The Takeovers Panel: A Review

Ian Ramsay*

Introduction

It is now almost 20 years since the Takeovers Panel became part of the framework of takeovers regulation in Australia. The Panel was established in 1991 and was originally known as the Corporations and Securities Panel. The key power of the Panel was to declare circumstances to be unacceptable in relation to a takeover. This power had previously been vested in the National Companies and Securities Commission. However, there was a concern that it was inappropriate to vest in the corporate regulator the power of both investigation and adjudication and that a body independent of the Commission should have the power to adjudicate takeovers disputes.

The first half of the Panel's existence is widely regarded as unsuccessful. It could only act on a referral from the Australian Securities Commission. During the period 1991 to 2000, the Commission referred only four matters to the Panel.[1] Two years passed following the Panel's establishment before the Commission referred the first matter to the Panel. It was almost another six years before the Commission referred the second matter to the Panel. When we examine the second half of the Panel's existence the comparison is stark. In the 10 years since 2000 the Panel has decided more than 300 matters. It is regarded as having made a very important contribution to the effective regulation of takeovers in Australia.

On 12 March 2010, the Minister for Financial Services, Superannuation and Corporate Law, the Hon Chris Bowen MP, issued a media release that stated:

> Over the past decade, the Panel has established itself as a key part of the regulation of capital markets in Australia by providing a fair, speedy and cost-effective mechanism to resolve disputes during takeover transactions. The existence of the Panel ensures takeover transactions are not unnecessarily delayed by protracted and costly litigation, which would adversely impact upon shareholders and market efficiency…The effectiveness and professionalism of the Panel is evidenced by the way it has gained and retained the respect of market participants and the business

---

* Harold Ford Professor of Commercial Law and Director of the Centre for Corporate Law and Securities Regulation, Melbourne Law School, University of Melbourne. Professor Ramsay is a member of the Takeovers Panel.

[1] These four matters were *Re Titan Hills Australia Ltd* (1992) 10 ACLC 131; *Re Pivot Nutrition Pty Ltd* (1997) 15 ACLC 369; *Re Australian Securities Commission and John Fairfax Holdings Ltd* (1997) 25 ACSR 441 and *Re Australian Securities and Investments Commission and Wesfi Ltd* (1999) 17 ACLC 1690. The four matters are discussed in chapter 2 of this book.

> community…Australia's approach to the regulation of takeovers is recognised as being world-class.[2]

Why is there such a significant difference between the first and second decades of the Panel's existence? There are a number of reasons which are explored in this chapter. It is important to evaluate these reasons because the history of the Takeovers Panel holds lessons for other agencies. Before undertaking this analysis, it is useful to review: (1) the function of takeovers and takeovers regulation in Australia; (2) some data on takeovers; and (3) the role of the Takeovers Panel.

The Function of Takeovers and Takeovers Regulation

It is important to understand something about takeovers and how they are regulated in order to place our discussion of the role of the Panel into context. Takeovers can occur for many reasons. One company (A) may seek control of another company (B) because:

- B has assets (for example, certain technologies) that are valuable to A;
- B and A sell goods in the same market and A can increase its share of the market by acquiring control of B; or
- A may believe that it can operate B more efficiently than it is currently being operated.

According to the Australian Competition and Consumer Commission (ACCC):

> Mergers and acquisitions are important for the efficient functioning of the economy. They allow firms to achieve efficiencies, such as economies of scale or scope, and diversify risk across a range of activities. They also provide a mechanism to replace the managers of underperforming firms.[3]

To the extent to which takeovers are a mechanism for shifting assets from one company to another company that can make better use of them, commentators view them as positive.[4] A government paper on takeovers regulation puts the argument in support of takeovers in the following way:

> Takeovers are an integral part of the operation of equity markets and in turn the Australian economy. The benefits of takeovers, or the prospect of takeovers, to shareholders, the corporate sector and the economy include

[2] Minister for Financial Services, Superannuation and Corporate Law, the Hon Chris Bowen MP, 'Government Congratulates Takeovers Panel on 10 Year Anniversary', Media Release, 12 March 2010.
[3] Australian Competition and Consumer Commission, *Merger Guidelines*, November 2008, para 1.1.
[4] See, for example, MC Jensen, 'Takeovers: Their Causes and Consequences' (1988) *2 Journal of Economic Perspectives* 21.

> improved corporate efficiency and enhanced management discipline, leading ultimately to greater wealth creation.[5]

However, some commentators argue that takeovers do not benefit the economy where they force the management of target companies to adopt a short term perspective:

> More and more of our businesses are forced to concentrate on results in the next three months. They are being run so as to encourage the institutional investors, on which all publicly-traded companies today depend for their supply of capital, to hold onto the company shares rather than to toss them overboard the moment the first hostile takeover bid appears.[6]

Takeovers are not always desirable. Some takeovers may result in a market that is uncompetitive because of the increased market share of the acquiring company with the lack of competition in the market resulting in consumers paying higher and excessive prices. Therefore, one important part of the regulation of takeovers is ensuring that takeovers do not have anticompetitive effects. Section 50 of the *Trade Practices Act 1974* (Cth) prohibits takeovers that would have the effect, or be likely to have the effect, of substantially lessening competition in a market. The ACCC has the role of evaluating takeovers that may have an anticompetitive effect and the factors that are considered in assessing whether a takeover would be likely to substantially lessen competition include:

- the level of concentration in the market;
- the degree of countervailing power in the market;
- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
- the dynamic characteristics of the market, including growth, innovation and product differentiation; and
- the height of barriers to entry to the market: *Trade Practices* Act, s 50(3).

However, there is another important part of the regulation of takeovers. This part of the regulation focuses on the need to protect the shareholders in a company that is the subject of a takeover. These shareholders need to be able to make an informed decision regarding whether to sell their shares to the acquiring company. Therefore, s 602 of the *Corporations Act 2001* (Cth) contains fundamental principles that apply to many takeovers. These principles are that:

- the acquisition of control over companies takes place in an efficient, competitive and informed market;
- the shareholders and the directors of the company: (1) know the identity of any person who proposes to acquire a substantial interest in the company; and (2)

---

[5] Corporate Law Economic Reform Program Proposals for Reform, *Takeovers: Corporate Control: A Better Environment for Productive Investment*, Paper No 4, 1997, 7.

[6] PF Drucker, 'Corporate Takeovers - What is to be Done?' (1986) 82 *The Public Interest* 3, 13.

have a reasonable time to consider the proposal; and (3) are given enough information to enable them to assess the merits of the proposal; and

- as far as practicable, the shareholders all have a reasonable and equal opportunity to participate in any benefits resulting from the takeover.[7]

These principles, and the rules in the *Corporations Act* regulating the conduct of takeovers, apply to companies whose shares are listed on the securities exchange and also to companies whose shares are not listed but which have more than 50 shareholders. The principles and rules also apply to listed managed investment schemes.

In summary, the way in which this part of the regulation of takeovers operates is to require that a takeover is conducted in a way that ensures compliance with the principles and rules.[8] This includes compliance with detailed disclosure requirements by both the acquiring company and the target company. For example, the acquiring company must disclose information about itself and also details of its intentions regarding: (1) the continuation of the business of the target company; (2) any major changes to be made to the business of the target company; and (3) the future employment of the present employees of the target company: *Corporations Act*, s 636. The target company must disclose to its shareholders all the information that the shareholders and their professional advisers would reasonably require to make an informed assessment whether or not to accept the offer to the extent that the information is known to the directors of the target company and also to the extent that it is reasonable to expect this information in the target company's statement to its shareholders. The directors of the target company must also provide a statement recommending whether or not the bid should be accepted or rejected and giving reasons for the recommendation or giving reasons why a recommendation is not made: *Corporations Act*, s 638.

Some Data on Takeovers

Takeovers are frequent events in Australia. In the decade up to 1998, a significant majority of the largest companies listed on the Australian Securities Exchange (ASX) made at least one acquisition that exceeded 10 per cent of their market capitalisation

---

[7] Some commentators have been critical of several of these principles. Professor Coffee is critical of the principle of equal opportunity (JC Coffee, 'Partial Justice: Balancing Fairness and Efficiency in the Context of Partial Takeover Offers' (1985) 3 *Company and Securities Law Journal* 216), while two other commentators have argued that the principles in the second and third points undercut the principle of efficiency which is in the first point (P Brown and R da Silva Rosa, 'Australia's Corporate Law Reform and the Market for Corporate Control' (1998) 5 *Agenda* 179).

[8] There is more detailed discussion of the regulation of takeovers in Rodd Levy and Neil Pathak, *Takeovers Law and Strategy*, Thomson Reuters, Sydney, 3rd edition, 2008; I Renard and J Santamaria, *Takeovers and Reconstructions in Australia,* LexisNexis Butterworths, looseleaf; HAJ Ford, RP Austin and IM Ramsay, *Ford's Principles of Corporations Law,* LexisNexis Butterworths, looseleaf, chapter 23; *Australian Corporations and Securities Law Reporter*, CCH Australia, looseleaf, sections 190-000 to 194-300; and *Australian Corporations Law: Principles and Practice*, LexisNexis Butterworths, looseleaf, sections 6.1 to 6.9.

and, in the earlier period between 1971 and 1990, up to 16 per cent of all listed companies were subject to a takeover bid in a given year.[9] For the more recent period 1992 to 2004, there were 538 completed takeovers of Australian companies listed on the ASX.[10] There is further data on takeovers in chapter 4. The authors of that chapter note that for the period 2000 to 2009, there were 741 takeover announcements relating to listed companies. It should be noted that the data in this paragraph refers to listed companies. This means it underestimates the extent of takeover activity in Australia as only a small proportion of companies are listed on ASX. As at 31 May 2010, there were 1,754,997 companies registered by ASIC.[11] As at 30 June 2010, there were 2,192 companies listed on ASX.[12] In other words, only 0.12 per cent of all companies are listed on ASX.

There have been studies of the wealth effects of takeovers. One of the most comprehensive measured the share market performance of ASX listed companies that were involved in takeover bids between 1975 and 1990.[13] The authors found that the pre-bid performance of the target companies was 'unambiguously poor' but this poor performance was reversed on the announcement of a takeover bid. There was also a positive effect on the share price of the bidding companies. The authors view this as evidence of the wealth creating effects of takeovers. Another Australian study using share price data concluded that 'the overriding conclusion of this study is that takeovers, on average, are value-creating investments'.[14] A more recent Australian study also using share price data for a sample of 76 takeover announcements for the period 2000 to 2006 found that on average takeover announcements lead to increased share prices, particularly for the target companies.[15] However, the authors found evidence of some takeovers that did not create value.

Other studies have evaluated the performance of companies following a takeover by employing accounting data such as profitability. A study conducted by the Bureau of Industry Economics examined the effect of takeovers in three industries.[16] The Bureau observes in its report that the main benefits of the takeovers were expected to be economies in production, distribution and administration. Yet these benefits were not always realised. One of the findings was that of 'a substantial lag between the merger

---

[9] Brown and da Silva Rosa, above n 7, 185.
[10] A Dignam, 'Transplanting UK Takeover Culture: The EU Takeovers Directive and the Australian Experience' (2007) 4 *International Journal of Disclosure and Governance* 148, 154.
[11] Australian Securities and Investments Commission, Company Registration Statistics, available at www.asic.gov.au
[12] Australian Securities Exchange, About ASX Ltd, available at www.asx.com.au
[13] Brown and da Silva Rosa, above n 7.
[14] P Dodd and R Officer, 'Takeovers: The Australian Evidence' in Centre for Independent Studies, *Takeovers and Corporate Control: Towards a New Regulatory Environment*, 1987, 151.
[15] J Porter and H Singh, *An Empirical Analysis of the Motivation Underlying Takeovers in Australia*, 2007, Social Science Research Network Working Paper.
[16] Bureau of Industry Economics, *Mergers and Acquisitions*, Research Report 36, 1990.

and any apparent increases in productive efficiency and that other factors have had at least as great an impact on productive efficiency as the mergers'.[17]

In summary, there is strong evidence that takeovers create value when measured by the share price of target companies. However, not all takeovers are value enhancing.

The Role of the Takeovers Panel

The Takeovers Panel is the primary forum for resolving disputes about a takeover bid while the bid is underway. The Panel has replaced the courts as the primary forum to resolve takeovers disputes although, as we will see in the following sections of this chapter, this was not the case for the first half of the Panel's existence. The Panel is a peer review body, with part time members appointed from the active members of Australia's takeovers and business communities. The intention is that those with expertise and experience in takeovers and business will determine takeovers disputes brought before the Panel.

When the Panel receives an application, the President of the Panel appoints three members to be the 'sitting Panel' to decide the application. An initial matter for the 'sitting Panel' is whether it will commence proceedings in relation to the application.

The Panel has wide powers. Its primary power is to declare circumstances in relation to a takeover, or the control of an Australian company, to be unacceptable. The Panel has the power to make orders to protect the rights of persons (especially target company shareholders) during a takeover bid and to ensure that a takeover bid proceeds (as far as possible) in a way that it would have proceeded if the unacceptable circumstances had not occurred.

In summary, the Takeovers Panel has the power to declare that unacceptable circumstances exist:

- because of the effect that the circumstances have on the control or potential control of a company or the acquisition of a substantial interest in a company;
- having regard to the purposes set out in s 602 of the *Corporations Act* (these purposes include: (1) that the acquisition of control over the voting shares in a listed company, an unlisted company with more than 50 members, or the voting interests in a listed managed investment scheme, takes place in an efficient, competitive and informed market; (2) that 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 arising from the acquisition of a substantial interest; and (3) the holders of the shares or interests and the directors of the target company or entity know the identity of the acquirer, have a reasonable time to consider the proposal, and are given enough information to enable them to assess the merits of the proposal); or
- because they constitute a contravention of Chapter 6 or Chapter 6A, 6B or 6C of the *Corporations Act.*[18]

---

[17] Ibid, 105-106.

[18] Section 657A(1) of the *Corporations Act* provides that the Panel may declare circumstances in relation to the affairs of a company to be unacceptable. The Act

In addition, the Panel has the power to review decisions by ASIC to:

- exempt a person from a provision of Chapter 6 of the *Corporations Act* (Chapter 6 deals with the regulation of takeovers); or
- declare that Chapter 6 of the *Corporations Act* applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration: *Corporations Act*, s 656A(1)(a).[19]

Most of the work of the Panel concerns disputes about takeovers. A study of applications made to the Panel between 2000 and early 2005 found that 129 of the 153 applications involved a takeover bid.[20] However, there are other types of transactions that affect the control of companies and therefore the Panel may have jurisdiction if a dispute arises. These types of transactions include rights issues, share buy-backs and reductions of capital.

It is useful to provide insight into the types of unacceptable circumstances that may exist. The Panel has published a guidance note on this topic.[21] In this guidance note, the Panel reviews unacceptable circumstances according to the policy considerations contained in s 602 of the *Corporations Act.*[22]

> **Inhibition of efficient, competitive and informed market**: According to the Panel, unacceptable circumstances may result from a false market, a deficiency of information, or the premature lockout of rival bids, among other things. Similarly, the Panel considers that an efficient, competitive and informed market requires a person who makes a public statement in connection with a market activity concerning that person's proposed actions

---

contains a broad definition of 'affairs' in s 53A and this definition applies to s 657A by reason of regulation 1.0.18 of the Corporations Regulations 2001. Although s 657A refers to 'company', s 603 provides that Chapter 6 of the *Corporations Act* applies to listed bodies formed in Australia that are not companies and s 604 provides that Chapter 6 applies to listed managed investment schemes. The Panel has issued a guidance note that deals with an acquisition of a listed registered managed investment scheme pursuant to an amendment of the deed constituting the scheme following the vote of unitholders in the target scheme: Takeovers Panel, *Guidance Note 15 – Listed Trust and Managed Investment Scheme Mergers*, 2004.

[19] The Panel also has the power the review a decision by ASIC, in relation to securities of the target of a takeover bid during the bid period, to exempt a person from a provision of Chapter 6C of the *Corporations Act* (Chapter 6C deals with information about ownership of listed companies and managed investment schemes) or declare that Chapter 6C applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration: s 656A(1)(b). For further information regarding the Panel's role in reviewing certain decision of ASIC, see Takeovers Panel, *Guidance Note 2 – Reviewing Decisions*, 2008.

[20] Chris Miller, Rebecca Campbell and Ian Ramsay, *The Takeovers Panel – An Empirical Study*, Centre for Corporate Law and Securities Regulation, University of Melbourne, 2006, 15.

[21] Takeovers Panel, *Guidance Note 1 – Unacceptable Circumstances*, 2008.

[22] The following paragraph is an edited extract from paras 16 – 24 of Takeovers Panel, *Guidance Note 1 – Unacceptable Circumstances*, 2008.

or intentions to adhere to their statement, although there are limits to this principle. Other actions may compromise an efficient market, such as a bidder failing at all times to have a reasonable basis to believe that it will be able to pay the cash component offered in a bid, or failing to issue consideration securities, or refusing to reverse transactions which had been entered into in error and were promptly notified. The Panel also refers under this category to 'lock-up devices' (where these devices, such as break fees, no-talk agreements, no-shop agreements and asset lock-ups, have an adverse effect on competition in the market); uncertainty concerning the effect of conditions of a bid; and failure to correct inaccurate media reports thereby allowing the market to trade on an ill-informed basis.

Misinformation: The Panel states that a second category of unacceptable circumstances is where shareholders do not have the information necessary to make an informed decision or are misled about the relevant transaction. The decision could be whether to accept a bid or whether to approve a transaction. According to the Panel, particular issues relate to disclosure of the identity of parties concerning their interests in a company. These can arise in the context of disclosure in transaction documents (such as bidders' statements, prospectuses or notices of meeting) or in compliance with the substantial holding notice and tracing provisions in Chapter 6C of the *Corporations Act*. In all cases, the Panel will be concerned to ensure that information provided is adequate, and there is sufficient time for the relevant people to make a proper decision.

Reasonable and equal opportunities: The Panel states that a third category of unacceptable circumstances is where shareholders do not have reasonable and equal opportunities to take part in benefits accruing in connection with a transaction affecting control. Reasonable means that holders have adequate time to consider, sell, vote etc, and are not exposed to pressure tactics or maximum acceptance conditions (in bids) or uncommercial pricing. Equality means equal value, not identical dealing. The opportunity is often to participate directly, by selling their shares in a bid or buy-back or taking up shares in a rights offer, but it can also be an opportunity to participate indirectly, by voting on a transaction. The benefits can be given directly or in collateral transactions, and need not take the straightforward form of a price for shares. Conversely, this principle does not require that all transactions provide a premium to the existing market or be equally attractive to all shareholders. An example provided by the Panel is 'frustrating action' - conduct by the directors of a target that frustrates a bid can deprive target shareholders of an opportunity to share in the benefits of that bid. The Panel also states that shareholders of a company may be deprived of an equal opportunity if securities in a target are acquired by an associate of the target or its directors as part of a defence to a takeover bid, and the associate subsequently obtains a benefit from the target company, such as an interest in the assets of the target or a material trading arrangement with the target. In addition, the Panel states that if a rights issue (particularly if it is underwritten) does not afford genuine accessibility to the benefits of the rights issue to all shareholders, then shareholders may not have a reasonable opportunity to share in the benefits.

There are other situations that may give rise to unacceptable circumstances. These are a contravention of certain provisions of the *Corporations Act* and where appropriate procedures are not followed leading up to the compulsory acquisition of securities under Part 6A.1 of the *Corporations Act*.

The Panel may only make a declaration of unacceptable circumstances if it considers that doing so is not against the public interest: *Corporations Act*, s 657D(2). The Panel has stated that it interprets this to mean that it should consider not only the commercial interests and convenience of the parties and their shareholders directly involved in a dispute before the Panel but it should also consider wider issues such as 'what signals its decisions to make, or not make, a declaration of unacceptable circumstances in individual cases, will send to the market and the wider investing community'.[23]

If the Panel makes a declaration of unacceptable circumstances, it may make orders:

- to protect the rights or interests of anyone affected by the unacceptable circumstances; or
- to ensure that the takeover bid proceeds (as far as possible) as if the unacceptable circumstances had not occurred: *Corporations Act*, s 657D(2).

The orders that might be made by the Panel include requiring additional disclosure, cancelling contracts, freezing transfers of securities, freezing rights attached to securities, forcing the disposal of securities, allowing more time or information for shareholders to assess the merits of the proposal, or establishing rights to withdraw acceptances.[24]

The Panel may also make interim orders including where it has not made a declaration of unacceptable circumstances: *Corporations Act*, s 657E. According to the Panel:

> Interim orders are usually made to prevent unacceptable circumstances from happening, continuing or getting worse while proceedings are conducted. They may be made to preserve the status quo until proceedings are completed. They may also be made to ensure that the Panel's power to fashion the most appropriate remedy in the circumstances is not forestalled by intervening events.[25]

The Panel has the power to accept undertakings: *Australian Securities and Investments Commission Act*, s 201A. The Panel has stated that it considers the public interest is generally served by accepting an undertaking that addresses unacceptable circumstances.[26] Undertakings are an important part of the work of the Panel. The authors of chapter 4 provide evidence that 145 undertakings were given in the 322 applications to the Panel in the period 2000-2009.

---

[23] Ibid, para 14.
[24] Takeovers Panel, *Guidance Note 4 – Remedies - General*, 2008, paras 21 and 22.
[25] Ibid, para 9.
[26] Ibid, para 38.

The Panel has a system of internal reviews. Following a decision of the Panel, a party to the proceedings or ASIC may apply for review of the decision: *Corporations Act*, s 657EA. For this purpose, three different members of the Panel are appointed to hear the review application.

Australian is not the only county that has a Panel to adjudicate disputes about takeovers. The best known such Panel exists in the UK, which has the London Panel on Takeovers and Mergers. There are also Takeovers Panels in New Zealand, Ireland, South Africa, and Hong Kong. Singapore has a Securities Industry Council, which administers a Takeovers Code in a similar manner to London.[27]

Has the Takeovers Panel been Successful?

Whether the Takeovers Panel has been a success is a theme of most of the chapters in this book. On one key criterion, the number of matters decided since 2000 (more than 300 matters), it has been a success compared to the number of matters decided by the Panel during the first half of its existence (four matters). These matters generally have been decided promptly. Michael Hoyle, the author of chapter 2, refers to the Panel now having an extensive track record of 'resolving disputes quickly and efficiently' and more importantly he writes, 'its decisions have overwhelmingly ensured the outcome of bids has been resolved by shareholders on the basis of their commercial merits'. Other authors of chapters in this book refer to the way in which the Panel has improved market practice; for example, how disclosure in takeover documents has improved as a result of both decisions of the Panel and also the guidance it has provided in its guidance notes.

The Parliamentary Joint Committee on Corporations and Financial Services has stated that the Panel 'has become an effective arbiter and decision-maker in takeover disputes and has reduced the cost and improved the timeliness of resolving such disputes'.[28]As noted earlier in this chapter, the Minister for Financial Services, Superannuation and Corporate Law, the Hon Chris Bowen MP, has stated that the Panel 'has established itself as a key part of the regulation of capital markets in Australia by providing a fair, speedy and cost-effective mechanism to resolve disputes during takeover transactions' and it has 'gained and retained the respect of market participants and the business community'.[29]

Other evidence of the success of the Panel is gained from the 2006 'stakeholder assessment' report commissioned by the Panel.[30] The report presents the findings of interviews with 37 respondents from 33 organisations (law firms, investment banks, fund managers, stock brokers, regulators, shareholders' association, listed companies,

---

[27] These other Panels are mentioned on the Takeovers Panel website (www.takeovers.gov.au). For more information about these other Panels, see Nicole Calleja, *The New Takeovers Panel – A Better Way?* Centre for Corporate Law and Securities Regulation, University of Melbourne, 2002.

[28] Parliamentary Joint Committee on Corporations and Financial Services, *Report on the Corporations Amendment (Takeovers) Bill 2006 [Exposure Draft]*, 2007, 3.22.

[29] Above n 2.

[30] Chant Link & Associates, *A Report on Stakeholder Assessment of the Takeovers Panel*, 2006. This report is available on the Panel's website (www.takeovers.gov.au).

and financial journalists). The overall assessment was that the Panel 'had performed very well' with respondents commenting favourably on the way the Panel: (1) has improved the speed of dispute resolution; (2) has reduced tactical litigation; (3) has improved standards of disclosure in takeovers; (4) has efficient processes; and (5) reaches fair decisions. At the same time, the report also presents the comments of respondents where they thought improvements could be made.

Reasons for the Success of the Takeovers Panel

As noted above, for the first half of its existence, the Panel was not regarded as a success. However, it is now widely regarded as successful. In this section of the chapter, I explore the reasons for the Panel's success. It is not possible to have an exhaustive list of reasons. In addition, not all will agree what the reasons are for Panel's success. However, it is important to discuss why the Panel is successful. There has been extraordinary growth in the number of administrative agencies in Australia. The Takeovers Panel has a special history – it has gone from being an unsuccessful administrative agency to one that is successful. Identifying the reasons for this evolution may assist in ensuring the success of other administrative agencies.

The reasons discussed in this section are: (1) the independence of the Panel; (2) the government strengthening the role of the Panel in takeovers disputes; (3) the government expanding the jurisdiction of the Panel; (4) the decision of the High Court in *Alinta* confirming the constitutional validity of the Panel; (5) a clearer delineation of the respective roles of the courts and the Panel; (6) the strength of the membership of the Panel; (7) the influence of the Panel on market practice; (8) the timeliness of the decision-making process of the Panel; (9) the accessibility of the Panel; (10) the way the Panel has facilitated a shift away from tactical litigation; (11) the Panel's extensive consultation processes; (12) the Panel's informal and non-legalistic approach to resolving takeovers disputes; (13) the Panel's focus on policy; (14) the support the Panel has received from the government; and (15) the effective leadership of the President of the Panel and the expertise of the Panel executive.

Independence of the Panel

In its original incarnation as established in 1991, only the regulator (then the Australian Securities Commission) could bring applications to the Panel. This created problems of substance and problems of perception. The substantive problem was that the Panel was not accessible to participants in takeovers. Its work was therefore severely restricted and only matters that the Commission thought appropriate for the Panel would be brought to it. The problem of perception was that the Panel was viewed by some as not being sufficiently independent from the Commission. If the Panel relied solely for its work on referrals from the Commission, might this, at least as a matter of perception, undermine the independence of the Panel? The independence of the Panel was also compromised in the view of some commentators by the fact that the Panel did not have its own staff and budget. Section 11(2) of the *Australian Securities Commission Act 1989* provided that the Commission had the responsibility of providing staff and support facilities to the Panel. One commentator wrote in 1994 that at that time the Panel was staffed by only one person, a Panel Secretary, who was a part time employee of the Panel and a part time employee of the

Commission and who worked out of the Office of the Chairman of the Commission.[31] This commentator wrote that, in his opinion, it is 'not feasible to suggest that the Panel is independent of the ASC'.[32] These problems were solved with the important legislative amendments that came into effect in 2000.[33] Now, an application to the Panel may be made by the bidder, the target, ASIC, or any person whose interests are affected by the relevant circumstances: *Corporations Act*, s 657C(2). In addition, the Panel now receives its own separate budget allocation and employs its own staff.

Strengthening the Role of the Panel in Takeovers Disputes

Increasing access to the Panel was not the only change introduced in 2000. For the first half of the Panel's existence, disputes while a takeover bid was underway could be heard in the Panel (if the Commission decided to bring an application) but were more commonly heard in the courts. An important change in 2000 was to make the Panel the main forum for resolving disputes while a takeover bid is underway. Section 659B was introduced into the *Corporations Act* and it provides that only ASIC or certain government officials can commence court proceedings in relation to a takeover bid, or proposed takeover bid, before the end of the bid period. The purpose of this provision is 'to make the Panel the main forum for resolving disputes about a takeover bid until the bid period has ended': *Corporations Act*, s 659AA. This has been effective as there is now little litigation in the courts involving takeover bids.

Expanding the Jurisdiction of the Panel

Another change introduced in 2000 was to expand the jurisdiction of the Panel. There were two main ways this occurred. First, the Panel was given a new power to review decisions of ASIC to grant exemptions from, and modifications to, Chapter 6 of the *Corporations Act* and Chapter 6C of the *Corporations Act* in relation to securities of the target of a takeover bid during the bid period. This power was previously exercised by the Administrative Appeals Tribunal.

Second, the 2000 amendments broadened the circumstances when the Panel could declare that unacceptable circumstances exist. Section 733 of the former *Corporations Law* provided that the Panel could only declare unacceptable circumstances to have occurred in relation to the acquisition of shares in a company or as a result of conduct engaged in by a person in relation to shares in, or the affairs of, a company. This provision was limited by s 732 which provided that unacceptable circumstances could only occur in specified ways. The amendments in 2000 broadened the jurisdiction of the Panel so that the Panel can declare circumstances to be unacceptable because of a contravention of Chapter 6 or Chapter 6A, 6B or 6C of the *Corporations Act*. In addition, there is no longer any equivalent to former s 732 which stated that unacceptable circumstances could only occur in specified ways. Two officers of ASIC have written that in their opinion, the main reason for the limited number of matters

[31] George Williams, 'The Corporations and Securities Panel – What Future?' (1994) 12 *Company and Securities Law Journal* 164, 166.
[32] Ibid.
[33] *Corporate Law Economic Reform Program Act 1999* (Cth).

referred to the Panel by the Commission during the first half of its existence was the limited jurisdiction of the Panel.[34]

Constitutional Validity of the Panel

From the early days of the Panel's establishment, doubts were expressed regarding whether the Panel was, in some important respects, unconstitutional on the basis that it was, in breach of the *Australian Constitution*, exercising judicial power. Chapter III of the *Constitution* provides that the judicial power of the Commonwealth is vested in federal courts and other courts invested with federal jurisdiction. Judicial power cannot be invested in administrative agencies. Did the powers of the Panel mean that it was exercising judicial power? A negative answer was given by the High Court of Australia in the first challenge to the powers of the Panel in *Precision Data Holdings Ltd v Wills.*[35] However, when the Panel's powers were enhanced in 2000, although these positioned the Panel to deal more effectively with takeovers disputes, they created some uncertainty that Parliament may have, in breach of the *Constitution*, vested judicial power in the Panel. These uncertainties were laid to rest, at least in relation to the main powers of the Panel, in the decision of the High Court in *Attorney-General (Cth) v Alinta Ltd*.[36]

Delineating the Roles of the Panel and the Courts

For the Panel to operate effectively, there needed to be a clear delineation of the respective roles of the Panel and the courts. This did not occur for the first half of the Panel's existence. As noted above, during this time, the Commission referred only four matters to the Panel. The first of these, the Titan Hills matter, resulted in 10 separate court actions that, as Michael Hoyle observes in chapter 2 of this book, delayed the Panel's decision for over seven months. Another one of these referrals to the Panel, the Wesfi matter, resulted in 11 legal actions connected with the application and the proceedings.[37] One commentator, writing in 1993 as the Titan Hills matter was unfolding, stated that this matter 'demonstrates that a clear and effective subdivision of functions between the Panel and the Courts has not yet been achieved'.[38]

The amendment that operated from 2000 to make the Panel the main forum for resolving disputes about a takeover bid while the bid is underway has largely removed this problem. There is still some scope for court proceedings while a bid is underway. For example, the Panel may refer a question of law arising in a proceeding before it to the court for a decision: *Corporations Act*, s 659A. It should also be noted that there

---

[34] Michael Gething and Kimberley Ould, 'The Wesfi Takeovers Panel Application: Lessons for the Future' (2000) 18 *Company and Securities Law Journal* 351, 352.
[35] (1991) 173 CLR 167.
[36] (2008) 233 CLR 542.
[37] Corporations and Securities Panel, *Annual Report 1999-2000*, 2000, 3.
[38] RP Austin, 'Takeovers – The Australian Experience', in JH Farrar (ed), *Takeovers, Institutional Investors and the Modernization of Corporate Law*, Oxford University Press, New Zealand, 1993, 191.

are some questions regarding the possibility of court litigation during the bid period based on the drafting of s 659B.[39]

Both the Panel and the courts have demonstrated sensitivity to determining their respective roles. For example, the Panel has declined to commence proceedings where it formed the view that the matters before it were already before the court in separate proceedings.[40] There have, however, been two occasions where court judgments created significant challenges for the Panel. One of these was the decision of the Full Federal Court in *Australian Pipeline Trust v Alinta Ltd*[41] in which two of the three judges held that the subsection of 657A that allows the Panel to declare circumstances unacceptable because they constitute a contravention of certain provisions of the *Corporations Act* was unconstitutional. This was on the basis that in making a declaration on this ground, the Panel would be exercising judicial power in breach of the *Constitution*. The Panel then issued a media release in which it indicated that it would no longer accept applications based on an alleged breach of the *Corporations* Act.[42] The Panel's jurisdiction was therefore undercut by this decision. However, this decision of the Federal Court was overturned by the High Court of Australia in a unanimous decision.[43]

The second challenge for the operation and effectiveness of the Panel resulted from the two judgments of Emmett J in Glencore.[44] These decisions are discussed in chapters 2 and 6 of this book. In chapter 2, Michael Hoyle observes that these two judgments 'were widely seen as having a detrimental effect on the expeditious, commercially realistic and practical decision-making style of the Panel'. The Panel itself commented on these decisions:

> That three senior Panels considered the circumstances to be unacceptable, but a court considered, on two occasions, that we had not established a jurisdictional basis, caused the Panel concerns that as a result of the Glencore decisions, it may not be able to perform effectively the role intended by Parliament. Accordingly, the Panel commenced discussions with Treasury and the Government concerning possible legislative amendments. The amendments which the Panel has sought look to ensure that the Panel's proceedings, and commercial, market based, approach, while properly subject to judicial review, are not constrained by the strict interpretation of the Panel's legislation that appears to have been adopted in the two Glencore decisions.[45]

---

[39] These questions are explored in HAJ Ford, RP Austin and IM Ramsay, *Ford's Principles of Corporations Law,* LexisNexis Butterworths, looseleaf, chapter 23, [23.620].
[40] *Re Taipan Resources NL (No 2)* [2000] ATP 13.
[41] (2007) 240 ALR 158; 60 ACSR 245; [2007] FCAFC 55.
[42] Takeovers Panel, Media Release TP07/19, 30 April 2007.
[43] *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542.
[44] *Glencore International AG v Takeovers Panel* (2005) 54 ACSR 708; [2005] FCA 1290 and *Glencore International AG v Takeovers Panel* (2006) 56 ACSR 753; [2006] FCA 274.
[45] Takeovers Panel, *Annual Report 2005-2006*, 2006, 2.

The government responded by amending the *Corporations Act*[46] and the amendments are discussed in chapters 2 and 6. In particular, s 657A which outlines when the Panel can make a declaration of unacceptable circumstances, was broadened.

Membership of the Panel

The members of the Panel have experience in takeovers and business. Section 172 of the *Australian Securities and Investments Commission Act 2001* (Cth) provides that the Minister may nominate a person for membership of the Panel (the Governor-General appoints the members on the nomination of the Minister) only if the Minister is satisfied that the person is qualified for appointment by virtue of their knowledge of, or experience in, one or more of the following fields: business, administration of companies, financial markets, financial products and financial services, law, economics and accounting.

The Panel has 54 members (as at July 2010). They can be classified as follows:

- Banking and financial services – 18 members
- Legal (law firm, barrister or academic) – 20 members
- Company director or executive – 15 members
- Member of the New Zealand Takeovers Panel – 1 member.

This membership means that the Panel has a broad range of expertise to draw upon when deciding matters. The Panel has stated that when it forms a sitting Panel of three members to decide a matter, generally it aims to ensure a mix of expertise including a lawyer, an investment banker or other corporate adviser and, if possible, a member with particular skills relevant to the matter to be decided.[47] The result is that decisions are made by those with expertise which is an important matter for applicants and this is also important in instilling confidence in the work of the Panel. Kirby J stated in *Attorney-General (Cth) v Alinta Ltd*:[48]

> Certainly, 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 considerations of practicality, policy, economic impact, commercial and market factors and the public interest.

Influence on Market Practice

It is generally believed that the work of the Panel – both through decisions and guidance notes – has resulted in improvements in market practice. The influence of the Panel on market practice is a theme that runs through several of the chapters in this book. The Panel has addressed a number of market practices in its decisions. These include the quality of disclosure in takeover documents, action by target

---

[46] *Corporations Amendment (Takeovers) Act 2007* (Cth).
[47] Takeovers Panel, *Guidance Note 8 – Matter Procedures*, 2007, para 8.14.
[48] (2008) 233 CLR 542, [45].

companies designed to frustrate a hostile takeover bid, conditions that a bidder puts in its bid, and financing arrangements for a bid. The Panel has also addressed market practices through its guidance notes. Some of these are: GN 21 - Collateral benefits; GN 20 - Equity derivatives; GN 19 – Insider participation in control transactions; GN 17 - Rights issues; GN 14 - Funding arrangements; GN 13 - Broker handling fees; GN 12 - Frustrating action and GN 7 - Lock-up devices.

There is a related point. Courts must wait for applications before determining matters. They cannot issue guidance that will influence market practice in a particular area except where this is done as part of a judgment and even then courts will generally be reluctant to issue broad policy as part of a judgment. The bulk of the Panel's work is decisions where, as is the case with courts, the Panel needs to receive an application before it can determine a matter. However, the Panel can influence market practice through its guidance notes and the Panel can publish its guidance notes independently of any application. The result is that the Panel can be proactive in seeking to improve market practice.

Timeliness of Decisions

The evidence indicates clearly that the Panel has been prompt in its decision making. The authors of chapter 4 provide evidence that the median time taken by the Panel to make a decision is 13 days (the average is 16.2 days). In addition, the authors note that the time taken to reach decisions has been declining.

An example of very prompt decision making by the Panel is its two decisions in May 2007 in relation to the attempted takeover of Qantas.[49] In December 2006, a consortium titled Airline Partners Australia Ltd (APA) made an $11 billion dollar bid for Qantas. The consortium included Texas Pacific Group, Macquarie Bank and Allco Equity Partners. The offer was endorsed by the board of Qantas. However, APA struggled to receive sufficient acceptances from Qantas shareholders.

On Friday 4 May 2007 at 7pm, APA's bid for Qantas ended, APA having advised the media that it appeared that insufficient acceptances had been received from Qantas shareholders. Approximately five hours later, a purported acceptance from a Qantas shareholder was received that would, if accepted, have taken the bid acceptances over 50 per cent and triggered a statutory extension of the bid for two weeks. On Saturday 5 May 2007, APA made an application to the Panel for a declaration of unacceptable circumstances and orders that would have allowed the bid to proceed as if the purported acceptance had been received before the bid ended. On Sunday 6 May 2007, the initial Panel announced that it had declined to commence proceedings on the application. Accordingly, it did not make a declaration or orders. That same day APA sought an urgent review of the decision. On Monday 7 May 2007, before 10am, the review Panel announced that it had affirmed the decision of the initial Panel. Therefore, in this high profile matter that saw the end of the takeover bid for Qantas, the two Panel decisions were made over the course of a weekend.

[49] *Qantas Airways Ltd 02* [2007] ATP 6; *Qantas Airways Ltd 02R* [2007] ATP 7. The description of the facts in the following paragraph is taken from paras 4 – 6 of the decision of the review Panel.

In contrast to the time taken by the Panel to make decisions, court litigation can take significant time and this includes judicial review of Panel decisions. An example is the review by the Federal Court of the decision of the Panel in Rinker. The Panel received the application in relation to this matter on 13 June 2007. The Panel announced its decision on 12 July 2007 and published its reasons on 18 July 2007: *Rinker Group Limited 02* [2007] ATP 17. The Panel therefore made its decision in about a month. In this decision, the Panel declared circumstances unacceptable in relation to the affairs of Rinker Group Ltd. CEMEX (CEMEX, SAB de CV and a wholly owned indirect subsidiary, CEMEX Australia Pty Ltd) bidding for Rinker, announced on 10 April 2007 that its offer was its 'best and final' offer in the absence of a superior proposal, and then resiled from it by announcing on 7 May 2007 that it would allow accepting Rinker shareholders to retain the final dividend that Rinker declared on 27 April 2007. The Panel ordered that CEMEX pay Rinker shareholders who sold Rinker shares on market between the two announcements the equivalent of Rinker's dividend ($0.25) per share for net Rinker shares disposed of during the period after the 10 April announcement and before the 7 May announcement.

CEMEX sought a review of this decision by the Panel. In *Rinker Group Limited 02R* [2007] ATP 19, the Review Panel, in a decision dated 12 August 2007 with reasons published on 20 September 2007, affirmed the original decision. The review application was received on 16 July 2007 so again the Panel took about a month to make a decision.

CEMEX then sought judicial review of the decision of the Review Panel. The Federal Court application was made on 26 September 2007. The application was made under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 39B of the *Judiciary Act 1903* (Cth). The Panel granted a stay in respect of its orders pending the outcome of the application. The hearing in the Federal Court took place on 19 and 20 May 2008 about eight months after the application was filed in the Court. The Federal Court handed down its judgment on 23 October 2008,[50] more than a year after the application was filed. The Federal Court dismissed the application by CEMEX.

On 11 November 2008, CEMEX filed an appeal to the Full Federal Court. The hearing occurred on 21 May 2009, about six months after the appeal application was filed. The Full Federal Court handed down its judgment on 30 June 2009 and dismissed the appeal.[51] It can therefore be seen that the process of judicial review of the Panel decision extended from 26 September 2007 when the application was filed by CEMEX to 30 June 2009 when the Full Federal Court dismissed the appeal by CEMEX.

Access to the Panel

An application to the Panel may be made by the bidder, the target, ASIC, or any person whose interests are affected by the relevant circumstances: *Corporations Act*, s 657C(2). However, there are other aspects dealing with access to the Panel worthy of mention. First, the Panel is relatively inexpensive to access. The current fee to lodge an application is $2,010. This compares favourably to fees to commence litigation in

[50] *Cemex Australia Pty Ltd v Takeovers Panel* [2008] FCA 1572.
[51] *Cemex Australia Pty Ltd v Takeovers Panel* (2009) 177 FLR 98; [2009] FCAFC 78.

the courts. Second, because of the prompt nature of the decision making process of the Panel and also the fact that the Panel prefers parties to be represented by their commercial solicitors who have taken part in the relevant transaction rather than a litigation lawyer or a barrister,[52] this reduces the costs of parties when compared to litigation.

There is also evidence that the Panel is accessible to a wide range of companies – particularly smaller companies. In a study of the first 72 decisions of the Panel,[53] for the period 2000-2002, the authors obtained market capitalisation data for listed public company bidders and targets. The results are contained in Table 1.

Table 1 - Market Capitalisation of Listed Companies Involved in Panel Proceedings (sample of 72 decisions)

Entity	**Median Market Capitalisation (AU$)**
Listed Public Company Bidders	31m
Listed Public Company Targets	26.8m
Listed Public Company Applicants	30.4m

The authors use the median rather than the average market capitalisation because of one very large target company that featured in seven matters over the period of the study and therefore tended to skew the average market capitalisation figure considerably. The median market capitalisation of publicly listed targets involved in Panel applications was $26.8 million. Notably, 41 matters (for the sample of 72 decisions of the Panel) involved targets with a market capitalisation lower than $50 million.

The median market capitalisation of publicly listed bidders involved in Panel applications was only slightly higher than that of targets, at $31 million. Again, 22, or over half of the listed bidders had a market capitalisation lower than $50 million. The authors state that both statistics support the observation that the Panel provides a forum attractive to some of the smaller companies listed on the ASX.

However, the Panel has also determined applications involving very large companies. One of the most prominent was the decision relating to the failed attempted takeover of Qantas Airways Ltd by Airline Partners Australia Ltd in 2007.[54]

Less Tactical Litigation

In chapter 2, Michael Hoyle refers to the widespread perception that existed during the first half of the Panel's existence that tactical litigation had expanded to become a key weapon for target companies in resisting takeover bids. As noted in chapter 2, a particular problem with the previous regime where courts were the main arbiter of

[52] Takeovers Panel, *Guidance Note 8 – Matter Procedures*, 2007, para 8.34.
[53] Miller, Campbell and Ramsay, above n 20, 32.
[54] *Qantas Airways Ltd 02* [2007] ATP 6; *Qantas Airways Ltd 02R* [2007] ATP 7.

takeovers disputes was that takeover bids could readily become stalled in litigation and this could result in shareholders in target companies not receiving the opportunity to consider the bid. In other words, there was the use of tactical litigation by directors of target companies with the objective of preventing bids being considered by target shareholders. One commentator has said that the 'trend towards litigation was perhaps the most striking feature of Australian takeover activity in the late 1980s'.[55]

Bruce Dyer and Marie McDonald also refer in chapter 3 to the use of tactical litigation in their analysis of the reasons for the establishment of the Panel and they document the use of tactical litigation. They note that one court referred to a trend of 'wasteful and expedient litigation, designed not for the benefit of ensuring that shareholders are properly informed but simply to buy time'.[56]

It is therefore clear that one of the key reasons for the establishment of the Panel was to minimise tactical litigation. The Panel has stated that one of its purposes is 'expressly to reduce tactical litigation'.[57]

As noted above, the Panel is broadly accessible to those who wish to have it determine a takeover dispute. However, unfettered access to the Panel is not necessarily desirable. There is an issue about whether the Panel has been the recipient of tactical applications. In the early days of the Panel there were multiple applications submitted to it as part of the one takeover bid. For example, in 2000, the first year of operation of the 'new' Panel, eight matters decided by the Panel involved one company and most of the matters decided by the Panel that year involved multiple applications. In 2003, the Panel decided 19 matters involving Anaconda Nickel Ltd.

There is evidence of the Panel become 'tougher' on parties bringing applications of little merit. For example, in one matter in 2000, the Panel stated:

> We also note the Panel's concern at the serial and adversarial nature of the matters which have been brought before it by Troy and Taipan in relation to these transactions. The Parliament's intention in introducing the recent changes to the Panel's legislation was to reduce the incidence of tactical litigation in takeovers. The applications brought by the parties to these transactions so far place the parties at serious risk of breaching those intentions…The Panel is interested to resolve material disputes between parties where genuine attempts at negotiation have failed and to ensure that it is not used for purely tactical purposes.[58]

The Panel is not obliged to commence proceedings when it receives an application. There is evidence that the Panel is increasing the proportion of matters in which it declines to commence proceedings.[59] The following information details the percentage of applications received by the Panel in which it declined to commence

---

[55] Austin, above n 38, 179 (fn 51).
[56] *Cultus Petroleum NL v OMV Australia Pty Ltd* (1999) 32 ACSR 1, 21.
[57] Takeovers Panel, *Guidance Note 5 – Specific Remedies – Information Deficiencies*, 2008, para 10(a).
[58] *Taipan Resources NL 07* [2000] ATP 18, [54]-[55].
[59] The data in this paragraph is taken from chapter 4, Table 16.

proceedings: (1) for the first three years of the Panel following the major legislative changes that commenced in 2000; and (2) for the most recent three years.

2000 – 9 per cent
2001 – 6 per cent
2002 – 13 per cent
2007 – 35 per cent
2008 – 30 per cent
2009 - 34 per cent.

This data may indicate that in the early years of the 'new' Panel it was reluctant to dismiss an application without commencing proceedings. With experience, the Panel is now more willing to dismiss applications it considers lack merit.

Consultation

A feature of the work of the Panel is the extensive consultation that it undertakes. There are multiple aspects to this consultation. The first aspect is the consultation the Panel undertakes in relation to rules and guidance notes. The Panel has issued a guidance note on the consultation process it follows in relation to rules and guidance notes.[60] The Panel states in this guidance note that it:

> considers that a transparent consultation process and clear commitment by the Panel to be responsive to submissions will mean that its guidance and Substantive Rules will:
> (a) receive better acceptance and support from the market;
> (b) restrict the efficiency of the market as little as possible;
> (c) cause fewer unwanted costs and frictions in the market;
> (d) achieve their aims more efficiently and effectively;
> (e) contain fewer loopholes; and
> (f) be more responsive to changing circumstances.

The second aspect of the consultation undertaken by the Panel is the reviews of certain of the matters it has decided. The Panel has stated that:

> As part of its commitment to continuous improvement and stakeholder relations, after each matter the Panel invites the parties to give feedback to the Panel. The feedback is made available to the applicable sitting Panel and President, and more broadly matters of general interest are raised to the wider Panel.[61]

The Panel has undertaken reviews of its decisions with the parties involved in 44 per cent of its decisions.[62]

---

[60] Takeovers Panel, *Guidance Note 10 – Public Consultation*, 2004.
[61] Takeovers Panel, *Annual Report 2008-2009*, 2009, 21. See also Takeovers Panel, *Guidance Note 8 – Matter Procedures*, 2007, paras 8.90 – 8.93.
[62] See chapter 4, Table 23.

The third aspect of the consultation process of the Panel is its liaison with market participants. For example, the Panel executive has conducted 'roadshows' in the capital cities of Australia to discuss Panel processes. In 2008-2009, over 200 market participants attended these events.[63]

The fourth aspect of the consultation processes of the Panel is in relation to any orders it proposes to make following a declaration of unacceptable circumstances. Before making the order the Panel must give to each person to whom the proposed order would be directed, as well as each party to the proceeding and ASIC, an opportunity to make submissions to the Panel about the order: *Corporations Act*, s 657D(1).

The fifth aspect of the consultation process of the Panel is in relation to its draft reasons in a matter. The Panel generally gives parties a confidential draft of its reasons and an opportunity to make submissions on issues of fact or unfair prejudice.[64]

It can therefore be seen that consultation is an important part of the operations of the Panel. It relates not only to the preparation of guidance notes but also to decisions of the Panel. The important point is that meaningful consultation is part of the Panel gaining the confidence of those who work in the takeovers area.

A Less Legalistic Approach to Takeovers Dispute Resolution

Regulation 13 of the Australian Securities and Investments Commission Regulations 2001 (Cth) provides that the objective of the regulations dealing with Panel procedures is to ensure that the proceedings are:

- as fair and reasonable;
- conducted with as little formality; and
- conducted in as timely manner;

as the requirements of the regulations and the legislation and a proper consideration of the matters before the Panel permit. This contrasts with the formality of court proceedings. However, it also contrasts with the legalistic approach that was in evidence during the first half of the Panel's existence. It was noted above that during this time the Panel received only four applications from the Commission. In one of these matters, which was decided in 1997, the Panel criticised the legalistic approach adopted to the Commission's application and it also criticised the legislation governing the Panel's operations. The Panel referred to how the matter provided:

> a clear indication of how the original legislative intention appears to have miscarried. The intention which underwrote the establishment of the Panel was to have a body of suitably qualified persons with wide commercial experience apply their knowledge and expertise, without being constrained by the laws of evidence, to determine within a short time frame whether what occurred was or was not unacceptable conduct. Instead, the

[63] Takeovers Panel, *Annual Report 2008-2009*, 2009, 21.
[64] Takeovers Panel, *Guidance Note 4 – Remedies - General*, 2008, para 44.

> Application of the ASC was subjected to a technical and legalistic examination. This statement is not a reflection on Counsel but rather the legal framework within which the Panel is required to operate.[65]

The Panel continued:

> The legislative provisions governing the Panel created a difficult environment within which the Panel was required to discharge its functions…A unique aspect of the Panel's jurisdiction is said to be that it examines infringements of the *spirit* of the Law and not *actual* breaches of that Law…this matter became very legalistic…rather than the Panel having the intended benefit of the relevant legislative provisions in dealing directly with the Parties concerned, the Conference was required to be conducted in a manner which was entirely legal in nature because of the need to comply with the relevant procedural fairness and natural justice issues... The Panel is of the view that future conferences should be conducted in a more commercial manner…In the Panel's view, much of the short time available to it to consider the matters raised by this referral were taken up with overbearing procedural issues and debate rather than concentrating on the substantive issues. This was not the intention of Parliament.[66]

Unusually for an administrative agency, the Panel then made recommendations for reform of the legislation governing its operation:

> The Panel is of the view that the procedural provisions within the legislative framework need significant reform…The most pressing need for legislative amendment is in the role of the Panel to ensure that it is conferred with greater powers to conduct inquiries without those inquiries becoming unduly legalistic…The Panel is of the view that legal representation should not be denied to the parties but the parties must be the only persons entitled to address the Panel (with legal advice available) so that there will be direct dialogue between the relevant players and the Panel members as to the matters referred to the Panel.[67]

As noted above, the legislative framework governing the Panel was amended significantly in 2000. In addition, the Panel sought to move away from a legalistic approach to determining takeovers disputes with its stated preference for parties to be represented by their commercial solicitors who have taken part in the relevant transaction rather than a litigation lawyer or a barrister.[68]

Part of the shift away from the earlier legalistic approach to determining takeovers disputes is a focus on:

---

[65] *Re Australian Securities Commission and John Fairfax Holdings Ltd* (1997) 25 ACSR 441, [1.9].
[66] Ibid, [8.1].
[67] Ibid, [8.2].
[68] Takeovers Panel, *Guidance Note 8 – Matter Procedures*, 2007, para 8.34.

- ensuring where possible that a takeover bid proceeds so that target company shareholders can consider the bid; and
- commercial settlements.

These objectives have been expressly articulated by the Panel.[69]

A Focus on Policy

A foundation of the work of the Panel is its focus on policy issues. The Panel is required by the legislation to have regard to the purposes of Chapter 6 of the *Corporations Act* set out in s 602 when exercising its powers to make a declaration of unacceptable circumstances: *Corporations Act*, s 657A(3). These purposes include that the acquisition of control over listed companies and certain other entities takes place in an efficient, competitive and informed market. This focus on policy issues is an advantage of the Panel when compared to courts given the nature of takeovers regulation. Some limitations concerning the abilities and expertise of courts in relation to policy issues have been noted by a former Chief Justice of the High Court of Australia:

> courts have been ill-equipped or reluctant to grapple with policy issues which often must be examined before one can decide that an existing rule is no longer serving a useful purpose and that it should be replaced by another and better rule. The inductive and analogical reasoning by which the courts have traditionally proceeded is not appropriate to the resolution of such questions.[70]

It has also been argued that courts lack the flexibility, expertise, initiative and powers of coordination which are necessary to deal with complex regulatory problems when compared with specialist regulatory agencies.[71]

Government Support

A factor that will affect the success of an administrative agency is the support the agency receives from the government. This support can be reflected in a number of ways including the budget for the agency. The Takeovers Panel has, since 2000, received strong support from the government. First, the Panel receives a budget that is sufficient for it to undertake the functions it is given under the legislation. For the financial year 2008-2009 the Panel received approximately $1.96 million from the government to fund its operations.[72] Second, the government responded promptly to amend the *Corporations Act* when two decisions of a judge of the Federal Court in

---

[69] Takeovers Panel, *Guidance Note 5 – Specific Remedies – Information Deficiencies*, 2008, paras 16(b) and 29.
[70] Sir Anthony Mason, 'Australian Law for Australia'. Address to the 27th Australian Legal Convention, September 1991, reprinted in (1991) 26 *Australian Law News* 14.
[71] CR Sunstein, 'Law and Administration After Chevron' (1990) 90 *Columbia Law Review* 2071.
[72] Takeovers Panel, *Annual Report 2008-2009*, 2009, Table 2, 27.

2006 and 2007 threatened the efficient operation of the Panel.[73] This is discussed further in chapters 2 and 6. Third, the government has appointed members to the Panel who are in a position to make an effective contribution to the work of the Panel through their knowledge and expertise. The Panel has not suffered the problem that can beset some agencies of political appointments.

Effective Leadership and an Expert Executive

The Panel has benefitted from the effective leadership of its President and an executive with considerable expertise. Simon McKeon was appointed President of the Panel in 1999 and served with great distinction in that role until 31 August 2010. The responsibilities of the President include:

- liaising with the Minister, Government, Treasury and stakeholders;
- reviewing the performance of the executive;
- appointing members to constitute sitting Panels; and
- considering the interests of sitting Panel members for possible conflicts.[74]

The President also regularly sits on matters.

In relation to the executive, the Panel states in its most recent annual report that the role of the executive is to assist the Panel in making consistent, timely and commercial decisions. This role includes:

- administrative and legal support for Panel members;
- liaison with market practitioners, ASIC's takeovers staff and ASX; and
- providing an interface to prospective parties (for example, discussing issues and providing a perspective on takeovers policy as it may apply to current takeovers).[75]

The key members of the executive are the director and counsel. The individuals who have occupied these positions have come to the Panel with extensive regulatory experience of takeovers. In addition, the Panel has lawyers seconded from law firms to assist with the handling of matters and two administrative staff.

Summary

The Panel's success in the past 10 years can be attributed to a number of reasons. They include the independence of the Panel; the government strengthening the role of the Panel in takeovers disputes; the influence of the Panel on market practice; the timeliness of the decision-making process of the Panel; and its approach to resolving takeovers disputes. No doubt other reasons for the success of the Panel could be suggested. However, the reasons discussed in this section explain, to a large extent, why the Panel enjoys the confidence of those who are actively engaged in takeovers.

---

[73] See n 44 above for these two judgments. The government responded by enacting the *Corporations Amendment (Takeovers) Act 2007* (Cth).
[74] Takeovers Panel, *Annual Report 2008-2009*, 2009, 23-24.
[75] Ibid, 7.

Overview of the Chapters

Having discussed the role of the Panel and considered some of the reasons for its success, this section provides a brief overview of the chapters in this book. In chapter 2, Michael Hoyle reviews in more detail the functions and powers of the Takeovers Panel. However, as he observes, in order to understand the Panel's current functions and powers it is necessary to examine the policy debates that lay behind the establishment of the 'new' Panel in 2000. Importantly, this chapter traces the development of key aspects of the regulation of takeovers in Australia. Turning to the current operation of the Panel, the author discusses: (1) the constitution of the Panel; (2) the power of the Panel to make a declaration of unacceptable circumstances, to make orders and accept undertakings, to make rules, and to review certain decisions of ASIC; and (3) Review Panels. He concludes by discussing some powers the Panel does not have such as an advance rulings power and the power to deal with disputes relating to schemes of arrangement.

In chapter 3, Bruce Dyer and Marie McDonald explore reasons why the Takeovers Panel was established. They consider that the three most important reasons were regulation according to 'the spirit, not just the letter of the law', independent peer review, and an efficient dispute resolution process.

In chapter 4, Emin Altiparmak, Jemima O'Callaghan, Jerome Santamaria and Jon Webster provide an assessment of the work of the Panel during the last 10 years. They analyse the 322 applications that have been made to the Panel in the period 2000-2009. Some of their findings include:

- the percentage of applications brought by bidders (33.5 per cent) and targets (30.4 per cent) is almost the same, with shareholders being the third largest category of applicants (18.9 per cent) and ASIC bringing only 8 applications;
- Panel applications generally track takeover activity – the industry with the highest percentage of Panel applications is metals and mining and this is also the industry with the highest percentage of takeover bids;
- the vast majority of applications to the Panel involve applications for declarations and orders and only a small percentage relates to applications to review ASIC decisions;
- the most common ground on which applications are made to the Panel is that of insufficient information;
- the Panel declined to conduct proceedings in 21.1 per cent of the applications (there was also a small number of matters where the Panel declined to commence proceedings because one of the parties gave an undertaking); and
- the median time taken by the Panel to make a decision is 13 days (the average is 16.2 days) and the median time taken by the Panel from the time of making its decision to the time of publication of its reasons is 24 days (the average is 45.7 days). However, there has been a significant decline in the time taken to publish reasons in the last two years. For 2008-2009, the median time taken by the Panel from the time of making its decision to the time of publication of its reasons was 5 days (the average was 7.1 days).

The authors present a wealth of other data including the types of orders sought by applicants and the types of orders made by the Panel (including interim orders), the types of undertakings given to the Panel, and the number and outcome of review applications.

In chapter 5, Alison Lansley and Kate Johnson examine three issues that have figured prominently in decisions of the Takeovers Panel in the last 10 years: lock-up devices, disclosure, and rights issues. The authors argue that in relation to each of these issues the Panel has had a significant impact on market practice. For example, the authors state that the quality of disclosure in the areas focussed on by the Panel has improved. Rights issues (issues of shares by a company to its existing shareholders) have proved to be controversial to the extent that they can influence control of a company when some shareholders do not take up their entitlement and the rights issue is underwritten by a major shareholder in the company. The Panel has identified a number of factors it will examine in determining whether a rights issue gives rise to unacceptable circumstances, including the company's circumstances (such as its financial situation and what capital raising alternatives to the rights issue it has explored), the structure of the rights issue, and the effect of the rights issue on control of the company.

In chapter 6, Emma Armson considers judicial review of Takeovers Panel decisions. The author commences by outlining how the system of judicial review applies to Panel decisions and then moves to examine the key court judgments – the two Glencore judgments, the High Court decision in Alinta upholding the constitutionality of the Panel and the CEMEX judgments. The author concludes by observing that there are likely to be future judicial review challenges to Panel decisions and she notes the tension between Parliament's policy objective that litigation should not be used to affect the outcome of a takeover bid as disputes about takeovers should be determined by the Panel and the fact that judicial review is a necessary part of a system of dispute resolution – including the system of which the Panel is a part.

In chapter 7, Rodd Levy and Neil Pathak outline proposals to enhance the effectiveness and the role of the Panel. Their proposals include: (1) the appointment of some full time members to the Panel; (2) greater use of conferences by the Panel; (3) Parliament clarifying the scope of the prohibition in the *Corporations Act* on when court proceedings can be initiated; and (4) giving the Panel expanded powers to grant exemptions and modifications of the takeovers law (a power currently vested in ASIC), to excuse certain contraventions of the law, to intervene directly in a takeover dispute without having to wait to receive an application, and to grant advance rulings on whether given circumstances would be regarded as unacceptable. The authors propose that the Panel would be the sole regulatory body for issuing guidance and policy in relation to takeovers and that ASIC's current functions in these areas should be shifted to the Panel. The authors also discuss whether the supervisory role of schemes of arrangement should be shifted from the courts to the Panel.

Conclusion

Almost 20 years after the establishment of the Takeovers Panel it is important to reflect upon the successes of the Panel as well as the challenges that it has confronted. Both are documented in this book. With only four applications from 1991 to 2000, the first half of the Panel's existence was not successful. The Panel struggled, among

other things, with limited jurisdiction, a regulator not willing to bring applications to it, and a legal framework which restricted its operations. The second half of the Panel's existence stands in marked contrast to the first half. An objective of this chapter, in addition to reviewing the role of the Takeovers Panel and takeovers regulation more generally, has been to explore the reasons for this fundamental change. The reasons demonstrate the value of peer review dispute resolution in the context of takeovers. However, the Panel commenced with this objective of peer review dispute resolution so additional reasons are needed to explain the success of the Panel. These reasons include the support the Panel has received from the government and the flexibility and initiative the Panel has shown in adapting to new circumstances. After all, the government may amend the legislation to grant additional powers to the Panel but this, in itself, is no guarantee of success. Ultimately, the success of the Panel rests on the quality of its decisions and the way in which the Panel has improved standards in the conduct of takeovers. In this respect, the evidence is that the Panel has made an important contribution and that this is valued by those who work in the takeovers area.