambridge Law Journal} 422, 435.
level of takeover activity in the years leading up to the UK Code.\textsuperscript{495} Other factors included the ‘costly and unpredictable approach’ taken by the courts in relation to defensive measures by target directors, with the potential for litigation itself to become an effective deterrence to takeovers.\textsuperscript{496} In light of institutional investor concerns about defensive measures and further Government threats to legislate, the Working Party that produced the Notes was reconvened in late 1967.\textsuperscript{497} The UK Code that resulted from this process has accordingly been characterised as an example of ‘coerced self-regulation’.\textsuperscript{498}

2 \textbf{Takeover Code}

The UK Code came into effect on 27 March 1968, and comprised ten General Principles and 35 rules.\textsuperscript{499} Consistent with the Notes, the General Principles in the Code included the need for shareholders to have sufficient information and time to make their decision,\textsuperscript{500} and to ensure that a false market is not created in the target shares.\textsuperscript{501} As in


\textsuperscript{499} \textit{The City Code on Take-overs and Mergers}, 27 March 1968, 1.

\textsuperscript{500} Ibid 3 (General Principle 2).

\textsuperscript{501} Ibid 3 (General Principle 4).
the case of the Notes, the Code required the target board of directors to provide shareholders with their opinion on the bid.\(^{502}\) Importantly, the Code principles also required target shareholders to be treated similarly in terms of the offer and information made available.\(^{503}\) Other additional principles related to the conduct of target directors,\(^ {504}\) including that they act in their shareholders’ interests,\(^ {505}\) as well as a statement that documents containing information, opinions and recommendations should be given the same care as if they were a prospectus.\(^ {506}\) The most significant provision introduced in the Code was the principle prohibiting the target board from doing anything to frustrate a bona fide offer, unless it obtains the approval of the general meeting, once it becomes aware of either the offer or that it is likely to be forthcoming.\(^ {507}\) This was supplemented by a rule prohibiting share issues, material acquisitions or disposals of assets and contracts outside the ordinary course of business, once an offer was made or target directors had ‘reason to believe that such a *bona fide* offer is imminent’.\(^ {508}\) These frustrating action provisions have remained largely unchanged in substance in the Code,\(^ {509}\) and are central to its operation.\(^ {510}\) They transformed the approach taken in relation to defensive measures from a complex

\(^{502}\) *The City Code on Take-overs and Mergers*, 27 March 1968, 9 (r 16).

\(^{503}\) Ibid 4 (General Principles 7–8). The requirement to provide equality in information was subject to an exception for bona fide potential bidders: ibid (General Principle 8). See also ibid 7 (r 11).

\(^{504}\) These principles noted that the Code would place limits on the actions of boards, suggested that target boards should seek ‘competent outside advice’ when faced with a bid and made it clear that oppression of a minority (in its general sense) was unacceptable: ibid 3 (General Principles 1, 5, 6).

\(^{505}\) Ibid 4 (General Principle 9). See also ibid 7 (r 9). In addition, Principle 9 required the target directors to take into account the interests of employees and creditors: ibid.

\(^{506}\) Ibid 4 (General Principle 10).

\(^{507}\) Ibid 3 (General Principle 4).

\(^{508}\) Ibid 12–3 (r 38).

\(^{509}\) See *The City Code on Take-overs and Mergers*, 20 May 2013, r 21.

factual inquiry into the purpose of the target directors’ actions to focus on their effect on the ability of target shareholders to decide the outcome of the takeover bid.511

A number of significant changes were made to the Code in the subsequent decade. In 1969, the fundamental general principle requiring observance of the spirit as well as the letter of the Code was introduced.512 Amendments were also made in 1972 in light of concerns about control being acquired through market purchases without an offer being made to the remaining shareholders.513 As a result, a new rule was inserted to require a person who (together with any concert parties) crossed a threshold of 40 per cent of the voting rights to make an unconditional offer to the remaining shareholders at the highest market price paid by that person in the last year.514 The Code also required a person purchasing enough shares from the directors or a limited number of sellers to give ‘effective control’ to make a bid for the remaining shares.515 In light of the Panel’s view

512 Andrew Johnston, ‘Takeover Regulation: Historical and Theoretical Perspectives on the City Code’ (2007) 66 Cambridge Law Journal 422, 444. Prior to this, the Introduction to the original version of the Code made it clear that, as it was ‘impracticable to devise rules in such detail as to cover all the various circumstances which arise … persons engaged in [takeover] transactions should be aware that the spirit as well as the precise wording of these general principles and of the ensuing rules should be observed’: The City Code on Take-overs and Mergers, 27 March 1968, 2.
513 This was notwithstanding that the Panel had been interpreting rules 10 and 26 (applying to sales of control by directors and partial bids) to require such offers to be made by those acquiring significant blocks of shares: see ibid. Shareholders with more than 10 per cent of the share capital in the company were required to disclose their holdings under the Companies Act 1967 (UK) s 33. This threshold was reduced to 5 per cent under the Companies Act 1976.
515 This was incorporated into a new rule 34: see Alexander Johnston, The City Takeover Code (Oxford University Press, 1980) 78.
that a 30 per cent holding was sufficient to confer effective control and difficulties resulting from the application of both this and the 40 per cent threshold. A single mandatory bid rule applying the 30 per cent threshold was implemented in 1974. Further amendments were subsequently made to the rules in light of market developments, with a particular emphasis on shareholder protection. However, the substance of the key provisions as discussed above has not changed.

3 Takeover Panel

The Takeover Panel commenced operation on the same day as the UK Code. Its approach was characterised by ‘proactive involvement’, rather than adopting

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517 This rule applied where an acquisition resulted in a person and their concert parties having 30 per cent or more of a company’s voting rights or, if they already held between 30 and 50 per cent, their holding increased by more than 1 per cent in any 12 month period: ibid.
legalistic interpretations in an ‘ex post judicial approach’.\textsuperscript{522} Initially, the Panel comprised only non-executive members and was inundated with 575 cases in the first year.\textsuperscript{523} In light of criticisms of the Panel’s handling of a number of high profile cases, three key changes were made to the Panel after the first year, namely a full-time executive was set up with funding provided by City institutions, an Appeal Committee was constituted and the range of sanctions increased.\textsuperscript{524} Previously, the only sanctions available had been public censure by the Panel and, where applicable, ejection from the trade associations involved in the drafting of the UK Code.\textsuperscript{525} In a Policy Statement issued in 1969, the Panel advised that the Stock Exchange and the Board of Trade would also take action to delist a company or withdraw the right to deal in securities respectively on the request of the Panel.\textsuperscript{526} Throughout its history, the principal way that the Panel has enforced compliance with the Code is through the threat of the ultimate sanction of non-complying persons being prevented from operating within the London

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financial market (known as ‘cold shouldering’).\textsuperscript{527} Indeed, it has been observed that, at the early stages of the Panel’s existence, its ‘regulatory viability depended entirely on the credibility of this threat’.\textsuperscript{528}

It was famously observed by a member of the UK Court of Appeal in 1987 that the UK Panel operated at that time ‘without visible means of legal support’.\textsuperscript{529} Referred to by members of the Court of Appeal as a ‘unique’\textsuperscript{530} and ‘truly remarkable body’,\textsuperscript{531} the Panel’s functions as ‘[p]art legislator, part court of interpretation, part consultant, part referee [and] part disciplinary tribunal’ were described by Donaldson MR as follows:

[\textit{L}a\textit{c}king a statutory base, it has to determine and declare its own terms of reference and the rules applicable in the markets, thus acting as a legislator. It has to give guidance in situations in which those involved in take-overs and mergers may be in doubt how they should act … This is the consultancy role. Or they may arise out of difficulty in applying the rules literally, in which case the Panel interprets them in its capacity as a court of interpretation … Where it detects breaches of the rules during the course of a take-over, it acts as a whistle-blowing referee, ordering the party concerned to stop and, where it considers it appropriate, requiring that party to take action designed to nullify any advantage which it has obtained and to redress any disadvantage to other parties. Finally, when the dust has settled,}

\textsuperscript{529} \textit{R v Panel on Take-overs and Mergers, Ex parte Datafin plc} [1987] 1 QB 815, 834 (Donaldson MR).
\textsuperscript{530} \textit{R v Panel on Take-overs and Mergers, Ex parte Guinness Plc} [1990] 1 QB 146, 185 (Donaldson MR), 192 (Woolf LJ).
\textsuperscript{531} Ibid 157 (Donaldson MR).
it can take disciplinary action against those who are found to have broken the rules.\textsuperscript{532}

\textbf{B Judicial Restraint in 1987 Datafin decision}

The Takeovers Panel’s operations have not been significantly affected by applications for judicial review in light of the general approach of judicial restraint in relation to review of its decisions. This approach was established by the Court of Appeal’s decision in the first judicial review application in relation to a Panel decision in \textit{R v Panel on Take-overs and Mergers, Ex parte Datafin Plc & Anor (‘Datafin’)}\textsuperscript{533}. In that case, the application was made by a rival takeover bidder in light of a finding by the Panel that certain other parties had not acted in concert.\textsuperscript{534} The Panel’s submissions to the Court emphasised the ‘overwhelming need for speedy finality’ and that applications could be made to the court during the takeover as a tactic ‘to create uncertainty even after the outcome of the bid is known’.\textsuperscript{535} Dismissing the Datafin application, Donaldson MR in the Court of Appeal concluded that the role of the court was limited.\textsuperscript{536} Crucially, Donaldson MR made it clear that judicial review applications would only succeed in exceptional circumstances (in the ‘Datafin principle’):

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\item \textsuperscript{532} \textit{R v Panel on Take-overs and Mergers, Ex parte Guinness Plc} [1990] 1 QB 146, 157–8. The ‘legislative’ role of determining the content of the rules has since passed to a separate Code Committee, as a result of the need to separate the Panel’s adjudicative and rule-making functions in light of the \textit{Human Rights Act 1998}: see The Takeover Panel, The Takeover Panel, \textit{Report on the Year Ended 31 March 2001}, 8–9.
\item \textsuperscript{533} [1987] QB 815. The other members of the court agreed with the reasons of Donaldson MR for dismissing the application: at 844 (Lloyd LJ), 849 (Nicholls LJ).
\item \textsuperscript{534} \textit{R v Panel on Take-overs and Mergers, Ex parte Datafin Plc & Anor} [1987] QB 815, 831–3 (Donaldson MR).
\item \textsuperscript{535} Ibid 820 (Donaldson MR).
\item \textsuperscript{536} The issues to be considered were limited to whether there had been illegality (namely whether the Panel had ‘misdirected itself in law’), irrationality (in effect, whether no reasonable Panel could have reached such a decision) or procedural impropriety (failure to comply with rules governing its conduct or ‘the basic rules of natural justice’): ibid 842 (Donaldson MR).
\end{itemize}
in the light of the special nature of the Panel, its functions, the market in which it is operating, the time scales which are inherent in that market and the need to safeguard the position of third parties, who may be numbered in thousands, all of whom are entitled to continue to trade upon an assumption of the validity of the Panel’s rules and decisions, unless and until they are quashed by the court, I should expect the relationship between the Panel and the court to be historic rather than contemporaneous. I should expect the court to allow contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders which would enable the Panel not to repeat any error and would relieve individuals of the disciplinary consequences of any erroneous finding of breach of the rules. This would provide a workable and valuable partnership between the courts and the Panel in the public interest and would avoid all of the perils to which [the Panel] alluded.\footnote{537}{Ibid 842 (Donaldson MR) (emphasis added).}

This principle has been reinforced in subsequent judicial review decisions. Significantly, the two subsequent judicial review applications following Datafin were both unsuccessful, with the Court of Appeal declining applications seeking review of Panel decisions not to adjourn proceedings.\footnote{538}{See \textit{R v Panel on Take-overs and Mergers, Ex parte Guinness Plc} [1990] 1 QB 146; \textit{R v Panel on Take-overs and Mergers, ex parte Fayed and Ors} [1992] BCC 524.} Donaldson MR confirmed in the first of these decisions (‘Guinness’) that the Datafin principle meant that a court would not usually intervene during the takeover, but would adopt a limited role after that time.\footnote{539}{\textit{R v Panel on Take-overs and Mergers, Ex parte Guinness Plc} [1990] 1 QB 146, 158–9 (Donaldson MR).} In exercising this role, the members of the Court of Appeal in Guinness concluded that, although they would have granted a short adjournment had they been in the Panel’s position, the failure to grant an adjournment did not cause any injustice.\footnote{540}{Ibid 182 (Donaldson MR), 187 (Lloyd LJ), 197, 201 (Woolf LJ).} One of the reasons relied upon by Lloyd LJ in deciding that the procedure was not unfair was ‘the public interest in the Panel getting on with, and being seen to get on with, its self-
appointed task’. On the other hand, Woolf LJ referred to the particular nature of the Panel as being significant to his reasons:

I regard the unique qualities of the take-over Panel as being important in deciding what is the correct outcome of this appeal. I have in mind two particular features of the Panel. The first is that its authority is not derived from any statutory power. Instead it derives its authority from the institutions in the City of London who give it their support and nominate its members. The second is that the scope of its activities is self-determined. Except in so far as the Panel itself decides to limit its jurisdiction and to set out its functions, as it has in the City Code on Take-overs and Mergers, the constraints on its powers are those dictated not by legal but by practical considerations.

C Implementing Takeovers Directive in 2006

Proposals to set minimum standards for takeover regulation across the European Union led to concerns that this would undermine the effectiveness of the UK system. However, in light of the influence of the Takeover Panel and UK Government, the resulting Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on Takeover Bids (‘Takeovers Directive’) was consistent with the provisions in the UK Code. Importantly, the Directive set out identical general principles to those contained in the Code. These required Member States to ensure that target

541 Ibid 192.
542 Ibid 192.
544 The process was initially resisted by both the Panel and the UK Government, with their bargaining position bolstered by the concentration of European takeover activity in its jurisdiction: see ibid 377–9.
546 See ibid; Takeover Code, General Principles.
shareholders have equivalent treatment and protection, sufficient time and information for properly informed decisions and the opportunity to decide on the bid’s merits, that false markets are not created and bidders are able to fulfil the consideration offered, and that the target company is not hindered in the conduct of its affairs for longer than is reasonable.547 The Directive also contained the two key regulatory provisions in the UK system, namely those requiring a mandatory bid where a person and their concert parties achieve a specified percentage of voting rights,548 and the restrictions on target directors taking action to frustrate a takeover bid without prior authorisation of a meeting of the target shareholders.549

The Directive was implemented in the UK by the Companies Act 2006 (UK) (‘2006 Act’). This provided the UK Panel with a legislative basis for the first time,550 and resulted in a number of key changes affecting the Panel’s powers and structure. First, the Act required the Panel to make rules giving effect to certain Articles in the Directive.551 These Articles relate to compliance with the general principles, as well as provisions on the applicable law, mandatory bids, the disclosure of information and other rules concerning the conduct of bids, and frustrating action.552 Although this did not necessitate changes to the Code as such provisions were already in existence, it

547 Ibid.
549 Ibid art 9.
550 Companies Act 2006 (UK) s 942. Reforms to the UK regulation of financial services in 2000 had resulted in some statutory backing for the enforcement of the Code, with the financial market regulator given the power to take enforcement action for breaches of the Code upon the Panel’s request: Financial Services and Markets Act 2000 (UK) s 143.
551 Ibid s 943(1). The Panel was also empowered to make further rules, including making them subject to exceptions and authorising the Panel to dispense with or modify the application of the rules: at s 944.
entrenched these provisions and thus removed some of the flexibility in the Panel’s exercise of its rule-making powers. 553

Second, the 2006 Act contained a number of changes ‘designed to ensure a clear and transparent division of responsibilities between the various organs of the Panel in its executive, judicial and rule-making roles’. 554 This required that Panel decisions be subject to review by a separate Hearings Committee, with a right of appeal against Hearings Committee decisions to an independent tribunal to be called the Takeover Appeal Board. 555 The Act also required a separate committee to make Panel rules, 556 with this role undertaken by the Panel’s Code Committee. In order to meet any part of the expenses of the Panel, the 2006 Act allowed regulations to be made to provide for a levy to be payable to the Panel. 557 Finally, the Act contained a number of provisions relating to enforcement of the UK Code. 558 This included a new offence for breaches of the Takeovers Directive requirements relating to the offer and response document for bidders and the target board respectively. 559

553 Concerns have been raised in relation to the entrenchment of the frustrating action provision in the Code in particular: see Andrew Johnston, ‘Takeover Regulation: Historical and Theoretical Perspectives on the City Code’ (2007) 66 Cambridge Law Journal 422, 447, 459–60.

554 Explanatory Notes, Companies Act 2006 (UK) [1204].

555 Companies Act 2006 (UK) s 951. This included rules to ensure that members of the Hearings Committee and Takeover Appeal Board had not at any stage been a member of the Code Committee, and that Panel staff appearing before the Hearings Committee and Takeover Appeal Board were not members of either Committee or the Board: at s 951(5).

556 See ibid ss 943(4)–(5).

557 Ibid s 958.

558 Ibid ss 952–955.

Consultation documents issued by the UK Government and Panel prior to the implementation of the Directive\(^{560}\) raised concerns about the increased risk for litigation to delay or frustrate takeover bids, affect shareholders’ opportunity to decide upon the takeover based upon its merits\(^{561}\) and undermine the ‘speed, flexibility and certainty’ provided by the UK regulatory system.\(^{562}\) The 2006 Act contained four main sets of provisions designed to minimise this risk. First, the Panel’s rulings are given binding effect subject to the Panel’s rules and any review or appeal.\(^{563}\)

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\(^{563}\) *Companies Act 2006 (UK)* s 945(2).
of UK Panel decisions are required to be conducted by the Hearings Committee and Takeover Appeal Board respectively. Third, contravention of a Panel rule or requirement does not give rise to a right of action for breach of statutory duty, and a rule breach does not affect the validity or enforceability of a transaction. In addition, the Panel and its staff are not liable in damages in connection with the discharge of its functions except where bad faith is established. Finally, only the Panel has the power to apply to the court to enforce a Panel requirement. Where the Panel makes such an application, the court has the power to ‘make any order it thinks fit to secure compliance with the requirement’. In light of concerns that this may lead to a reassessment of the merits of the Panel’s decision, the Explanatory Notes accompanying the 2006 Act emphasised that:

[i]t is expected that in accordance with usual practice, the court will not, in exercising its jurisdiction under this section, rehear substantively the matter or examine the issues giving rise to the ruling or, as the case may be, the request for documents or information except on ‘judicial review principles’, where there has been an error of law or procedure.

This is consistent with the statement in the Explanatory Notes that the 2006 Act does not affect the availability of judicial review. At the same time, the Explanatory Notes emphasised the Court of Appeal’s conclusion in Datafin that ‘generally the courts should limit themselves only to reviewing the Panel’s decision-making processes after the bid has been concluded’. The implementation of the Takeovers Directive introduced a new risk in relation to certainty of Panel decisions, namely the potential for

564 Ibid s 956. However, transactions continue to be liable to be set aside in such cases as misrepresentation or fraud: see Explanatory Notes, Companies Act 2006 (UK) [1214(b)].
565 Companies Act 2006 (UK) s 961.
566 Ibid s 955(1).
567 Ibid.
568 Explanatory Notes, Companies Act 2006 (UK) [1212].
569 Ibid [1178].
570 Ibid.
 litigation in the European Court of Justice.\textsuperscript{571} This placed the UK system squarely within the European regulatory context. Although these developments have not had a significant impact on the UK Panel to date, it remains to be seen whether this will undermine the efforts of the UK Parliament in seeking to maintain its preference for non-judicial determination of takeover disputes.

\textbf{D Amendments to Takeover Code in 2011}

The hostile takeover of Cadbury plc (‘Cadbury’) by the US company Kraft Foods Inc (‘Kraft’) at the beginning of 2010 attracted significant controversy. Although Cadbury had previously announced the closure of a UK plant in favour of overseas production, Kraft announced that it would be in a position to preserve local jobs by keeping the plant open.\textsuperscript{572} Kraft’s subsequent decision to close the plant resulted in public censure by the Panel,\textsuperscript{573} and led to calls for changes to takeover regulation to make it harder for such hostile bids to succeed.\textsuperscript{574} In the context of this controversy, the Code Committee of the UK Panel announced a consultation process for possible amendments to the UK Code.\textsuperscript{575} This resulted in a number of Public Consultation Papers and Response

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\textsuperscript{572} The Takeover Panel, Kraft Foods Inc. (“Kraft”) Offer for Cadbury Plc (“Cadbury”), Statement 2010/14, 26 May 2010, 1.

\textsuperscript{573} Ibid.


Statements,\textsuperscript{576} culminating in the 2011 Amendments.\textsuperscript{577} In the context of its review, the Code Committee observed that comments from respondents had confirmed that the Code had served the market well for over 40 years, with the Panel applying clear principles that had changed little over that time despite significant developments in market practice and the wider economy.\textsuperscript{578} However, the Committee also noted concerns that it had become ‘too easy’ for hostile bidders to succeed and that the outcome of offers could be influenced ‘unduly’ by short-term investors who obtain their interests only after the announcement of an offer.\textsuperscript{579}

After considering these views and those of respondents to its initial Consultation Paper,\textsuperscript{580} the Code Committee concluded that ‘hostile offerors [bidders] have, in recent times, been able to obtain a tactical advantage over the offeree [target] company to the detriment of the offeree company and its shareholders’.\textsuperscript{581} As a result, the Committee decided to amend the code by reducing this tactical advantage and redressing the balance in favour of the target company, as well as improving the offer process and taking more account of the impact on persons other than the target shareholders.\textsuperscript{582} The key objectives of the 2011 Amendments included strengthening the position of target companies by protecting them against ‘protracted “virtual bid” periods’ and prohibiting inducement fees and deal protection measures, and enhancing disclosure of offer-related

\textsuperscript{579} Ibid [2.5].
\textsuperscript{582} Ibid [2.5].
fees, financial information in relation to the bid and the bidder’s intentions regarding the target company and its employees.\textsuperscript{583}

The 2011 Amendments attracted further controversy, which included concerns that the requirement to name a potential bidder and prohibition on deal protection measures would deter takeover activity.\textsuperscript{584} There was also criticism that the Code Committee had conducted an ‘insufficient review process’ and ‘misinterpreted and wrongly distorted’ the UK Code’s philosophy through the protection of UK companies and employees instead of shareholders.\textsuperscript{585} This culminated in the view that the Panel had been unable to ‘maintain its independence in the face of immense public outcry and government pressure’.\textsuperscript{586} Another commentator also noted that the Panel had operated ‘quickly, and in what could have been viewed as a reactionary manner’.\textsuperscript{587} On the other hand, the Panel’s response to the calls for change has been described as ‘fair and balanced’\textsuperscript{588} and ‘measured’.\textsuperscript{589} Over time, the Panel appears to have garnered acceptance of the changes


\textsuperscript{584} See, eg, Clifford Chance, \textit{Impact of UK Takeover Code Reform}, Autumn 2011, 8; Mayer Brown, \textit{Takeover Code Changes Published – Is This a New Era for UK Takeovers?}, Corporate Legal Alert, July 2011, 2.

\textsuperscript{585} Michael R Patrone, ‘Sour Chocolate: The UK Takeover Panel’s Improper Reaction to Kraft’s Acquisition of Cadbury’ (2011) 8 \textit{International Law and Management Review} 63, 73.

\textsuperscript{586} Ibid 86. On the other hand, concerns were raised in the government that the UK Panel had not gone far enough: see, eg, Alan Wells, ‘Are You a Cadbury’s Fruit and Nut Case?’ (2011) \textit{Business Law Review} 113, 117.


notwithstanding the resistance demonstrated when they were first proposed.\textsuperscript{590} In its review of the 2011 Amendments just over a year following their implementation,\textsuperscript{591} the Code Committee concluded that the amendments had ‘operated satisfactorily’ to date and did not propose any further changes at that time.\textsuperscript{592}

### III IMPLICATIONS FOR AUSTRALIAN PANEL

This Part evaluates the significance of the developments concerning the UK Panel discussed in Part II in relation to the CLERP reforms. Part III starts with a comparative analysis of how the UK and Australian Panels operate. It then analyses the implications of the UK developments for the Australian Panel. This informs the analysis in Part IV relating to whether the objectives for the UK Panel can be used as the criteria for the effectiveness of the Panel.

#### A How the UK Panel operates

The UK Panel’s key roles involve setting, administering, monitoring compliance with and enforcing the detailed rules contained in the UK Code, as well as its ‘spirit’ and General Principles.\textsuperscript{593} They also include the Panel’s ability to grant dispensations from the Code’s operation.\textsuperscript{594} In relation to breaches of the Code, the Panel may choose to respond by private reprimand, public censure, reporting conduct to another person (such as a regulator or certain professional bodies) or taking action to trigger the cold shouldering arrangements that would require the members of professional bodies not to

\textsuperscript{590} See, eg, Squire Patton Boggs, \textit{The UK Takeover Code – 12 Months on from the Overhaul}, 18 September 2012.


\textsuperscript{593} \textit{The City Code on Take-overs and Mergers}, 20 May 2013, Introduction, A1, A10–A11.

\textsuperscript{594} This includes the power to allow different conditions to be attached to takeover offers and an adjusted price to be used as the minimum consideration instead of the highest price paid by the bidder and associated persons in the last 12 months: ibid rr 9.3, 11.3.
act for the person in breach.\textsuperscript{595} The Code Committee was established in 2001 to review and amend the Code in a separation of the adjudicative and rule-making functions of the Panel in light of the \textit{Human Rights Act 1998} (UK).\textsuperscript{596}

Most decisions are made by the Takeover Panel Executive, which currently comprises 27 staff. In addition to its roles of administering and monitoring compliance with the Code and supporting the Code Committee, the Panel Executive provides advice on the Code’s operation and has the power to make binding rulings in relation to the conduct of market participants (subject to the appeal process discussed below).\textsuperscript{597} The Panel Executive can also act on its own motion.\textsuperscript{598} Parties may appeal from Executive decisions to the Hearings Committee of the Panel, which comprises the Panel Chairman and members appointed by the Panel and its constituent bodies.\textsuperscript{599} The quorum for Panel hearings conducted by the Hearings Committee is five members.\textsuperscript{600} Disciplinary

\textsuperscript{595} Ibid, Introduction, A20–A21.


\textsuperscript{597} \textit{The City Code on Take-overs and Mergers}, 20 May 2013, Introduction, A11.

\textsuperscript{598} Ibid, Introduction, A10.


\textsuperscript{600} \textit{The City Code on Take-overs and Mergers}, 20 May 2013, Introduction, A14.
matters may also be referred to the Panel by the Executive.601 There is also the right to appeal to the Takeover Appeal Board in relation to Hearings Committee rulings.602

In making its decisions, the Panel relies upon informal proceedings that do not involve the rules of evidence.603 The Panel conducts oral hearings as a matter of course and, although parties can be represented by advisers, it is not usually by legal advisers.604 In relation to communication to the public, the Panel usually publishes its decisions and reasons in the form of a Panel Statement.605 Historically, the Panel released guidance in the form of Notes to the Rules in the Code and interpretation contained within its Annual Reports. However, to order to avoid difficulties in accessing the latter, the Panel started releasing Practice Notes in 2004.606

B Overview of the Australian Panel

Unlike the UK Panel, the Australian Panel does not act of its own volition, but instead decides applications brought before it.607 Its key role is to make a declaration of unacceptable circumstances and orders where appropriate.608 The Panel may make a declaration where it appears that circumstances are unacceptable having regard to (a) their effect on control or an acquisition of a substantial interest in a company, (b) the purposes of the takeover provisions, or (c) if they are likely to give rise to a contravention of the provisions on takeovers, compulsory acquisitions, takeover rights and liabilities, substantial shareholdings or tracing beneficial ownership.609 Although

604 Ibid.
606 These are now referred to as Practice Statements: see The Takeover Panel, Statements, Practice Statements < http://www.thetakeoverpanel.org.uk/statements/practice-statements>.
607 See Corporations Act 2001 (Cth) s 657C.
608 Ibid ss 657A, 657D. The CLERP reforms also gave the Panel the power to review ASIC decisions in relation to the exercise of its exemption and modification powers: see s 656A.
609 See ibid ss 602A; 657A(1)–(3).
the Panel cannot order a person to comply with a requirement in the legislation for constitutional reasons,\textsuperscript{610} it can make a broad range of orders including restraining the exercise of voting rights, directing the disposal of shares and vesting shares in ASIC.\textsuperscript{611} The Panel also publishes Guidance Notes in relation to the exercise of its powers.\textsuperscript{612}

Takeover disputes are resolved by the Australian Panel based primarily on the purposes of the takeover provisions set out in s 602 of the \textit{Corporations Act}.\textsuperscript{613} These purposes set out the underlying policy of ensuring that acquisitions take place in an ‘efficient, competitive and informed market’, target shareholders have enough information, reasonable time to make a decision and are afforded a ‘reasonable and equal opportunity to participate in any benefits’ under a takeover bid, and an appropriate procedure is followed prior to the use of the compulsory acquisition provisions.\textsuperscript{614} The purposes are implemented in the takeover provisions in ch 6 of the \textit{Corporations Act} through the takeover prohibition preventing a person acquiring more than 20 per cent of the voting


\textsuperscript{613} See \textit{Corporations Act 2001} (Cth) s 657A(3)(a)(i); Takeovers Panel, \textit{Guidance Note 1 – Unacceptable Circumstances} (21 September 2010).

\textsuperscript{614} \textit{Corporations Act 2001} (Cth) s 602.
power in a company. One of the key exceptions to the prohibition involves making a general offer to all target shareholders. There are also detailed legislative requirements in relation to such offers, including on the terms, timing and disclosure of information.

The Australian Panel comprises legal and commercial experts in takeovers, and relies on less formal procedures than a court. Matters are decided by a Sitting Panel of three members, who are chosen from the current total of 45 part-time members. There is an internal Panel review process for unacceptable circumstances matters, with the Review Panel comprising another three members of the Panel and having similar powers to the original Panel. The Panel is supported by an Executive that comprises four permanent staff (its Director, Counsel and two support staff), with two other non-ongoing members (including at least one law firm secondee). The Executive does not perform any of the roles of the Panel, and consequently does not make decisions in relation to any circumstances discussed with market participants.

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615 This does not apply where a company has 50 or fewer members and its shares are not traded on the stock exchange, but extends to certain indirect forms of investments that are so traded: ibid ss 604, 606.

616 Ibid s 611, item 1.

617 See, eg, ibid pt 6.4–6.6.

618 Australian Securities and Investments Commission Act 2001 (Cth) s 172(4).

619 See below Section A (under the heading ‘2 Powers and Process’) in Part III of Chapter 5.

620 Australian Securities and Investments Commission Act 2001 (Cth) s 184(1).


624 Ibid.
Decisions regarding exemptions and modifications of the takeover provisions are made by ASIC as the corporate regulator,\textsuperscript{625} which also has the responsibility for monitoring market developments and bringing actions to enforce the law. In order to make the Panel the primary forum for resolving takeover disputes, the CLERP reforms deferred the ability of persons other than ASIC and governmental authorities to apply to the court in relation to a takeover bid until the end of the takeover bid period.\textsuperscript{626} Notwithstanding this, applications for judicial review of Panel decisions can be made to the High Court under s 75(v) of the \textit{Australian Constitution} during the takeover bid,\textsuperscript{627} and can also be made subsequently in the Federal Court.\textsuperscript{628}

\textbf{C Implications of UK Developments}

In essence, both the Australian and UK Panels are responsible for deciding whether the actions of parties to a takeover are acceptable. The UK Panel’s more extensive role and functions are supported through its Panel Executive having a significantly higher level of staffing than its Australian counterpart.\textsuperscript{629} This reflects the greater amount of funding received by the UK Panel, through a sliding scale of document fees based on a percentage of the value of the offer and a levy paid on certain trades concerning equity securities.\textsuperscript{630} In contrast, in light of its limited role in deciding applications for declarations of unacceptable circumstances and reviewing ASIC takeover exemption and modification decisions, the Australian Panel is funded more modestly.\textsuperscript{631}

\textsuperscript{625} \textit{Corporations Act 2001} (Cth) s 655A. These decisions are subject to Panel review: at s 656A.

\textsuperscript{626} See ibid ss 659AA, 659B. The court’s powers under the Act where the Panel has refused to make such a declaration are also limited: at s 659C.

\textsuperscript{627} See also ibid s 659B(5); \textit{Judiciary Act 1903} (Cth) s 39B.

\textsuperscript{628} See \textit{Administrative Decisions (Judicial Review) Act 1977} (Cth) ss 3, 5.

\textsuperscript{629} The UK Panel currently has 29 members: see The Takeover Panel, About, \textit{Panel Membership} <http://www.thetakeoverpanel.org.uk/structure/panel-membership>.


\textsuperscript{631} See, eg, Takeovers Panel, \textit{Annual Report 2015-2016}, 27.
Importantly, both Panels make their decisions based on similar aims and regulatory principles. In the UK Code, the first three General Principles require target shareholders to receive equivalent treatment, sufficient time and information, and the opportunity to decide on the merits of the bid for target shareholders. Although they are not expressed in the same terms, these General Principles are similar in effect to the operation of the Eggleston principles under the Australian legislation. As discussed earlier, the Eggleston principles focus on ensuring that target shareholders have enough information, reasonable time to make a decision and are afforded a ‘reasonable and equal opportunity to participate in any benefits’ under a takeover bid. The key difference between the principles operating in Australia and the UK is the additional focus in Australia on acquisitions taking place in an ‘efficient, competitive and informed market’. This is only partly covered in the UK General Principles, which have a narrower focus on avoiding a false market in relation to the securities of companies concerned by the takeover bid and ensuring that bidders fulfil their obligations in relation to the payment of consideration under the bid.

Notwithstanding their common purpose, there are significant differences in the way that the two Panels operate. At the time of the CLERP reforms, the UK Panel functioned without a statutory basis, instead relying on the ability of the institutions constituting the Panel to exclude non-complying persons from participating in the London market. In the first key UK development following the Australian Panel reforms, the UK Panel was given legislative backing in 2006 as a result of the implementation of the Takeovers Directive. This led to concerns that the legislative changes would undermine the elements that make the UK system successful. In particular, there were concerns that it could undermine the certainty that has resulted from the application of the Datafin

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632 The City Code on Take-overs and Mergers, 20 May 2013, General Principles 1–3.

633 Corporations Act 2001 (Cth) ss 602(b), (c).

634 Ibid s 602(a).

635 The City Code on Take-overs and Mergers, 20 May 2013, General Principles 4–5. The remaining principle is designed to ensure that target companies are not ‘hindered in the conduct of its affairs for longer than is reasonable’ (as a result of the operation of restrictions on frustrating action in Rule 21): at General Principle 6.
principle, which has allowed the UK Panel to operate without the impact of tactical litigation. However, these concerns have not been realised. This can in part be explained by the fact that the 2006 legislative changes have not had a substantive impact on the way that the UK Panel operates in practice.\(^6\)

The second key development in the UK following the CLERP reforms was the significant amendments to the UK Code in 2011. As highlighted above, the UK Panel has a much broader role than the Australian Panel in terms of its powers and functions. In particular, unlike its Australian counterpart, the UK Panel determines the content of the takeover rules in the UK Code through the work of its Code Committee. As a result, this aspect of the UK Panel’s operations is less relevant to an assessment of the Australian Panel. However, it is an important element of the UK Panel’s reputation as an effective takeover regulator. Although the 2011 Amendments generated controversy due to their broad scope and effect on hostile bids, they do not appear to have had a lasting impact on the standing of the UK Panel. Accordingly, it can still be argued that the UK Panel continues to be an effective takeover body. This success has in the past been attributed to a number of factors. These include the concentration of takeover matters in the city of London, Panel members including representatives of key bodies concerned with takeovers, and the need for access to advisers and financial resources (with the possibility of persons who do not comply with the UK Code being denied such access through ‘cold shoudering’).\(^7\)

The above analysis establishes that the developments in the UK since the CLERP reforms have not impacted upon the essential features of the UK Panel. These features led it to be the key comparator for the expanded role of the Australian Panel under the

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CLERP reforms. As a result, the UK Panel continues to provide a successful model of a non-judicial body deciding takeover disputes in order to provide speed, flexibility and certainty in decision-making. Notwithstanding the differences between the Australian and UK systems, they seek to achieve similar goals based on comparable underlying regulatory principles.

IV CRITERIA TO ASSESS PANEL

In response to the first research question, this Part evaluates whether the UK Panel objectives of speed, flexibility and certainty can be applied to the Australian Panel. This analysis is based on the aims established for the Australian Panel in the CLERP reforms. As discussed above, the CLERP 4 Paper set out the key advantages of ‘an effective Panel for dispute resolution’ in proposing the new role of the Australian Panel. These advantages were to inject legal and commercial specialist expertise into takeover dispute resolution and provide ‘speed, informality and uniformity’ in decision making. It was considered that this would also minimise ‘tactical litigation’ and free up court resources. The first section below analyses the applicability of the UK Panel objectives of speed, flexibility and certainty to the Australian Panel in light of the aims of the CLERP reforms. The second section examines issues arising from the application of these objectives, namely the relationship between them and other important considerations.

A Applicability of UK Panel Objectives

The three objectives of providing speed, flexibility and certainty have become the touchstone for the UK Panel’s operations. The first two objectives of speed and

638 See above Section G in Part II of Chapter 2.


640 Ibid. See also Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 38.

641 Ibid.
flexibility were introduced in the Panel’s first annual report, with subsequent annual reports raising concerns about situations where there was uncertainty for market participants. These three objectives were subsequently adopted by the Court of Appeal in its 1987 decision in Datafin, and were reinforced in the January 2005 consultation paper by the Department of Trade and Industry prior to the legislative changes implementing the Takeovers Directive. They have also been emphasised as ‘essential characteristics of the Panel system’ as part of an introduction to the Panel appearing in its annual reports since 1992. The significance of each of these objectives to the UK and Australian Panels is analysed below.

1 Speed

The objective of speed in decision-making in the context of a takeover matter is based on the effect that delay can have on a takeover bid. There are high financial stakes for the bidder in making a general offer to purchase all of the remaining target shares, as required in different circumstances under the Australian and UK takeover rules. This is due to the risks and timing pressures involved in making such an offer, particularly where the bidder needs to obtain finance for a cash payment as part of the offer. The CLERP reforms were proposed in part in response to concerns that target directors could seek to stymie an unwanted takeover bid by making an application to the courts

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on the basis of deficiencies in disclosure documentation.648 It was argued that target directors could bring litigation for a tactical purpose to delay or prevent the takeover as a result of the delays involved in the court process.649 This would undermine the disciplinary effect of takeovers on company management, as the threat of takeover provides a strong incentive for directors to ensure that their company is operating efficiently.650 Accordingly, the overall aim of the CLERP reforms was for the inevitable disputes in hostile bids ‘to be resolved as quickly and efficiently as possible’ to allow the outcome of the bid to be decided by target shareholders ‘on the basis of its commercial merits’.651

Speed is undoubtedly an aim of both the Australian and UK Panels,652 consistent with the need to deal quickly and efficiently with takeover matters discussed above. It is difficult to establish empirically the extent to which the UK Panel meets this goal. This is because the UK Panel Executive undertakes a significant proportion of the decision-making without published reasons and the UK Panel’s internal records are not accessible for confidentiality reasons. However, in practice, the Executive often communicates its decisions over the phone within short timeframes.

649 Ibid 37.
652 See, eg, ibid; The Takeover Panel, Report and Accounts for the Year Ended 31 March 2013, 19.
The Australian Panel has also endeavoured to deal with matters efficiently in response to the CLERP aim of speed in decision-making. This is reflected in the time that the Panel takes to both make its decisions and provide reasons for those decisions. Studies of the Panel’s operations in its early years raise the question whether the expectation in the CLERP 4 Paper that the Panel would ‘be well placed to act with speed in every case’ was a realistic one.653 These studies demonstrate that the Panel’s ability to achieve this goal has varied over time.654 This would appear to be a function of such factors as the number of matters being considered by the Panel at any time and the complexity involved in each matter.

2  Flexibility

A Panel-based system can provide flexibility in relation to both of its key elements. That is, procedural flexibility is reflected in the Panel’s powers, procedures and expertise, with substantive flexibility arising from the Panel exercising its decision-making powers flexibly. In contrast, members of the High Court in the Alinta decision recognised the limitations of the courts in dealing with takeover disputes, in the context of upholding the constitutionality of the Australian Panel following the CLERP reforms.655 Gleeson CJ noted that the judicial process was ‘ill-adapted’ to take account of the considerations and interests that the Panel was required to contemplate.656 His Honour pointed out that judges are appointed based on their legal knowledge and experience and that any other talents are not assessed. Gleeson CJ also noted that the adversarial setting of a court limits the information that it can legitimately take into


655 A-G (Cth) v Alinta Ltd (2008) 233 CLR 542. The High Court had previously confirmed the constitutionality of the CSP, which was the pre-CLERP incarnation of the Panel, in Precision Data Holdings Ltd v Wills (1991) 173 CLR 167, 190–2 (The Court).

Similarly, Kirby J thought that the courts had ‘disadvantages and defects’ in dealing with takeover disputes, primarily due to their composition, appeal provisions, procedures and scope for collateral challenge. In contrast, Kirby J reflected that the Panel was established to allow takeover disputes to be decided by persons with ‘substantial commercial experience’, who ‘could look not only at the letter of the Act but also at its spirit, and reach outcomes according to considerations of practicality, policy, economic impact, commercial and market factors and the public interest’.

Commentators have remarked on the flexibility in the approach adopted by the UK Panel. As in the case of the speed criterion discussed above, is difficult to gather empirical evidence to establish the extent to which the UK Panel operates flexibly given that much of its decision-making is not recorded in documents available to the public. However, the Panel exercises its powers to waive compliance with the UK Code where appropriate. It has also been observed that the UK Panel has endured due to the speed with which it can respond to developments, which has avoided calls for legislative intervention. This reflects the UK Panel’s ability to change the UK Code and its policies in light of market developments.

The objective of providing flexibility is also applicable to the role of the Australian Panel. The key CLERP aim relevant to the criterion of flexibility is ‘informality’ in decision-making. This is reflected in the streamlined procedures adopted by the Panel, including relying generally on written submissions rather than oral evidence. In relation

657 Ibid 551–2.
658 Ibid 562.
to its substantive approach to decision making, it is considered that the concept of flexibility should incorporate the goal of providing a ‘commercial’ approach. This is consistent with the Panel making decisions based on the ‘spirit’ as well as the letter of the law, with an approach that is less technical and avoids ‘excessive legalism’. These aims are assisted by the specialist expertise of Panel members (include industry representatives and the specialist lawyers), which were expected to ‘bring greater understanding and expertise to takeover disputes’. Although it does not determine the substance of the takeover rules like its UK counterpart, the Australian Panel provides guidance notes in order to inform market participants of the factors that it takes into account in making its decisions.

3 Certainty

Parties involved in a takeover seek certainty to allow them to make properly informed and timely decisions. This requires both consistency in decision-making and confidence that the Panel’s decision will become final within a reasonable period of time. In relation to the latter aspect, decisions may become subject to internal review and judicial review. These appeal processes are important to ensure that the Panel acts according to the law. However, this creates a tension where a system of dispute resolution has been established to avoid court proceedings in relation to the same matters. In this context, the potential for court challenges to the administrative body deciding takeover matters can undermine the very purpose of the system.

The UK system of takeover regulation has sought to achieve certainty by relying on its internal appeal processes rather than judicial review. It has achieved this aim to date

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665 Ibid 32.
666 Ibid 37.
through the operation of the *Datafin* principle. As discussed above, there have only been three judicial review cases in the UK since 1968, with the most recent decision in 1992.\(^668\) Giving the UK Panel a legislative basis has not affected the applicability of the *Datafin* decision, notwithstanding concerns raised at that time. As a result, the *Datafin* decision continues to play a crucial role in creating strong disincentives for judicial review applications. In particular, the self-regulatory nature of the system has led to few court cases in relation to UK Panel decisions. This is because, apart from implementing statutory recognition of the UK Panel, the 2006 Act maintained the essential features of the existing takeover regulatory regime. That is, the Panel determines the rules governing takeover bids, there is a system of hearings and appeals within the organisational structure of the Panel and there is a public interest in ensuring that the Panel continues to be able to provide speed, flexibility and certainty in its decision-making.

Similarly, the CLERP reforms have sought to achieve certainty in relation to decision-making by the Australian Panel. One of the key aims of the reforms was to provide ‘uniformity’ (or consistency) in decision making,\(^669\) with the Panel expected to ‘be well placed … to apply uniform standards’.\(^670\) However, it was also conceded that an appeal process would be required ‘to provide appropriate protection against erroneous decisions and facilitate uniform standards’.\(^671\) On the other hand, the aims of the CLERP reforms also promote finality by removing the opportunity for parties to bring court proceedings to delay or stymie a takeover bid.\(^672\) It was considered that placing takeover disputes before a commercial body set up to hear matters informally and quickly would allow target shareholders to decided upon the merits of a takeover bid.\(^673\)

\(^{668}\) See above Section B in Part II of this Chapter.


\(^{670}\) Ibid 37.

\(^{671}\) Ibid 40.

\(^{672}\) Ibid 36.

\(^{673}\) Ibid.
In relation to judicial review, it was envisaged that the Australian Panel would be ‘protected … whilst it operated in good faith and within reasonable bounds and complied with the procedures in the legislation and the rules of natural justice’.  

However, the entrenched ability to challenge the decisions of Panel members in the High Court under s 75(v) of the Australian Constitution has meant that judicial review applications will continue to test the ability of the Panel to provide finality in its decision-making.

B Issues to Consider in Applying Criteria

There are a number of issues to consider in the context of applying the criteria of speed, flexibility and certainty. Firstly, there are overlapping elements and tensions between the criteria that need to be taken into account. Second, there are two other important considerations relevant to the Panel’s operations, namely fairness and transparency.

1 Relationship between Criteria

Applying the criteria of speed, flexibility and certainty can lead to challenges in light of the relationship between them. There are two key issues to consider in this context, namely the existence of overlap and tensions between the criteria. The first issue of overlap applies to the criteria of speed and flexibility, particularly in relation to the issue of procedural flexibility. That is, the mechanisms providing flexibility the Panel’s operations can also facilitate timely decision-making. For example, the primary method of communication in Australian Panel proceedings is by email, with the Panel usually making its decisions based on written submissions from the parties. Recent legislative amendments also allow the Panel President to give directions as to which members should constitute a sitting Panel for a particular matter, and for the members to

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674 Ibid.


676 However, the Panel may decide to conduct a conference to hear oral evidence if this is considered to be more efficient: see ibid [25]; Takeovers Panel, Procedural Rules (1 June 2010) r 6.4.1 note 1.
participate in proceedings, where they are outside Australia. 677 This creates an overlap between the elements of the regulatory system that provide for both speed and procedural flexibility. However, given that these elements complement each other, this is merely a question of characterisation rather than impacting upon the assessment of whether the Panel meets these criteria.

On the other hand, there are tensions between the flexibility that the Panel has in making its decisions, and the aim of providing certainty in terms of consistency in decision-making. That is, the exercise of discretionary power by the Panel based on the policy purposes underlying the takeover regulation creates a tension between allowing flexibility in the operation of the regulatory regime and providing certainty for market participants. 678 As discussed above, the Australian and UK regulatory systems both rely upon general principles to shape their decision-making. 679 In particular, the Panels apply an approach based on maintaining the ‘spirit’ underlying the regulatory system. This flexibility in the system assists with reducing complexity in the takeover regulation, by avoiding the need for the rules to account for every situation. 680 It also allows the Panel to adopt a less technical approach, consistent with the broad aim of it adopting a ‘commercial’ or ‘pragmatic’ approach in its decision-making. However, the uncertainty arising from the use of such discretions can create difficulties for market participants.

For example, the Australian Panel has the role of determining whether circumstances are unacceptable based on the principles underlying the legislation, whether or not there has been a breach of the legislative requirements. A similar power was initially given to the NCSC in 1981, in addition to its role as the corporate and securities law regulator at

677 See Corporations Legislation Amendment (Deregulatory and Other Measures) Act 2015 (Cth) sch 2 pt 1 items 1–2; Explanatory Memorandum, Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014 (Cth) [5.4]–[5.5].


679 See above Section C in Part III of this Chapter.

680 See above Section B in Part III of Chapter 2.
that time.\footnote{A separate Panel was established in Australia in 1991, in response to concerns that the NCSC had been ‘acting as prosecutor, judge and jury’: see Explanatory Memorandum, Corporations Bill 1988 (Cth) 18.} This led to concerns about the uncertainty surrounding the NCSC’s exercise of the power where the legislation was complied with. In particular, one commentator concluded that ‘[y]ou might as well have a one-line Act saying that whatever the NCSC thinks is right is what applies’\footnote{Australian Financial Review, 4 August 1981, 60, cited in Quentin Digby, ‘The Principal Discretionary Powers of the National Companies and Securities Commission under the Takeovers Code’ (1984) 2 Company and Securities Law Journal 216, 216 n 3.}.

In light of these concerns, it is important to ensure that the general principles applied by the Panel are expressed in clear terms and that the Panel provides guidance on how it will exercise its discretions in order to minimise uncertainty.\footnote{See, eg, Ian Ramsay, ‘Corporate Law in the Age of Statutes’ (1992) 14 Sydney Law Review 474, 480, 482–3; Australian Securities and Investments Commission, Regulatory Index – Takeovers and Reconstructions <http://asic.gov.au/regulatory-resources/regulatory-index/takeovers-and-reconstructions/>; Takeovers Panel, Guidance Notes <http://www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=GN>.} However, there is tension between the aims of flexibility and certainty (in terms of consistency) in decision-making, particularly where the Panel first applies new policies such as its frustrating action policy.\footnote{See below Section A in Part IV of Chapter 5.} Consequently, the Panel needs to achieve an appropriate balance between flexibility and clarity in the exercise of its regulatory discretions.\footnote{See, eg, Justice M H McHugh, ‘The Growth of Legislation and Litigation’ (1995) 69 Australian Law Journal 37, 48; Ramsay, above n 683, 482, 493–4.} This also presents challenges in terms of assessing the extent to which the body meets the criteria of flexibility and certainty in this context.
Other Considerations

(a) Fairness

It is arguable that the criteria of speed, flexibility and certainty have a primary focus on ensuring that the Panel operates efficiently. This gives rise to questions as to the extent to which the system is operating fairly. An important means of achieving fairness is through consistency in decision-making. In addition, one of the primary aims of the takeover regulatory systems in Australia and the UK is to protect the interests of target shareholders. This is implemented through the regulatory regimes, which reflect the underlying general principles designed to ensure that target shareholders receive similar treatment, sufficient information and enough time in relation to the takeover offer. Accordingly, the Introduction to the UK Code states that it has been developed ‘to reflect the collective opinion of those professionally involved in the field of takeovers as to appropriate business standards and as to how fairness to offeree [target] company shareholders and an orderly framework for takeovers can be achieved’. 

In addition, procedural fairness is implemented through the opportunity given to persons affected by a decision to put forward their case before the decision is made. For example, the UK Panel Executive hears the views of the other parties involved before making a binding ruling. Similarly, the Australian Panel is required to give persons affected by a final order, parties to the proceedings and ASIC the opportunity to make submissions before making the final order. The Panel must also not be ‘satisfied that

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688 Ibid, Introduction, A12. The UK Hearings Committee can vary its procedural rules as considered appropriate for the ‘fair and just conduct and determination of the case’: at Introduction, A14.

689 Corporations Act 2001 (Cth) s 657D(1).
the order would unfairly prejudice any person’. Consequently, the Australian Panel is required to give ASIC, parties and any persons affected by a proposed declaration or orders an opportunity to make submissions. However, both the UK Panel Executive and Australian Panel can make conditional rulings or interim orders respectively on an ex-parte basis in the case of urgent matters.

Notwithstanding this, there is an inevitable tension between procedures designed to ensure the efficient resolution of disputes and those providing procedural fairness to the fullest possible extent. This is recognised in the legislation governing the proceedings of the Australian Panel, which makes it clear that the legislation and/or accompanying regulations may contain provisions that would override the rules of procedural fairness. These tensions are also reflected in the objects of the Panel procedures set out in the accompanying regulations. The objects are to ensure that the proceedings are ‘as fair and reasonable’ and ‘conducted with as little formality … [and] in as timely manner’, as permitted by the legislative requirements and ‘a proper consideration of the matters before the Panel’. An example of the tension between efficiency and fairness can be found in the Australian Panel’s approach of deciding matters based on written submissions rather than using oral hearings as a general rule for its proceedings. However, the Panel may decide to hold a hearing if it would expedite the proceedings or if it is required for a ‘better understanding of evidence, issues or arguments’. It should also be noted that the courts play a role in ensuring that procedural fairness is complied with when deciding judicial review applications. In this context, the Federal Court has

693 Australian Securities and Investments Commission Act 2001 (Cth) s 195(4).
695 Takeovers Panel, Procedural Rules (1 June 2010) r 1.1.1 note 1(a).
696 Ibid r 6.4.1 note 1.
confirmed that procedural fairness does not require an oral hearing to be held in every case.\textsuperscript{697}

\textit{(b) Transparency}

Another key issue for the Panel relates to transparency in decision-making. Unlike courts, the processes of the Australian and UK Panels are usually conducted in private.\textsuperscript{698} A party may also be allowed to withhold confidential and/or commercially sensitive information from other parties.\textsuperscript{699} However, this would only be allowed in exceptional circumstances due to procedural fairness concerns.\textsuperscript{700} The primary rationale for this approach is to ensure that the Panel can make its decisions based on all available material, without compromising the confidentiality of commercially sensitive information. This is important not only to protect the financial and other interests of the bodies to whom the information relates, but also to ensure that confidential information is handled in an appropriate manner given the implications for market integrity. A particular concern is to avoid trading based on inside information.\textsuperscript{701}

\textsuperscript{697} \textit{Tinkerbell Enterprises Pty Ltd as Trustee for The Leanne Catelan Trust v Takeovers Panel} (2012) 208 FCR 266, 298 (Collier J).


\textsuperscript{700} See Takeovers Panel, \textit{Procedural Rules} (1 June 2010) r 2.3.1 note 2; \textit{The City Code on Takeovers and Mergers}, 20 May 2013, Introduction, A14.

\textsuperscript{701} See \textit{Corporations Act 2001} (Cth) s 1043A; \textit{The City Code on Takeovers and Mergers}, 20 May 2013, r 4.1.
confidentiality also triggers requirements to disclose to the market information that is material to the market price of securities.\textsuperscript{702}

As a result, there are restrictions affecting access to information arising out of the proceedings of takeover bodies. For example, recordings of UK Hearings Committee and Takeover Appeal Board hearings are retained for administrative purposes only during the course of the proceedings, with transcripts available to parties subject to confidentiality conditions.\textsuperscript{703} The UK Code also requires that confidential information concerning a proposed offer only be passed to a person if necessary and where they are made aware of the need for secrecy.\textsuperscript{704} Similarly, each party to proceedings in the Australian Panel is required to make two undertakings concerning its own conduct and that of its directors, officers and advisers to protect confidentiality in relation to the proceedings.\textsuperscript{705} The first prevents the use or disclosure of confidential information provided to a party in the proceeding, except in relation to use in the proceedings or where required to disclose under the law or securities exchange listing rules.\textsuperscript{706} Second, parties are required to undertake not to canvas any issue relevant to the proceedings in the media unless the statement only identifies the parties, subject matter and/or broad nature of the unacceptable circumstances or orders sought (without discussing their merits).\textsuperscript{707}

These limitations are consistent with what would be expected of a commercially-orientated body making decisions in the context of confidential and market sensitive information. However, the bodies are accountable to the parties (and the public) through


\textsuperscript{703} See The Takeover Panel, \textit{Hearings Committee Rules of Procedure} r 5.10; The Takeover Appeal Board, \textit{Rules of the Takeover Appeal Board}, r 2.18.

\textsuperscript{704} \textit{The City Code on Take-overs and Mergers}, 20 May 2013, r 2.1.

\textsuperscript{705} Takeovers Panel, \textit{Procedural Rules} (1 June 2010) Annexure A.

\textsuperscript{706} Ibid, para A.

\textsuperscript{707} Ibid, para B.
the giving of reasons for their decisions.\textsuperscript{708} This information is more easily accessed in the case of the Australian Panel compared to its UK counterpart, as the reasons for the Australian Panel’s decisions are published sequentially on the website on separate pages for each year.\textsuperscript{709} There are only exceptional circumstances in which this does not occur if the matter is confidential.\textsuperscript{710} In contrast, decisions made by the UK Panel Executive on a day-to-day basis are generally not announced in Panel Statements, which makes it difficult to assess much of the work of the UK Executive. However, such decisions can be appealed to the UK Hearings Committee and Takeover Appeal Board, for which reasons are generally available.\textsuperscript{711}

\textbf{V \hspace{12pt} CONCLUSION}

This Chapter addresses the first research question in the thesis in determining the criteria that should be used to measure the effectiveness of the Australian Panel. In answering this question, the Chapter focuses on the UK Panel as it is the key comparator for the Australian Panel for the purposes of establishing the criteria to be applied to determine the effectiveness of the Panel. This is because the UK Panel was the key overseas body cited in support of the CLERP reforms.\textsuperscript{\textsuperscript{712}} The above analysis of the key UK legislative and rule changes since the CLERP reforms demonstrate that these developments have not impacted upon the essential features of the UK Panel that led it to be the key comparator for the expanded role of the Australian Panel. That is, the UK Panel continues to provide a successful model of a non-judicial body deciding takeover disputes with the view to providing speed, flexibility and certainty.

\textsuperscript{708} These are available on the websites of the relevant bodies, namely those for the Takeovers Panel in Australia, and the Takeover Panel and the Takeover Appeal Board in the UK.


\textsuperscript{710} This has only occurred once to date: see Takeovers Panel, 2009 Reasons for Decisions, \textit{Confidential} [2009] ATP 24.

\textsuperscript{711} See \textit{The City Code on Take-overs and Mergers}, 20 May 2013, Introduction, A15, A17.

The Chapter then examines whether the three objectives of the UK Panel, namely speed, flexibility and certainty, can be used as the criteria to measure the effectiveness of the Australian Panel. These three objectives have been a touchstone for the UK Panel’s operations over a number of decades. Although there are significant differences in the way that the Australian and UK Panels operate, they are based on similar aims and regulatory principles. Both Panels also operate with similar time pressures in an environment in which there are significant incentives for parties to test the regulatory boundaries. In light of the above analysis, it is concluded that the objectives of speed, flexibility and certainty can be applied similarly to the Australian Panel as the criteria to determine whether it has achieved the aims set for it as part of the CLERP reforms.
Chapter 4 – Speed

I INTRODUCTION

Timely decision-making is an important element of an effective system of dispute resolution, with time delays leading to concerns about access to justice. 713 In light of the delays generally experienced in the court system, the ability of tribunals to make relatively speedy decisions is a key advantage of using administrative tribunals in place of courts. 714 However, this Chapter does not compare the Panel’s operations to the litigation conducted in the courts prior to the CLERP reforms. It instead assesses the speed of Panel decision-making against different standards based on the timing expectations of the Panel, other administrative bodies and courts making decisions relating to takeover and corporate law matters. There is sparse empirical research in relation to the timely resolution of disputes in the Australian system of civil dispute resolution. 715 One of the key difficulties in comparing the timeliness of the decisions of different bodies is the lack of consistency in the periods used to measure timeliness, and the fact that many bodies report the percentage of matters resolved over a certain period (often 12 months) without providing further detail. 716

716 Productivity Commission, Access to Justice Arrangements, Inquiry Report No 72 (2014) vol 2, 883. For example, empirical research based on a survey relating to the Victorian Small Claims Tribunal concluded that it appeared that the Tribunal was speedier than the Magistrates Courts based on an average estimated waiting time of 11 weeks between filling in the claim form and the hearing, and high levels of satisfaction with the amount of time before the hearing:
Speed in decision-making was one of the key aims of the CLERP reforms.\textsuperscript{717} This is due to the effect that delay can have on a takeover bid and the ability of the target shareholders to decide upon the merits of the bid. There are high financial stakes for the bidder in making a general offer to purchase the remaining shares in the target company, in light of the risks and timing pressures involved. This is particularly the case where the bidder needs to obtain finance for cash consideration for the takeover offers.

Litigation was used frequently in the context of takeovers prior to the CLERP reforms,\textsuperscript{718} often as a defence tactic to either give the target company more time to respond to the takeover or prevent the bid being considered by target shareholders.\textsuperscript{719}

Consequently, the CLERP reforms were proposed partly in response to concerns that tactical litigation could delay or prevent the takeover as a result of the delays involved.


\textsuperscript{719} See, eg, \textit{Cultus Petroleum NL v OMV Australia Pty Ltd} (1999) 32 ACSR 1, 21 (Santow J); Ian Ramsay, ‘The Takeovers Panel – A Review’ in Ian Ramsay (ed), \textit{The Takeovers Panel and Takeovers Regulation in Australia} (Melbourne University Press, 2010) 1, 23.
in the court process. This would also undermine the disciplinary effect of takeovers on company management. Accordingly, the overall aim of the CLERP reforms was for disputes in takeover hostile bids ‘to be resolved as quickly and efficiently as possible’ to allow the outcome of the bid to be decided by target shareholders ‘on the basis of its commercial merits’. Indeed, it was contemplated that the Panel would ‘be well placed to act with speed in every case’.

This Chapter assesses the extent to which the Panel has achieved speed in its decision-making consistent with the CLERP reforms over the period from 13 March 2000 to 30 June 2016. The Chapter is divided into five parts. Part II examines how to measure speed in relation to Panel decision-making. It develops different standards of speed based on an examination of the timing expectations of the Panel and other administrative bodies and courts making decisions relating to takeover and corporate law matters. These standards are used in the assessment in Part IV, which analyses the time between the dates of the applications to the Panel, the Panel’s decisions and the


723 Ibid 37.
publication of its reasons. Part III analyses the elements of the Panel’s processes affecting its ability to make speedy decisions. Part IV assesses the Panel’s decision-making against the criterion of speed, with concluding comments in Part V.

II HOW TO MEASURE SPEED

This Part examines how to measure speed in decision-making by the Panel. As discussed above, Panel decisions are only made in response to certain types of applications.\footnote{See above Section C in Part I of Chapter 1.} The outcome of Panel decisions in relation to those applications are communicated to the public through media releases available on its website.\footnote{See Takeovers Panel, \textit{Media Releases} <http://www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=MR>.} Reasons for the Panel’s decisions are also published sequentially on the website on separate pages for each year.\footnote{Each application is assigned an ATP number for that year: see Takeovers Panel, \textit{Reasons for Decisions} < http://www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=RD>.} There are only exceptional circumstances in which this does not occur due to the matter being confidential.\footnote{This has only occurred once to date: see Takeovers Panel, 2009 Reasons for Decisions, \textit{Confidential} [2009] ATP 24.} Consequently, the speed of the Panel’s decision-making can be assessed through an empirical analysis of the time period between the dates of each application to the Panel and its decision on the application. As the Panel’s reasons provide an important accountability mechanism in providing the basis upon which the Panel has made its decision, it is appropriate to also assess the timing of the publication of the Panel’s reasons for its decisions. This can be measured based on the time between the date of the Panel’s decisions and the publication of its reasons.

The methodology adopted to assess speed includes an analysis of the elements of the regulatory framework affecting the Panel’s ability to meet the speed criterion. It is also important to examine how the timing of Panel decision-making has been affected by judicial review. Different levels of speed that could be achieved are quantified and placed on a spectrum taking into account varying levels of conformance with these
standards. The assessment is consequently conducted in light of what are considered to be strong, medium and weak forms of speed in decision-making. This reflects the timing goals for courts and other tribunals making decisions relating to corporate and takeover matters, which are used as benchmarks for the speed of the Panel’s decisions.

Court proceedings relating to Corporations Act matters are generally brought in the Supreme and Federal Courts. Apart from the Panel, the other key administrative decision-maker in the context of the Corporations Act is the AAT. The AAT reviews certain ASIC decisions under the Act, including the exercise of its exemption and modification powers apart from those reviewed by the Panel. It was responsible for reviewing all ASIC takeover and exemption modification decisions prior to the CLERP reforms. Another administrative body that is relevant to takeovers is the Australian Competition Tribunal (‘Competition Tribunal’). The Competition Tribunal decides applications for authorisation of takeovers and mergers that would result in a substantial lessening of the competition in a market under the Competition and Consumer Act 2010 (Cth). It also reviews certain decisions of the Australian Competition and Consumer Commission, Australian Energy Regulator (‘AER’), Economic Regulation Authority and relevant Minister.

In its Report on Government Services 2017, the Australian Productivity Commission noted the national benchmarks applying in relation to its 2015-16 review of the court

729 See Corporations Act 2001 (Cth) s 58AA.
730 In relation to takeovers, see ibid ss 669, 673, 1317B(1)(b), 1317C(ga), (gb).
731 See Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 38.
733 See, eg, Competition and Consumer Act 2010 (Cth) s 44K, pt X; National Electricity (NSW) Law s 71B; National Gas (NSW) Law s 245. See also Federal Court of Australia, Annual Report 2015-2016, 156.
system. This involved Supreme and Federal Courts completing at least 90 per cent of matters within a year, and all matters within two years. The Federal Court has set its own time goal of completing 85 per cent of cases within eighteen months of commencement. Similarly, the AAT seeks to finalise 75 per cent of matters within 12 months of lodgment, with its NSW counterpart focusing on reducing outstanding matters that are older than 12 months.

A shorter time frame is applied by the Productivity Commission in relation to the Federal Circuit Court and the magistrates’ and children’s courts. This involves these courts completing at least 90 per cent of matters within six months of lodgment and all within a year. In addition, nearly half of the matters before the Federal Court in 2015-16 related to its Corporations jurisdiction and just under 90 per cent of these matters were aged under six months. Similarly, the median time taken by the AAT in 2015-16 to finalise commercial matters that did not involve taxation was 24 weeks. The Productivity Commission has previously found that most tribunals reporting data on timeliness over 2011-12 had resolved a majority of its disputes within six months.

The Competition Tribunal and the Panel strive for the shortest time periods. Both bodies are not bound by the rules of evidence and conduct proceedings with as much

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735 Ibid.
740 Federal Court of Australia, Annual Report 2015-2016, 29 (Table 3.1).
741 Administrative Appeals Tribunal, Annual Report 2015-16, 26 (Table 3.4).
743 The Superannuation Complaints Tribunal (‘SCT’) is the other key dispute resolution body in the Australian Treasury portfolio, which provides an alternative to the court system in relation to superannuation complaints. It operates differently to the Competition Tribunal and the Panel, in seeking to resolve a significant volume of complaints over the reporting period through a
expedition and little formality as permitted by a proper consideration of the matter.\textsuperscript{744} However, unlike the Panel, the Competition Tribunal generally conducts its hearings in public.\textsuperscript{745} The Competition Tribunal is deemed to have refused to grant a merger authorisation if it has not done so within three months of the application (or within a further three month period if the Tribunal determines that there are special circumstances).\textsuperscript{746} In relation to certain AER decisions, the Competition Tribunal is also required to ‘use its best endeavours’ to determine applications for review within a three month period after it grants leave for the application.\textsuperscript{747} The Tribunal granted leave following one to two months after the application in the majority of the seven AER review decisions in 2016.\textsuperscript{748}

There are also provisions in the \textit{Corporations Act} concerning the timing of Panel decisions. Consistent with the CLERP aim of speed in decision-making, the Panel only has the power to decide unacceptable circumstances matters where the application is

\textsuperscript{744} See \textit{Australian Securities and Investments Commission Regulations 2001} (Cth) regs 13, 16(2); \textit{Competition and Consumer Act 2010} (Cth) s 130(1); Federal Court of Australia, \textit{Annual Report 2015-2016}, 156.

\textsuperscript{745} Federal Court of Australia, \textit{Annual Report 2015-2016}, 156.

\textsuperscript{746} See \textit{Competition and Consumer Act 2010} (Cth) s 95AZI. Similar time limits apply in relation to applications for variations and revocations (or substitutions) of authorisations under sections 95AZL and 95AZM respectively.

\textsuperscript{747} See, eg, \textit{National Electricity (NSW) Law} s 71Q; \textit{National Gas (NSW) Law} s 260. These provisions allow this ‘standard period’ to be extended.

\textsuperscript{748} See \textit{Applications by Public Interest Advocacy Centre Ltd and Endeavour Energy} [2016] ACompT 2; \textit{Applications by Public Interest Advocacy Centre Ltd and Essential Energy} [2016] ACompT 3; \textit{Application by ActewAGL Distribution} [2016] ACompT 4; \textit{Application by Jemena Gas Networks (NSW) Ltd} [2016] ACompT 5.
made ‘within … 2 months after the circumstances have occurred’. However, the Panel can extend the time for applications provided it first allows procedural fairness to affected persons by allowing them an opportunity to make submissions: see s 657C(3)(b); Queensland North Australia Pty Ltd v Takeovers Panel (2014) 100 ACSR 358, 376 (Collier J); Queensland North Australia Pty Ltd v Takeovers Panel (2015) 320 ALR 726, 741 (The Court).

Consistent with these legislative requirements, the Panel’s website indicates that it will usually decide whether to conduct proceedings between a few days and a week following an application. If proceedings are not conducted, the Panel expects that it will usually conclude the matter in around one to two weeks after the application. On the other hand, matters are expected to conclude around two to three weeks after the

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749 Corporations Act 2001 (Cth) s 657C(3)(a). However, the Panel can extend the time for applications provided it first allows procedural fairness to affected persons by allowing them an opportunity to make submissions: see s 657C(3)(b); Queensland North Australia Pty Ltd v Takeovers Panel (2014) 100 ACSR 358, 376 (Collier J); Queensland North Australia Pty Ltd v Takeovers Panel (2015) 320 ALR 726, 741 (The Court).


751 See Corporations Act 2001 (Cth) s 657B.


753 See Corporations Act 2001 (Cth) s 657EA(5).


755 Ibid.
application if the Panel decides to conduct proceedings.\textsuperscript{755} The Panel is required to notify ASIC and persons to whom the application relates of its decision on whether to conduct proceedings ‘as soon as practicable after making the decision’.\textsuperscript{756} Where proceedings are conducted, the Panel usually provides its reasons at a later time.\textsuperscript{757}

In light of the above analysis, there would be a strong form of speed if the Panel consistently makes its decision within one month of receiving the application and publishes its reasons within three months of the application. This reflects the timing requirements for Panel decisions to make declarations of unacceptable circumstances, as well as the three month periods applicable to Competition Tribunal determinations (which include its reasoning). A medium form of speed would be reflected in the Panel consistently making its decisions and publishing its reasons from three to six months of receiving the application. This would be comparable to what is generally being achieved in relation to similar matters in the AAT and Federal Court. Finally, there would be a weak form of speed if the decisions were made and reasons available consistently from six to 12 months following the application. This reflects the highest standard generally applied to courts and tribunals in relation to all matters.

### III PANEL PROCESSES

The Panel’s processes are analysed in this Part to determine the extent to which they promote speed in decision-making. These processes are determined by the regulatory framework applying to the Panel\textsuperscript{758} and procedural rules adopted by the Panel to discharge its responsibilities (‘Procedural Rules’).\textsuperscript{759} There are competing objectives reflected in the procedures applying in both the \textit{Australian Securities and Investments Commission Regulations 2001} (Cth) (‘ASIC Regulations’) and the \textit{Procedural Rules}.

\textsuperscript{755} Ibid.

\textsuperscript{756} \textit{Australian Securities and Investments Commission Regulations 2001} (Cth) regs 21(1)–(2).

\textsuperscript{757} Cf \textit{Re Online Advantage Ltd} [2002] ATP 14.

\textsuperscript{758} See \textit{ Corporations Act 2001} (Cth) pt 6.10 div 2; \textit{Corporations Regulations 2001} (Cth) pt 6.10; \textit{Australian Securities and Investments Commission Act 2001} (Cth) pt 10; \textit{Australian Securities and Investments Commission Regulations 2001} (Cth) pt 3.

\textsuperscript{759} Takeovers Panel, \textit{Procedural Rules} (1 June 2010).
These involve balancing the aims of providing informality, fairness and timeliness in decision-making.

After an application is made to the Panel, the Panel President directs three Panel members to constitute the Sitting Panel that decides the outcome of the application. This direction is made in light of any conflicts of interest identified in the application and/or disclosed by Panel members. To assist with this process, the Panel President has recently been given the power to make the direction while outside Australia. Other Panel members are also appointed as Acting Presidents so that they can progress matters when the Panel President is unable to discharge their duties.

The Sitting Panel decides at the outset whether to conduct proceedings and, if there is an application for an interim order, whether to make the order. Interim orders can be

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760 See *Australian Securities and Investments Commission Regulations 2001* (Cth) regs 13(b), 16(2)(c)(ii).

761 See *Australian Securities and Investments Commission Regulations 2001* (Cth) regs 13(a), 16(2)(c)(i); Takeovers Panel, *Procedural Rules* (1 June 2010) r 1.1.1(a), (c).

762 See *Australian Securities and Investments Commission Regulations 2001* (Cth) regs 13(c), 16(2)(c)(iii); Takeovers Panel, *Procedural Rules* (1 June 2010) r 1.1.1(b), (d).


764 See *Australian Securities and Investments Commission Act 2001* (Cth) ss 185(1), (1A); Takeovers Panel, *Guidance Note 11 – Conflicts of Interest* (24 August 2009) [9]–[10]. The Guidance Note indicates that a reconstituted Sitting Panel may need to rehear a matter where a conflict is identified after Panel proceedings commence: at [21].

765 See *Australian Securities and Investments Commission Act 2001* (Cth) s 184(3A); *Corporations Legislation Amendment (Deregulatory and Other Measures) Act 2015* (Cth) sch 2 pt 1 items 1–2; Explanatory Memorandum, *Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014* (Cth) [5.4]–[5.5].


767 See *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 20; *Corporations Act 2001* (Cth) ss 657C(1), 657E(1); Takeovers Panel, *The Panel and Process*
made by the Sitting Panel or Panel President without consulting other parties, although submissions and rebuttal submissions may be sought if the order is not urgent.\textsuperscript{768} It is expected that parties will give the Panel or President at least one business day to deal with an application for an interim order.\textsuperscript{769} In relation to the decision whether to conduct proceedings, parties other than the applicant can make preliminary submissions but not rebuttal submissions in relation to other preliminary submissions.\textsuperscript{770} Typically, the Panel declines to conduct proceedings in situations where there is ‘no reasonable prospect that it would declare the circumstances unacceptable’.\textsuperscript{771} This similarly occurs where the Panel considers the material is insufficient to warrant further investigation.\textsuperscript{772} A Review Panel may also decide not to conduct proceedings where it agrees with the initial Panel’s decision and reasons, and concludes that it would not decide the matter differently.\textsuperscript{773}

If the Sitting Panel conducts proceedings, it sends a brief to the parties inviting submissions on the key issues or questions identified and setting out the timetable for making submissions and rebuttal submissions.\textsuperscript{774} Although copies of documents must be provided to interested persons,\textsuperscript{775} it is possible that further submissions may not be given to each party and documents may be withheld ‘for confidentiality or other


\textsuperscript{769} Takeovers Panel, \textit{Procedural Rules} (1 June 2010) r 8.1.1 note 2.

\textsuperscript{770} Ibid r 6.1.1.


\textsuperscript{772} See, eg, \textit{Re Celamin Holdings NL (No 1R)} [2014] ATP 23, 4.

\textsuperscript{773} Takeovers Panel, \textit{Procedural Rules} (1 June 2010) r 3.3.1 note 3.

\textsuperscript{774} Ibid r 6.2.1 note 2.

\textsuperscript{775} See \textit{Corporations Act 2001} (Cth) ss 657A(6), 657D(4); \textit{Australian Securities and Investments Commission Regulations 2001} (Cth) reg 28(2); Takeovers Panel, \textit{Procedural Rules} (1 June 2010) rr 2.2.2, 2.2.3, 7.1.1, 8.1.1.
reasons’. The Panel prefers to conduct its proceedings in private. It relies predominantly on written submissions and uses email as its primary means of communicating. Panel members can also now participate in proceedings while overseas. However, a conference can be convened to allow oral evidence. The Panel has indicated that it may conduct a conference if it considers that it would ‘expedite proceedings or if it requires a better understanding of evidence, issues or arguments’.

The Panel does not need to comply with the rules of evidence, and may instead act based on ‘any logically probative material from any source’. Before making a declaration or orders, the Panel is required to give ASIC, parties and any persons affected by the proposed declaration or orders an opportunity to make submissions. Parties are encouraged to resolve issues before making the application and the Panel will generally give consent to withdraw an application where the dispute is resolved (unless unacceptable circumstances are suspected to occur or continue). The Panel also urges parties to propose undertakings to remedy concerns raised, particularly in the context of preliminary submissions, and the making of declarations and/or orders.

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776 See Australian Securities and Investments Commission Regulations 2001 (Cth) regs 30(2)–(3); Takeovers Panel, Procedural Rules (1 June 2010) r 2.3.1.
777 Takeovers Panel, Procedural Rules (1 June 2010) r 2.1.1 note 1.
778 Ibid rr 1.1.1 note 1; 2.1.1 note 1.
779 See Australian Securities and Investments Commission Act 2001 (Cth) s 188(3); Corporations Legislation Amendment (Deregulatory and Other Measures) Act 2015 (Cth) sch 2 pt 1 items 1–2; Explanatory Memorandum, Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014 (Cth) [5.4]–[5.5].
780 Australian Securities and Investments Commission Regulations 2001 (Cth) regs 35, 37(1).
781 Takeovers Panel, Procedural Rules (1 June 2010) r 6.4.1 note 1.
782 Australian Securities and Investments Commission Regulations 2001 (Cth) reg 16(2)(a).
783 Takeovers Panel, Procedural Rules (1 June 2010) r 6.3.1 (see also note 1).
785 See Takeovers Panel, Procedural Rules (1 June 2010) rr 3.1.1 note 6, 3.4.1 note 1.
786 Ibid rr 6.1.1 note 3, rr 7.1.1 note 2, 8.1.1 note 5.
There are a number of ways in which decisions can be reviewed. In addition to the Panel’s power to review ASIC decisions, parties can seek review of a Panel decision relating to unacceptable circumstances.\(^{787}\) This latter application must be made within two business days of the decision of the initial Panel.\(^{788}\) The Review Panel comprises another three members of the Panel and has similar powers to the initial Panel.\(^{789}\) Panel decisions are also subject to judicial review.\(^{790}\) Judicial review applications to date have focused on procedural fairness,\(^{791}\) and whether the Panel has complied with the legislative requirements giving it jurisdiction.\(^{792}\)

In relation to procedural fairness, parties must be given a reasonable opportunity to make submissions before the Panel exercises its powers to review ASIC decisions and make a declaration of unacceptable circumstances and orders.\(^{793}\) However, in the case of an ASIC decision subject to Panel review, the Panel can decline to give a reasonable opportunity for submissions if it is ‘not practicable’ due to ‘the urgency of the case or otherwise’.\(^{794}\) On the other hand, the courts have applied procedural fairness rules to the

\(^{787}\) See *Corporations Act 2001* (Cth) ss 656A, 657EA.

\(^{788}\) *Corporations Regulations 2001* (Cth) reg 6.10.01.

\(^{789}\) *Corporations Act 2001* (Cth) s 657EA(4); *Australian Securities and Investments Commission Act 2001* (Cth) s 184(1).

\(^{790}\) See *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 3, 5; *Judiciary Act 1903* (Cth) s 39B; *Australian Constitution* s 75.

\(^{791}\) See *Tinkerbell Enterprises Pty Ltd as Trustee for The Leanne Catelan Trust v Takeovers Panel* (2012) 208 FCR 266; *Queensland North Australia Pty Ltd v Takeovers Panel* (2014) 100 ACSR 358; *Queensland North Australia Pty Ltd v Takeovers Panel* (2015) 320 ALR 726.


\(^{793}\) See *Corporations Act 2001* (Cth) ss 656B(3), 657A(4), 657D(1); Takeovers Panel, *Procedural Rules* (1 June 2010) r 8.1.1 note 7. There may also be submissions on interim orders if the matter is not urgent: at r 8.1.1 note 4.

\(^{794}\) *Corporations Act 2001* (Cth) s 656B(4).
Panel in circumstances where the legislation did not specifically require this. Consequently, the Panel has been found to have exercised improperly its power to extend the time for an application for a declaration of unacceptable circumstances where it had not given affected parties an opportunity to make submissions beforehand.795 Courts have also quashed a number of Panel decisions based on breaches of the legislative requirements concerning its jurisdiction.796 Following the first two judicial review decisions, the legislation was amended in light of concerns that it had been interpreted too narrowly.797

IV  ASSESSMENT OF SPEED

This Part assesses the speed of decision-making of the Panel over the period from 13 March 2000 to 30 June 2016. The first section contains an empirical analysis of the timing of Panel decisions.798 It focuses particularly on the average times that the Panel took to make its decisions and publish the reasons for its decisions in each year, as well as the average times taken to make interim orders. This section also evaluates the effect of the Panel deciding not to conduct proceedings and the use of conferences on the timing of decision-making. The second section analyses the impact of judicial review on the time that it took to resolve the affected matters. It compares the relative times taken by the Panel and the courts in relation to these matters and the time taken by the courts in relation to the different judicial review matters over time. The final section assesses the speed of Panel decision-making using the methodology set out in Part II.

795 See ibid s 657C(3)(b); Queensland North Australia Pty Ltd v Takeovers Panel (2014) 100 ACSR 358, 376 (Collier J); Queensland North Australia Pty Ltd v Takeovers Panel (2015) 320 ALR 726, 741 (The Court).


797 See Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 1–2.

798 This analysis is based on statistical information made available by the Panel.
A Timing of Panel Decision-Making

The most important indicator of the speed of the Panel’s decision-making is the time that it takes to make its decisions and publish the reasons for its decisions. As discussed above, the Panel usually announces its decision prior to the publication of the reasons. Accordingly, Table 1 below provides an empirical analysis of the average number of days taken from the application to the decision, from the decision to the publication of reasons and from the application to the reasons for Panel applications occurring between 13 March 2000 and 30 June 2016. This data set is also depicted in Graph 1 below. In addition, Table 1 sets out the average number of applications per month for each year. This latter information allows the Panel’s workload for each year to be compared on an equivalent basis, given the shorter time periods in the first and last calendar year over the relevant period.

As set out at the bottom of Table 1, the Panel’s decisions were on average made within 16.6 days of the application, with reasons being provided an average of 29.5 days later. This resulted in a total average of 46.1 days between the date of the application and the availability of reasons for the decision. The average time taken for the Panel to make its decisions over this period ranged from 9.8 days in 2008 to 23.1 days in 2002. This highest average is still around a week less than the one month time limit applicable to the Panel making a declaration of unacceptable circumstances. Although there were only seven matters in which the Panel conducted an oral conference, it is interesting

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799 This includes applications up to and including that relating to the decision in Re Sovereign Gold Company Ltd [2016] ATP 12.
800 Corporations Act 2001 (Cth) s 657B(b).
to note that the average time for the Panel to make its decision in these matters was 30 days, which is nearly double the overall average.  

Table 1 – Timing of Panel decisions and reasons from 13 March 2000 to 30 June 2016

<table>
<thead>
<tr>
<th>Year</th>
<th>Average number of applications each month</th>
<th>Average days from application to decision</th>
<th>Average days from decision to reasons</th>
<th>Average days from application to reasons</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>2.1</td>
<td>12.2</td>
<td>25.6</td>
<td>37.8</td>
</tr>
<tr>
<td>2001</td>
<td>2.6</td>
<td>17.7</td>
<td>29.4</td>
<td>47.1</td>
</tr>
<tr>
<td>2002</td>
<td>1.9</td>
<td>23.1</td>
<td>57.0</td>
<td>80.1</td>
</tr>
<tr>
<td>2003</td>
<td>4.1</td>
<td>16.0</td>
<td>92.1</td>
<td>108.1</td>
</tr>
<tr>
<td>2004</td>
<td>2.8</td>
<td>18.7</td>
<td>29.8</td>
<td>48.5</td>
</tr>
<tr>
<td>2005</td>
<td>2.2</td>
<td>15.7</td>
<td>47.2</td>
<td>63.0</td>
</tr>
<tr>
<td>2006</td>
<td>3.0</td>
<td>16.4</td>
<td>92.8</td>
<td>109.2</td>
</tr>
<tr>
<td>2007</td>
<td>2.8</td>
<td>14.1</td>
<td>36.7</td>
<td>50.8</td>
</tr>
<tr>
<td>2008</td>
<td>3.1</td>
<td>9.8</td>
<td>9.2</td>
<td>19.0</td>
</tr>
<tr>
<td>2009</td>
<td>2.7</td>
<td>14.3</td>
<td>5.0</td>
<td>19.2</td>
</tr>
<tr>
<td>2010</td>
<td>2.2</td>
<td>13.0</td>
<td>7.3</td>
<td>20.3</td>
</tr>
<tr>
<td>2011</td>
<td>1.3</td>
<td>19.8</td>
<td>7.0</td>
<td>26.8</td>
</tr>
<tr>
<td>2012</td>
<td>2.1</td>
<td>14.6</td>
<td>7.8</td>
<td>22.3</td>
</tr>
<tr>
<td>2013</td>
<td>1.7</td>
<td>18.3</td>
<td>11.8</td>
<td>30.1</td>
</tr>
<tr>
<td>2014</td>
<td>2.1</td>
<td>17.4</td>
<td>11.5</td>
<td>29.0</td>
</tr>
<tr>
<td>2015</td>
<td>1.3</td>
<td>20.7</td>
<td>15.5</td>
<td>36.1</td>
</tr>
<tr>
<td>2016</td>
<td>2.2</td>
<td>20.2</td>
<td>16.3</td>
<td>36.6</td>
</tr>
<tr>
<td>Average</td>
<td>2.4</td>
<td>16.6</td>
<td>29.5</td>
<td>46.1</td>
</tr>
</tbody>
</table>

802 However, the average time to provide reasons in these matters was 30.6 days, which was only just above the overall average figure.
Graph 1 – Timing of Panel decisions and reasons from 13 March 2000 to 30 June 2016

Graph 1 highlights the greater variability in the average times taken for the Panel to publish its reasons. These ranged from an average of five days in 2009 to 92.8 days in 2006. The second highest average in 2003 also exceeded three months (92.1 days). An obvious factor in relation to the timing is the average number of applications received each month over the relevant time periods. There is some correlation between the average number of applications and timing of the reasons. In particular, the highest average number of applications occurred in 2003 (4.1 per month), which was the year in which average time for the reasons was the second longest. Significantly, the Panel received 19 applications in relation to Anaconda Nickel Ltd (the highest number in relation to any matter) over just under 3 months at the beginning of 2003.\(^{803}\) Similarly, the longest time for the reasons occurred in 2006, which had the third highest average number of applications (three per month). The number of applications is clearly not the only relevant factor given that the average times for the decision and reasons were significantly lower in 2008, which had the second largest average number of applications (3.1 per month). It is also important to note that there was significant delay

in relation to the Panel’s reasons for their decisions concerning Alinta Ltd,\textsuperscript{804} with their timing affected by three sets of court decisions that ultimately led to the High Court upholding the constitutionality of the Panel in Alinta.\textsuperscript{805}

There was no discernible correlation between the number and timing of interim orders. Table 2 below sets out the average number of days between the dates of the application and interim order for each year from 13 March 2000 to 30 June 2016. It also contains the average monthly number of applications for an interim order for each year, together with the number of interim orders granted in each year. The overall average time for the making of interim orders was 5.7 days, with the minimum average time of 1.5 days in 2006.

\textsuperscript{804} The reasons for these decisions were each published more than 500 days after the decision: see Re Alinta Ltd (No 1) [2006] ATP 15; Re Alinta Ltd (No 1R) [2006] ATP 19; Re Alinta Ltd (No 2) (2007) 25 ACLC 1746.

Table 2 – Timing of interim orders from 13 March 2000 to 30 June 2016

<table>
<thead>
<tr>
<th>Year</th>
<th>Average number of applications each month</th>
<th>Average days from application to interim order</th>
<th>Number of interim orders</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>1.1</td>
<td>5.0</td>
<td>1</td>
</tr>
<tr>
<td>2001</td>
<td>1.1</td>
<td>5.6</td>
<td>5</td>
</tr>
<tr>
<td>2002</td>
<td>1.1</td>
<td>8.0</td>
<td>2</td>
</tr>
<tr>
<td>2003</td>
<td>1.8</td>
<td>2.6</td>
<td>5</td>
</tr>
<tr>
<td>2004</td>
<td>1.2</td>
<td>5.9</td>
<td>8</td>
</tr>
<tr>
<td>2005</td>
<td>1.3</td>
<td>8.0</td>
<td>4</td>
</tr>
<tr>
<td>2006</td>
<td>1.8</td>
<td>1.5</td>
<td>2</td>
</tr>
<tr>
<td>2007</td>
<td>1.3</td>
<td>3.0</td>
<td>1</td>
</tr>
<tr>
<td>2008</td>
<td>2.3</td>
<td>3.4</td>
<td>7</td>
</tr>
<tr>
<td>2009</td>
<td>1.6</td>
<td>6.2</td>
<td>6</td>
</tr>
<tr>
<td>2010</td>
<td>1.5</td>
<td>7.8</td>
<td>8</td>
</tr>
<tr>
<td>2011</td>
<td>0.9</td>
<td>6.7</td>
<td>3</td>
</tr>
<tr>
<td>2012</td>
<td>1.5</td>
<td>6.0</td>
<td>2</td>
</tr>
<tr>
<td>2013</td>
<td>1.4</td>
<td>7.6</td>
<td>6</td>
</tr>
<tr>
<td>2014</td>
<td>1.9</td>
<td>8.4</td>
<td>5</td>
</tr>
<tr>
<td>2015</td>
<td>0.8</td>
<td>7.4</td>
<td>4</td>
</tr>
<tr>
<td>2016</td>
<td>1.8</td>
<td>3.6</td>
<td>3</td>
</tr>
<tr>
<td><strong>Average</strong></td>
<td><strong>1.4</strong></td>
<td><strong>5.7</strong></td>
<td><strong>4.2</strong></td>
</tr>
</tbody>
</table>

It is notable from Table 1 that the total average time periods from the date of application to the publication of reasons in the years starting from 2008 were all lower than the overall average. This can be explained partly by the Panel generally declining to conduct proceedings in a higher percentage of matters over that time. Table 3 below sets out the percentage of matters in which the Panel conducted proceedings, declined to conduct proceedings and consented to the withdrawal of the application in the matters from 13 March 2000 to 30 June 2016. This data set is also depicted in Graph 2.
### Table 3 – Process outcomes from 13 March 2000 to 30 June 2016

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage of matters: proceedings conducted</th>
<th>Percentage of matters: declined to conduct</th>
<th>Percentage of matters: applications withdrawn</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>66.7</td>
<td>19.0</td>
<td>14.3</td>
</tr>
<tr>
<td>2001</td>
<td>87.1</td>
<td>9.7</td>
<td>3.2</td>
</tr>
<tr>
<td>2002</td>
<td>78.3</td>
<td>17.4</td>
<td>4.3</td>
</tr>
<tr>
<td>2003</td>
<td>75.5</td>
<td>12.2</td>
<td>12.2</td>
</tr>
<tr>
<td>2004</td>
<td>58.8</td>
<td>26.5</td>
<td>14.7</td>
</tr>
<tr>
<td>2005</td>
<td>69.2</td>
<td>26.9</td>
<td>3.8</td>
</tr>
<tr>
<td>2006</td>
<td>58.3</td>
<td>25.0</td>
<td>16.7</td>
</tr>
<tr>
<td>2007</td>
<td>32.4</td>
<td>47.1</td>
<td>20.6</td>
</tr>
<tr>
<td>2008</td>
<td>43.2</td>
<td>37.8</td>
<td>18.9</td>
</tr>
<tr>
<td>2009</td>
<td>50.0</td>
<td>40.6</td>
<td>9.4</td>
</tr>
<tr>
<td>2010</td>
<td>38.5</td>
<td>30.8</td>
<td>30.8</td>
</tr>
<tr>
<td>2011</td>
<td>62.5</td>
<td>31.3</td>
<td>6.3</td>
</tr>
<tr>
<td>2012</td>
<td>44.0</td>
<td>48.0</td>
<td>8.0</td>
</tr>
<tr>
<td>2013</td>
<td>60.0</td>
<td>30.0</td>
<td>10.0</td>
</tr>
<tr>
<td>2014</td>
<td>32.0</td>
<td>64.0</td>
<td>4.0</td>
</tr>
<tr>
<td>2015</td>
<td>26.7</td>
<td>66.7</td>
<td>6.7</td>
</tr>
<tr>
<td>2016</td>
<td>76.9</td>
<td>15.4</td>
<td>7.7</td>
</tr>
<tr>
<td><strong>Average</strong></td>
<td><strong>56.5</strong></td>
<td><strong>32.3</strong></td>
<td><strong>11.3</strong></td>
</tr>
</tbody>
</table>
Graph 2 – Process outcomes from 13 March 2000 to 30 June 2016

Table 4 – Average process outcomes from 13 March 2000 to 30 June 2016

<table>
<thead>
<tr>
<th></th>
<th>Percentage of matters: proceedings conducted</th>
<th>Percentage of matters: declined to conduct</th>
<th>Percentage of matters: applications withdrawn</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000-2005</td>
<td>72.6</td>
<td>18.6</td>
<td>8.8</td>
</tr>
<tr>
<td>2006-2010</td>
<td>44.5</td>
<td>36.3</td>
<td>19.3</td>
</tr>
<tr>
<td>2011-2016</td>
<td>50.4</td>
<td>42.6</td>
<td>7.1</td>
</tr>
</tbody>
</table>

As set out in Table 3 above, the Panel either declined to conduct proceedings or consented to withdrawal of the application in at least half of the matters in seven out of the 10 years starting in 2007. This trend is also demonstrated in Graph 2. In addition, Table 4 highlights that the number of matters in which the Panel declined to conduct proceedings increased over time based on the averages for the time periods 2000-2005, 2006-2010 and 2011-2016. It is noteworthy to compare this with Table 1 above, which shows that the average times for providing reasons in the years from 2008 was lower compared to the average times taken to make the decision. Table 1 also reveals that there has been a significant reduction in the time taken to provide reasons for decisions.
overall in those years. The combination of these factors suggest that the Panel has become more efficient in its decision-making over time.

**B Impact of Judicial Review**

Judicial review affected Panel decisions in relation to four different sets of circumstances over the period from 13 March 2000 to 30 June 2016. This involved a total of nine Panel decisions and nine court decisions.\(^{806}\) Table 5 below sets out the times between the application and when the reasons were provided in relation to each of these decisions.\(^{807}\) It demonstrates clearly the adverse impact that judicial review has on the overall timing of decision-making by the Panel.

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\(^{806}\) This excludes the circumstances relating to the *Alinta* cases, which were ultimately concerned with whether the Panel had exercised its powers in accordance with the *Australian Constitution*: see *Australian Pipeline Ltd v Alinta Ltd* (2006) 237 ALR 158; *Australian Pipeline Ltd v Alinta Ltd* (2007) 159 FCR 301; *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542.

\(^{807}\) The dates for the application and reasons are typically set out in the relevant Panel or Court decisions, or have otherwise been obtained from searches of the Panel’s media releases (<http://www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=MR>) or the Commonwealth Courts Portal (<http://www.fedcourt.gov.au/online-services/commonwealth-courts-portal>).
Table 5 – Timing of judicial review applications from 13 March 2000 to 30 June 2016

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Initial Panel</td>
<td>74 days(^{808})</td>
<td>35 days(^{809})</td>
<td>61 days(^{810})</td>
<td>59 days(^{811})</td>
</tr>
<tr>
<td>Review Panel</td>
<td>47 days(^{812})</td>
<td>66 days(^{813})</td>
<td>19 days(^{814})</td>
<td>N/A</td>
</tr>
<tr>
<td>First Court</td>
<td>49 days(^{815})</td>
<td>393 days(^{816}) (&gt;1 year)</td>
<td>591 days(^{817}) (&gt;1 year, 7 months)</td>
<td>622 days(^{818}) (&gt;1 year, 8 months)</td>
</tr>
<tr>
<td>Second Review Panel</td>
<td>56 days(^{819})</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Second Court</td>
<td>120 days(^{820})</td>
<td>231 days(^{821}) (&gt;7 months)</td>
<td>N/A</td>
<td>436 days(^{822}) (&gt;1 year, 2 months)</td>
</tr>
</tbody>
</table>

\(^{808}\) See Re Austral Coal Ltd (No 2) (2005) 55 ACSR 60.

\(^{809}\) See Re Rinker Group Ltd (No 2) [2007] ATP 17.


\(^{811}\) See Re The President’s Club Ltd [2012] ATP 10.

\(^{812}\) See Re Austral Coal Ltd (No 2R) (2005) 55 ACSR 60.

\(^{813}\) See Re Rinker Group Ltd (No 2R) (2007) 64 ACSR 472.

\(^{814}\) See Re CMI Ltd (No 1R) [2011] ATP 5.


\(^{818}\) See Takeovers Panel, ‘The President’s Club Limited – Application for Judicial Review’ (Media Release, No TP12/72, 24 September 2012); Queensland North Australia Pty Ltd v Takeovers Panel (2014) 100 ACSR 358.

\(^{819}\) This comprised 29 days before second Court proceedings and 27 days following the orders to extend the time for the Panel’s decision: see Re Austral Coal Ltd (No 2RR) (2005) 23 ACLC 1797; Takeovers Panel v Glencore International AG (2005) 55 ACSR 453.

### Timing (from date of application to that body to date of reasons)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Second Panel</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>144 days[^23]</td>
</tr>
<tr>
<td>Third Court</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>29 days[^24]</td>
</tr>
<tr>
<td>Total for Panel</td>
<td>177 days (3 decisions)</td>
<td>101 days (2 decisions)</td>
<td>80 days (2 decisions)</td>
<td>203 days (2 decisions)</td>
</tr>
<tr>
<td>decisions</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total for Court</td>
<td>169 days (2 decisions)</td>
<td>624 days (2 decisions)</td>
<td>591 days (1 decision)</td>
<td>1087 days (4 decisions)</td>
</tr>
<tr>
<td>decisions</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Court time taken</td>
<td>95%</td>
<td>618%</td>
<td>739%</td>
<td>535%</td>
</tr>
<tr>
<td>compared to Panel</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total time for</td>
<td>346 days (11.4 months[^25])</td>
<td>725 days (1 year, 11.8 months)</td>
<td>671 days (1 year, 10.1 months)</td>
<td>1290 days (3 years, 6.4 months)</td>
</tr>
<tr>
<td>decisions</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

For the Panel decisions affected by judicial review, the average time between the dates of the applications and the publication of reasons was 62.3 days.[^26] This is longer than the equivalent average time of 46.1 days for all Panel matters over the same time period.


[^22]: This figure combines the timing of the first and second decisions of the Full Federal Court, comparing the date of the application to that of the second judgment setting out the Court’s orders: see Takeovers Panel, ‘The President’s Club Limited – Full Federal Court Decision’ (Media Release, No TP15/45, 4 September 2015); *Queensland North Australia Pty Ltd v Takeovers Panel* (2015) 320 ALR 726 (reasons); *Queensland North Australia Pty Ltd v Takeovers Panel (No 2)* (2015) 236 FCR 370 (orders).

[^23]: This involved 82 days before the third Court proceedings and 62 days following the date of the judgment of the third Court: see *Re The President’s Club Ltd (No 2)* [2016] ATP 1; *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* (2015) 328 ALR 664.


[^25]: The number of months calculated for the total times taken are approximated based on an average of 30.4 days per month.

[^26]: Average calculated using data in ‘Total time taken for Panel decisions’ row in Table 5 above.
set out in Table 1 above. In contrast, the average time taken for the Court decisions in relation to judicial review was 274.5 days.\textsuperscript{827} This is just over four times the average time taken by the Panel to provide its reasons in relation to the matters subject to judicial review.

As highlighted in the final rows of Table 5, the first judicial review proceedings in the Glencore cases took marginally less time than the Panel decisions under review.\textsuperscript{828} They also took significantly less time than the court proceedings in relation to the subsequent Panel decisions.\textsuperscript{829} The Glencore cases related to decisions by an initial and Review Panel that required Glencore to sell shares to each person selling shares on the Australian Securities Exchange over a certain time period.\textsuperscript{830} One possible factor that could help explain the relative speediness of the Glencore judicial review cases is that the proceedings were initially commenced during the takeover bid period.\textsuperscript{831} This is likely to have led to increased time pressures in relation to the finalisation of the proceedings.

In contrast, the court decisions in the CEMEX and Tinkerbell matters took around 3.5 times the amount of time as the Glencore cases, and 618 per cent and 739 per cent respectively of the time taken by the Panel in relation to each of those matters. This resulted from the fact that the court decisions in each of the CEMEX and Tinkerbell matters took a total of over a year and seven months. There was also a significant discrepancy in relation to the most recent judicial review decisions in QNA. These

\textsuperscript{827} Average calculated using data in ‘Total time taken for Court decisions’ row in Table 5 above.

\textsuperscript{828} See ‘Court time taken compared to Panel’ row in Table 5 above.

\textsuperscript{829} See ‘Total time taken for Court decisions’ row in Table 5 above.


\textsuperscript{831} The first application was accordingly brought in the High Court to avoid the operation of the privative clause in the legislation: see \textit{Glencore International AG v O’Bryan} [2005] HCATrans 458.
decisions took over six times the time taken in the Glencore cases, and 535 per cent of the time taken in the Panel decisions subject to review.\textsuperscript{832} 

The longest delay in the judicial review matters resulted from the first instance judgment in QNA, which was delivered after over a year and eight months.\textsuperscript{833} It then took just over a year and two months for the Full Federal Court to provide its reasons and orders, which were delivered in separate judgements. However, the Federal Court subsequently only took 29 days to dismiss a judicial review application in relation to the Panel extending time for the application and to extend time for the Panel to make its declaration.\textsuperscript{834} This was the second fastest time taken for any Panel or court decision in relation to the judicial review matters, only being longer than the 19 days taken by the Review Panel in Tinkerbell to decide and provide reasons for its decision not to conduct proceedings.\textsuperscript{835} 

\textbf{C Overall Assessment} 

Speed in Panel decision-making is assessed based on the methodology discussed in Part II above. Consequently, there would be a strong form of speed where the Panel consistently makes its decisions within one month of the application, and publishes its reasons consistently within three months. A medium form of speed would be reflected in the Panel consistently making its decisions and publishing its reasons from three to six months of receiving the application. The weak form is considered to result where both of these occur from six to 12 months following the application. 

There are many elements of the Panel’s processes that are designed to produce speed in decision-making. Two of the most important are the Panel using written submissions

\textsuperscript{832} See ‘Court time taken compared to Panel’ row in Table 5 above. 

\textsuperscript{833} An amended originating application was filed just over 10 months following the initial application: see Takeovers Panel, ‘The President’s Club Limited – Application for Judicial Review’ (Media Release, No TP12/72, 24 September 2012); Queensland North Australia Pty Ltd v Takeovers Panel (2014) 100 ACSR 358, 361 (Collier J). 

\textsuperscript{834} Palmer Leisure Coolum Pty Ltd v Takeovers Panel (2015) 328 ALR 664. 

\textsuperscript{835} Re CMI Ltd (No 1R) [2011] ATP 5.
and email communication to conduct its proceedings. Similarly, it is significant that the Panel conducts its proceedings in private and is not subject to the rules of evidence. Although the Panel can decide to allow oral argument by convening a conference, this has only been done in seven matters (with only one of these occurring since 2002). The Panel has also used its power to decline to conduct proceedings increasingly over time.

In light of these processes, the Panel took an average of 16.6 days to make its decisions and a further average of 29.5 days to make its decisions in the period from 13 March 2000 to 30 June 2016. This resulted in an overall total average of 46.1 days for the decisions and reasons. Over this period, there were only two years in which the average time to publish the Panel’s reasons exceeded three months. These average times were 108.1 days and 109.2 days in 2003 and 2006 respectively. It is notable that the highest number of application in relation to any matter was received in 2003.836 There was also a significant delay in the reasons for the Panel’s decisions in 2006 concerning Alinta Ltd, in light of court proceedings that ultimately led to the High Court upholding the constitutionality of the Panel in Alinta.837 Notwithstanding this, the Panel’s decisions were announced on average around 16 days after the application in both of these years.

As highlighted in the preceding section, judicial review had a significant impact on the timing of the final decision in relation to the four sets of affected matters. This resulted in the total time taken by the Panel and the courts to make their decisions in those proceedings ranging from over 11 months in Glencore to over 3.5 years in QNA. Notwithstanding this delay in the final outcome, the Panel provided its reasons on average 62.3 days following the application in the four sets of proceedings, which is slower than the overall average of 46.1 days. In light of this and the overall average taken by the Panel to make its decisions and publish its reasons, the Panel achieved a strong form of speed overall in relation to its decision-making over this period.

V CONCLUSION

Speed in decision-making is an important element of an effective dispute resolution system and was one of the main aims of the CLERP reforms. This reflects one of the key advantages of using administrative bodies in place of the courts. It is particularly important in the context of takeovers due to the impact that delay can have on the viability of the takeover, especially where the bidder needs financing for to pay cash consideration. This Chapter assesses the speed of the Panel’s decision-making from 13 March 2000 to 30 June 2016. It achieves this by measuring the timing of Panel decisions against different standards based on the legislative requirements for Panel decision-making and benchmarks applied to courts and other tribunals making similar types of decisions. Accordingly, a strong form of speed reflects the Panel consistently making its decisions in one month, and providing its reasons within three months, of the application.

The assessment of speed is conducted primarily based on an empirical analysis of the timing of the announcement of Panel decisions and publication of the reasons for its decisions. Overall, the Panel took an average of 16.6 days to make its decisions and an overall total average of 46.1 days from the application to the publication of its reasons. This can be contrasted with the total time taken by the Panel and the courts in the matters affected by judicial review (ranging from around 11 months to 3.5 years). However, the Panel provided its reasons on average 62.3 days after the application in the matters affected by judicial review. This demonstrates that the aim of speed is best achieved where the Panel is the sole decision-maker in relation to takeover disputes. In light of the above analysis, it is concluded that the Panel has achieved a strong form of speed overall since the CLERP reforms in 2000 to date.
Chapter 5 – Flexibility

I INTRODUCTION

Flexibility in decision-making is another key advantage of using administrative tribunals in place of courts. However, this Chapter does not compare the Panel’s operations to the litigation conducted in the courts prior to the CLERP reforms. It instead assesses the flexibility of Panel decision-making against the different standards identified in Part II. Flexibility is important particularly in the context of takeovers in light of the need to respond to changes in the market. Indeed, the Takeovers Directive emphasised that ‘in order to be effective, takeover regulation should be flexible and capable of dealing with new circumstances as they arise’. Consistent with this, it has been observed that one of the significant features of the UK Panel has been its ability to respond to developments that would otherwise have led to legislative intervention. This flexibility results from the fact that the UK Panel can apply its takeover rules according to their ‘spirit’, in addition to having informal procedures and staffing by


market participants.\textsuperscript{842} It has also been observed that pragmatism is an important feature of UK Panel decision-making.\textsuperscript{843}

There are a number of factors that impact upon a Panel’s ability to provide flexibility in its decision-making. A key factor is the Panel’s ability to make decisions taking into account broad-based principles and policy considerations, rather than being limited to applying prescribed legislative provisions. This is reflected in the Panel’s role to ensure that the ‘spirit’ of the takeover rules is upheld as well as their substance.\textsuperscript{844} Another significant factor affecting the way that the Panel approaches its decision-making is the qualifications of Panel members. In contrast to judges who are chosen according to their legal expertise, members of the Panel are appointed in light of their experience in a range of different fields (including law, business, financial markets, economics and accounting).\textsuperscript{845} These factors combine to produce a different approach to decision-making compared to court decisions enforcing legislative provisions. Consequently, it was pointed out in Australian Parliamentary debate in the 1980s that one of the key benefits of adopting a panel-based model is to adopt a ‘commercial approach’ in contrast to the technical and legalistic techniques adopted historically by the courts.\textsuperscript{846}


\textsuperscript{844} See Corporations Act 2001 (Cth) ss 602, 657A(3)(a)(i).

\textsuperscript{845} Australian Securities and Investments Commission Act 2001 (Cth) s 172(4).

This Chapter addresses the question whether there has been flexibility in relation to Panel decision-making since the CLERP reforms. Flexibility can be divided into two elements, namely procedural and substantive flexibility. These both reflect the CLERP reform aim of ‘informality’ in decision-making. Procedural flexibility is shaped by the design features of the Panel system. In particular, it is determined by the powers of the Panel, its processes and the expertise of its members. These are set out in the regulatory framework and the Panel’s Procedural Rules. Procedural flexibility reflects the aim of the CLERP reforms to allow the Panel to ‘bring greater understanding and expertise to takeover disputes’. It was also intended that proceedings would be conducted ‘as informally as is consistent with providing parties with a fair hearing and the expeditious resolution of the matter’. Substantive flexibility is more difficult to assess, as it involves an analysis of the extent to which the Panel has demonstrated flexibility in exercising its decision-making powers. There are a number of factors that are relevant to substantive flexibility. These relate to the extent to which the Panel adopts policies that are based on discretions rather than narrow rules, whether it uses a commercial or pragmatic approach to decision-making rather than a legalistic one, and the extent to which decision outcomes are based on negotiation rather

849 Takeovers Panel, Procedural Rules (at 1 June 2010).
than orders. This reflects the CLERP aim of avoiding ‘excessive legalism’ in Panel proceedings.\textsuperscript{852}

The Chapter is divided into five parts. Part II examines how to measure both procedural and substantive flexibility in relation to decision-making by the Panel. Part III assesses the first element of procedural flexibility. This assessment is conducted by analysing the powers given to the Panel, its procedures and the expertise of its members. Part IV focuses on the second element relating to substantive flexibility in Panel decision-making. This element is assessed based on a case study examining the Panel’s development of its frustrating action policy up to 30 June 2016. Part IV explains why this particular case study was selected. It then analyses the nature of the policy as it was established, the extent to which it developed, the approach adopted by the Panel in applying the policy and the outcomes in those matters. Part V concludes with an assessment of the extent to which decision-making by the Panel satisfies the criterion of flexibility.

\section*{II \ HOW TO MEASURE FLEXIBILITY}

This Part examines how to measure the extent to which the Panel’s decision-making meets the criterion of flexibility. As discussed in Part I above, flexibility in this context can be evaluated using two elements, namely procedural and substantive flexibility. This necessarily involves value judgments in relation to both elements. The methodology adopted to assess these is discussed below. It includes an analysis of the factors relevant to determining whether Panel decision-making meets the flexibility criterion. The different levels of flexibility that could be achieved in relation to the two elements are then considered and placed on a spectrum taking into account varying levels of conformance with these standards. The assessment is consequently conducted in light of what are considered to be strong, medium and weak forms of achievement of both procedural and substantive flexibility.\textsuperscript{853}

\textsuperscript{852} Ibid 40.

Procedural flexibility is determined by the powers given to the Panel, its procedures and the expertise of its members. Accordingly, in relation to each of these factors, a strong form of procedural flexibility would result where the Panel has substantial discretion in relation to the exercise of its powers, its processes are highly adaptable and Panel members have an extensive range of knowledge and experience. The expertise of members is an important factor in this context as it facilitates Panels taking into account a wide range of commercial and other considerations, in addition to any legal issues involved. On the other hand, there would be a medium form of procedural flexibility for these factors where there was a moderate level of discretion in relation to Panel powers, some adaptability in its processes and a sufficient range of knowledge and experience represented in its membership. In contrast, a weak form of procedural flexibility would involve low levels of discretion in the Panel’s powers, rigidity in its processes and/or a restricted range of knowledge and experience in the Panel membership.

Substantive flexibility involves the extent to which the Panel demonstrates flexibility in exercising its decision-making powers. This is assessed in Part IV below using a case study examining the Panel’s establishment and development of its frustrating action policy. The relevant factors relating to substantive flexibility are the extent to which the policy involves discretionary powers (rather than narrow rules), the Panel adopts a commercial or pragmatic approach (instead of a legalistic one), and the outcome of the decisions are based on negotiation (including the use of undertakings rather than the Panel making declarations of unacceptable circumstances and/or orders). A strong form of substantive flexibility would result where the policy is based largely on the exercise of discretionary powers, the Panel consistently adopts a commercial or pragmatic approach and the decision outcomes frequently involve undertakings. The medium form of these would involve the policy being based on discretions to a limited extent, the Panel adopting a commercial or pragmatic approach in some cases and undertakings being used on a restricted basis. Finally, a weak form of substantive flexibility would be indicated by a low level of discretion in the application of the policy, the Panel adopting a legalistic approach and/or there being little use of negotiated outcomes such as undertakings.
III PROCEDURAL FLEXIBILITY

Procedural flexibility is assessed in this Part through an analysis of the regulatory requirements applying to the Panel and its *Procedural Rules*. There are competing objectives reflected in the procedures applying in both the *ASIC Regulations* and the *Procedural Rules*. These involve balancing the aims of providing informality, fairness and timeliness in decision-making. In this context, the first section below focuses on the design features of the Panel system affecting flexibility, particularly the expertise of Panel members and the legislative and procedural rules concerning its decision-making. It also examines other considerations that are relevant to the Panel’s operations. These relate to constitutional limitations, the statutory framework, the rules of procedural fairness and the need to ensure matters are conducted efficiently. The factors examined in the first section are analysed in the second section to provide an assessment of the extent to which there is procedural flexibility in relation to Panel decision-making.

A Regulatory Framework

1 Expertise

Members are appointed to the Panel on a part-time basis based on their professional experience and/or knowledge in accounting, business, company administration, economics, law and financial markets, products and services. In the period between 13 March 2000 and 30 June 2016, there was a total of 134 current and past Panel

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854 See *Australian Securities and Investments Commission Regulations 2001* (Cth) regs 13(b), 16(2)(c)(ii).
855 See *Australian Securities and Investments Commission Regulations 2001* (Cth) regs 13(a), 16(2)(c)(i); Takeovers Panel, *Procedural Rules* (1 June 2010) rr 1.1.1(a), (c).
856 See *Australian Securities and Investments Commission Regulations 2001* (Cth) regs 13(c), 16(2)(c)(iii); Takeovers Panel, *Procedural Rules* (1 June 2010) rr 1.1.1(b), (d).
857 *Australian Securities and Investments Commission Act 2001* (Cth) s 172(4).
members. At the time of their appointment, the largest numbers of members were lawyers (47 per cent), investment advisers and bankers (22 per cent), company directors (19 per cent) and accountants (4 per cent). There was a smaller proportion of members from the funds management industry (2 per cent), company administration (1 per cent), academia (1 per cent), the stockbroking industry (less than 1 per cent) and the Australian Securities Exchange (‘ASX’) (less than 1 per cent).

Of the total Panel members, the largest group were commercial solicitors (34 per cent). There was a smaller number of barristers (6 per cent), legal and general counsel (5 per cent) and judges (1 per cent). The concentration of commercial lawyers on the Panel reflects its preference for parties to be represented by the commercial lawyers working on the transaction. This is consistent with a desire to focus on the commercial nature of the transactions rather than legal issues. As a result, the Panel has only consented to legal representation by senior counsel on one occasion, in an early decision. Similarly, the two judges were only appointed to the Panel during the first six years of the Panel’s operation following the CLERP reforms.

The knowledge and experience held by Panel members has allowed it to draw upon a wide range of commercial expertise, notwithstanding that a significant proportion of Panel members have had legal qualifications. The Panel President directs three

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859 See Takeovers Panel, Procedural Rules (1 June 2010) r 4.3.1 note 2.

860 See Australian Securities and Investments Commission Act 2001 (Cth) s 194; Re Email Ltd (No 3) (2000) 18 ACLC 708.

861 For example, in a study of the Panel’s composition from March 2000 until November 2004, it was found that at least 71 per cent of all members had legal qualifications; see Emma Armson, ‘The Australian Takeovers Panel: Commercial Body or Quasi-Court?’ (2004) 28 Melbourne University Law Review 565, 566, 574–5.
members to become the Sitting Panel, and designates one of them to be the President of the Sitting Panel (‘Sitting President’). Their aim is for the Sitting Panel to include ‘a lawyer, an investment banker or other corporate adviser and, if possible, a member with particular skills directly relevant to the issues raised’. Each of the above factors facilitates the Panel focusing on the commercial aspects of the transactions under consideration.

2 Powers and Process

One of the key features of the Panel system promoting flexibility is the legislative basis upon which the Panel makes its decisions. That is, the Panel applies the purposes underlying the takeover provisions in relation to both its powers to review ASIC decisions and to make declarations of unacceptable circumstances. This can involve the Panel exercising broad discretionary powers based on competing policy objectives, particularly those to ensure both a ‘competitive, efficient and informed market’ and a ‘reasonable and equal opportunity’ for target shareholders to participate in the benefits arising from a proposed acquisition. Although guidance notes are issued to assist market participants in the context of the Panel’s exercise of its discretionary powers, the Panel decides matters on the individual circumstances before it. The Panel also has the power to make a broad range of orders, both following a declaration of unacceptable circumstances and on an interim basis without such a declaration. Its orders may be different to those sought in the application, and interim orders can be made without

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862 See Australian Securities and Investments Commission Act 2001 (Cth) s 184.
865 Ibid ss 602(a), (c).
866 See ibid ss 657D, 657E.
seeking submissions from or consulting other persons.\textsuperscript{868} Orders are also frequently varied in light of different circumstances arising since the original orders were made.\textsuperscript{869}

In addition, there are two legislative powers that the Panel has not yet used. The first is the power to dismiss an application and/or direct a person not to make a subsequent application of a similar kind where it is satisfied that the application is ‘frivolous or vexatious’.\textsuperscript{870} It would appear that the Panel has not needed to exercise this power in light of its ability to decline to conduct proceedings.\textsuperscript{871} Second, in addition to its power to make procedural rules,\textsuperscript{872} there is a legislative provision empowering the Panel to make substantive rules regulating the conduct of takeovers.\textsuperscript{873} However, this provision does not on its face give the Panel an explicit power to waive compliance with the Panel’s substantive rules, which undermines the flexibility that the substantive rules could otherwise provide.\textsuperscript{874}

There is significant flexibility in the processes relating to the Panel’s proceedings. For example, the Sitting President nominated by the Panel President has the power to determine the time and place at which proceedings are conducted.\textsuperscript{875} Recent legislative

\textsuperscript{868} Ibid r 8.1.1 note 3.
\textsuperscript{869} See ibid r 8.1.1.
\textsuperscript{870} Corporations Act 2001 (Cth) s 658A.
\textsuperscript{871} Australian Securities and Investments Commission Regulations 2001 (Cth) reg 20. These Regulations also allow the Panel to disregard matters that are frivolous or vexatious (at reg 26(1)(b)) or are irrelevant to the proceedings (at regs 25–6).
\textsuperscript{872} See Australian Securities and Investments Commission Act 2001 (Cth) s 195(1); Takeovers Panel, Procedural Rules (1 June 2010).
\textsuperscript{873} Corporations Act 2001 (Cth) s 658C. Such rules would prevail over any inconsistent ASIC exemptions and modifications: at s 658D.
\textsuperscript{874} It has also been argued that the power should be amended to make it clear that such rules would override any inconsistent takeover provisions in the legislation: see Rodd Levy and Neil Pathak, ‘The Takeovers Panel of the Future: Proposals to Enhance the Effectiveness and the Role of the Panel’ in Ian Ramsay (ed), The Takeovers Panel and Takeovers Regulation in Australia (Melbourne University Press, 2010) 211, 230–1.
\textsuperscript{875} See Australian Securities and Investments Commission Act 2001 (Cth) ss 184(3), 188(2).
amendments also allow the Panel President and members of the Sitting Panel to be outside Australia when constituting the Sitting Panel and conducting its proceedings respectively.\(^\text{876}\) Although three members are appointed to the Sitting Panel, they can act with a quorum of two members.\(^\text{877}\) Related applications can be heard together.\(^\text{878}\) In addition, the *Procedural Rules* emphasise that they should be interpreted according to their ‘spirit’, by focusing on substance rather than form to promote their objectives.\(^\text{879}\) The Panel can also excuse non-compliance with, or override the application of, its *Procedural Rules* in a particular matter.\(^\text{880}\) For example, the Rules note specifically the possibility of waiving the submission requirements relating to word limits and timing.\(^\text{881}\)

The way that the Panel makes its decisions is also more flexible than a court-based process. For example, the Panel does not need to comply with the rules of evidence,\(^\text{882}\) and may instead act based on ‘any logically probative material from any source’.\(^\text{883}\) When exercising the power to review decisions of ASIC or an initial Panel, the Panel or Review Panel respectively decide the matter ‘de novo’.\(^\text{884}\) This means that the circumstances are reconsidered ‘afresh’ in light of the relevant policy considerations and taking into account any new circumstances since the original decision.\(^\text{885}\) The

\(^{876}\) See ibid ss 184(3A), 188(3); *Corporations Legislation Amendment (Deregulatory and Other Measures) Act 2015* (Cth) sch 2 pt 1 items 1–2; Explanatory Memorandum, Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014 (Cth) 21.

\(^{877}\) *Australian Securities and Investments Commission Act 2001* (Cth) ss 184(2), 193.

\(^{878}\) *Takeovers Panel, Procedural Rules* (1 June 2010) r 3.1.1.

\(^{879}\) See ibid rr 10.2.1, 1.1.1.

\(^{880}\) Ibid rr 1.2.1–1.2.3.

\(^{881}\) See ibid rr 2.2.4 note 2, 3.1.1 note 3.

\(^{882}\) *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 16(2)(a).

\(^{883}\) *Takeovers Panel, Procedural Rules* (1 June 2010) r 6.3.1. See also at r 6.3.1 note 1.

\(^{884}\) Ibid rr 3.2.1, 3.3.1.

\(^{885}\) See ibid rr 3.2.1 note 1, 3.3.1 note 2; *Corporations Act 2001* (Cth) ss 655A(2), 656A(3), 657A(3), 673(2).
Review Panel can also decline to conduct proceedings where it agrees with the decision, reasons and any declaration and/or orders of the initial Panel.886

There is a considerable focus on negotiation in the Panel’s processes. For example, the Panel encourages parties to resolve issues before making the application and will generally give consent to withdraw an application where the dispute is resolved (unless unacceptable circumstances are suspected to occur or continue).887 Most importantly, the Panel urges parties to propose undertakings to remedy concerns raised, particularly in the context of preliminary submissions and the making of declarations and/or orders.888 This has had a significant impact on the way that the Panel conducts its proceedings.

Although the Panel predominantly relies on written submissions,889 a conference can be convened to allow oral evidence for the purposes of clarification, resolving inconsistent statements or the Panel informing itself.890 Persons can be permitted to attend the conference using telephone, video conferencing and any other form of communication approved by the Sitting President.891 Witnesses can also be summoned to attend proceedings to answer questions.892 The Panel has indicated that it may conduct a conference if it considers that it would ‘expedite proceedings or if it requires a better understanding of evidence, issues or arguments’.893

886 Takeovers Panel, Procedural Rules (1 June 2010) r 3.3.1 note 3. See also Australian Securities and Investments Commission Regulations 2001 (Cth) reg 20.
887 See Takeovers Panel, Procedural Rules (1 June 2010) rr 3.1.1 note 6, 3.4.1 note 1.
888 See ibid rr 6.1.1 note 3, 7.1.1 note 2, 8.1.1 note 5.
889 See ibid rr 1.1.1 note 1, 2.1.1, note 1.
890 Australian Securities and Investments Commission Regulations 2001 (Cth) regs 35, 37(1).
891 Ibid regs 37(3)–(4).
892 See Australian Securities and Investments Commission Act 2001 (Cth) ss 192(1)–(4), 198(1), 201.
893 Takeovers Panel, Procedural Rules (1 June 2010) r 6.4.1 note 1.
3 Other Considerations

There are a number of other considerations relevant to the Panel’s decision-making. First, the most significant of these are the statutory limitations resulting from Chapter III of the Australian Constitution, which prevent administrative bodies such as the Panel exercising judicial power.\(^\text{894}\) Consequently, the Panel cannot order a person to comply with a requirement in the legislation, or enforce its own orders or rules.\(^\text{895}\) However, the Panel can refer questions of law to the courts,\(^\text{896}\) and the legislation provides for court enforcement of Panel orders and rules.\(^\text{897}\) Second, there are limitations on the Panel’s power to make costs orders, which can only be exercised where the Panel has made a declaration of unacceptable circumstances.\(^\text{898}\) Although the Panel indicated that it would ‘discuss this limitation with the Government’ in its first decision on the frustrating action policy in 2001,\(^\text{899}\) there has not been any subsequent legislative change in relation to this.\(^\text{900}\) However, the Panel has indicated that costs orders will be only used in exceptional cases, as it considers that ‘a party is entitled to make, or resist, an


\(^{895}\) Corporations Act 2001 (Cth) s 657D(2).

\(^{896}\) See ibid s 659A; Re Colonial First State Property Trust Group (No 3) [2002] ATP 17, 2; Seabrook, Re Takeovers Panel and the Corporations Act (2003) 21 ACLC 82 (Conti J).


\(^{898}\) Ibid ss 657D(1)–(2).


\(^{900}\) This is notwithstanding amendments made to the Panel’s powers to make orders under Corporations Act 2001 (Cth) s 657D(2) in 2007: see Corporations Amendment (Takeovers) Act 2007 (Cth).
application once without exposure to a costs order, provided it presents a case of reasonable merit in a businesslike way’. 901

Third, the regulatory framework gives the Australian Panel a more limited role than its UK counterpart. It has been argued that the Australian Panel’s role and powers should be expanded to include those held by the UK Panel. 902 In particular, the UK Panel has the power to act on its own motion and its Executive can provide advanced rulings that are binding on the parties. 903 On the other hand, the Australian Panel only makes decisions in response to applications made to it, 904 and its Executive cannot make binding decisions (although it can provide guidance as to the Panel’s likely response to particular circumstances). 905 However, this should not be considered to be a limitation on the ability of the Australian Panel to operate flexibility. Rather, the Australian Panel is undertaking a different role to the UK Panel, which sets, administers, monitors compliance with and enforces the detailed takeover rules. 906 The CLERP reforms instead established the Australian Panel as the primary body responsible for resolving

904 See Corporations Act 2001 (Cth) ss 656A(2), 657C(1). Applications may be only made by persons whose interests are affected (including ASIC in the case of a declaration of unacceptable circumstances): at ss 656A(2), 657C(2). However, the Panel can refer matters to ASIC so that it can consider making an application and accept submissions from non-parties: see Australian Securities and Investments Commission Regulations 2001 (Cth) regs 18, 23; Takeovers Panel, Procedural Rules (1 June 2010) r 4.1.1 note 7, 6.1.1 note 1.
905 See Takeovers Panel, Procedural Rules (1 June 2010) 3 (introduction), r 10.1.1. The Executive is not mentioned in the legislative regime and regulations set out in n 848 above, with its role instead set out in the Procedural Rules (at rr 2.2.1, 2.2.3, 2.3.2, 2.4.1, 3.1.1, 10.1.1).
takeover disputes and maintained ASIC’s responsibility for monitoring and enforcing compliance with the legislative provisions on takeovers.907

Fourth, the Panel’s processes are affected by the need to provide procedural fairness, which applies to the extent that it is not inconsistent with other regulatory provisions.908 Before proceedings are conducted, any conflicts of interest are disclosed by Panel members in order to avoid fairness concerns with members appointed to a Sitting Panel.909 Parties must also have a reasonable opportunity to make submissions before the Panel exercises its powers to review ASIC decisions and make a declaration of unacceptable circumstances and orders.910 However, in the case of an ASIC decision subject to Panel review, the Panel can decline to do this if it is ‘not practicable’ due to ‘the urgency of the case or otherwise’.911 On the other hand, the courts have applied procedural fairness rules to the Panel in circumstances where the legislation did not specifically require this. Consequently, the Panel was found to have exercised improperly its power to extend the time for an application for a declaration of unacceptable circumstances on the basis that it had not given affected parties an opportunity to make submissions beforehand.912

Furthermore, Panel orders cannot ‘unfairly prejudice any person’.913 Given this, the Panel is required to give ASIC, parties and any persons affected by a proposed

907 See Corporations Act 2001 (Cth) s 659AA; Australian Securities and Investments Commission Act 2001 (Cth) s 1(2).
908 Australian Securities and Investments Commission Act 2001 (Cth) s 195(4).
909 See generally ibid s 185; Takeovers Panel, Procedural Rules (1 June 2010) r 5.1.1.
910 See Corporations Act 2001 (Cth) ss 656B(3), 657A(4), 657D(1); Takeovers Panel, Procedural Rules (1 June 2010) r 8.1.1 note 7. There may also be submissions on interim orders if the matter is not urgent: see at r 8.1.1 note 4.
911 Corporations Act 2001 (Cth) s 656B(4).
912 See ibid s 657C(3)(b); Queensland North Australia Pty Ltd v Takeovers Panel (2014) 100 ACSR 358, 376 (Collier J); Queensland North Australia Pty Ltd v Takeovers Panel (2015) 320 ALR 726, 741 (The Court).
declaration or orders an opportunity to make submissions.\textsuperscript{914} The Panel also takes into account time zone differences affecting the lodgment of documents to avoid any ‘unfair tactical advantage’.\textsuperscript{915} In addition, there are a number of requirements designed to ensure both fairness and transparency in relation to the Panel’s operations. For example, parties must be notified as soon as practicable after the Panel decides whether or not to conduct proceedings,\textsuperscript{916} and copies of documents must be provided to interested persons.\textsuperscript{917} However, it is possible that further submissions may not be given to each party and that documents can be withheld ‘for confidentiality or other reasons’.\textsuperscript{918}

Finally, there are a number of timing limitations affecting the Panel’s exercise of its powers. These apply to restrict the time period in which the Panel can make decisions, in light of the CLERP aim to provide speed in decision-making. For example, the Panel has the power to decide applications that are made ‘within … 2 months after the circumstances have occurred’.\textsuperscript{919} However, the Panel can extend the time for applications provided that it first allows procedural fairness to affected persons by allowing them an opportunity to make submissions. The Panel can also only make a declaration of unacceptable circumstances within the later of ‘3 months after the circumstances occur’ or 1 month following the application.\textsuperscript{920} This time limitation can be extended, with the courts having exercised this power in relation to two of the

\textsuperscript{914} See Corporations Act 2001 (Cth) ss 657A(4), 657D(1), (4).

\textsuperscript{915} Ibid r 2.2.3 note 1.

\textsuperscript{916} Australian Securities and Investments Commission Regulations 2001 (Cth) reg 21.

\textsuperscript{917} See Corporations Act 2001 (Cth) ss 657A(6), 657D(4); Australian Securities and Investments Commission Regulations 2001 (Cth) reg 28(2); Takeovers Panel, Procedural Rules (1 June 2010) r r 2.2.2, 2.2.3, 7.1.1, 8.1.1.

\textsuperscript{918} See Australian Securities and Investments Commission Regulations 2001 (Cth) regs 30(2)–(3); Takeovers Panel, Procedural Rules (1 June 2010) r 2.3.1.

\textsuperscript{919} Corporations Act 2001 (Cth) s 657C(3)(a). The Full Federal Court has found that it is insufficient that the effects of the circumstances are continuing: Queensland North Australia Pty Ltd v Takeovers Panel (2015) 320 ALR 726, 740 (The Court).

\textsuperscript{920} Corporations Act 2001 (Cth) s 657B.
matters affected by judicial review.\textsuperscript{921} A similar time restriction and power of extension by the court applies in relation to declarations following an application for review by a Review Panel.\textsuperscript{922}

\textbf{B \hspace{1em} Assessment of Procedural Flexibility}

As discussed in Part II above, procedural flexibility is determined by the Panel’s powers, procedures and member expertise. Under the strong form of procedural flexibility, the Panel would have substantial discretionary powers, highly adaptable processes and members with an extensive range of knowledge and experience. The medium form would exist in the case of a moderate level of discretion in relation to Panel powers, some adaptability in its processes and where its members have a sufficient range of knowledge and experience. On the other hand, the weak form would involve low levels of discretion, rigid processes and/or a restricted range of knowledge and experience held by Panel members.

In relation to the Panel’s expertise, there is a broad range of both knowledge and experience possessed by its current and past members. A significant proportion of these members has emanated from the legal profession (47 per cent), with many other members legally trained. However, a comparable number of members (43 per cent) has been drawn from the ranks of company directors and management, corporate advisors and investment bankers. A relatively small percentage of remaining members has been appointed from the accounting profession, funds management and stockbroking industries, academia and the ASX. In deciding which members will constitute the

\begin{footnotesize}

\textsuperscript{922} \textit{Corporations Act 2001} (Cth) s 657EA(5).
\end{footnotesize}
Sitting Panel to decide a particular matter, one of the key factors taken into account is whether the members bring a range of different perspectives.

The Panel has significant discretionary powers in its decision-making. When reviewing ASIC decisions, it has the same wide-ranging discretions as ASIC to exempt persons from, and modify the operation of, the takeover and beneficial ownership provisions of the Corporations Act.923 Similarly, both initial and Review Panels have a broad discretion to make a declaration of unacceptable circumstances.924 Each of these powers is exercised in light of the policy purposes underlying the takeover provisions in s 602 of the Corporations Act. This can involve the balancing of broad and sometimes competing policy objectives, particularly providing an ‘efficient, competitive and informed market’ and a ‘reasonable and equal opportunity’ for target shareholders to participate in the benefits arising from a takeover bid.925 The Panel also has the power to make a wide range of orders, including interim orders that do not require it to make a declaration of unacceptable circumstances beforehand.926

Given the extensive reliance on discretion in the Panel’s powers, the constitutional and statutory limitations discussed in the previous section do not have a significant impact on the flexibility of its powers. In particular, the constitutional limitations that prevent the Panel from enforcing its own orders do not affect the outcome of its decision-making. This is also the case in relation to the Panel’s power to award costs being confined to where it has made a declaration of unacceptable circumstances. In addition, the Panel is disinclined to use the power to award costs apart from in exceptional circumstances, instead seeking to encourage parties to present cases ‘of reasonable merit in a businesslike way’.927 This reflects a commercial approach to applications to the Panel, rather than the more legalistic one adopted in a court context. Accordingly, costs

923 See ibid ss 655A, 656A, 673.
924 Ibid ss 657A, 657EA(4).
925 Ibid ss 602(a), (c).
926 Ibid s 657E.
have been awarded in a small proportion (less than three per cent)\(^\text{928}\) of the Panel’s decisions from 13 March 2000 to 30 June 2016.

The Panel’s powers are also affected by the rules of procedural fairness and statutory timing requirements. Although the procedural fairness requirements can affect the outcome of the Panel’s decision, they predominantly have an impact upon the speed with which the Panel can fulfil its functions. This is because they require typically that persons affected by Panel decisions have an opportunity to make submissions beforehand. The need to avoid orders that would ‘unfairly prejudice any person’ also involves the inclusion of additional processes before the Panel can exercise its powers.\(^\text{929}\) Similarly, the deadlines for making Panel applications and decisions can be extended through an application to the Panel and courts respectively in appropriate circumstances. Failure to comply with the procedural fairness and timing requirements have led to successful judicial review applications, particularly in relation to the *Glencore* cases\(^\text{930}\) and the most recent decisions by the Full Federal Court (in the *QNA* matter).\(^\text{931}\) This was not able to be remedied by the Panel in the first two decisions, with the *Glencore* cases resulting in legislative changes giving the Panel broader powers.\(^\text{932}\)


\(^{929}\) *Corporations Act* 2001 (Cth) ss 657D(1)–(2).


\(^{932}\) See *Corporations Amendment (Takeovers) Act* 2007 (Cth) sch 1 items 3–4.
On the other hand, the deficiencies identified in the QNA matter were subsequently rectified by the Panel after further delay.\footnote{933}{See Re The President’s Club Ltd (No 2) [2016] ATP 1.}

Finally, the Panel’s processes involve a high level of adaptability. Unlike courts, the Panel is not subject to the rules of evidence and decides all of its matters afresh in light of the circumstances before it. The Panel President can constitute a Sitting Panel, with Panel members also able to participate in proceedings, while overseas. Panels can hear related proceedings together and waive compliance with the \textit{Procedural Rules}. Although it usually conducts proceedings based on written submissions, the Panel has the power to conduct oral conferences. Consistent with the aim of speed in decision-making, conferences have been used sparingly. Indeed, there have been conferences in less than two per cent of the Panel’s decisions from 13 March 2000 to 30 June 2016, with all but one of them occurring within the first two and a half years of the Panel’s operations following the CLERP reforms.\footnote{934}{See Re Infratil Australia Ltd (No 2) [2000] ATP 1; Re Email Ltd (No 3) (2000) 18 ACLC 708; Re Vincorp Wineries Ltd (2001) 38 ACSR 584; Re Pinnacle VRB Ltd (No 5) (2001) 39 ACSR 43; Re Pinnacle VRB Ltd (No 8) (2001) 39 ACSR 55; Re Online Advantage Ltd [2002] ATP 14; Takeovers Panel, ‘Panel Decision in Online Advantage Limited’ (Media Release, TP02/052, 10 September 2002); Re Yancoal Australia Ltd [2014] ATP 24.}

Another significant example of procedural flexibility is the Panel’s ability to use undertakings in preference to making declarations of unacceptable circumstances and/or orders.\footnote{935}{See \textit{Australian Securities and Investments Commission Act} 2001 (Cth) s 201A.} The Panel considers that accepting undertakings promotes the public interest, as it ‘can be more flexible and quicker than orders’.\footnote{936}{Takeovers Panel, \textit{Guidance Note 4 – Remedies General} (27 May 2015) 9.} As a result, just over a third of Panel matters from 13 March 2000 to 30 June 2016 have involved an undertaking, compared to the less than a quarter of the decisions involving a declaration of unacceptable circumstances (either with or without orders).\footnote{937}{A handful of decisions have also involved both a declaration and an undertaking (instead of orders): see Re Namakwa Diamond Co NL (No 2) [2001] ATP 9; Re Rivkin Financial Services Ltd (No 2) (2005) 54 ACSR 59; Re Gondwana Resources Ltd (No 1) [2014] ATP 9.} This provides a clear
demonstration of the adaptability of the Panel’s processes. In light of this and the Panel’s expertise, discretionary powers and other adaptive processes, the Panel is assessed as having a strong form of procedural flexibility.

IV SUBSTANTIVE FLEXIBILITY

As discussed in Part I above, substantive flexibility involves an analysis of the extent to which the Panel has demonstrated flexibility in exercising its decision-making powers. There are three key factors relevant to substantive flexibility. These involve the extent to which the Panel adopts policies that are based on discretions rather than narrow rules, it uses a commercial or pragmatic approach to decision-making rather than a legalistic one, and its decision outcomes are based on negotiation rather than orders.

A Frustrating Action Policy

This section comprises a case study analysis relating to the application of the frustrating action policy (‘FAP’) from when it was first introduced by the Takeovers Panel in a decision on 25 May 2001 to 30 June 2016. The FAP prevents a target company from taking action without its shareholders’ approval in certain circumstances. It typically applies to action that would trigger a condition of either a formal takeover bid or potential bid communicated to target directors, where it could lead to the bid being

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938 The decisions used in the case study are predominantly listed under the ‘Frustrating action’ headings in the Takeovers Panel, Index of Reasons: By Topic 2000–2014 (8 April 2015) 6, 20, 24, 27. This list was supplemented by decisions obtained from searches of the LexisNexis database and Takeovers Panel website using the search term of ‘frustrating action’. It does not include decisions that do not refer explicitly to frustrating action: see Re Taipan Resources NL (No 4) (2001) 19 ACLC 791 (decided prior to the first FAP decision; cf ‘Placement as frustrating action’ heading in Takeovers Panel, Index of Reasons: By Topic 2000–2014 (8 April 2015) 20); Re Normandy Mining Ltd (No 6) [2001] ATP 32 (cf Takeovers Panel, Guidance Note 1 – Unacceptable Circumstances (21 September 2010) 12 n 57); Re Anaconda Nickel Ltd (No 19) [2003] ATP 20 (Review Panel decision in relation to Re Anaconda Nickel Ltd (No 15) [2003] ATP 17 not referring to frustrating action).
withdrawn, lapsing or not being proceeded with. The introduction of the FAP was significant because it resulted in a substantial change in the regulation of the conduct of target companies and their directors in the context of a takeover. Importantly, it resulted in a change from the courts’ focus on the purpose of the target directors’ actions in complying with their duties to the company. Instead, the Panel examines the effect of the action on the target shareholders’ ability to make a decision on whether to accept the takeover bid. This altered the balance between the interests of the bidder and target companies by imposing further restrictions on what actions target company directors can take when faced with a takeover.

The FAP has been chosen for the purposes of the case study for a number of reasons. First, it is significant in demonstrating the Panel’s ability to develop its own policy to apply in addition to the legislative requirements. This allows the nature of the policy implemented by the Panel to be analysed, in order to determine whether the Panel has exercised its powers flexibly in introducing the policy. Second, the FAP similarly provides an opportunity to examine the extent to which the policy has been applied flexibly, including whether it has been amended to respond to issues arising from its application. This can be determined through an analysis of the Panel’s decisions and

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939 See Takeovers Panel, Guidance Note 12 – Frustrating Action (18 July 2014), especially 1, 2. This is the most recent version of the Guidance Note for the purposes of the case study. However, a new version has since been released: see Takeovers Panel, Guidance Note 12 – Frustrating Action (1 December 2016).


942 Ibid.

guidance issued in relation to the policy. Finally, there is a significant body of Panel decisions relating to the FAP. This provides a case study of 35 decisions, which represent just fewer than nine per cent of the Panel decisions from 13 March 2000 to 30 June 2016. There is a larger body of Panel decisions in relation to other key topic areas, particularly those matters involving association, bidder’s statement disclosure and rights issues. However, the FAP has been chosen for the case study instead of these topics as it provides an opportunity to analyse the flexibility of the Panel’s decision-making in the context of both the introduction and development of a policy that has had a substantial impact on the operation of the relevant law.

There are four parts to the case study analysis in this section. The first part focuses on the initial decisions establishing the FAP (‘Pinnacle decisions’). These decisions are examined to allow an assessment of the extent to which the policy established by these decisions is narrow or rule-based, involves the use of discretions and reflects a commercial or pragmatic approach to decision-making. The second part analyses the development of the FAP through the guidance notes issued by the Panel, with the third part focusing on the application of the policy in the Panel’s decisions. These parts allow an examination of the extent to which the FAP has been developed and applied based on discretions rather than narrow rules, as well as whether the Panel is adopting a commercial or pragmatic approach rather than a legalistic one. The final part focuses on the outcomes of the Panel’s decisions on the FAP to establish the extent to which they are based on negotiation rather than orders. These issues are analysed in detail in Section B below to provide an assessment of the Panel’s decision-making in relation to substantive flexibility.

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944 For a list of the decisions in the FAP case study in order of the date of the decision, see Appendix 1.


I Introduction of Policy

The FAP was first introduced in Australia in the Panel’s decision in Re Pinnacle VRB Ltd (No 5) (‘Pinnacle 5’).\(^{947}\) In doing this, the Pinnacle 5 Panel relied on a number of matters. First, the Panel noted that it was required to have regard to the purposes of the takeover provisions in determining whether there were unacceptable circumstances.\(^{948}\) In this context, the Panel emphasised the purpose in s 602(c) of ensuring that target shareholders ‘all have a reasonable and equal opportunity to participate in any benefits’ under a takeover bid.\(^{949}\) Second, it also pointed out that the legislation required it to take into account actions causing or contributing to a takeover bid not proceeding.\(^{950}\) Third, the Panel noted that ASIC’s policy on share buy-backs at that time indicated that frustrating a takeover bid could lead to unacceptable circumstances.\(^{951}\) Finally, it observed that the UK Code required target directors to seek shareholder approval for material sales or contracts that were not in the ordinary course of business.\(^{952}\)

Accordingly, the Panel concluded that s 602(c) provided ‘a solid basis for a similar rule or policy in Australia’.\(^{953}\)

In Pinnacle 5, the Panel summarised the FAP as requiring that ‘a transaction entered into after a bid has been announced and before it closes should be conditional on approval by [target] shareholders, if it may cause the bid to fail by causing a defeating...”

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\(^{947}\) (2001) 39 ACSR 43, 51. At the time of this decision, the relevant legislation was the Corporations Law. However, as the key provisions are the same, the following analysis refers to the equivalent provisions in the Corporations Act.


\(^{949}\) See Re Pinnacle VRB Ltd (No 5) (2001) 39 ACSR 43, 46; Corporations Act 2001 (Cth) ss 602(c), 657A(3)(a).

\(^{950}\) See Re Pinnacle VRB Ltd (No 5) (2001) 39 ACSR 43, 46; Corporations Act 2001 (Cth) s 657A(3).

\(^{951}\) Re Pinnacle VRB Ltd (No 5) (2001) 39 ACSR 43, 47.

\(^{952}\) See ibid; The City Code on Take-overs and Mergers, 20 May 2013, r 21.1.

\(^{953}\) Re Pinnacle VRB Ltd (No 5) (2001) 39 ACSR 43, 47.
condition not to be fulfilled.\textsuperscript{954} However, the application of this policy was made subject to the Panel’s discretion, as the \textit{Pinnacle 5} Panel considered that the target’s shareholders ‘should decide if the transactions should proceed, unless there were compelling reasons why shareholder approval should not be required in this particular case.’\textsuperscript{955} In its decision, the Panel focused on the commercial imperatives driving the proposed transactions, which involved the utilisation of intellectual property owned by the target company.\textsuperscript{956}

The \textit{Pinnacle 5} Panel concluded that, in deciding whether the approval of target shareholders should have been sought either prior to or as a condition of the transactions, ‘the test is an objective one, based on commercial considerations rather than a subjective test based on proper purposes.’\textsuperscript{957} This involved a weighing up process, balancing the concern that target shareholders decide whether the transactions proceed (and consequently the outcome of the takeover bid) with the potential harm to the target company from delaying the transactions.\textsuperscript{958} While the Panel accepted the target’s evidence in relation to the commercial reasons for the transactions,\textsuperscript{959} it found that there were no ‘compelling reasons’ why shareholder approval could not be obtained in this case given that the transactions were material and would trigger a defeating condition in the bid.\textsuperscript{960} Accordingly, the Panel concluded that shareholder ratification

\textsuperscript{954} Ibid.
\textsuperscript{955} Ibid 48.
\textsuperscript{956} Ibid 48–9. Two staff members from the Panel Executive inspected documentation at the target company’s office in relation to this: at 52.
\textsuperscript{957} Ibid 50. Both \textit{Pinnacle} Panels emphasised that the FAP is a separate issue to the question whether there is a breach of the duties of the target company directors: at 51; \textit{Re Pinnacle VRB Ltd (No 8)} (2001) 39 ACSR 55, 66–7. However, the \textit{Pinnacle 8} Panel noted that if there was clear evidence of an improper purpose with the target board acting to defeat a bid, this would be relevant to the exercise of its discretion to make a declaration of unacceptable circumstances: \textit{Re Pinnacle VRB Ltd (No 8)} (2001) 39 ACSR 55, 68.
\textsuperscript{958} \textit{Re Pinnacle VRB Ltd (No 5)} (2001) 39 ACSR 43, 51.
\textsuperscript{959} Ibid.
\textsuperscript{960} Ibid 48.
would not be ‘so harmful to [the target company] and the transactions as to outweigh the need for ratification’.

However, the *Pinnacle 5* Panel acknowledged that the parameters of the newly introduced FAP needed to be developed further:

> The policy needs to be refined to make its application clear in instances where, for instance, the facts involve breaches of conditions which may be unreasonable for a bidder to rely on, transactions which have been entered into or announced before a bid is made, or compelling reasons why shareholder approval should be dispensed with in a particular case.

The uncertainty surrounding the operation of the FAP at the time it was introduced was also highlighted by the Review Panel in this matter in *Re Pinnacle VRB Ltd (No 8)* (*‘Pinnacle 8’*). The *Pinnacle 8* Panel acknowledged that the principles applied in the *Pinnacle* decisions would ‘need to be fleshed out by a process of policy formulation’ and that any guidance obtained from the Panel Executive in relation to ‘gaps in the policy’ would not be binding on future Panels. There were two qualifications made to the FAP in the *Pinnacle 8* decision. The first was that the Panel could make a declaration of unacceptable circumstances if the target directors were clearly acting to ‘defeat or delay’ takeover offers by putting a transaction of ‘dubious benefit’ to its members.

Second, the *Pinnacle 8* Panel noted that there may be ‘exceptional circumstances’ in which target shareholder approval may not need to be obtained notwithstanding that the action would trigger a defeating condition in a takeover bid. Examples cited were transactions that were ‘far advanced’ before the bid announcement and ‘clearly for the commercial advantage of the company and so motivated’, or where the bid conditions

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961 Ibid 51.
962 Ibid 48.
965 Ibid 58.
966 Ibid.
exceeded what was ‘commercially reasonable in the circumstances’. Noting that some transactions may be in a ‘grey area’, the *Pinnacle 8* Panel emphasised that a balance needed to be struck between preventing ‘unfair defensive’ action by target directors and ‘not interfering unreasonably with the ordinary and proper conduct of the target’s business’.

### 2 Development of Policy

**(a) First Guidance Note**

In June 2003, the Panel released the first version of *Guidance Note 12: Frustrating Action* (‘first GN 12’). The Overview highlighted the Panel’s discretion in applying the FAP, noting that ‘the Panel *may* prevent the target from proceeding with the frustrating action’. Rather than providing ‘bright line’ rules, the first GN 12 set out a series of matters that the Panel may take into account in applying the FAP. Consistent with this, the first GN 12 made it clear that the existence of unacceptable circumstances depends upon the individual facts in the case. The first GN 12 accordingly gave a list of the type of actions that ‘*might* give rise to unacceptable circumstances’, which included significant issues of shares, sales of major assets and declaring ‘special or abnormally large’ dividends.

There were also a series of exceptions set out in the first GN 12 that might allow the target action to proceed without shareholder approval. The exceptions were stated to apply generally, while allowing the Panel to decide that they did not apply in a

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967 Ibid.
968 Ibid.
971 Ibid.
972 Ibid 7 (emphasis added).
particular case. They related to actions forming part of the target’s ordinary business or implementing agreements already announced or entered into,\textsuperscript{973} where the action did not have a material effect on the target’s business or financial position or the bid condition was ‘overly extensive or restrictive’,\textsuperscript{974} where there was a ‘commercial or legal imperative’ for the action,\textsuperscript{975} or if it resulted from compliance with a ‘court order, legislative requirement or Government directive’.\textsuperscript{976}

The first GN 12 emphasised the focus of the Panel on commercial factors in its decision-making in relation to the FAP.\textsuperscript{977} It also required that the Panel take the commercial aspects of the transactions into account in different ways. First, it stressed that ‘the Panel will not regard the breach of a defeating condition which cannot commercially be considered critical to the bid as giving rise to unacceptable circumstances’.\textsuperscript{978} Second, the first GN 12 indicated that the Panel would be ‘less likely’ to find that there were unacceptable circumstances where the breach of the condition resulted from soliciting a competing proposal that would allow target shareholders to choose between them, especially where the conditions were ‘anti-competitive, overly restrictive or lack commercial justification’.\textsuperscript{979} Finally, as noted above, one of the key exceptions to the FAP applied in relation to a ‘commercial or legal imperative’.\textsuperscript{980}

There was also a reference to the balancing process undertaken by the Panel in exercising its discretion to make a declaration of unacceptable circumstances. In particular, where the target’s action had a material effect on and formed part of its ordinary course of business, the first GN 12 concluded that the Panel would ‘balance the

\textsuperscript{973} Ibid.
\textsuperscript{974} Ibid 8.
\textsuperscript{975} Ibid 8. See also at 9–10.
\textsuperscript{976} Ibid 8.
\textsuperscript{977} In relation to its general approach, see ibid 6.
\textsuperscript{978} Ibid 4.
\textsuperscript{979} Ibid 5.
\textsuperscript{980} Ibid 8.
nature of the triggering action against its potential effect on the bidder’s stated objectives in relation to the target’.\textsuperscript{981} The first GN 12 also discussed the need to balance the policy or ‘spirit’ underlying the takeover provisions with the directors’ duties to the company, and set out a number of ways that this might be achieved.\textsuperscript{982} These involved seeking prior approval from target shareholders or making the target’s action conditional on such approval,\textsuperscript{983} making the transaction conditional on the failure of the bid or have a ‘cooling-off clause’ exercisable by any new management if it succeeds,\textsuperscript{984} or target management making an announcement ‘that they will enter into an agreement after a specified, reasonable time, unless control has by then passed to the bidder’.\textsuperscript{985} This last option introduced a new alternative to target shareholder approval (the ‘passage of time’ exception).

\textit{(b) Second Guidance Note}

The second version of Guidance Note 12 (‘second GN 12’) was released in February 2010.\textsuperscript{986} Less than two thirds of the length of the first GN 12, the second GN 12 no longer contained references to the balancing processes, and some of the commercial factors, which were included in the first GN 12. However, the second GN 12 continued the focus on the commercial importance of both the defeating conditions of the bid,\textsuperscript{987} and the possibility of a ‘commercial imperative’ allowing the frustrating action to

\textsuperscript{981} Ibid 7.
\textsuperscript{982} See ibid 8–9.
\textsuperscript{983} Ibid 9.
\textsuperscript{984} Ibid.
\textsuperscript{985} Ibid.
\textsuperscript{986} Takeovers Panel, \textit{Guidance Note 12 – Frustrating Action} (11 February 2010). This was issued following the release of a Consultation Paper (Takeovers Panel, \textit{Consultation Paper – Rewrite of GN 7, GN 12, GN 14 and GN 17} (13 May 2009)) and Public Consultation Response Statement (Takeovers Panel, \textit{Public Consultation Response Statement – Rewrite of GN 7, GN 12, GN 14 and GN 17} (11 February 2010)).
\textsuperscript{987} See Takeovers Panel, \textit{Guidance Note 12 – Frustrating Action} (11 February 2010) 3 (example 1), 4, 30 n 12.
proceed without shareholder approval. The overall focus on the Panel’s discretion is also maintained in the subsequent versions of Guidance Note 12. For example, the second GN 12 emphasises that, although an action triggering a condition will be a frustrating action, whether it leads to unacceptable circumstances will depend on the effect on target shareholders and the market, in light of the policy purposes in ss 602(a) and (c) and the Panel’s jurisdiction under s 657A of the legislation. The second GN 12 also introduced an explicit warning that the examples of frustrating action provided ‘are illustrative only and nothing in the note binds the Panel in a particular case’.

Another key development in the FAP reflected in the second GN 12 arose from the decision in Re MacarthurCook Ltd (‘MacarthurCook’). This decision involved the Panel’s first application of the FAP in the context of a ‘potential offer’. A proposal to make offers for the target’s shares had been communicated to the target subject to the qualification that it was ‘non-binding, indicative and incomplete and expresses current intentions only’. The MacarthurCook Panel concluded that this was a ‘genuine potential offer’. This was because it was made by a ‘genuine potential bidder’, the terms were set out in enough detail, and the qualification was designed to avoid the continuous disclosure requirements and the requirement to make a takeover bid under s

988 Ibid 4.
989 Ibid 2–3.
990 Ibid 1.
992 A ‘potential offer’ was defined in the first GN 12 as ‘an offer the terms of which have been communicated to target directors publicly or privately by a genuine bidder, but is not yet a formal offer under Chapter 6 of the Corporations Act’: see Takeovers Panel, Guidance Note 12 – Frustrating Action (16 June 2003) 2 (emphasis added).
994 Ibid 350.
995 This was because it could comply with its financial obligations, had conducted discussions with the target and had entered into a pre-bid agreement to purchase its shares: ibid.
996 Although not ‘finally settled’, the terms included the conditions and price: ibid.
631 of the Corporations Act. Following MacarthurCook, the definition of ‘potential offer’ in the first GN 12 was replaced by the term ‘potential bid’ in the second GN 12. The MacarthurCook decision was noted by including a footnote to this definition indicating that it includes ‘announcements to which s 631 applies but [is] not limited to these’.

(c) Third Guidance Note

There was only just over a year between the second and third versions of the Guidance Note, with the latter (‘third GN 12’) released in May 2011. Significantly, the key substantive revisions in the third GN 12 were designed to give the target company greater freedom to take action in certain circumstances. The first amendment reflected the Panel’s decision in Re Transurban Group (‘Transurban’). In Transurban, the Panel concluded that the FAP did not apply in circumstances where the bidding parties were not prepared to make a hostile takeover bid, and the target board had rejected a

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997 Ibid. The continuous disclosure rules require listed entities to disclose to the market information that ‘a reasonable person would expect to have a material effect on the price or value’ of its securities: see Australian Securities Exchange, Listing Rules (at 14 April 2014) r 3.1; Corporations Act 2001 (Cth) s 674. This is subject to exceptions, which include ‘an incomplete proposal or negotiation’ that is confidential and would not be expected to be disclosed by a reasonable person: Australian Securities Exchange, Listing Rules (at 14 April 2014) r 3.1A. Section 631 of the Corporations Act requires a person to make a takeover bid with comparable terms and conditions within two months of proposing publicly to make a bid.

998 This new definition removed the reference to a ‘genuine bidder’ and instead referred to ‘a genuine potential bid communicated to target directors publicly or privately which is not yet a formal bid’: Takeovers Panel, Guidance Note 12 – Frustrating Action (11 February 2010) 2.

999 Ibid 2 n 4.

1000 Takeovers Panel, Guidance Note 12 – Frustrating Action (6 May 2011). The third GN 12 was issued following the release of a Consultation Paper (Takeovers Panel, Consultation Paper – GN 12 Frustrating Action (10 December 2010)) and a Public Consultation Response Statement (Takeovers Panel, Public Consultation Response Statement – Amendment of GN 12 (6 May 2011)).

number of proposed schemes of arrangement that required the target’s support.\textsuperscript{1002} As a result, the third GN 12 made it clear that proposed schemes of arrangement cannot be frustrated if they are not supported by the target board.\textsuperscript{1003}

The other key revisions in the third GN 12 related to target directors making announcements that would allow frustrating action to occur after a certain time period. First, the ‘passage of time’ exception, under which target directors could announce that they would proceed with an agreement following a ‘specified, reasonable time’, was amended to allow it to apply in a wider range of circumstances.\textsuperscript{1004} The following new paragraph was also added:

One of the factors that the Panel will take into account in deciding whether unacceptable circumstances exist is whether, before undertaking a corporate action, the target notified the potential bidder that it intends to take the action if the potential bidder does not make its bid or formally announce its proposed bid [under s 631] within a \textit{reasonable time}.\textsuperscript{1005}

In relation to this new paragraph, the third GN 12 indicated that two weeks would usually constitute a ‘reasonable time’, but that this would be determined in light of the particular facts of the case.\textsuperscript{1006} While it indicated that such a notification may have assisted in the circumstances of \textit{MacarthurCook}, the third GN 12 warned that this would not provide a ‘safe harbour’ and that a declaration of unacceptable circumstances may be made nevertheless due to other considerations.\textsuperscript{1007}

\textsuperscript{1002} \textit{Re Transurban Group} [2010] ATP 5, 1, 4.
\textsuperscript{1003} Takeovers Panel, \textit{Guidance Note 12 – Frustrating Action} (6 May 2011) 3 (example 3).
\textsuperscript{1004} See ibid 2.
\textsuperscript{1005} Ibid 7 (emphasis added).
\textsuperscript{1006} Ibid 7 n 25.
\textsuperscript{1007} Ibid 7 n 24.
(d) Fourth Guidance Note

The fourth version of Guidance Note 12 (‘fourth GN 12’) was released in July 2014.\textsuperscript{1008} This resulted from changes proposed in response to concerns raised both with the Panel and generally that the FAP ‘unduly restricts targets’ activities’.\textsuperscript{1009} There was a particular concern that a hostile bidder could use the policy to force a target to negotiate in circumstances where it was unclear whether the bidder would rely on a condition that had already been triggered.\textsuperscript{1010} As a result, the fourth GN 12 Consultation Paper proposed three revisions to the paragraph in GN 12 setting out the considerations the Panel considers in exercising its discretion to declare circumstances to be unacceptable.\textsuperscript{1011} The first proposed change was implemented and required the Panel to consider ‘whether a condition has been triggered previously and the bidder has not disclosed whether it will rely on it or waive it within a reasonable time’.\textsuperscript{1012} In light of comments received on the Consultation Paper, the Panel also included additional guidance on the factors it would take into account in determining what is a ‘reasonable time’ in this context.\textsuperscript{1013} However, the Panel decided not to make the further amendments proposed in relation to this issue given submissions that these changes


\textsuperscript{1010} Ibid.

\textsuperscript{1011} Ibid.

\textsuperscript{1012} Ibid.

\textsuperscript{1013} Ibid.

\textsuperscript{1013} Noting that this will depend on the ‘prevailing circumstances’, the Guidance Note indicates that such factors will include the nature of the condition triggered, whether there has been a subsequent variation to the bid terms, and ‘whether it is still acceptable to wait until the time for giving notice of the status of conditions’: see ibid 4 n 15; \textit{Re Novus Petroleum Ltd (No 1)} (2004) 22 ACLC 436.
were not needed in light of the first change.\textsuperscript{1014} In addition, the Consultation Paper had also sought comment on whether a fixed timeframe such as 90 or 120 days should be introduced after which the FAP would no longer apply.\textsuperscript{1015} Such a fixed timeframe was not pursued given that the submissions concluded that this was unnecessary.\textsuperscript{1016}

3 \textit{Application of Policy}

The Panel has focused on the commercial aspects of the transactions under consideration in its decisions relating to the FAP.\textsuperscript{1017} This has occurred both in the context of the conditions put forward by the bidder and the circumstances that may justify the target acting without shareholder approval. In relation to the former, declarations of unacceptable circumstances and orders have been made in cases where the Panel has concluded that the proposed or actual bid conditions affected by the frustrating action were ‘commercially critical’.\textsuperscript{1018} On the other hand, the Panel has determined that it will be less likely to find circumstances to be unacceptable if the event activating the relevant condition is ‘not material to the bid’, particularly where it is based on conditions that are easily triggered or are otherwise inappropriate.\textsuperscript{1019} The Panel has also declined to find frustrating action where it considered that the condition placed an unreasonable burden on the target company as it required the bidder to have

\textsuperscript{1014} See Takeovers Panel, \textit{Consultation Paper – GN 12 Frustrating Action} (6 January 2014) 2;


\textsuperscript{1017} There were a few decisions in which the FAP was not discussed in detail: see \textit{Re Anaconda Nickel Ltd (No 15)} [2003] ATP 17, 5 (only in submissions); \textit{Re International All Sports Ltd (No 1)} [2009] ATP 4, 4 (only in submissions); \textit{Re Powerlan Ltd} [2010] ATP 2, 3–5, 10 (interim order granted to allow submissions but not pursued by applicant).


\textsuperscript{1019} \textit{Re Austock Group Ltd} [2012] ATP 12, 8.
access to information held by the target. Although most of the FAP decisions have focused on the triggering of conditions that would result in defeating the takeover bid, the Panel has also considered whether the target’s action had a material effect on the bid’s objectives in a handful of decisions.

In relation to the exceptions to the FAP, the Pinnacle 5 Panel emphasised at the outset that there would need to be ‘compelling reasons’ why shareholder approval should not be sought for the frustrating action. In particular, it focused on the need for a ‘commercial imperative’, which it did not find in relation to the proposed transactions in that case. The Pinnacle 8 Panel also concluded that the target should seek shareholder approval after considering the ‘commercial interests’ of the target and its shareholders. Similarly, the Guidance Notes referred to a ‘commercial imperative’ as a relevant factor for the Panel in deciding whether frustrating action results in unacceptable circumstances. Subsequent Panel decisions considering the existence

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1025 These references to a ‘commercial imperative’ have since been replaced by a statement that there is unlikely to be unacceptable circumstances where ‘the frustrating action is required to avoid a materially adverse financial consequence, such as insolvency’: see Takeovers Panel, Guidance Note 12 – Frustrating Action (1 December 2016) 7. The decision in Re Perilya Ltd (No 2) [2009] ATP 1 is cited as an example of this in the footnote to the new paragraph 21(c). Although it removes the explicit reference to ‘commercial’ in this context, the new wording requires the Panel to consider the commercial implications of requiring target shareholders to approve the frustrating action.
of a commercial imperative have related to arguments that the target needed to raise funds.1026 In most of these decisions, the question whether there was a commercial imperative did not need to be decided in light of action taken remedying the Panel’s concerns.1027 It was found in another decision that there appeared to be a commercial imperative, based on the need for the target to have funds to continue its ordinary activities and financial information indicating that it would be in financial difficulties in two months.1028 This decision also considered how the commercial objectives of the bid would be frustrated.1029 However, the Panel did not make any final conclusions on whether there was frustrating action in light of undertakings accepted by the Panel.1030

The only decision to state clearly that there was a commercial imperative for the action taken by a target company provides a strong example of the flexible approach adopted by the Panel in its decision-making (‘Perilya 2’).1031 In Perilya 2, the target had announced that it had received a $10 million refundable deposit in relation to a $45 million placement, and given a call option to sell a major asset for $15 million in the event that the deposit was not repaid if the placement did not proceed.1032 Although the call option was not subject to prior approval by target shareholders, a meeting was subsequently convened for them to approve the terms of the call option and placement.1033 Notwithstanding the risk that the aggregation of the refundable deposit

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1026 See Re Resource Pacific Holdings Ltd [2007] ATP 26, 4 (entitlement offer); Re Babcock & Brown Communities Group [2008] ATP 25, 8 (issue of convertible and loan notes); Re Perilya Ltd (No 2) [2009] ATP 1, 7 (placement); Re Rey Resources Ltd [2009] ATP 14, 4–5 (rights issue).


1029 Ibid 4.

1030 Ibid.

1031 Re Perilya Ltd (No 2) [2009] ATP 1, 7.

1032 Ibid 1–2.

1033 Ibid 2–3.
and call option could constitute frustrating action, the *Perilya 2* Panel concluded that there was a commercial imperative for the target to be paid the deposit before the target shareholder meeting.\(^\text{1034}\) In making its decision, the Panel took into account the ‘unusual’ nature of both the deposit and the prevailing market conditions in the aftermath of the global financial crisis.\(^\text{1035}\) In light of these extraordinary circumstances, the *Perilya 2* Panel indicated that another target company in a similar situation may not receive the same result.\(^\text{1036}\)

One of the important features of the Panel’s decision-making in relation to the FAP has been its approach of balancing the different interests of the parties. This approach was introduced at the outset, with the *Pinnacle 5* Panel seeking submissions from all parties on whether the advantages of the proposed transactions to shareholders outweighed their potential effect on the takeover bid.\(^\text{1037}\) Consistent with this, the *Pinnacle 8* Panel emphasised that whether the ‘transactions led to unacceptable circumstances depends upon their effects on the outcome of the bid but also on the other commercial interests of Pinnacle and its shareholders’.\(^\text{1038}\) It also noted that a balance needed to be struck between preventing ‘unfair defensive’ action by target directors and ‘not interfering unreasonably with the ordinary and proper conduct of the target’s business’.\(^\text{1039}\) Similarly, the *Perilya 2* Panel concluded that it ‘must balance the impact of its decision on the company and other interested parties, including whether its decision may place the company in a precarious financial position’.\(^\text{1040}\) This is reflected in the competing factors that the Guidance Note indicates the Panel will take into account in considering whether the frustrating action leads to unacceptable circumstances.\(^\text{1041}\) On the one hand, the Panel considers the effect of the action on the takeover bid, including its likely

\(^{1034}\) Ibid 5, 7.

\(^{1035}\) Ibid 5–6.

\(^{1036}\) Ibid 6.

\(^{1037}\) *Re Pinnacle VRB Ltd (No 5)* (2001) 39 ACSR 43, 49.

\(^{1038}\) *Re Pinnacle VRB Ltd (No 8)* (2001) 39 ACSR 55, 68.

\(^{1039}\) Ibid 58.

\(^{1040}\) *Re Perilya Ltd (No 2)* [2009] ATP 1, 6.

success and whether the action triggers a condition that is ‘commercially critical’. However, it also focuses on the impact of the FAP on the target’s business. This includes whether it would be ‘unreasonable’ to rely on the condition for the purpose of the policy, such as where it requires co-operation from the target or is ‘overly restrictive’. The Guidance Note also stresses that the bidder ‘must accept that the target’s normal business will continue normally’.

The application of this balancing process led to different outcomes in the decisions of the initial and Review Panels in the second set of decisions on the FAP (‘Bigshop decisions’). The decisions involved a proposed placement, commitment fee and board appointments announced by the target company in the context of a proposed proportional takeover bid. The Bigshop 1 Panel weighed up the elements of the proposed placement to determine whether they were ‘significant enough’ or ‘sufficiently material’ to frustrate the intention of the proposed bid. In Bigshop 1, the initial Panel concluded that, although the target’s actions ‘came very close to being frustrating action’, they did not ‘on balance’ frustrate the bidder’s intentions. The Bigshop 1 Panel considered this decision was made easier by developments during the proceedings. These included a reduction in the proposed placement size, and undertakings concerning the resolution to approve the proportional bid that prevented the new directors from making recommendations and the party receiving the placement shares from voting. Although Bigshop 2 also applied a materiality test, it found ‘[o]n balance’ that the placement would be likely to defeat the proposed bid if it was not approved by target shareholders due to its effect on the bidder’s aim to achieve

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1042 Ibid 4.
1043 See ibid 4 (especially Examples 1–2).
1044 Ibid 5.
1046 Ibid 530, 532.
1047 Ibid 539.
1049 Ibid.
‘effective control’.\textsuperscript{1050} Unusually, it made interim orders instead of a declaration of unacceptable circumstances and final orders in order to facilitate this approval.\textsuperscript{1051} Apart from minor differences in the undertakings accepted by the \textit{Pinnacle} Panels,\textsuperscript{1052} the other Review Panels in the case study confirmed the decision of the initial Panel in relation to the FAP.\textsuperscript{1053}

4 Decision Outcomes

The outcomes resulting from the decisions on the FAP in the case study can be divided into three categories.\textsuperscript{1054} The first category comprises the 13 (or 41 per cent of) decisions in which the Panel either did not conduct proceedings or make a declaration in relation to the FAP.\textsuperscript{1055} In many of these decisions, the Panel concluded that there was no frustrating action as there was no takeover bid at the time of the relevant action. This

\begin{flushright}
\textsuperscript{1050} \textit{Re Bigshop.com.au Ltd (No 2)} [2001] ATP 24, 8, 16.
\textsuperscript{1051} Ibid 1, 17–8.
\textsuperscript{1054} This analysis does not include the decisions in which the FAP is not discussed in detail: see above n 1017.
\end{flushright}
was either because no takeover bid was contemplated at that time,\textsuperscript{1056} or the takeover bid had not yet been communicated.\textsuperscript{1057} There were also a significant number of decisions in which the Panel did not apply the FAP where the relevant bid condition involved the bidder accessing information held by the target.\textsuperscript{1058} In addition, the FAP was not enlivened by the target repaying convertible notes as they fell due.\textsuperscript{1059} On the other hand, notwithstanding the risk of frustrating action, the \textit{Perilya} 2 Panel declined to make a declaration of unacceptable circumstances in relation to a significant placement and related call option given the target company’s precarious financial situation.\textsuperscript{1060}

A similar number of decisions (13, or 41 per cent) involved the Panel accepting undertakings or some other form of action instead of deciding whether to make a declaration of unacceptable circumstances.\textsuperscript{1061} In the first decisions on the FAP, the \textit{Pinnacle} Panels accepted undertakings that target shareholder approval would be sought


\textsuperscript{1057} See \textit{Re Selwyn Mines Ltd} [2003] ATP 33 [4], [34], [38]; \textit{Re Gondwana Resources Ltd (No 1)} [2014] ATP 9, 7.


\textsuperscript{1059} \textit{Re Sydney Gas Ltd (No 1)} [2006] ATP 9, 17.

\textsuperscript{1060} See above Section A (under the heading ‘3 Application of Policy’) in Part IV of this Chapter.

for the proposed transactions before they were implemented.1062 On the other hand, the Bigshop 1 Panel considered that an offer to reduce the size of the placement and undertakings concerning a resolution to approve a proposed proportional takeover bid made it easier for the Panel to conclude that there was no frustrating action.1063 The Panel also accepted undertakings from the proposed bidder and underwriter to the rights issue in Anaconda 1 to allow the application to be withdrawn,1064 and was able to conclude proceedings in BreakFree 1 given that the target had volunteered to make undertakings to terminate the asset sale agreements in that matter.1065 In later decisions relating to approval of the frustrating action, the Panel either declined to conduct or concluded proceedings as the target had provided additional disclosure to remedy deficiencies in the information provided to target shareholders for the approval process.1066 There were also a handful of decisions in which the target’s undertaking or provision of further information avoided the need for the Panel to decide whether there was frustrating action.1067

In the third and smallest category of decisions (six, or 19 per cent), the outcome of the FAP proceedings was determined by the Panel making orders.1068 Four of these

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1063 See Re Bigshop.com.au Ltd (No 1) (2001) 39 ACSR 525, 529–30, 539. However, as discussed above in Section A (under the heading ‘3 Application of Policy’) in Part IV of this Chapter, the Bigshop 2 Panel came to the opposite conclusion.
1064 Re Anaconda Nickel Ltd (No 1) [2003] ATP 2, 2, 8.
1065 Re BreakFree Ltd (No 1) [2003] ATP 29, 1, 8, 11–12.
1068 Interim orders were also made in relation to the following decisions: Re Powerlan Ltd [2010] ATP 2, 3–5, 10; Re Coopers Brewery Ltd (No 3) (2005) 57 ACSR 1, 9, 24; Re Coopers
decisions involved the Panel making both a declaration of unacceptable circumstances and final orders requiring shareholder approval for the frustrating action.\textsuperscript{1069} The outcome in the other two decisions was unusual. In \textit{Bigshop 2}, the Panel used interim rather than final orders to regulate the conduct of meetings so that the target shareholders could choose between approving a proportionate bid and the proposed placement.\textsuperscript{1070} The \textit{Bigshop 2} decision demonstrates the flexibility of the Panel’s powers in allowing it to make interim orders for 2 months that remedied the Panel’s concerns.\textsuperscript{1071} In \textit{Re Austock Group Ltd},\textsuperscript{1072} the Panel took the rare step of making a costs order in light of the bidder’s conduct in that matter. This was because the Panel had found that the bidder had brought an application solely based on frustrating action when it had not arranged finance and was consequently incapable of implementing the bid.\textsuperscript{1073}

B Assessment of Substantive Flexibility

Substantive flexibility is assessed based on the case study on the FAP using the methodology discussed in Part II above. Consequently, there would be a strong form of substantive flexibility where the policy applied by the Panel is largely based on the exercise of discretionary powers, the Panel consistently adopts a commercial or pragmatic approach and the decision outcomes frequently involve undertakings. On the other hand, the medium form of each of these would be demonstrated by the existence of discretionary powers to a limited extent, a commercial or pragmatic approach adopted in some cases or undertakings being used on a restricted basis. In contrast, a weak form of substantive flexibility would involve a low level of discretion in the


\textsuperscript{1070} See \textit{Re Bigshop.com.au Ltd (No 2)} [2001] ATP 24, 1, 17–18. The \textit{Bigshop 2} Panel also accepted undertakings from the bidder: at 1, 5–7, 12, 14.

\textsuperscript{1071} See \textit{Corporations Act 2001} (Cth) s 657E.

\textsuperscript{1072} [2012] ATP 12.

\textsuperscript{1073} See \textit{Re Austock Group Ltd} [2012] ATP 12, 8–9, 12–13.
application of the policy, the adoption of a legalistic approach and/or little use of negotiated outcomes such as undertakings.

The case study shows clearly that the Panel’s decision-making is based on the exercise of discretionary powers to a significant extent. First, and perhaps most importantly, the introduction of the FAP in the Pinnacle 5 decision demonstrates the Panel’s ability to adapt the regulatory framework through the use of its discretionary powers. This was achieved through the Panel’s power to declare circumstances to be unacceptable under s 657A of the Corporations Act, which is based on the broad purposes or ‘spirit’ of the takeover regulation set out in s 602. As a result, the Panel was able to introduce a policy that required target shareholders to approve target company actions that may frustrate a takeover bid, in order to uphold the purpose of ensuring that the shareholders have a ‘reasonable and equal opportunity to participate in any benefits’ arising from the proposed bid.1074

Second, the nature of the FAP as introduced by the Panel involves a high degree of discretion in relation to the operation of the policy. This follows from the policy being established as a general rule, with flexibility provided through the use of exceptions where appropriate. These exceptions were only formulated at a high level at the time that the FAP was established, with the Pinnacle 5 Panel concluding that target shareholders should approve the frustrating action ‘unless there were compelling reasons why shareholder approval should not be required in this particular case.’1075

However, the FAP has been subsequently ‘refined’ and ‘fleshed out’ as predicted by the Pinnacle 5 and Pinnacle 8 Panels respectively.1076

Third, the development of the FAP over the four versions of Guidance Note 12 in the case study has reinforced its reliance on the Panel’s discretionary powers. In particular, the Guidance Notes make it clear that the Panel decides whether to exercise its power to make a declaration of unacceptable circumstances and/or orders based on the policy in light of the particular facts in each case. The Guidance Notes also demonstrate that the Panel has responded to emerging issues in relation to the policy. This is shown in

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1074 See Corporations Act 2001 (Cth) ss 602(c), 657A(3).
1076 See ibid; Re Pinnacle VRB Ltd (No 8) (2001) 39 ACSR 55, 57.
amendments reflecting the Panel’s application of the policy to potential offers in *MacarthurCook*, as well as its decision in *Transurban* not to apply the policy in the context of schemes of arrangement.\(^\text{1077}\) More recently, the Panel has made changes to the Guidance Note in light of concerns about the burden that the FAP places on target companies.\(^\text{1078}\) It has also modified its position in light of submissions received regarding its proposals.\(^\text{1079}\) Finally, the Panel has used its discretionary powers in applying the FAP. One of the key ways in which this has been established is through the Panel’s process of weighing up the different interests affected. This has involved balancing the effect on the target of delaying the proposed action on the one hand, with the impact on the proposed or actual bid and the opportunity for the target shareholders to choose between the alternative options on the other.

The Panel has also consistently adopted a commercial or pragmatic approach in applying the FAP. This has resulted from its focus on the commercial aspects of the transactions under consideration. In deciding whether the policy applies, the Panel takes into account the extent to which it is reasonable for the bidder to rely on the conditions triggered by the proposed frustrating action, including whether the conditions are ‘commercially critical’.\(^\text{1080}\) The Panel also considers the ‘commercial interests’ of the target and its shareholders.\(^\text{1081}\) Similarly, the Panel has taken into account whether there is a ‘commercial imperative’ in deciding whether to allow the target to act without shareholder approval.\(^\text{1082}\) In a key decision demonstrating the Panel’s commercial approach, the *Perilya 2* Panel used the existence of a ‘commercial imperative’ to allow

\(^{1077}\) See above Section A (under the heading ‘2 Development of Policy’) in Part IV of this Chapter.

\(^{1078}\) Ibid.

\(^{1079}\) Ibid.

\(^{1080}\) See above Section A (under the heading ‘3 Application of Policy’) in Part IV of this Chapter.

\(^{1081}\) See *Re Pinnacle VRB Ltd (No 8)* (2001) 39 ACSR 55, 68, 71.

\(^{1082}\) See above Section A (under the heading ‘3 Application of Policy’) in Part IV of this Chapter.
a potentially frustrating action to proceed in light of the target’s need for funding in the aftermath of the global financial crisis.\(^\text{1083}\)

It is arguable that the Review Panels in the first two FAP matters adopted a more legalistic approach than in the other decisions. The initial Panel decision in *Pinnacle 5* focused primarily on the commercial imperatives for the transactions, in order to determine whether there was a justification for not requiring shareholder approval in that case.\(^\text{1084}\) Although the Review Panel decision in *Pinnacle 8* also weighed up the commercial interests of the parties,\(^\text{1085}\) it included a significant emphasis on the legal implications of the actions of the parties involved (including a detailed examination of issues arising from the purpose of the target directors’ actions).\(^\text{1086}\) Similarly, both the initial and Review Panels in the *Bigshop* matter weighed up the different factors to decide whether the intention of the proposed bid would be frustrated.\(^\text{1087}\) However, the *Bigshop 2* decision also contained a lengthy discussion of the Panel’s interim orders, in light of the impact of the resolution for approving the frustrating action on resolutions already proposed to approve the proportionate bid.\(^\text{1088}\) It is explicable though that the initial Panel did not focus on this issue, as only the Review Panel concluded that there was frustrating action in this matter.\(^\text{1089}\)

The greater emphasis in the Review Panel decisions in *Pinnacle 8* and *Bigshop 2* on the legal issues arising from the introduction of the FAP could be attributed in part to the composition of the Panels. Unlike in the other Panel decisions on the FAP, the Sitting President was at that time a sitting judge in both *Pinnacle 8* (Santow J) and *Bigshop 2*

\(^{1083}\) Ibid.


\(^{1085}\) See *Re Pinnacle VRB Ltd (No 8)* (2001) 39 ACSR 55, 68, 71.

\(^{1086}\) Ibid 68–9.

\(^{1087}\) See above Section A (under the heading ‘3 Application of Policy’) in Part IV of this Chapter.


This may explain the focus in these decisions on the impact of the new requirement for target shareholders to approve frustrating action on existing shareholder approval processes, particularly those relating to breaches of directors’ duties. However, given that the Pinnacle and Bigshop matters involved the first decisions in relation to the FAP, these differences could also be attributed to a desire by the Review Panels to flesh out the FAP to the greatest extent possible in light of uncertainty surrounding the operation of the policy following its introduction. Both Review Panels were concerned to ensure that the relevant processes were compatible so that shareholders would have a real choice between a takeover bid and the alternative proposal by the target board. It is also important to note that both Austin and Santow JJ had extensive commercial experience in corporate law prior to becoming judges, with the Pinnacle decision emphasising the need for the Panel to operate as a ‘first-rate commercial panel’ rather than a ‘second-rate court’.

In addition, the outcomes in the Panel’s decisions on the FAP have involved negotiation to a significant extent, with undertakings accepted frequently by the Panel. The Panel decided not to conduct proceedings in a significant number of the decisions (41 per cent), with this figure including a decision in which the Panel allowed the action to proceed without prior shareholder approval due to a ‘commercial imperative’. Undertakings or other action taken by the parties were used to conclude the proceedings in the same number of FAP decisions (41 per cent). This is more than double the amount of decisions that were resolved using declarations of unacceptable circumstances and/orders (19 per cent). Undertakings were also used instead of interim

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1091 See above Section A (under the heading ‘1 Introduction of Policy’) in Part IV of this Chapter.


1094 See Re Perilya Ltd (No 2) [2009] ATP 1, 1, 8.
orders in 16 per cent of the decisions. In light of this and the above analysis, it is concluded that a strong form of substantive flexibility applies in relation to Panel decision-making.

V CONCLUSION

Flexibility is an important aim of takeover regulation given the need to respond to new developments in the market. It is also one of the key reasons why the Panel was given the role of resolving takeover disputes in place of the courts in the CLERP reforms. Consequently, it is important that there is flexibility in relation to Panel decisions, consistent with the CLERP aim of ‘informality’ in decision-making. The question whether the Panel has achieved flexibility in decision-making from 13 March 2000 to 30 June 2016 is examined in this Chapter by focusing on two key elements. The first element of procedural flexibility is determined by three key features in the design of the Panel system, namely the powers of the Panel, its processes and the expertise of its members. Substantive flexibility is the second element, which examines the extent to which the Panel has demonstrated flexibility in exercising its decision-making powers.

The analysis in this Chapter commences with a focus on how to measure these two elements of flexibility. Procedural flexibility is examined using a qualitative analysis of the regulatory framework and the Panel’s Procedural Rules. This results in an assessment of a strong form of procedural flexibility. In particular, the Panel’s powers are based on discretions to a significant extent and its processes involve a high level of adaptability. Panel members also have a broad range of knowledge and experience in relation to providing commercial advice on corporate and takeover transactions. Although there are limitations on the Panel’s powers, these do not impact significantly on the Panel’s ability to provide flexibility in its decision-making.

A case study approach was adopted in relation to substantive flexibility to enable a qualitative analysis of the extent to which the Panel has demonstrated flexibility in the

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exercise of its decision-making powers. The case study analyses the Panel’s development of the frustrating action policy. This policy was adopted as the basis for the case study because it provides an opportunity to examine the nature of a policy that has been introduced by the Panel. It also enables an analysis of whether the FAP has been flexibly applied and amended in light of emerging issues. In light of the sample size of the case study, this provides a sufficient basis upon which to make conclusions in relation to the Panel’s decision-making generally.

The case study establishes a strong form of substantive flexibility in Panel decision-making. This was demonstrated at the outset by the Pinnacle 5 Panel in introducing the FAP based on the broad policy purposes underlying the takeover provisions, particularly the equal opportunity principle in s 602(c) of the Corporations Act. At the time of its introduction, the FAP involved the Panel exercising a high level of discretion and it was foreshadowed that the policy would need to be developed further over time. This has occurred through subsequent decisions and successive issues of Guidance Note 12. The Guidance Notes have expanded upon the issues to be taken into account by the Panel in exercising its discretion whether to make a declaration of unacceptable circumstances and responded to emerging issues in relation to the policy. In particular, the Guidance Note has been amended in response to concerns that the policy had swung the balance too much in favour of bidders over target companies.

In the Panel’s decisions applying the FAP, there has been a consistent focus on the commercial aspects of the transactions. This has resulted in the Panel applying a commercial or pragmatic approach rather than a legalistic one. A significant number of decisions have also involved the use of negotiated outcomes instead of declarations and/or orders. Given this and the assessment on procedural flexibility, it is concluded that the Panel has achieved a strong form of flexibility overall since the CLERP reforms in 2000 to date.
Chapter 6 – Certainty

I INTRODUCTION

A significant challenge for the Panel is to promote certainty in its decision-making. It has been observed that there is a need for certainty in relation to tribunal decisions generally.1096 This also reflects one of the key purposes of corporate and securities law regulation. Accordingly, the legislative aims of ASIC include maintaining the performance of the financial system ‘in the interests of commercial certainty’.1097 Indeed, Brown refers to commercial certainty as a ‘fundamental legal and economic need’.1098 Similarly, in the context of proposals to change the law applying to overseas acquisitions affecting Australian companies, the Legal Committee of the Companies and Securities Advisory Committee commented that ‘effective participation by Australia in international capital markets requires greater certainty’.1099

This Chapter addresses the question whether there has been certainty in relation to the Panel’s decision-making since the CLERP reforms. Certainty is sought by parties involved in a takeover so that they can make properly informed and timely decisions. As emphasised by the Panel, the need for certainty in the market is founded upon two of the purposes of the takeover provisions, namely ensuring an ‘efficient, competitive and informed market’ and that target shareholders have enough information to enable them to assess the merits of the takeover proposal.1100 Certainty can be evaluated using two

1097 Australian Securities and Investments Commission Act 2001 (Cth) s 1(2)(a).
1100 See Corporations Act 2001 (Cth) ss 602(a), (b)(iii); Takeovers Panel, Consultation Paper – Revision of GN 14 Funding Arrangements (6 October 2015) [10].
key elements. The first element is consistency in decision-making.\textsuperscript{1101} This requires that persons who are in a similar situation ‘receive similar treatment and outcomes’,\textsuperscript{1102} and is reflected in the CLERP reform aim of ‘uniformity’ in decision-making.\textsuperscript{1103} It is also an important means of achieving fairness.\textsuperscript{1104} Consistency in decision-making is a particular concern in any system where similar matters are decided by different decision-makers. Panel matters are decided by the Sitting Panel of three members,\textsuperscript{1105} who are chosen by the Panel President from the current total of 45 part-time members.\textsuperscript{1106} In addition, an application for review of an initial Panel decision in relation to ‘unacceptable circumstances’ matters may lead to a different decision by the Review Panel comprising another three Panel members. Panel decisions are also not subject to the doctrine of precedent as it applies to courts.

The second element of certainty relates to the finality of Panel decisions, namely the extent to which the Panel determines the matter finally.\textsuperscript{1107} This element incorporates decisions made under the internal Panel review process. However, the availability of


\textsuperscript{1103} See Commonwealth Treasury, Corporate Law Economic Reform, Proposals for Reform, No 4, Takeovers – Corporate Control: A Better Environment for Productive Investment (Canberra, 1997) 32.


\textsuperscript{1105} Australian Securities and Investments Commission Act 2001 (Cth) s 184(1).

\textsuperscript{1106} Ibid s 184(2).

judicial review affects finality adversely. This is consistent with the CLERP reform aim of minimising ‘tactical litigation’. There are many incentives to use litigation as a strategy to affect the outcome of a takeover bid. This is primarily due to the significant financial interests and conflicting aims of the parties involved. Consequently, the CLERP reforms were designed to allow the target’s shareholders to decide upon the merits of a takeover bid. This was sought to be achieved by removing the opportunity for parties to bring court proceedings in order to delay or stymie the bid and instead placing takeover disputes before a commercial body set up to hear matters informally and quickly.

There is an underlying tension between providing finality and the need to allow for the review of Panel decisions in some circumstances. Importantly, the CLERP reforms included an internal Panel review process ‘to provide appropriate protection against erroneous decisions and facilitate uniform standards’. However, there are both legal and policy reasons for judicial review of Panel decisions. As a matter of law, the

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1111 Ibid.

1112 Commonwealth Treasury, Corporate Law Economic Reform, Proposals for Reform, No 4, Takeovers – Corporate Control: A Better Environment for Productive Investment (Canberra, 1997) 40. This is consistent with the aim of providing ‘uniformity’ in decision-making: at 32.
**Australian Constitution** mandates that decisions of Panel members (as officers of the Commonwealth) are subject to review under the High Court’s original jurisdiction.\(^{1113}\) This reflects the underlying policy concern that, as part of the rule of law, a person exercising public power should be subject to judicial supervision.\(^{1114}\) Accordingly, the CLERP proposals envisaged that the Panel would be ‘protected from judicial review whilst it operated in good faith and within reasonable bounds and complied with the procedures in the legislation and the rules of natural justice’.\(^{1115}\) However, the availability of judicial review presents a significant challenge to the finality of Panel decisions. Given that judicial review proceedings typically involve lengthy delays, this type of review is also likely to have a significant impact on the time taken to resolve the matter.

There are five parts in this Chapter, which examines certainty in relation to the Panel’s decision-making from 13 March 2000 to 30 June 2016. Part II examines how to measure both elements of certainty in relation to decisions by the Panel. Part III assesses the first element of consistency in decision-making. It contains a case study analysis of Panel decisions relating to the application of ASIC’s policy on statements providing ‘truth in takeovers’.\(^{1116}\) Part III explains why this particular case study was selected. It then analyses the Panel decisions relating to the policy and the extent to which there is consistency in the Panel’s decision-making. Part IV focuses on the second element relating to the finality of Panel decisions. In particular, it analyses the impact of judicial review on Panel decision-making. Part V concludes with an assessment of the extent to which decision-making by the Panel satisfies the criterion of certainty.

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\(^{1113}\) *Australian Constitution* s 75(v).


II HOW TO MEASURE CERTAINTY

This Part examines how to measure the extent to which the Panel’s decision-making meets the certainty criterion. As discussed in Part I above, certainty in this context can be evaluated using two elements. Although there are other factors affecting certainty for market participants, such those arising from market and other risks, consistency and finality are the key elements that determine certainty in relation to Panel decisions. Accordingly, the methodology adopted to assess each of these elements is discussed below, including an analysis of the factors relevant to determining whether Panel decision-making meets the certainty criterion. The different levels of certainty that could be achieved in relation to these two elements are also considered and placed on a spectrum to assist with the assessment process.

Consistency in decision-making is, like the flexibility criterion, perhaps one of the more difficult matters to assess. This is because it involves a qualitative analysis of the Panel’s decisions to evaluate the level of consistency in the reasoning and outcomes of decisions by both initial and Review Panels. There is a tension arising between the flexibility and certainty criteria in this context. This is because the flexibility provided through the exercise of discretions based on policy considerations can lead to uncertainty in relation to the outcome. The Panel can help to minimise this uncertainty by providing guidance on how it will exercise its discretionary powers. Part III assesses the consistency element of certainty through a case study approach. The impact of the internal Panel review process on consistency is also determined using an analysis of the matters subject to internal review. This includes an examination of how frequently reviews led to different outcomes, and the extent to which the different outcomes were the result of a different conclusion based on the same facts or new

1117 See above Section B (under the heading ‘1 Relationship between Criteria’) in Part IV of Chapter 3.

circumstances arising. The impact of judicial review on the outcome of Panel decisions is also considered in the context of assessing the second element of finality in Part IV.

The extent to which the certainty criterion is achieved necessarily involves value judgments in relation to both the consistency and finality of Panel decisions. Accordingly, this Chapter’s assessment of these two elements is based on what are considered to be strong, medium and weak forms of both consistency and finality.\textsuperscript{1119} In terms of consistency, the strong form would result in a system where there is a high level of consistency in relation to the outcome of both the initial and Review Panel decisions considered in the case study. The medium form would provide consistency as a general rule, with deviation in a limited number of matters. The weak form would involve inconsistency in decision-making due to the existence of such factors as inadequate guidance provided by the Panel and/or decision outcomes varying frequently in relation to similar circumstances.

Given that judicial review applications affect adversely the finality of Panel decisions, the impact on finality can be assessed using an empirical and qualitative analysis of the matters subject to judicial review. Consequently, the analysis in Part IV focuses on the frequency and extent to which the court decisions result in a different outcome to the Panel decisions subject to review. Adopting a similar approach to that in relation to consistency, a strong form of finality would exist where the courts consistently affirm decisions of the Panel and/or discourage judicial review applications through their decisions. Under the medium form, judicial review would be limited to some extent and/or would lead to a different outcome in a limited number of matters. The weak form would involve frequent judicial review applications being made and/or the consistent overturning of Panel decisions by the courts. For example, the Panel’s decisions may be overturned where it has acted in breach of the rules of natural justice or outside its jurisdiction. It is also important to consider the general approach adopted by the courts in relation to judicial review, given its potential to affect the number of judicial review applications.

This Part comprises a case study analysis of Panel decisions in order to assess the extent to which they are consistent. The analysis examines Panel decisions relating to the ‘truth in takeovers’ policy (‘TTP’), which is set out in ASIC’s Regulatory Guide 25, Takeovers: False and Misleading Statements (‘ASIC RG 25’). This set of decisions was chosen for a number of reasons. First, the policy provides a clear basis for comparing Panel decisions in different factual situations, as it focuses on the extent to which persons are held to statements that they have made in the context of a takeover bid. Many of the decisions in the case study involve a ‘last and final statement’, which is a ‘statement made by a market participant that it will or will not do something in the course of the bid’. Such statements include a bidder stating that they will not improve the consideration, extend the offer period and/or waive a condition applicable to the offer, or substantial shareholders stating their intention to accept or reject offers under the takeover bid. Second, there is a significant body of Panel decisions relating to the TTP. This Chapter provides a case study of 38 decisions, which represents just under 10 per cent of the Panel decisions analysed. Although there is a larger body of Panel decisions in relation to other key topic areas, such as matters involving

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1120 The decisions used in the case study are predominantly those listed under the ‘Truth in takeovers’ heading in the Takeovers Panel, Index of Reasons: By Topic 2000-2014 (8 April 2015) 33–4. This list was supplemented by decisions obtained from searches of the LexisNexis database and Takeovers Panel website using the search terms of ‘truth in takeovers’, ‘takeovers: false and misleading statements’ and ‘last and final’. It does not include other decisions that have had the effect of holding a person to their statement, without any such reference to the TTP policy: see, eg, Re Normandy Mining Ltd (No 7) [2002] ATP (No 2); Re Qantas Airways Ltd (No 2) (2007) 62 ACSR 347; Re Qantas Airways Ltd (No 2R) (2007) 62 ACSR 416.


1122 Ibid [25.4].

1123 Ibid [25.21]–[25.31].

1124 For a list of the decisions in the TTP case study in order of the date of the decision, see Appendix 2.
association, bidder’s statement disclosure and rights issues, these are less useful for comparative purposes as they have a greater focus on the particular circumstances in each case. The case study also includes six Review Panel decisions, which can be analysed to determine the extent to which they are consistent with the decisions of the initial Panel.

The case study analysis is divided into three sections below. Section A examines statements in Panel decisions concerning the appropriateness of the TTP. This provides a framework for the case study, by setting out the extent to which the Panel states that the policy should be applied in the context of its decisions. Section B contains an analysis of the Panel decisions relating to the TTP. It starts by focusing on the decisions where the TTP was not applied and the reasons for this. It then discusses the range of outcomes in the decisions where the policy was applied. This is followed by an analysis of the extent to which there is consistency in the Panel’s decision-making in this area. Finally, section C assesses consistency in Panel decision-making using the methodology set out in Part II.


A ‘Truth in Takeovers’ Policy

Many Panel decisions have included general statements endorsing the TTP, with a number of later decisions referring to the policy without commenting on its appropriateness. In the first decision relating to the TTP, the Taipan 6 Panel stated that the underlying principle was that ‘offerees [target shareholders] and the market should be able to rely on statements of intention by participants in a takeover’. It noted that this principle is based on the legislative policy relating to the Corporations Act provisions on misleading and deceptive conduct and proposing or announcing a takeover bid, and the purposes of the takeover provisions to ensure that target shareholders and directors have sufficient information and that acquisitions take place in an ‘efficient, competitive and informed market’. However, the Taipan 6 Panel made it clear that the principle is not absolute and that its application will depend upon the circumstances:

[W]e accept that ASIC’s published policies include a general principle, which we regard as sound, that where a bidder makes a statement about its intention in relation to the conduct of a bid, shareholders and market participants can reasonably expect the bidder to act consistently with that stated intention. This principle is not an absolute rule that the bidder must act out its stated intentions mechanically. What it is reasonable to expect


1130 Re Taipan Resources NL (No 6) (2000) 36 ACSR 716, 720 (‘Taipan 6’).

1131 See ibid; Corporations Act 2001 (Cth) ss 1041H, 631, 602(b), 602(a) respectively.
depends also on the degree of precision of its statement, the presence or absence of clear qualifications to the statement, on the acts of other persons, on new circumstances, on later statements of the bidder itself and on how far it is reasonable to expect stated intentions to be pursued.1132

The third TTP decision in BreakFree 3/4 also included a clear qualification to its support for the policy, with the Panel stating ‘that, in general, ASIC’s truth in takeovers policy is an important and appropriate policy to apply in the context of takeovers in Australia’.1133 This was made more explicit in the subsequent Review Panel decision, where the BreakFree 4R Panel emphasised the different roles that ASIC and the Panel have in relation to the TTP:

Like the Initial Panel, we consider that PS 25 is a soundly-based policy … However, we consider that PS 25 [now RG 25] must be understood within its purposes and context … PS 25, is one of the Policy Statements [now Regulatory Guides] concerning ASIC’s enforcement discretions and not the exercise of its statutory discretionary powers (such as that under section 655A) … While ASIC needs to make its own assessment whether a statement may be “relied on” against a person, whether a market statement would be misleading or deceptive for the purposes of section 1041H is a question of law, not administrative discretion. Similarly whether circumstances are unacceptable is a matter for the decision by the Panel, not ASIC.1134

The Consolidated Minerals 3 Panel also noted that:

ASIC RG 25 does contemplate the correction, clarification and withdrawal of last and final statements in certain circumstances. It does not preclude the possibility that there might be a change of position as a result of realising that a mistake had been made (ie, not only between what was intended and

\[\text{1132 Re Taipan Resources NL (No 6) (2000) 36 ACSR 716, 720 (emphasis added).}\]

\[\text{1133 Re BreakFree Ltd (Nos 3 and 4) (2003) 49 ACSR 337, 355 (emphasis added).}\]

\[\text{1134 Re BreakFree Ltd (No 4R) (2004) 22 ACLC 1165, 1173–4 (emphasis added).}\]
what was said, but also between what was intended and what was desirable). Of course the ability to make such a change is very severely circumscribed, and properly so if the market is to be able to rely on due skill and care being applied to statements on which market participants are intended to rely.\textsuperscript{1135}

There have been stronger statements of support for the TTP in other Panel decisions, which should be considered in the context of the outcome in those decisions. In \textit{ALH 3}, the Panel considered it ‘essential that market participants should not be able to resile from “last and final statements” made during the course of a takeover bid’, but did not require the bidder to adhere to its statements in that case due to the intervention of the Panel.\textsuperscript{1136} Significantly, the Panel in \textit{Summit} stated that ‘[t]he panel considers that truth in takeovers is a fundamental tenet of the takeovers regime and on this basis made a declaration of unacceptable circumstances’.\textsuperscript{1137} However, the \textit{Summit} Panel concluded that there were no orders that ‘would appropriately remedy the effects of the unacceptable circumstances’.\textsuperscript{1138} Similarly, although the \textit{Warrnambool} Panel accepted undertakings instead of making a declaration of unacceptable circumstances,\textsuperscript{1139} it stated that:

A fundamental principle of an efficient, competitive and informed market is that those who make last and final statements to the market about their own intentions or proposed conduct should act consistently with them. Thus,

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\textsuperscript{1135} \textit{Re Consolidated Minerals Ltd (No 3)} (2007) 25 ACLC 1729, 1735 (emphasis added).
\textsuperscript{1136} \textit{Re Australian Leisure and Hospitality Group Ltd (No 3)} (2004) 52 ACSR 260, 269 (‘\textit{ALH 3}’) (emphasis added).
\textsuperscript{1138} \textit{Re Summit Resources Ltd} (2007) 64 ACSR 626, 627.
\end{flushright}
‘Market participants that make a last and final statement should be held to it, as with a promise’.

This approach was implemented in Ambassador 1, where a number of target shareholders had made similar ‘Intention Statements’ to the effect that they intended to accept the takeover offer ‘within 14 days from the opening of the [o]ffer, in the absence of a superior offer’. After finding that that these were ‘statements to which ASIC’s truth in takeovers policy applies’, the Ambassador 1 Panel concluded that ‘[i]t follows that the … Shareholders should be held to their Intention Statements’. In support of this conclusion, the Ambassador 1 Panel referred to a number of earlier TTP decisions (including BreakFree 3/4, BreakFree 4R, Rinker 2R, Summit and Warrnambool). The Rinker 2R Panel had stated the following:

The purpose in s 602(a) [of the Corporations Act] is to ensure that the acquisition of control over shares takes place in an efficient, competitive and informed market. If statements on which the market should be entitled to rely are subsequently departed from, or ... actions are taken inconsistent with them, the review panel considers that all or some aspects of this purpose are undermined. The need for reliable and accurate information also underpins ss 602(b) and (c).

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1140 Ibid 7 (emphasis in original). See also Australian Securities and Investments Commission, Regulatory Guide 25, Takeovers: False and Misleading Statements (22 August 2002) [25.9].

1141 See Re Ambassador Oil and Gas Ltd (No 1) [2014] ATP 14 (‘Ambassador 1’), 2.

1142 Ibid 14 (citations omitted).

1143 Ibid.

1144 Re Rinker Group Ltd (No 2R) (2007) 64 ACSR 472, 481. See also Australian Securities and Investments Commission, Regulatory Guide 25, Takeovers: False and Misleading Statements (22 August 2002) [25.2], [25.6].
B  Analysis of Panel Decisions

1  Where Policy Not Applied

The issue of whether the TTP should apply to the particular circumstances was not decided by the Panel in a significant number of the decisions in the case study.\textsuperscript{1145} Of these, the TTP policy was only implied or mentioned in passing in seven decisions.\textsuperscript{1146} In a number of other matters, the Panel concluded that there was an insufficient basis for commencing proceedings,\textsuperscript{1147} either in relation to the TTP specifically\textsuperscript{1148} or the issues raised in the application generally.\textsuperscript{1149} Some of the applications were found to be premature, either because there was not yet a concrete proposal or revised bid,\textsuperscript{1150} or the


\textsuperscript{1147} See \textit{Australian Securities and Investments Commission Regulations 2001} (Cth) r 20(a).


\textsuperscript{1150} \textit{Re Alesco Corp Ltd (Nos 1 and 2)} [2012] ATP 14, 9; \textit{Re Alesco Corp Ltd (No 3)} [2012] ATP 18, 6 respectively.
statements related to an event for which the time had not yet elapsed.\(^{1151}\) Another decision merely stated that the Panel had determined not to commence proceedings in relation to statements by a bidder concerning revised consideration that a rival bidder alleged were ‘last and final statements’ under ASIC RG 25.\(^{1152}\) Similarly, the Yancoal Panel noted ASIC’s submission that the Regulatory Guide did not apply as the assurances were not made in the context of a control transaction and concluded that it did ‘not need to consider this issue further’.\(^{1153}\) In contrast, the Gosford Quarry 1 Panel did not discuss the TTP in response to the applicant’s argument that it had been misled by a ‘last and final statement’ that the bid would be extended to 4pm on a particular day.\(^{1154}\) The matter was instead decided on the basis that the reference to 4pm was ‘simply incorrect’, as the offer period had been extended by the legislation until the close of trading at 4.12pm.\(^{1155}\)

In other decisions, the Panel concluded that there was not a ‘last and final’ statement and/or the TTP did not apply to the statement. In Axiom 2, the Panel considered a statement by the bidder that ‘it was reluctant to revise its bid … because it was concerned it would further delay the rival offers for the company being put to shareholders’.\(^{1156}\) The Axiom 2 Panel concluded that this was not sufficiently definitive to be a ‘last and final statement’, as the statements ‘had some reasonable words of caution and possibility of change’.\(^{1157}\) In Consolidated Minerals 2, the Panel also concluded that the bidder had not made a ‘last and final’ statement, as an on-market order had been announced as being ‘in addition’ to the off-market bid and a reasonable target shareholder would not have considered that the order was part of the bid.\(^{1158}\) On

\(^{1151}\) *Re Envestra Ltd* [2014] ATP 13, 4–5.

\(^{1152}\) *Re Consolidated Minerals Ltd (No 1)* [2007] ATP 20, 4.

\(^{1153}\) *Re Yancoal Australia Ltd* [2014] ATP 24, 19.

\(^{1154}\) *Re Gosford Quarry Holdings Ltd (No 1)* (2008) 67 ACSR 156, 162.

\(^{1155}\) Ibid. The Review Panel agreed with this reasoning: see *Re Gosford Quarry Holdings Ltd (No 1R)* (2008) 67 ACSR 164, 165, 167.

\(^{1156}\) *Re Axiom Properties Ltd (No 2)* [2006] ATP 5, 3 (‘Axiom 2’).

\(^{1157}\) Ibid 4.

\(^{1158}\) *Re Consolidated Minerals Ltd (No 2)* [2007] ATP 21, 2, 4–5 (‘Consolidated Minerals 2’).
the other hand, the *Golden West 3/4* Panel found that a ‘last and final’ statement no longer applied because a variation in the offer consideration had triggered one of the conditions applying to the statement.\(^{1159}\)

In *BreakFree 3/4*, the Panel concluded that the TTP did not apply to the facts because ‘ASIC’s policy is that a substantial holder may only be held to a public statement made on its behalf (that is, a third party statement) if the substantial holder made a statement to the declarant which supports the third party statement’.\(^{1160}\) It also found it implicit that the holder could only be taken to have ‘made’ the statement if it was reflected accurately in the third party statement.\(^{1161}\) The *BreakFree 4R* Panel considered that the initial Panel’s guidance on this issue was consistent with the TTP and its understanding of what the market expected.\(^{1162}\) Consistent with this, the *Bullabulling* Panel found that the TTP did not apply to statements that had been attributed to shareholders in a way that was misleading, and without appropriate qualifications and the express consent of the shareholders.\(^{1163}\) Consequently, the *Bullabulling* Panel accepted an undertaking by the target to provide supplementary disclosure about shareholder intention statements that it had included in documents sent to shareholders.\(^{1164}\)

The *Novus 2* Panel did not apply the TTP to the alleged statements in that matter, although it considered that there should be disclosure to remedy inaccurate information in the market, consistent with ASIC RG 25.\(^{1165}\) Press reports had attributed statements to the bidder that it would decide on a possible increase in the bid price by a certain

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\(^{1161}\) Ibid.

\(^{1162}\) *Re BreakFree Ltd (No 4R)* (2004) 22 ACLC 1165, 1174.

\(^{1163}\) *Re Bullabulling Gold Ltd [2014]* ATP 8, 4, 6 (‘Bullabulling’).

\(^{1164}\) Ibid 1, 7, 11.

date, with no further comment by the bidder.\textsuperscript{1166} However, the \textit{Novus 2} Panel did not conduct proceedings in light of an announcement by the bidder that it would increase its bid price conditional on a number of specified factors.\textsuperscript{1167} Similarly, both the \textit{Ludowici I} and \textit{Ludowici 1R} Panels concluded that there was not a ‘last and final’ statement in an article first published overseas, as a result of the bidder’s chief executive officer answering ‘no’ to a question whether ‘he would consider raising the bid’.\textsuperscript{1168} Instead, the bidder was ordered to pay compensation to shareholders able to establish that they had sold their shares in reliance on the article before it was corrected.\textsuperscript{1169}

There are also decisions in which the Panel found that the TTP applied in the circumstances, but decided the matter on another basis. In \textit{Anaconda 18}, the Review Panel considered statements that the bidder would only exercise its rights under a rights offer for the target’s shares at a level that reflected its maximum shareholding ownership at a certain date under its takeover offer.\textsuperscript{1170} The \textit{Anaconda 18} Panel stated that it supported the TTP and found that the bidder had acted inconsistently with these statements.\textsuperscript{1171} However, it ‘prefer\[red] not to base its decision on this’,\textsuperscript{1172} and instead focused on the breach of the takeover prohibition in s 606 of the \textit{Corporations Act} that had resulted from the bidder’s conduct.\textsuperscript{1173} On the other hand, the \textit{MYOB} Panel concluded that it did not need to decide whether the TTP would require investors to act

\begin{footnotes}
\item[1166] Ibid 96. Many of these statements were alleged to have been made in Indonesia and were reported in online financial news services: ibid 97, 99.
\item[1167] Ibid 96, 100.
\item[1168] \textit{Re Ludowici Ltd} [2012] ATP 3, 1, 5, 9; \textit{Re Ludowici Ltd (No 1R(a) and (b))} [2012] ATP 4, 1, 5.
\item[1169] \textit{Re Ludowici Ltd} [2012] ATP 3, 9, 15–17; \textit{Re Ludowici Ltd (No 1R(a) and (b))} [2012] ATP 4, 6.
\item[1170] \textit{Re Anaconda Nickel Ltd (No 18)} [2003] ATP 18, 11 (especially recitals B–C).
\item[1171] Ibid 8.
\item[1172] Ibid.
\item[1173] Ibid 5–6, 11 (especially recitals C–E). However, the declaration of unacceptable circumstances was also based on the bidder’s actions being inconsistent with its statements: see ibid 11 (paras (a), (b)).
\end{footnotes}
in accordance with statements that they intended to accept the takeover offer. Instead, the MYOB Panel made a declaration of unacceptable circumstances on the basis that the statements formed part of an understanding between the parties that resulted in the bidder breaching the takeover prohibition in s 606, and made orders including releasing the investors from their commitment.

2 **Outcomes Where Policy Applied**

The TTP has been applied by the Panel in order to hold a person to their statement in only a few decisions. In the only decision involving an application for unacceptable circumstances, the Ambassador 1 Panel held a number of target shareholders to their statements that they intended to accept the offer ‘within 14 days’ after the offer opened, unless there was a superior offer. The Ambassador 1 Panel concluded that the shareholders had acted contrary to their intention statements by only waiting four days before accepting the offer. As a result, there were unacceptable circumstances as the market had been misinformed, with the early acceptances by the shareholders also precluding the opportunity of a rival bid emerging. Rather than allowing these shareholders withdrawal rights, the Panel agreed with ASIC that it should order reversal of their acceptances to ensure that they were held to their statements.

The other Panel decisions resulting in the person being held to their statement involved applications for the review of ASIC decisions. In the first decision, the Taipan 6 Panel refused to remove an ASIC condition for regulatory relief under s 631 of the Corporations Act that reflected a condition that the bidder had included in earlier public statements. Significantly, the bidder had earlier threatened court proceedings in

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1174 *Re MYOB Ltd* [2008] ATP 27, 2, 6.
1175 Ibid 6, 8–9, Annexure A [3]–[4], Annexure B, especially [1]–[3].
1176 *Re Ambassador Oil and Gas Ltd (No 1)* [2014] ATP 14, 1 (definition of ‘Accepting IS Shareholders’), 2–3.
1177 Ibid 14.
1178 Ibid 11, 15, 18–19, 27.
1179 Ibid 17–19, 28–32.
relation to the target stating in a letter to shareholders that it was ‘always open for [the bidder] to waive this self-imposed condition at any time’. In response to this, the bidder announced that it intended to maintain the condition ‘as a pre-condition to any … bid’. Accordingly the Taipan 6 Panel agreed with ASIC that the condition should continue to apply, although it noted that

[i]f [the bidder] had not taken issue with [the target’s] letter in the way that it did, or if it had made an immediate and public protest over ASIC’s condition that the defeating condition be made non-waivable and had quickly sought to set aside that condition, our conclusion might have been different.

Both Prudential and Lion-Asia involved review of a minimum acceptance condition imposed by ASIC in the context of providing joint bid relief. In Prudential, the Panel observed that market participants appreciate that ASIC can allow a condition to be waived where the bidder makes it clear that the condition has been included at ASIC’s insistence. The Prudential Panel consequently drew a distinction between this case, where it was clear to the market that the ‘bid acceptances condition was not immutable if ASIC had good policy reasons to allow a change to it’, and the statements of the ‘bidder’s own intentions’ that applied in the Taipan 6 decision. Consequently, the Prudential Panel varied the regulatory relief to remove the condition, as its purpose had already been achieved. In contrast, the Lion-Asia Panel held the

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1181 Ibid 719.
1182 Ibid.
1184 Ibid 721.
1185 Re Prudential Investment Co of Australia Ltd (2003) 49 ACSR 147, 151; Re Lion-Asia Resources Pte Ltd [2009] ATP 25, 2 (definition of ‘Minimum Acceptance Condition’), 4 (‘Lion-Asia’).
1187 Ibid 160.
1188 Ibid 162.
1189 Ibid 159, 164.
joint bidders to their statement. Although the Lion-Asia Panel considered the decisions of Taipan 6 and Prudential, it concluded that it did not need to decide whether the application raised a TTP issue.\textsuperscript{1190} The Lion-Asia Panel emphasised that, unlike in the case before it, the applicant in Prudential could establish that it had satisfied the condition when uncontactable shareholders were excluded.\textsuperscript{1191} The Lion-Asia Panel concluded that it was not appropriate to waive the condition as it would change the basis on which the market had been operating, with a number of target shareholders having chosen to accept a rival bid on the basis that the condition was not waivable.\textsuperscript{1192}

On the other hand, both the Consolidated Minerals 3 and Consolidated Minerals 3R Panels made orders allowing the bidder to withdraw statements that it would not increase the consideration for, or extend voluntarily, its bid.\textsuperscript{1193} The bidder had made two statements in relation to not increasing the consideration just over two hours apart.\textsuperscript{1194} The Consolidated Minerals 3 Panel found that the second statement represented ‘a change of position’ due to an error in the first statement, and noted that this was contemplated in ASIC RG 25.\textsuperscript{1195} The Consolidated Minerals 3 Panel found that the no voluntary extension statement was misleading due to the possibility of an automatic extension of the offer period being triggered under the legislation.\textsuperscript{1196} Given this, the Consolidated Minerals 3 Panel ‘did not consider that it would be appropriate to hold [the bidder] to the ordinarily understood effect of the statement’.\textsuperscript{1197} The Consolidated Minerals 3R Panel also made orders allowing the statements to be withdrawn.\textsuperscript{1198}

\textsuperscript{1190} Re Lion-Asia Resources Pte Ltd [2009] ATP 25, 10.
\textsuperscript{1191} Ibid 10–11.
\textsuperscript{1192} Ibid 7–8, 11.
\textsuperscript{1195} Ibid 1735.
\textsuperscript{1196} Ibid 1736.
\textsuperscript{1197} Ibid.
The ALH 3 Panel similarly found that it would be unreasonable to hold a bidder to its original ASX announcement given that the Panel had made an interim order overriding it. The bidder had announced at 2.13pm on a Monday that it would increase the offer price if it obtained a relevant interest in 20 per cent of the target’s shares by 6pm that day, or close the bid at 7pm that day if it did not. In response to the interim order extending the bid until the following Monday, the bidder made a second announcement that provided for a similar increase in the offer if a differently defined 20 per cent threshold was reached by 6pm on the later Monday. The Panel declined to hold the bidder to the details in the original announcement, as its order had ‘fundamentally changed the analysis underlying’ the bidder’s original commitments.

In Warrnambool, the target and a bidder were also not held to their ‘last and final’ statements as the Panel found they had established dividend ‘arrangements that were complex, created uncertainty and were most undesirable’. The Warrnambool Panel noted that it would not be possible for the market ‘to trade in an informed and orderly manner after the conditional record date’ that had been announced, as it would not be clear at that time whether the dividends would become payable. Consequently, the Warrnambool Panel accepted undertakings, that included the bidder increasing the consideration to provide at least equal value to what was originally proposed and offering withdrawal rights to shareholders who had accepted the offer as at a certain date. The Andean Panel also accepted undertakings in circumstances where it ‘considered it to be important that [the target] make an announcement as required [by]

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1200 Ibid.
1201 Ibid 264–5, 269.
1202 Ibid 269.
1204 Ibid.
1205 Ibid 5, 11.
1206 Ibid 1, 15, 18–20.
paragraph PS 25.51 [now ASIC RG 25 para 25.51]. However, it did not conduct proceedings given undertakings to make disclosures to update the market on possible rival proposals in light of ASIC RG 25. Similarly, the Just Group Panel declined to conduct proceedings after the bidder announced, in accordance with ASIC RG 25, the percentage of shareholders who represented the ‘couple of major players’ that it had indicated would accept the offer.

Unusually, although the Summit Panel made a declaration of unacceptable circumstances on the basis that the bidder’s conduct was contrary to the TTP, it could not find any orders that would have remedied the circumstances effectively. The Summit Panel considered it unacceptable for the bidder to have departed from an unqualified intention statement, in addition to its failure to advise the market and shareholders in the target and bidder of its changed intentions. The Panel noted that it may have found withdrawal rights or other orders to be appropriate had the application been made before a significant number of target shareholders had accepted the bidder’s offer or, irrespective of the timing, provided evidence of adverse effects on them. In addition, it was considered impractical to order the bidder to vote in favour of the transaction, as it would not be possible to work out how many target shareholders had accepted on the basis of the original announcement and it would potentially harm the bidder’s shareholders to compel the bidder to join a joint venture against its

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1207 Re Andean Resources Ltd [2006] ATP 21, 4–5. ASIC RG 25 requires that the target company update the market between 7 and 14 days before the end of the offer period about the status of any discussions with possible competing bidders that it has announced: Australian Securities and Investments Commission, Regulatory Guide 25, Takeovers: False and Misleading Statements (22 August 2002) [25.51].

1208 Re Andean Resources Ltd [2006] ATP 21, 1.


1210 Re Summit Resources Ltd (2007) 64 ACSR 626, 627, 630.


1212 Ibid 632. See also ibid 630–1.
wishes.\textsuperscript{1213} However, the Summit Panel emphasised that it ‘would not regard the fact that it decided in this situation not to make orders as any precedent for future cases involving the truth in takeovers policy’.\textsuperscript{1214}

It is surprising that ASIC applied for compensation orders in \textit{Rinker 2}, rather than insisting on its own policy that bidders cannot depart from ‘no increase’ statements (even with compensation).\textsuperscript{1215} This is particularly so given that ASIC did not give reasons why it considered compensation to be appropriate in that case.\textsuperscript{1216} After announcing its ‘best and final’ offer on 10 April 2007, the bidder had announced on 7 May that it would allow target shareholders to retain a dividend.\textsuperscript{1217} Noting the impact on the market and target shareholders if intention statements are not complied with,\textsuperscript{1218} the \textit{Rinker 2} Panel concluded that the circumstances were unacceptable particularly in light of the significant increase in trading following the first announcement.\textsuperscript{1219} Consequently, the \textit{Rinker 2} Panel ordered that the bidder pay the equivalent of the dividend to those target shareholders who sold their shares on the market between the announcements.\textsuperscript{1220} The conclusions and outcomes in \textit{Rinker 2R} were similar to that in the \textit{Rinker 2} decision.\textsuperscript{1221}

Interestingly, both the \textit{Rinker 2} and \textit{Rinker 2R} Panels noted that they may have considered ordering the bidder to comply with its first announcement in other

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\textsuperscript{1213} \textit{Ibid} 631–2.
\textsuperscript{1214} \textit{Ibid} 632.
\textsuperscript{1215} Australian Securities and Investments Commission, \textit{Regulatory Guide 25, Takeovers: False and Misleading Statements} (22 August 2002) [25.23].
\textsuperscript{1216} \textit{Re Rinker Group Ltd (No 2) [2007] ATP} 17, 3, 6.
\textsuperscript{1217} \textit{Ibid} 1, 7.
\textsuperscript{1218} The \textit{Rinker 2} Panel referred to the \textit{BreakFree 3/4} and \textit{Taipan 6} decisions in this regard: see \textit{ibid} 6.
\textsuperscript{1219} \textit{Ibid} 9–10, 17.
\textsuperscript{1220} \textit{Ibid} 1, 12, 18–19.
\textsuperscript{1221} \textit{Re Rinker Group Ltd (No 2R) (2007) 64 ACSR} 472, especially 473–4, 480, 495, 497.
\end{flushleft}
circumstances.\textsuperscript{1222} The \textit{Rinker 2} Panel observed that it was not appropriate ‘in a practical sense’ for it to make such an order given that the offer had been accepted by nearly 70 per cent of target shareholders by the time ASIC made the application.\textsuperscript{1223} Similarly, the \textit{Rinker 2R} Panel stated that it may have been appropriate to hold the bidder to its first announcement had ASIC applied to the Panel or made a public announcement a day or two after the second announcement (instead of just over a month later).\textsuperscript{1224}

\section{3 Consistency between Initial and Review Panel Decisions}

As discussed above, the key determinant of consistency is ensuring that persons in similar situations ‘receive similar treatment and outcomes’.\textsuperscript{1225} Review Panel matters provide an important way of testing this as they will generally be decided based on the same facts, except where new information is presented to the Review Panel. A significant percentage of the matters in the TTP case study involved Review Panel proceedings, with over a quarter of the total number of decisions being either a Review Panel decision or the earlier initial Panel decision relating to the same matter. There was a high level of consistency between the decisions in two out of the six ‘sets’ of decisions. In these matters, the Review Panel declined to conduct proceedings on the basis that it agreed with the initial Panel (\textit{Gosford Quarry 1R} and \textit{Ludowici 1R}). However, there were differences in relation to the remaining matters, which are discussed below.

\textsuperscript{1222} \textit{Re Rinker Group Ltd (No 2)} [2007] ATP 17, 6–7; \textit{Re Rinker Group Ltd (No 2R)} (2007) 64 ACSR 472, 496.
\textsuperscript{1223} \textit{Re Rinker Group Ltd (No 2)} [2007] ATP 17, 6–7.
\textsuperscript{1224} This would have been achieved by requiring the bidder to withdraw the second announcement and provide withdrawal rights to any shareholder who had subsequently accepted its offer: see \textit{Re Rinker Group Ltd (No 2R)} (2007) 64 ACSR 472, 496.
The first set of decisions was unusual in that only the Review Panel decision in *Anaconda 18* considered the issue of the TTP in its decision.\(^{1226}\) However, this did not make a significant difference in terms of the application of the policy given that the *Anaconda 18* Panel based its decision on the contravention of the takeover prohibition in any event.\(^ {1227}\) On the other hand, both the *BreakFree 3/4* and *BreakFree 4R* Panels considered that the TTP did not apply given that the shareholders had not authorised the statements included in the target’s announcements. However, in light of additional documentation provided to the *BreakFree 4R* Panel, it also found that the statements were misleading.\(^ {1228}\)

Notwithstanding the fact that the conclusions and outcomes in *Rinker 2* and *Rinker 2R* were similar, there were differences between the declarations of unacceptable circumstances and orders made by the initial and Review Panels. The *Rinker 2R* Panel made only minor changes to the declaration,\(^ {1229}\) with more significant changes made to the orders. Although the Review Panel’s orders still required the payment of the equivalent of the dividend to affected target shareholders, they introduced a claim form system and allowed the bidder a longer time for payment.\(^ {1230}\) On the other hand, there were only slight substantive differences between both the declarations and orders in *Consolidated Minerals 3* and *Consolidated Minerals 3R*. This reflected the fact that only the *Consolidated Minerals 3* included a reference to the ‘no extension’ statement being misleading in its declaration, and consequently ordered that there be corrective disclosure in the event that the statement was not withdrawn.\(^ {1231}\)

\(^{1226}\) *Re Anaconda Nickel Ltd (Nos 16 and 17)* [2003] ATP 15, 4 n 7.

\(^{1227}\) *Re Anaconda Nickel Ltd (No 18)* [2003] ATP 18, 5–6, 11 (especially recitals C–E).

\(^{1228}\) *Re BreakFree Ltd (No 4R)* (2004) 22 ACLC 1165, 1171, 1176.

\(^{1229}\) See, eg, the new text in *Re Rinker Group Ltd (No 2R)* (2007) 64 ACSR 472, 499 (Annexure A, [11], [16]).


\(^{1231}\) *Re Consolidated Minerals Ltd (No 3)* (2007) 25 ACLC 1729, 1737 (Annexure A, [5]–[6]), 1738–9 (Annexure B, [9]–[10]).
4  **Consistency in Approach to Policy**

A number of commentators have criticised the Panel’s decision-making in relation to the TTP on the basis that there is uncertainty as to when the Panel will apply ASIC’s policy.\(^{1232}\) However, as discussed above, the Panel made it clear at the outset in *Taipan* \(^{6}\) that it would not be automatically following the policy in the TTP.\(^{1233}\) It instead noted that there were some circumstances in which it may not be appropriate to do so. In particular, it was emphasised that the Panel would consider other matters including new circumstances and the extent to which it was reasonable to expect the statement to be pursued.

The *Consolidated Minerals* \(^{3}\) Panel later added that the TTP contemplated that statements could be corrected where there had been a mistake, including where the intended action was undesirable. In *BreakFree* \(^{4R}\), the Panel made it clear that it had a different role to ASIC in relation to the policy. That is, rather than determining whether ASIC enforcement action should be taken, the Panel was required to determine whether there were unacceptable circumstances (in accordance with the legislative provisions). Although it could be argued that the stronger, less qualified statements made by other panels in support of the TTP undermine this, the approach that the Panel has adopted overall in applying the TTP is consistent with these general principles.

There were only three decisions in the case study in which persons were held to their statements. Two of those decisions involved situations where the Panel refused to


\(^{1233}\) See above Section A in Part III of this Chapter.
remove a condition that ASIC had required to be non-waivable in exchange for relief from the legislative provisions (Taipan 6 and Lion-Asia). The Panel’s decision in Prudential to waive a similar condition to that in Lion-Asia is not inconsistent with the other decisions, given that the Panel found that the condition had, in effect, been satisfied in that case. In contrast, the condition had not been satisfied in Lion-Asia and a number of target shareholders had sold their shares on the basis that the condition was non-waivable.

The other decision where the Panel held persons to their statements involved circumstances where shareholders had accepted their shares earlier than the 14-day period given in their statements, with the Panel reversing their acceptances (Ambassador 1). The Panel found that the shareholders’ intention statements in both Ambassador 1 and MYOB evidenced an association between the parties. It would not have been reasonable to expect the shareholders in MYOB to be held to their statements, given that these statements related to accepting the takeover bid and the Panel had found that their conduct led to a contravention of the takeover prohibition in s 606. There is some inconsistency in the decision in Anaconda 18 recognising that a ‘last and final’ statement had been made, but instead basing its decision on the takeover prohibition contravention. However, this is explicable given that the takeover prohibition is considered to be the ‘cornerstone’ of the takeover regulatory regime.1234

Similarly, it would not have been reasonable to expect statements to be implemented where they were mistaken and misleading (Consolidated Minerals 3 and Consolidated Minerals 3R), operating at a different time due to Panel intervention (ALH 3) or unworkable (Warrnambool). In addition, persons were found not to be bound by statements contained in overseas press reports where it was unclear whether they were responsible for making ‘last and final’ statements (Novus 2, Ludowici 1 and Ludowici 1R). This was also not appropriate in circumstances where statements that were sent to target shareholders were misleading and not authorised by the persons alleged to have made them (BreakFree 3/4, BreakFree 4R and Bullabulling). In these circumstances, the Panel required disclosure to the market to ensure that it was properly informed.

1234 See, eg, Re MYOB Ltd [2008] ATP 27, 7.
The Panel decisions in *Summit, Rinker 2* and *Rinker 2R* are more controversial in relation to their outcome on orders. However, the timing of the applications in these matters meant that there were new circumstances that the panels needed to take into account. Specifically, the panels found that it was no longer appropriate to order withdrawal rights for target shareholders who had already accepted (which would have facilitated holding the bidders in those matters to their original statement), given the significant number of shareholders who had already accepted by the time of the application. Consequently, the panels found that it was not reasonable for the bidders to be held to their statements in these circumstances. This is consistent with the reasoning in *Lion-Asia*, where the Panel refused to allow the removal of a condition that had been disclosed to target shareholders as being non-waivable, as a significant number of target shareholders had already accepted a rival offer. Accordingly, the *Lion-Asia* Panel found that it was not appropriate for the condition to be waived in circumstances that would require compensation to be paid. In contrast, the panels in *Summit, Rinker 2* and *Rinker 2R* needed to decide what action to take in light of the bidders in those circumstances already having departed from their ‘last and final’ statements.

The different outcomes concerning the orders in the *Summit, Rinker 2* and *Rinker 2R* decisions are also explicable. In *Summit*, the Panel unusually did not make any orders as there had not been any evidence provided of the adverse impact of the circumstances on target shareholders. This meant that there were no effective remedies available to the *Summit* Panel given that withdrawal rights were not appropriate in the circumstances. In contrast, it was clear that the bidder’s departure from its ‘no increase’ statement in the *Rinker* matters had an adverse effect on target shareholders who had subsequently sold their shares on-market, as they would not get the benefit of the dividend that the bidder later announced would be available under the takeover offer. Ordering the bidder to pay an equivalent amount to the dividend to those shareholders was obviously contrary to ASIC’s policy that a person should be held to a ‘no increase’ statement, rather than providing compensation. However, it is significant that ASIC was the party seeking the compensation order in this context. This reinforces the point that it is not tenable for the TTP to be applied inflexibly, but rather that it is the role of the Panel to consider the circumstances before it in exercising its powers. Consequently, the Panel has adopted a pragmatic approach of holding persons to their statements where appropriate, and
otherwise accepting undertakings or making orders where practical to protect the interests of target shareholders and ensure that the market is properly informed.

C Assessment of Consistency

As discussed in Part II above, whether consistency is being achieved in Panel decisions has been assessed at different levels, namely strong, medium and weak forms. The strong form involves a high level of consistency in relation to the outcome of both the initial and Review Panel decisions in the case study, with the medium form providing consistency as a general rule with deviation in a limited number of matters. On the other hand, the weak form would involve inconsistency in decision-making, for example, where decision outcomes vary frequently in relation to similar circumstances.

Notwithstanding criticism that there is uncertainty as to when the Panel will apply ASIC’s ‘truth in takeovers’ policy, the above case study analysis demonstrates that the Panel has achieved high levels of consistency in relation to its decisions on this issue. This is because, with the exception of minor differences between the declarations and orders in some of the Review Panel decisions, the Panel decisions, on the whole, adopt a consistent approach in relation to the way that it applies the ASIC policy. In light of the size of the case study and controversy surrounding the Panel’s decisions on this issue, this provides a sufficient basis upon which to conclude that the Panel’s decision-making provides a strong form of consistency generally.

IV FINALITY

As discussed in Part I above, the finality of Panel decision-making relates to the extent to which the matter is determined finally by the Panel and is affected adversely by applications for judicial review. The experience of the UK Panel is important to consider when examining the issue of finality, as it provides an example of a strong form of finality. This is because the UK courts have affirmed decisions of the UK Panel consistently and discouraged judicial review applications through their decisions. Accordingly, the appeal processes relating to the UK Panel have to date focused on

1235 See above n 1232 and accompanying text.
internal review. That is, UK Panel decisions are subject to review by a separate Hearings Committee, with a right of appeal against Hearings Committee decisions to an independent tribunal (the Takeover Appeal Board). 1236

The UK Panel’s operations have not been affected significantly by judicial review applications due to a general approach of judicial restraint in relation to review of Panel decisions. This was established by the Court of Appeal’s decision in 1987 in relation to the first judicial review application in Datafin. 1237 As a result, there has only been a total of three judicial review applications since the UK Panel commenced in 1968, with none of them successful and the most recent decision in 1992. 1238 In Datafin, Sir Donaldson MR made it clear that judicial review applications would only succeed in exceptional circumstances, with the expectation that the courts ‘would allow contemporary decisions to take their course, ... intervening, if at all, later and in retrospect by declaratory orders which would enable the panel not to repeat any error and would relieve individuals of the disciplinary consequences of any erroneous finding of breach of the rules’. 1239

In Australia, there have been nine court decisions involving judicial review of its Panel decisions in relation to four different circumstances since 2000. 1240 To examine the effect of judicial review on the finality of the Panel’s decision-making, the first section below provides an overview of the legislative framework underpinning the role of the courts in relation to takeover matters following the CLERP reforms. The second section

1236 Companies Act 2006 (UK) s 951.


1238 See ibid; R v Panel on Take-overs and Mergers, Ex parte Guinness plc [1990] 1 QB 146; R v Panel on Take-overs and Mergers, Ex parte Fayed [1992] BCC 524.

1239 R v Panel on Take-overs and Mergers, Ex parte Datafin plc [1987] 1 QB 815, 842 (Donaldson MR).

1240 For a list of the judicial review decisions, see Appendix 3. This excludes the circumstances relating to the Alinta cases, which were ultimately concerned with whether the Panel had exercised its powers in accordance with the Australian Constitution: see Australian Pipeline Ltd v Alinta Ltd (2006) 237 ALR 158; Australian Pipeline Ltd v Alinta Ltd (2007) 159 FCR 301; A-G (Cth) v Alinta Ltd (2008) 233 CLR 542.
analyses the judicial review decisions to date, with the third section evaluating the impact of judicial review on Panel decisions. Finally, the last section assesses the extent to which there is finality of Panel decision-making.

A Legislative Framework

To minimise the opportunity for the tactical use of litigation, the Corporations Act places significant limitations on the courts’ role in order ‘to make the Panel the main forum for resolving disputes about a takeover bid until the bid period has ended’.1241 First, s 659B contains a limitation clause that restricts access to a ‘Court’ (principally the Federal and Supreme Court)1242 during the takeover bid period, only allowing governmental authorities to ‘commence court proceedings in relation to a takeover bid or proposed takeover bid’ at that time.1243 However, this privative clause does not prevent applications to the High Court under s 75(v) of the Australian Constitution.1244 Second, where the Panel has refused to make a declaration of unacceptable circumstances despite finding that there has been a breach of the Corporations Act, s 659C limits the orders that a Court can make following the bid period.1245 That is, the Court cannot exercise its powers under the Corporations Act to unwind a transaction and instead can only use those powers to make remedial orders involving the payment of money.1246 However, this restriction does not apply to the Court’s exercise of its other powers, such as those exercisable in relation to breaches of directors’ duties under the general law.

1241 Corporations Act 2001 (Cth) s 659AA.
1242 Ibid s 58AA(1).
1243 Ibid ss 659B(1), (4).
1244 Ibid s 659B(5).
1245 Ibid ss 659C(1), 58AA.
1246 Ibid s 659C(2).
B Judicial Review Decisions

1 Glencore Cases

The *Glencore* cases were the first two judicial review decisions and arose from circumstances occurring around five years after the CLERP reforms.\(^{1247}\) They resulted from a declaration of unacceptable circumstances and orders made by both a Review Panel and (unusually) a Second Review Panel.\(^{1248}\) The declarations and orders were based on a deficiency in information available to the market in light of the non-disclosure of certain equity derivative transactions.\(^{1249}\) The *Glencore* cases were significant for a number of reasons. First, the first *Glencore* case resulted from an application to the High Court made during the takeover bid period under the exception to the privative clause in s 659B(5) of the *Corporations Act*.\(^{1250}\) This demonstrated the relative ease with which parties are able to sidestep the privative clause through the use of constitutional writs, with the High Court referring the matter to the Federal Court to decide.\(^{1251}\) Second, in the first *Glencore* case, Emmett J recognised the importance of allowing the Panel to fulfil its role with minimal court intervention in certain circumstances. Although Emmett J did not make any explicit reference to any other material in this regard, his Honour concluded that:

Having regard to the clear policy evinced by the privative provisions of s 659B of the [Corporations] Act, the court should be slow to interfere with

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a decision of the [P]anel, in circumstances where the market is significantly volatile by reason of the currency of takeover offers.  

However, Emmett J concluded in the first *Glencore* case that this limitation did not apply in the circumstances.  

This resulted from the finding that, although the takeover bid was still open, there was ‘probably unlikely to be any significant volatility in the market’.  

Third, the *Glencore* cases resulted in the quashing of the declaration and orders made by both the Review Panel and those made by the second Review Panel constituted in response to the first *Glencore* case.  

As they were the first judicial review decisions, this unfortunate start raised the spectre of a continuing pattern of parties seeking court intervention during the takeover bid period contrary to the policy underlying the CLERP Panel reforms. Finally, the *Glencore* cases generated substantial concerns that the Panel’s jurisdiction had been interpreted too narrowly for it to perform its role effectively.  

This was recognised by consequential legislative changes designed to remove many of the limitations placed on the Panel’s decision-making in the *Glencore* cases.

### 2 CEMEX Cases

Following the second set of judicial review decisions (‘CEMEX cases’), the Panel was in a stronger position than it had been following the *Glencore* cases. In the CEMEX cases, both Stone J at first instance and the Full Federal Court dismissed applications

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1253 Ibid.

1254 Ibid.


1256 See Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 1–2.

1257 See above Section H in Part II of Chapter 2.

1258 *Cemex Australia Pty Ltd v Takeovers Panel* (2008) 106 ALD 5; *Cemex Australia Pty Ltd v Takeovers Panel* (2009) 177 FCR 98.
seeking judicial review of the *Rinker 2R* Panel decision. The *Rinker 2R* Panel had made a declaration of unacceptable circumstances and orders in relation to statements by the bidder that it had made its ‘best and final offer’, in light of a subsequent announcement that it would allow target shareholders to retain the benefit of a dividend.

The *CEMEX* cases strengthened the position of the Panel in two main ways. First, the Full Court decision confirmed that the amendments to the Panel’s jurisdiction following the *Glencore* cases allow the Panel to focus on maintaining the policy under the takeover provisions. This included a finding that the Panel does not need to establish a causal nexus between the unacceptable circumstances and their effect on the group of persons, instead only needing to satisfy itself that the order is appropriate to protect their rights or interests. In addition, the Full Court reinforced the view that, in determining the effect of the relevant circumstances, the Panel can speculate as to what would have happened without those circumstances provided there is a foundation for its conclusion. The Full Court set a high threshold for the circumstances in which it would have intervened in relation to this matter, indicating that it would have come to a different position if the order had been ‘totally disproportionate to any rational view of the lost opportunity [to benefit from the dividend]’.

Second, the *CEMEX* cases build upon the clear endorsement of the Panel’s expertise by the High Court in upholding the constitutionality of the Panel in *Alinta*. Significantly, both Stone J and the Full Federal Court relied upon the High Court’s

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1259 *Cemex Australia Pty Ltd v Takeovers Panel* (2008) 106 ALD 5, 21 (Stone J); *Cemex Australia Pty Ltd v Takeovers Panel* (2009) 177 FCR 98, 123 (The Court).
1263 *Cemex Australia Pty Ltd v Takeovers Panel* (2009) 177 FCR 98, 122.
endorsement of the Panel in *Alinta* in upholding the Review Panel’s decision.\textsuperscript{1265} The Full Court emphasised the approach adopted in separate judgments by Gleeson CJ, Kirby J and Hayne J in *Alinta* in relation to the Panel’s expertise and role in resolving takeover disputes.\textsuperscript{1266} In particular, Kirby J recognised the ‘substantial commercial experience’ of Panel members and their ability to ‘reach outcomes according to considerations of practicality, policy, economic impact, commercial and market factors and the public interest’.\textsuperscript{1267}

3 \textit{Tinkerbell Case}

The third judicial review matter (‘*Tinkerbell case*’) related to decisions of an initial and Review Panel finding that persons were associated and had consequently breached the takeover prohibition in s 606 of the *Corporations Act*.\textsuperscript{1268} A declaration of unacceptable circumstances and orders were made by the initial Panel.\textsuperscript{1269} The Review Panel declined to conduct proceedings as there was not any reasonable likelihood they would come to a different outcome.\textsuperscript{1270} The initial Panel used inferences to come to its conclusions, applying the Panel’s usual approach in relation to such matters.\textsuperscript{1271} These conclusions were that a daughter and her father were acting or proposing to ‘act in concert’ in relation to an acquisition of shares, or that they had entered into a relevant agreement in


\textsuperscript{1266} See *Cemex Australia Pty Ltd v Takeovers Panel* (2009) 177 FCR 98, 115; *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542, 552 (Gleeson CJ), 562 (Kirby J), 576 (Hayne J).

\textsuperscript{1267} See *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542, 562; *Cemex Australia Pty Ltd v Takeovers Panel* (2009) 177 FCR 98, 115 (The Court).

\textsuperscript{1268} *Tinkerbell Enterprises Pty Ltd as Trustee for The Leanne Catelan Trust v Takeovers Panel* (2012) 208 FCR 266, 268–9, 279 (Collier J).

\textsuperscript{1269} Ibid 269.

\textsuperscript{1270} Ibid 280.

\textsuperscript{1271} Ibid 279.
relation to the acquisition for the purpose of controlling or influencing the conduct of the company’s affairs.\textsuperscript{1272}

In dismissing the judicial review application,\textsuperscript{1273} the Federal Court in the \textit{Tinkerbell} case bolstered the position of the Panel in relation to the three key grounds of attack against the Panel decisions. First, Collier J rejected an argument that the Panel’s finding is reviewable as an error of law if it is not ‘reasonable and definite’.\textsuperscript{1274} Instead, the Court reaffirmed earlier authority that there will be no error of law provided the inference is ‘reasonably open’ to the Panel, even if the inference appeared to have resulted from ‘illogical reasoning’.\textsuperscript{1275} Second, the Court made it clear that the Panel is not required to hold an oral hearing ‘in every case’ to comply with the rules of natural justice.\textsuperscript{1276} Rather, Collier J recognised that it would have been unusual for the Panel to convene an oral conference in this case.\textsuperscript{1277}

Finally, the Court in the \textit{Tinkerbell} case rejected the argument that it was a breach of natural justice for the initial Panel to draw inferences and reach conclusions relating to what was ‘uncommercial behaviour’ or ‘usual’ based upon their collective experience.\textsuperscript{1278} Collier J instead concluded that it was appropriate for the initial Panel to draw on ‘their own skill, knowledge and experience … in assessing evidence and drawing inferences’, and noted that the Panel had stated in its reasoning when it had done this.\textsuperscript{1279} In support of this, Collier J cited the Full Federal Court decision in the \textit{CEMEX} matter,\textsuperscript{1280} and noted that the Panel would otherwise be stripped ‘in large part

\begin{itemize}
\item \textsuperscript{1272} Ibid 278–9.
\item \textsuperscript{1273} Ibid 299.
\item \textsuperscript{1274} Ibid 288, 296–7.
\item \textsuperscript{1275} Ibid 296–7.
\item \textsuperscript{1276} Ibid 298.
\item \textsuperscript{1277} Ibid 297.
\item \textsuperscript{1278} Ibid.
\item \textsuperscript{1279} Ibid 299.
\item \textsuperscript{1280} \textit{Cemex Australia Pty Ltd v Takeovers Panel} (2009) 177 FCR 98, 119–20.
\end{itemize}
of its effectiveness as a specialist body established to resolve takeover disputes, as mandated by the legislation’. 1281

4  QNA Cases

The most recent set of judicial review cases (‘QNA cases’)1282 raise important questions relating to certainty and the role of the Panel. The first three of these cases related to a declaration of unacceptable circumstances and orders by the Panel (‘First Panel’) in July 2012, in relation to acquisitions by Queensland North Australia Pty Ltd (‘QNA’) in July 2011 (‘first acquisition’) and March 2012 (‘second acquisition’).1283 The First Panel had found that the first acquisition occurred in contravention of the takeover prohibition in s 606 of the Corporations Act, while the second acquisition only satisfied the creeping acquisition exception in s 611 item 9 due to the first acquisition.1284 The pivotal issue before the courts was whether the application to the First Panel on 26 June 2012 had been made within the time limit in s 657C(3) of the Corporations Act.1285 This subsection provides that:

(3) An application for a declaration under section 657A can be made only within:

(a) 2 months after the circumstances have occurred; or

(b) a longer period determined by the Panel.1286

1281 Tinkerbell Enterprises Pty Ltd as Trustee for The Leanne Catelan Trust v Takeovers Panel (2012) 208 FCR 266, 299.
1284 Ibid 26, 28–9.
1285 Ibid 5.
1286 Unless it obtains an extension from the Court, the Panel is required to make the declaration within the latest of ‘[three] months after the circumstances occur’ or one month after the
The First Panel concluded that this requirement was satisfied as the application alleged contraventions of the *Corporations Act* that were ‘ongoing circumstances’. In addition to the breach of the takeover prohibition, the application had alleged that ‘QNA appeared to be in breach of s 631 as the time for making a complying bid had passed’. It also alleged that QNA had lodged a bidder’s statement that did not comply with the minimum price rule in s 621(3) and contained ‘material information deficiencies’. In the alternative, the First Panel stated that ‘in case it should be necessary we extended the time for making the application to the date on which it was made’.

In the Federal Court at first instance, Collier J dismissed QNA’s application for judicial review of the First Panel’s decision. In relation to the key issue of the timing of the application, Collier J concluded that the First Panel had found that there were ‘ongoing unacceptable circumstances’ and that this finding was open to the Panel. However, it was found that the proceedings would otherwise have been out of time as the First Panel had extended the time for the application in a manner that was contrary to the rules of natural justice. In particular, Collier J noted that the First Panel had made its decision ‘cursorily’, without providing QNA with an opportunity to make submissions and without reasons. Her Honour contrasted this with the ‘careful consideration’ of this issue in *Re Austral Coal Ltd (No 3)*, and endorsed the following statement by the Panel in that decision:

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application: *Corporations Act 2001* (Cth) s 657B. See also *Re The President’s Club Ltd* [2012] ATP 10, 6.
1287 *Re The President’s Club Ltd* [2012] ATP 10, 6.
1288 Ibid 5.
1289 Ibid.
1290 Ibid 6.
1291 *Queensland North Australia Pty Ltd v Takeovers Panel* (2014) 100 ACSR 358, 417.
1292 Ibid 378, 383.
1293 Ibid 376.
1294 Ibid.
The [P]anel is given a discretion to extend the 2 month time limit set out in s 657C(3)(a) to make an application. The panel considered that it should not lightly exercise that discretion. The time limit was set by the legislature to provide certainty to market participants in the context of takeovers that actions could not be challenged indefinitely.\textsuperscript{1296}

The Full Federal Court allowed QNA’s appeal against Collier J’s decision, set aside the First Panel’s declaration of unacceptable circumstances and orders, and remitted the matter for rehearing by the Panel.\textsuperscript{1297} This decision resulted from the Full Court’s finding that the application to the First Panel, and consequently its declaration of circumstances, were made out of time.\textsuperscript{1298} The Full Court agreed with Collier J that the First Panel’s decision to extend time was contrary to the rules of natural justice,\textsuperscript{1299} but disagreed that the circumstances were ‘ongoing or continuing’.\textsuperscript{1300}

In disagreeing with Collier J, the Full Court focused on the wording of the First Panel’s declaration, the relevant legislation and the policy rationale for the Panel’s role. First, it noted that the First Panel’s declaration relied on the conclusion that the ‘circumstances’ of the first and second acquisitions were ‘unacceptable’ having regard to their ‘effect’.\textsuperscript{1301} Second, the Full Court emphasised the fact that ss 657B(a) and 657C(3)(a) refer respectively to when the circumstances ‘occur’ and ‘occurred’.\textsuperscript{1302} In particular, the Full Court observed that: ‘That the effects of the circumstances (the acquisition of

\textsuperscript{1296} \textit{Re Austral Coal Ltd (No 3)} (2005) 55 ACSR 283, 286. See also \textit{Queensland North Australia Pty Ltd v Takeovers Panel} (2014) 100 ACSR 358, 379.

\textsuperscript{1297} The Full Court delivered two decisions by the whole Court, the first setting out its reasons (\textit{Queensland North Australia Pty Ltd v Takeovers Panel} (2015) 320 ALR 726), and the second containing its orders effective on 4 September 2015 (\textit{Queensland North Australia Pty Ltd v Takeovers Panel (No 2)} (2015) 236 FCR 370).

\textsuperscript{1298} \textit{Queensland North Australia Pty Ltd v Takeovers Panel} (2015) 320 ALR 726, 741.

\textsuperscript{1299} Ibid.

\textsuperscript{1300} Ibid 739–40.

\textsuperscript{1301} Ibid 739.

\textsuperscript{1302} Ibid.
the shares in breach of s 606) are continuing does not render the circumstances as continuing to ‘occur’ or as continuing to ‘have occurred’.  

Finally, the Full Court pointed out that coming to a different interpretation would be contrary to the policy objectives of the legislative scheme. In particular, it noted that these objectives contemplated applications to and declarations by the Panel being made ‘within relatively short periods of time following the occurring of the particular “circumstances”’. Consequently, the time limits in ss 657B and 657C(3) could not be extended through reliance on the ‘ongoing effects of the circumstances’. Significantly, the Court emphasised the effect of uncertainty on the market that would otherwise occur, as there would be extended periods during which ‘the market would be operating on a basis which might later be the subject of regulatory intervention by the panel’.

Notwithstanding this, the Full Federal Court remitted the matter to be considered by another Panel (‘Second Panel’) for determination in light of its conclusion that it was ‘by no means clear that … [this] would be futile’. The Second Panel’s decision to extend the time for the application to be made under s 657C(3)(b) was also the subject of a judicial review application. However, this challenge was unsuccessful, with the Federal Court also extending the time for a declaration of unacceptable circumstances to be made. In making this decision, the Court concluded that the purpose of the provisions on declarations of unacceptable circumstances could still be achieved notwithstanding the amount of time that had passed. The Second Panel concluded that there was a clear contravention of the takeover prohibition in s 606 and the

1303 Ibid 740 (emphasis in original).
1304 Ibid.
1305 Ibid (emphasis in original).
1306 Ibid.
1307 Ibid 746.
1309 See ibid 686, 694 (Greenwood J).
1310 Ibid 694.
‘ongoing effects’ of this contravention had not diminished over time. In relation to market certainty, the Second Panel noted that the legislative time limit reflected the need for matters to be resolved quickly, but that this was not determinative. As a result, the Second Panel made a declaration of unacceptable circumstances, with orders limiting the voting rights of the relevant parties to be consistent with the 20 per cent threshold and the circumstances in which they could rely on the creeping acquisition exception.

There are two clear lessons for the Panel resulting from the QNA cases. First, before exercising its discretion under s 657C(3)(b) to extend time for an application, the Panel must give affected persons an opportunity to make submissions and give reasons for its decision. Second, the Panel must ensure that it distinguishes clearly between unacceptable circumstances that are ongoing and the ongoing effects of unacceptable circumstances. Indeed, it was argued in the most recent Federal Court decision that the Second Panel had erred in continuing to refer to ‘ongoing unacceptable circumstances’ in its summary of its reasons for extending time for the application. Although the Court concluded that it was not satisfied that the Second Panel had taken irrelevant considerations into account or otherwise erred in making its decision, it remarked that the ‘use of this phrase is unfortunate’. This serves as a further warning to future Panels to avoid such statements.

C Impact of Judicial Review on Finality

The judicial review decisions to date confirm the important role that courts play in ensuring that the Panel acts according to the law. This rule of law concern provides a significant policy basis for judicial review of Panel decisions, in addition to the legal requirement arising from s 75(v) of the Australian Constitution. In particular, this is

1311 Re The President’s Club Ltd (No 2) [2016] ATP 1, 22, 37.
1312 Ibid 23.
1313 Ibid 37–9, 42, 56–8.
1314 See Palmer Leisure Coolum Pty Ltd v Takeovers Panel (2015) 328 ALR 664, 682 (Greenwood J).
1315 Ibid 683.
demonstrated through the Tinkerbell and QNA cases, which provide guidance on the application of the rules of natural justice to the Panel’s proceedings. The Glencore and QNA cases also present examples of where the Court has found that the Panel has erred in exercising its powers. Following the Glencore cases, the legislative provisions were amended in response to concerns that the interpretation given to the Panel’s jurisdiction would undermine its ability to perform its functions. The benefits of these amendments and the High Court’s decision in Alinta were confirmed in the CEMEX cases. Following this, the outcome of the QNA cases reflected the Datafin principle applied by the UK courts, as they resulted in orders enabling the Panel not to repeat its errors and relieving parties of the consequences.

However, the availability of judicial review necessarily affects the ability of Panel decision-making to provide finality for market participants. Although the experience to date has not validated concerns that judicial review might become a routine part of Panel proceedings following the Glencore cases, the entrenched ability to apply to the High Court under s 75(v) during the takeover bid period undermines the effectiveness of the privative clause in s 659B of the Corporations Act. This means that the extent to which the system can minimise tactical litigation depends upon the approach adopted by the courts in response to applications made by market participants. In the UK, the courts have adopted an approach of judicial restraint, which has resulted in only three applications to date (with none successful in over 45 years). In contrast, the Australian courts have adopted a less restrictive approach, and have decided more judicial review matters in relation to the Australian Panel decisions in over 15 years.

Although judicial review has been used to a greater extent in Australia than in the UK, there have only been nine Australian Panel decisions in four different circumstances affected by judicial review applications since the CLERP reforms commenced on 13 March 2000 until 30 June 2016.\textsuperscript{1316} This represents a relatively small proportion of the

\textsuperscript{1316} This excludes the circumstances relating to the Alinta cases, which were ultimately concerned with whether the Panel had exercised its powers in accordance with the Australian Constitution: see Australian Pipeline Ltd v Alinta Ltd (2006) 237 ALR 158; Australian Pipeline Ltd v Alinta Ltd (2007) 159 FCR 301; A-G (Cth) v Alinta Ltd (2008) 233 CLR 542.
total decisions made by the Panel over that period (just over 2 per cent). However, the incidence of judicial review has had a significant impact on those particular matters in terms of the time that it has taken to resolve the matters. In this context, it is unfortunate that the QNA cases resulted in further delay given the focus of the Full Federal Court on promoting certainty in the market.

D Assessment of Finality

As in the case of consistency, this Part has assessed finality against benchmarks involving strong, medium and weak forms. The strong form of finality is indicated where courts confirm decisions of the Panel consistently and/or discourage judicial review applications through their decisions. Under the medium form, judicial review is limited to some extent and/or leads to a different outcome in a limited number of matters. On the other hand, the weak form involves frequent judicial review applications being made and/or the consistent overturning of Panel decisions by the courts.

Based on the above analysis, the outcome of judicial review applications regarding Australian Panel decisions to date reflects a medium form of finality. The position in Australia can be contrasted with the strong form evidenced in relation to judicial review in the UK. On the other hand, the relatively small number of judicial review decisions in Australia compared to the total number of Panel decisions means that it would not be appropriate to assess the finality of Panel decision-making as reflecting the weak form. The conclusion of a medium form of finality is supported by the fact that Panel decisions have been overturned in the context of half of the four different circumstances affected by judicial review. In addition, judicial review applications are able to be made during the takeover bid period notwithstanding the privative clause, with the Australian courts also adopting less restraint in relation to judicial review matters compared to their UK counterparts.

1317 See above Section B (under the heading ‘Glencore Cases’) in Part IV of this Chapter.

1318 Compare ibid with text following n 1236.
Certainty is needed to create an environment in which parties can enter into commercial transactions. This is particularly the case in the context of takeovers, given the significant amount of funds involved and impact that such transactions have on shareholders. As the Panel is responsible for deciding takeover disputes during the bid period, it is consequently important that there is certainty in relation to its decisions. This Chapter has examined whether there has been certainty in relation to Panel decision-making from 13 March 2000 to 30 June 2016. The Chapter has addressed this question by focusing on the two key elements of certainty. The first element of consistency requires that persons who are in a similar situation ‘receive similar treatment and outcomes’. The second element of certainty relates to the finality of Panel decisions, namely the extent to which the matter is determined finally by the Panel. This is affected adversely by the availability of judicial review.

The analysis in this Chapter began with a focus on how to measure these two elements of certainty. In relation to consistency, a case study approach was adopted to facilitate a qualitative analysis of the Panel’s decision-making. The case study focused on Panel decision-making in relation to ASIC’s ‘truth in takeovers’ policy, and established that the Panel decisions demonstrated a strong form of consistency. This is because, with the exception of minor differences between the declarations and orders in some of the Review Panel decisions, the Panel decisions, on the whole, adopted a consistent approach in relation to the way that the Panel applied the policy. In light of the sample size of the case study and controversy surrounding the Panel’s decisions on the TTP policy, this provides a sufficient basis upon which to conclude that the Panel’s decisions provide high levels of consistency generally.

In order to assess finality, a qualitative analysis was conducted of the judicial review decisions in relation to Panel matters. The analysis demonstrated that the Panel’s

experience with judicial review to date reflects a medium form of finality, notwithstanding the relatively small number of judicial review decisions compared to the total number of Panel decisions. This is because the courts overturned the Panel’s decisions in the context of half of the four sets of circumstances affected by judicial review. The regulatory framework and judicial approach in Australia also place fewer limitations in relation to judicial review applications than in the UK. As a result, it is concluded that the Panel has achieved a medium to strong form of certainty overall since the CLERP reforms in 2000 to date.
Chapter 7 – Conclusion

This thesis addresses two overarching research questions. The first is to determine the criteria that should be used to measure the effectiveness of the Panel in resolving takeover disputes since the implementation of the CLERP reforms on 13 March 2000. The second is the extent to which the Panel has satisfied these criteria. Chapter 1 provided an explanation of the key concepts relevant to the analysis in the thesis, explained the research questions and the methodology used to answer them, and set out the structure of the thesis. In order to inform the assessment of the effectiveness of the Panel in the thesis, Chapter 2 analysed the policy goals underlying the historical development of Australian takeover regulation and the establishment of the Panel and its predecessors. It built upon the introductory outline of the current takeover provisions in Chapter 1 by evaluating the key drivers for legislative change to provide a detailed context for the analysis of the research questions in the thesis. Chapter 3 examined the historical development of the UK Panel, which was the key overseas body cited in support of the CLERP reforms, and accordingly was the key comparator for the Australian Panel for the purposes of establishing the criteria to be applied to determine the effectiveness of the Panel. This Chapter then conducted a comparative analysis of the operations of the Australian and UK Panels. In light of this historical and comparative analysis, Chapter 3 evaluated whether the three objectives for the UK Panel, namely speed, flexibility and certainty, could be used as the criteria to be applied to the Australian Panel to determine its effectiveness. Finally, Chapters 4 to 6 assessed the extent to which the Panel’s decision-making from 13 March 2000 to 30 June 2016 has met the criteria of speed, flexibility and certainty respectively.

The conclusions in each chapter were as follows. Chapter 2 found that the implementation of successive takeover legislation led to complex regulation in an ongoing attempt to close legislative loopholes as they arose. This led to concerns that there had been ‘over-regulation’ and much litigation, in contrast to the ‘commercial

\[1320\] Commonwealth Treasury, Corporate Law Economic Reform, Proposals for Reform, No 4, Takeovers – Corporate Control: A Better Environment for Productive Investment (Canberra, 1997) 32.
approach’ sought.\textsuperscript{1321} There were two key regulatory developments in response to this. First, takeover law was transformed from relying solely on black letter law to becoming a hybrid system based on detailed legislation and regulatory discretions. These discretions have been exercised having regard to the long-standing Eggleston principles, which focus on ensuring that target shareholders have enough information, reasonable time to make their decision and are given a ‘reasonable and equal opportunity to participates in any benefits’ under a takeover bid.\textsuperscript{1322} In addition, the potentially competing policy aim of ensuring an ‘efficient, competitive and informed market’ has been given increasing importance over time.\textsuperscript{1323} Second, and most importantly for this thesis, the CLERP reforms implemented the most recent significant change to Australian takeover law in making the Panel the main forum for resolving disputes in place of the courts. This transformation of our system of takeover dispute resolution was designed to inject legal and commercial specialist expertise into takeover dispute resolution and provide ‘speed, informality and uniformity’ in decision-making.\textsuperscript{1324} This would also have the effect of minimising ‘tactical litigation’ and freeing up court resources.\textsuperscript{1325}

Chapter 3 made a number of conclusions based on the analysis of the historical developments relating to the UK Panel and comparative analysis of the operations of the Australian and UK Panels. First, it was found that the developments affecting the UK Panel since the CLERP reforms have not impacted upon the essential features of the UK Panel that led it to be the key comparator for the expanded role of the Australian Panel. Second, the comparative analysis led to the conclusion that the Australian and UK Panels are seeking to achieve the same overall objectives given their similar regulatory

\textsuperscript{1321} Commonwealth, Parliamentary Debates, House of Representatives, 30 November 1983, 3041 (Lionel Bowen, Minister for Trade).

\textsuperscript{1322} See \textit{Corporations Act 2001} (Cth) s 602(b), (c).

\textsuperscript{1323} Ibid s 602(a).


\textsuperscript{1325} Ibid.
aims, notwithstanding the significant differences in the way that they operate. As a result, Chapter 3 concluded that the UK Panel objectives of speed, flexibility and certainty can be applied to the Australian Panel in determining its effectiveness in light of the CLERP reforms.

Chapter 4 concluded that the Panel has achieved a strong form of speed overall since the CLERP reforms to date. This assessment was conducted based on an empirical analysis of the timing of the announcement of Panel decisions and publication of the reasons for its decisions in the period 13 March 2000 to 30 June 2016. The timing of Panel decisions was measured against different standards based on the legislative requirements for Panel decision-making and benchmarks applied to courts and other tribunals making similar types of decisions. It was concluded that a strong form of speed reflects the Panel consistently making its decisions in one month, and providing its reasons within three months, of the application. Overall, the Panel took an average of 16.6 days to make its decisions and an overall total average of 46.1 days from the application to the publication of its reasons. This can be contrasted with the total time taken by both the Panel and the courts in the matters affected by judicial review, which ranged from around 11 months to 3.5 years. However, the Panel provided its reasons on average 62.3 days after the application in the matters affected by judicial review. This demonstrates that the aim of speed is best achieved where the Panel is the sole decision-maker in relation to takeover disputes.

Chapter 5 concluded that the Panel has achieved a strong form of flexibility overall since the CLERP reforms to date. Flexibility was assessed based on its two key elements, namely procedural and substantive flexibility. Procedural flexibility was determined by the powers given to the Panel, its procedures and the expertise of its members, with substantive flexibility concerning the extent to which the Panel demonstrates flexibility in exercising its decision-making powers. The first element of procedural flexibility was evaluated using a qualitative analysis of the regulatory framework and the Panel’s Procedural Rules. It was concluded that there was a strong form of procedural flexibility given that the Panel’s powers are based on discretions to a significant extent, its processes involve a high level of adaptability and Panel members have a broad range of commercial knowledge and experience. Although there are
limitations on the Panel’s powers, these do not impact significantly on the Panel’s ability to provide flexibility in its decision-making.

Second, Chapter 5 assessed the extent to which the Panel has demonstrated substantive flexibility in the exercise of its powers. This assessment was conducted based on a case study analysing the Panel’s development and application of its frustrating action policy. The case study established a strong form of substantive flexibility based on the Panel’s decision-making relating to the policy from when it was introduced on 25 May 2001 to 30 June 2016. This resulted from the policy involving the Panel exercising a high level of discretion, the Panel consistently adopting a commercial or pragmatic approach in applying the policy and the decision outcomes frequently involving undertakings. In light of the sample size of the case study, it was concluded that this provides a sufficient basis upon which to make conclusions in relation to the flexibility of the Panel’s decision-making generally.

Chapter 6 concluded that the Panel has achieved a medium to strong form of certainty overall since the CLERP reforms to date. Certainty was assessed based on its two key elements, namely consistency and finality of decision-making. The first element of consistency was evaluated using a case study analysing the Panel’s decision-making in relation to ASIC’s ‘truth in takeovers’ policy from 13 March 2000 to 30 June 2016. The case study demonstrated that the Panel achieved high levels of consistency in relation to its decisions on this issue. This is because, with the exception of minor differences between the declarations and orders in some of the initial and Review Panel decisions, the Panel decisions, on the whole, adopted a consistent approach in relation to the way that the Panel applied the policy. In light of the sample size of the case study and controversy surrounding the Panel’s decisions on the policy, this provides a sufficient basis upon which to conclude that the Panel’s decision-making provides a strong form of consistency generally.

Second, Chapter 6 assessed the finality of Panel decision-making through a qualitative analysis of the impact of judicial review applications on Panel decisions from 13 March 2000 to 30 June 2016. It was concluded that a strong form of finality results where courts confirm decisions of the Panel consistently and/or discourage judicial review applications through their decisions, with the medium form involving judicial review
being limited to some extent and/or leading to a different outcome in a limited number of matters. The analysis demonstrated that there was a medium form of finality in light of the judicial review decisions to date, notwithstanding the relatively small number of judicial review decisions compared to the total number of Panel decisions. This was because the courts overturned the Panel’s decisions in the context of half of the four sets of circumstances affected by judicial review. The regulatory framework and judicial approach in Australia also place fewer limitations in relation to judicial review applications than in the UK.

Given the conclusions in the preceding Chapters, the Panel has provided an effective forum for dispute resolution in light of the aims of the CLERP reforms. This is based on the findings that Panel decision-making has demonstrated strong forms of speed and flexibility, and a medium to strong form of certainty, overall from 13 March 2000 to 30 June 2016. The only assessment resulting in less than a strong form was that relating to the finality of Panel decisions, which was for the reasons discussed in the preceding paragraph. On the other hand, the judicial review decisions to date have confirmed the important role that courts play in ensuring that the Panel acts according to the law. The entrenched ability to seek judicial review of Panel decisions in the High Court under s 75(v) of the Australian Constitution means that such applications will continue to present challenges for the Panel.

The thesis reached these conclusions using four key methods. First, there was a doctrinal analysis of the underlying legislative framework, secondary literature and decisions of the Panel. Second, the thesis conducted a comparative analysis of the operations of the Panel and its UK counterpart, which is the most important comparator for the Australian Panel for the purposes of establishing the criteria to be applied to determine the effectiveness of the Panel. Third, empirical work was conducted in relation to the speed of Panel decision-making. Finally, case studies were undertaken in the context of assessing flexibility and certainty in relation to Panel decision-making. However, these are not the only ways in which the Panel’s operations can be analysed. For example, the thesis did not compare the Panel’s operations to the litigation conducted in the courts prior to the CLERP reforms, consider whether the Panel-based system is better than the previous court-based system or focus on the operations of other
Panels apart from analysing the UK Panel for the purposes of establishing the criteria to be applied to determine the effectiveness of the Panel. It also did not evaluate the work of the Panel from the perspective of regulatory theory, by analysing the costs and benefits arising from takeovers or Panel decision-making, or by examining their impact on particular industries or markets.

These other aspects not covered in the thesis provide opportunities for future research on the Panel. For example, the impact of tactical litigation in takeovers could be evaluated through an empirical and qualitative analysis of such litigation before and after the CLERP reforms. This would allow an assessment of the extent of the impact that the CLERP reforms have had in relation to tactical litigation. In addition, the work of the Australian Panel could be compared to its counterpart in the UK and other overseas jurisdictions. The decision-making of the Australian Panel should also continue to be assessed, both in terms of the Panel’s effectiveness and the impact of its decisions on the conduct and regulation of takeovers.
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Appendix 1 – Panel Decisions on Frustrating Action Policy

The Panel decisions in the FAP case study in Chapter 5 over the period 13 March 2000 to 30 June 2016 are as follows (in order of the date of the decision):

Re Pinnacle VRB Ltd (No 5) (2001) 39 ACSR 43

Re Pinnacle VRB Ltd (No 8) (2001) 39 ACSR 55


Re Bigshop.com.au Ltd (No 2) [2001] ATP 24

Re Equity-1 Resources NL [2002] ATP 20

Re Anaconda Nickel Ltd (No 1) [2003] ATP 2

Re Anaconda Nickel Ltd (No 15) [2003] ATP 17

Re Anaconda Nickel Ltd (Nos 2–5) [2003] ATP 4

Re BreakFree Ltd (No 1) [2003] ATP 29

Re Selwyn Mines Ltd [2003] ATP 33

Re Rivkin Financial Services Ltd (2004) 50 ACSR 147

Re Goodman Fielder Ltd (No 2) [2003] ATP 5

Re Coopers Brewery Ltd (No 3) (2005) 57 ACSR 1

Re Coopers Brewery Ltd (Nos 3R and 4R) (2005) 57 ACSR 348

Re Volante Group Ltd [2006] ATP 2

Re Sydney Gas Ltd (No 1) [2006] ATP 9

Re Wattyl Ltd (2006) 57 ACSR 362

Re Sydney Gas Ltd (No 2) [2006] ATP 18
Re GoldLink Growthplus Ltd [2007] ATP 23

Re Resource Pacific Holdings Ltd [2007] ATP 26

Re Lion Selection Ltd (No 1) [2008] ATP 14

Re Lion Selection Ltd (No 2) [2008] ATP 16

Re MacarthurCook Ltd (2008) 67 ACSR 345

Re Babcock & Brown Communities Group [2008] ATP 25

Re Perilya Ltd (No 2) [2009] ATP 1

Re International All Sports Ltd (No 1) [2009] ATP 4

Re Rey Resources Ltd [2009] ATP 14

Re Powerlan Ltd [2010] ATP 2

Re Transurban Group [2010] ATP 5

Re Austock Group Ltd [2012] ATP 12

Re World Oil Resources Ltd [2013] ATP 1

Re Hastings Rare Metals Ltd [2013] ATP 13

Re Gondwana Resources Ltd (No 1) [2014] ATP 9

Re Gondwana Resources Ltd (No 2) [2014] ATP 15

Re Gondwana Resources Ltd (No 2R) [2014] ATP 18.
Appendix 2 – Panel Decisions on ‘Truth in Takeovers’ Policy

The Panel decisions in the TTP case study in Chapter 6 over the period 13 March 2000 to 30 June 2016 are as follows (in order of the date of the decision):

Re Taipan Resources NL (No 6) (2000) 36 ACSR 716

Re Anaconda Nickel Ltd (No 18) [2003] ATP 18

Re Sirtex Medical Ltd [2003] ATP 22

Re Prudential Investment Co of Australia Ltd (2003) 49 ACSR 147

Re BreakFree Ltd (Nos 3 and 4) (2003) 49 ACSR 337

Re BreakFree Ltd (No 4R) (2004) 22 ACLC 1165

Re Novus Petroleum Ltd (No 2) (2004) 50 ACSR 95

Re Australian Leisure and Hospitality Group Ltd (No 3) (2004) 52 ACSR 260

Re Patrick Corporation Ltd (2005) 55 ACSR 231

Re Austral Coal Ltd (No 2RR) (2005) 23 ACLC 1797

Re Axiom Properties Ltd (No 2) [2006] ATP 5

Re Andean Resources Ltd [2006] ATP 21

Re Aztec Resources Ltd (No 2) [2006] ATP 30

Re Vision Systems Ltd (No 2) [2006] ATP 33

Re Summit Resources Ltd (2007) 64 ACSR 626

Re Rinker Group Ltd (No 2) [2007] ATP 17

Re Rinker Group Ltd (No 2R) (2007) 64 ACSR 472

Re Consolidated Minerals Ltd (No 1) [2007] ATP 20
Re Consolidated Minerals Ltd (No 2) [2007] ATP 21

Re Consolidated Minerals Ltd (No 3) (2007) 25 ACLC 1729

Re Consolidated Minerals Ltd (No 3R) (2007) 25 ACLC 1739

Re Golden West Resources Ltd (Nos 3 and 4) (2008) 26 ACLC 116

Re Gosford Quarry Holdings Ltd (No 1) (2008) 67 ACSR 156

Re Gosford Quarry Holdings Ltd (No 1R) (2008) 67 ACSR 164

Re Just Group Ltd [2008] ATP 22

Re MYOB Ltd [2008] ATP 27

Re Lion-Asia Resources Pte Ltd [2009] ATP 25

Re Ludowici Ltd [2012] ATP 3

Re Ludowici Ltd (No 1R(a) and (b)) [2012] ATP 4

Re Alesco Corp Ltd (Nos 1 and 2) [2012] ATP 14

Re Alesco Corp Ltd (No 3) [2012] ATP 18

Re Warrnambool Cheese and Butter Factory Company Holdings Ltd [2013] ATP 16

Re Bullabulling Gold Ltd [2014] ATP 8

Re Envestra Ltd [2014] ATP 13

Re Ambassador Oil and Gas Ltd (No 1) [2014] ATP 14

Re Yancoal Australia Ltd [2014] ATP 24

Re Sedgman Ltd [2016] ATP 2

Appendix 3 – Judicial Review of Panel Decisions

The judicial review decisions by the courts relating to Panel decisions over the period 13 March 2000 to 30 June 2016 are as follows (in order of the date of the decision):

Glencore International AG v Takeovers Panel (2005) 220 ALR 495

Glencore International AG v Takeovers Panel (2006) 151 FCR 77

Cemex Australia Pty Ltd v Takeovers Panel (2008) 106 ALD 5

Cemex Australia Pty Ltd v Takeovers Panel (2009) 177 FCR 98

Tinkerbell Enterprises Pty Ltd as Trustee for The Leanne Catelan Trust v Takeovers Panel (2012) 208 FCR 266

Queensland North Australia Pty Ltd v Takeovers Panel (2014) 100 ACSR 358

Queensland North Australia Pty Ltd v Takeovers Panel (2015) 320 ALR 726

Queensland North Australia Pty Ltd v Takeovers Panel (No 2) (2015) 236 FCR 370
