

Chapter 2

Oversight of the Takeovers Panel

Introduction

2.1 This chapter discusses the committee's inquiries into the activities of the Takeovers Panel (the Panel) as required under section 243(a)(i) of the ASIC Act. The Takeovers Panel was established by Part 10 of the ASIC Act as a peer review body largely comprised of takeover experts. The main purpose of the Panel is to resolve takeover disputes.¹ A takeover dispute may arise if a party to a takeover bid considers that unacceptable circumstances have arisen during the takeover bid.

2.2 A takeover under chapter 6 of the *Corporations Act 2001* (Corporations Act) involves the acquisition of control over voting shares or voting interests in listed companies and unlisted companies with more than 50 members and listed managed investment schemes:²

Under s659B of the Corporations Act, private parties to a takeover no longer have the right to commence civil litigation, or seek injunctive relief from the courts in relation to a takeover, while the takeover is current.³

2.3 A party to a takeover bid may make an application to the Takeovers Panel to seek a resolution of a dispute. During a takeover bid the Panel is able to declare unacceptable circumstances with respect to the public interest in relation to the affairs of a company, in addition to establishing orders to remedy those circumstances.⁴

The Panel has the power to make orders to protect the rights of persons or groups (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.⁵

1 The Takeovers Panel, *About the Panel*, http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=about/about_the_panel.htm, (accessed 21 October 2014).

2 The Takeover Panel, *Summary of takeover provisions in Australia*, http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=panel_process/summary_of_takeover_provisions_in_australia.htm, (accessed 21 October 2014).

3 The Takeover Panel, *Role of the Takeovers Panel*, http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=about/about_the_panel.htm, (accessed 21 October 2014).

4 *Corporations Act 2001*, s. 657A, s. 657D.

5 The Takeover Panel, *Role of the Takeovers Panel*, http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=about/about_the_panel.htm, (accessed 21 October 2014).

2.4 The Panel aims to improve the certainty, efficiency and fairness of Australia's takeovers market. The Panel is also able to review decisions made by ASIC.⁶

Members of the Takeovers Panel are nominated by the Minister and appointed by the Governor-General. Members are chosen so that there is a mix of expertise, geographical representation and gender.⁷ On 19 October 2014, the Takeovers Panel had 41 members, slightly fewer than the 48 members it had on 30 June 2013.⁸

2.5 The committee is required to inquire into the activities of the Takeovers Panel under section 243(a)(i) of the ASIC Act. The committee has already reported on the 2012–13 annual report of the Takeovers Panel.⁹ In this report, the committee examines:

- trends in the matters dealt with by the Takeovers Panel; and
- proposals for reform of the Takeovers Panel.

Trends in the matters dealt with by the Takeovers Panel

2.6 This section discusses the committee's consideration of trends in how the Takeovers Panel dealt with applications to have matters considered by it.

2.7 During the 2012–13 financial year the Takeovers Panel received 20 applications to have matters considered. That number is below the yearly average of 30 applications, though greater than the 16 applications received in the previous year.¹⁰

2.8 Under section 658A of the Corporations Act, the Panel may dismiss an application if it is satisfied that the application is frivolous or vexatious.¹¹ In 2012–13, the Takeovers Panel declined to conduct proceedings for 50 per cent of the applications it received. Over the previous decade the proportion of applications for which the Takeovers Panel declined to conduct proceedings has grown steadily from 6 per cent in 2001 to 50 per cent in 2012–13.¹² In 2010 it was suggested that the trend:

6 Takeovers Panel, *Annual Report 2012–13*, p. 7.

7 Takeovers Panel, *Annual Report 2012–13*, p. 8.

8 The Takeovers Panel, *Panel members*, http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=about/panel_members.htm, (accessed 19 October 2014); Takeovers Panel, *Annual Report 2012–13*, p. 1.

9 Parliamentary Joint Committee on Corporations and Financial Service, *Report on the 2012–13 annual reports of bodies established under the ASIC Act*, March 2014, pp 11–14.

10 Takeovers Panel, *Annual Report 2012–13*, p. 3.

11 *Corporations Act 2001*, s. 658A.

12 Takeovers Panel, *Annual Report 2012–13*, p. 5.

...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.¹³

2.9 Mr Allan Bulman, Director of the Takeovers Panel, informed the committee that the Takeovers Panel was considering the trend:

It is true that this year so far there have been considerably more matters where the [P]anel has declined to conduct proceedings. It should be noted that around that time mergers and acquisitions activity has been relatively low, and that might be a factor that goes to it. The other thing I would also say is that the [P]anel, with the executive, meets a couple of times a year to discuss things such as trends, and certainly this trend will be discussed and debated at length. It is hard to really know whether you can read a lot into why it has occurred.¹⁴

Proposals for reform of the Takeovers Panel

2.10 This section discusses proposals for reform of the Takeovers Panel that have been raised in recent years.

2.11 In a 2010 publication on the Takeovers Panel, Rodd Levy and Neil Patak discussed several potential areas for reform:

- improving the speed, uniformity and informality of decision-making by the Panel;
- reducing the overlap in the jurisdiction of the Takeovers Panel, ASIC and the courts, including in relation to schemes of arrangement;
- expanding the role and powers of the Takeovers Panel to enable it to grant exemptions, give advance rulings, and intervene directly in a takeover; and
- adjusting application fees, potentially scaling fees by the bid size and giving the Takeovers Panel the power to order costs or reimbursement.¹⁵

13 Ian Ramsay, *The Takeovers Panel and Takeovers Regulation in Australia*, Melbourne University Publishing Ltd, December 2010, p. 25.

14 Mr Allan Bulman, Director, The Takeovers Panel, *Committee Hansard*, 28 March 2014, p. 1.

15 Rodd Levy and Neil Patak, *The Takeovers Panel and Takeovers Regulations*, edited by Ian Ramsay, Melbourne University Publishing Ltd, 2010, Chapter 7.

2.12 Findlaw Australia also proposed reforms to the Takeovers Panel's powers to give rulings and the scheme of arrangements process.¹⁶ In an article on improving efficiencies in takeovers, Rodd Levy argued for enhancements to the Takeovers Panel, including giving the Panel the power to grant exemptions or power to make modifications to the law, the power to make binding advance rulings, and greater funding through modest fees on bidder statements.¹⁷

2.13 The Business Law Section of the Law Council of Australia conducted a survey on the Takeovers Panel in 2010 and reported on potential areas for improvements and reform including:

- consistency and predictability;
- whether the legal principles provide adequate guidance;
- evidence gathering by the Takeovers Panel;
- transparency of appointments to the Takeovers Panel;
- whether the Takeovers Panel's guidance notes are specific enough; and
- whether jurisdiction for schemes of arrangement should be moved from ASIC to the Takeovers Panel.¹⁸

2.14 In 2013, the Treasury published a scoping paper on takeovers issues that identified a number of potential areas for reform including creeping acquisitions, use and disclosure of equity derivatives, clarity of takeovers proposals, disclosure of associations and the impact of new media.¹⁹ The Treasury informed the committee about the outcome of the consultation on the scoping paper, indicating that there were a wide range of views on each of the particular issues identified in the scoping paper. The former government did not make any findings or conclusions following the consultation process.²⁰ The Treasury also informed the committee about amendments to the takeovers framework since the consultation process:

16 Findlaw Australia, *Top 10 Takeovers reforms*, <http://www.findlaw.com.au/articles/1539/top-10-takeover-reforms.aspx>, (accessed 20 March 2014).

17 Rodd Levy, Herbert Smith Freehills, *Improving efficiencies in takeovers*, 7 February 2013, <http://www.herbertsmithfreehills.com/insights/legal-briefings/improving-efficiencies-in-takeovers>, (accessed 20 March 2014).

18 Business Law Section of the Law Council of Australia, *Report on the Survey on the Takeovers Panel conducted in May 2010*, pp 4–12.

19 The Treasury, *Takeovers issues – Treasury scoping paper*, 2013, pp 1–3.

20 The Treasury, *Answer to written question on notice 11 April 2014*, received on 30 April 2014.

Since the completion of the roundtables in 2012, the takeovers framework has been amended by the Corporations and Australian Securities and Investments Commission Regulations 2013 which removed the need for the Takeovers Panel to provide statements of reasons at the same time as declining to conduct proceedings; and facilitated the use of Takeovers Panel conferences by removing the requirement to make a transcript of the conference and to enable suitable technology to be used to facilitate communication.²¹

...the Corporations Legislation (deregulation and other measures) Bill...was released on 10 April 2014. The draft Bill includes possible amendments to the ASIC Act to ensure that the Takeovers Panel President and members can exercise their functions while outside of Australia; and facilitate the operation of acting Presidents of the Panel when the President is not available.²²

2.15 At the time of preparing this report, the Corporations Legislation (deregulation and other measures) Bill 2014, had not been introduced.

Positive views of the Takeover's Panel operations

2.16 The committee received a private briefing from an industry expert and submissions from the Financial Services Institute of Australia (FINSIA) and Business Law Section of the Law Council of Australia. The briefing and the submissions noted many positive aspects of the operations of the Takeovers Panel.

2.17 The Business Law Section of the Law Council of Australia in its 2010 survey identified areas where the Panel was working well, including that:

- there has been a significant improvement in market standards and in the efficiency of resolution of disputes regarding takeovers since the introduction of the Panel in its present form;
- the Panel provides for the prompt resolution of disputes in the takeovers context, while ensuring that the outcome of bids have been decided on the basis of their commercial merit;
- the Panel strikes a reasonable balance between having regard to legal principles and adopting an informal and non-legalistic approach in its decision-making which is inherent in its success in resolving disputes;
- the arrangements have avoided the costly, delaying and disruptive litigation which used to be common in the takeovers arena;
- the Panel gives sufficient regard to legal principles contained in the Corporations Act in its decision making and is significantly better equipped than the courts to apply these principles and has been doing so effectively;

21 The Treasury, *Answer to written question on notice 11 April 2014*, received on 30 April 2014.

22 The Treasury, *Answer to written question on notice 11 April 2014*, received on 30 April 2014.

- the move in recent years to more simple Panel documents has been beneficial;
- the Panel’s guidance notes are generally satisfactory; and
- the Panel’s reasons achieve the right balance between length and guidance as to what constitutes unacceptable circumstances.²³

2.18 In its submission, FINSIA indicated its positive view on current arrangements for the Takeovers Panel, while proposing some reforms:

[FINSIA] broadly believes that the current arrangements for the Takeovers Panel provide a mechanism for the efficient and effective resolution of takeover disputes. It believes the Takeovers Panel is well staffed, resourced and appropriately funded at current levels. It is supportive of a peer review body that is comprised of leading decision-makers with vast commercial experience who can comprehend the many factors that are required to be assessed in all transaction disputes. We also note that the appeal mechanism functions and operates well.²⁴

FINSIA’s consultation and research supports a Takeovers Panel that operates in a transparent, consistent and predictable manner to maintain the efficient and effective resolution of disputes. We strongly believe that it currently operates well and only propose reform to provide a “truth in takeovers” Guidance Note and for the [P]anel’s powers to award costs being broadened to improve the process for vetting obstructive applications.²⁵

2.19 The committee questioned the Takeovers Panel on whether it considered there were areas that needed to be reformed. Mr Bulman informed the committee that the Panel is able to deal with issues as they arise under its current framework:

I will hark back to the fact that Treasury in 2012 actually had a look at these issues such as creeping acquisitions, and they went to every major business location in Australia. We were there as well, as were ASIC and a number of other stakeholders. There was generally a feeling expressed there that the system is working reasonably well and there are no overly concerning trends that are occurring in the Australian market. That is not to say there may not be issues in the future that we might have to deal with, but I think the strength of the panel is that it is a principles-based body that can deal with developing issues when they arise.²⁶

23 Business Law Section of the Law Council of Australia, *Submission 2*, pp 1–2.

24 Financial Services Institute of Australia, *Submission 1*, p. 1.

25 Financial Services Institute of Australia, *Submission 1*, p. 2.

26 Mr Alan Bulman, Takeovers Panel, *Committee Hansard*, 28 March 2014, p. 3.

Committee view

2.20 During public hearings the committee examined some of the proposals for reform, relating to consistency and predictability of decisions,²⁷ truth in takeovers guidance,²⁸ powers to award costs,²⁹ creeping acquisitions,³⁰ ASIC reviews,³¹ advance rulings,³² seeking evidence,³³ Panel involvement in schemes of arrangement,³⁴ and fee increases.³⁵ Based on the evidence before it including the evidence discussed above from the Takeovers Panel and the Treasury consultation process, the committee considers that the Takeovers Panel is working effectively. The committee considers that while a number of the proposals for reform may have merit, the committee is not making any recommendations for changes at this time.

27 *Committee Hansard*, 28 March 2014, pp 6–7.

28 *Committee Hansard*, 28 March 2014, p. 2.

29 *Committee Hansard*, 28 March 2014, p. 2.

30 *Committee Hansard*, 28 March 2014, pp 2–3.

31 *Committee Hansard*, 28 March 2014, p. 5.

32 *Committee Hansard*, 28 March 2014, p. 7.

33 *Committee Hansard*, 28 March 2014, p. 7.

34 *Committee Hansard*, 28 March 2014, pp 6, 9–10.

35 *Committee Hansard*, 28 March 2014, p. 10–11.

