



**Australian Government**

**Takeovers Panel**

## **Submission to the Senate Economics References Committee's Inquiry into Penalties for White Collar Crime**

### **EXECUTIVE SUMMARY**

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1. The Takeovers Panel (the **Panel**) welcomes the opportunity to make this submission to assist the Senate Economics References Committee with its inquiry into the inconsistencies and inadequacies of current criminal, civil and administrative penalties for corporate and financial misconduct or white-collar crime. Thank you for allowing our late submission.
2. We support a review to address making available additional penalties that would increase deterrence, as well as promote confidence and fairness in our regulation system.
3. This submission outlines:
  - (a) the role of the Panel in considering unacceptable circumstances in relation to a takeover or the control of an Australian company or listed managed investment scheme
  - (b) the powers of the Panel to make orders in light of unacceptable circumstances and
  - (c) recommendations for broadening the powers of the Panel to provide for cold shoulder and disgorgement orders for serious contraventions of law and other circumstances.

### **ROLE OF THE TAKEOVERS PANEL**

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#### **Introduction**

4. The Panel is the primary forum for resolving disputes about a takeover bid until the bid period has ended. While the Panel has exclusive jurisdiction in relation to a takeover during the bid period,<sup>1</sup> its power extends beyond takeover bids to other control transactions such as rights issues, buy-backs and other reductions of capital.
5. The Panel is a peer review body, with part time members appointed from the active members of Australia's takeovers and business communities. The Panel seeks to decide disputes in a speedy manner by focusing primarily on commercial and policy issues.
6. The Panel's primary power is to declare circumstances unacceptable in relation to a takeover or the control of an Australian company or listed managed investment scheme. The Panel's jurisdiction to consider a matter is limited to where a person

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<sup>1</sup> Section 659B. References are to the *Corporations Act 2001 (Cth)* unless otherwise indicated

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who has standing makes an application to the Panel.<sup>2</sup> An application to the Panel may also be made by the Australian Securities and Investments Commission (ASIC).

7. When an application is made, the President of the Panel appoints three members to be the “sitting Panel” and the sitting Panel must consider whether it will conduct proceedings in relation to the matter. The Panel’s proceedings are informal and conducted in private.
8. The Panel also has the power to review decisions of ASIC regarding whether to grant exemptions or modifications to Chapter 6 or Chapter 6C during the life of a takeover.<sup>3</sup>
9. The Panel also has a function of reviewing its own, first instance, decisions concerning unacceptable circumstances.<sup>4</sup> A Panel reviewing the first instance decision of another Panel consists of different members. There can be only one review of an original Panel decision.

### Declaration of Unacceptable Circumstances

10. The Panel may only declare circumstances to be unacceptable if the circumstances:
  - (a) are unacceptable having regard to their effect on:
    - (i) the control, or potential control, of the company or another company or
    - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company or
  - (b) are otherwise unacceptable having regard to the purposes of Chapter 6 set out in s602 or
  - (c) are unacceptable because they contravene or are likely to give rise to a contravention of Chapter 6, 6A, 6B or 6C.<sup>5</sup>
11. Accordingly, the Panel may declare circumstances to be unacceptable circumstances whether or not the circumstances constitute a contravention of a provision of the Corporations Act.
12. The Panel may only make a declaration, or only decline to make a declaration, if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant. This generally means that the Panel will consider issues beyond the commercial interests and convenience of the parties in a proceeding to such things as the policy of the legislation and the signal the decision may send the market and the wider investing community.
13. In exercising its powers, the Panel must have regard to the purposes of Chapter 6 set out in s602, the other provisions of Chapter 6 and any rules or matters

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<sup>2</sup> Section 657C

<sup>3</sup> Section 656A

<sup>4</sup> Section 657EA. The Panel has an additional review function if a matter is referred from the court, under s657EB

<sup>5</sup> Section 657A

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specified in the regulations and may also consider any other matters it considers relevant.

14. Section 602 sets out the purposes of Chapter 6 (primarily the 'Eggleston principles') that are to ensure that:
  - (a) the acquisition of control over voting shares in a listed company, an unlisted company with more than 50 members or a listed body or managed investment scheme takes place in an efficient, competitive and informed market
  - (b) the holders of shares and directors of the company, body or the responsible entity:
    - (i) know the identity of any person who proposes to acquire a substantial interest in the company, body or scheme
    - (ii) have a reasonable time to consider the proposal and
    - (iii) are given enough information to enable them to assess the merits of the proposal and
  - (c) as far as practicable, the holders of shares in the relevant class all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the company, body or scheme<sup>6</sup> and
  - (d) an appropriate procedure is followed as a preliminary to compulsory acquisition.

### Power and Approach to Orders

15. The Panel may only make an order if it has declared circumstances to be unacceptable.<sup>7</sup>
16. The Panel has the power to make any order (including a remedial order but not an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C) that it thinks appropriate to protect rights or interests affected by the unacceptable circumstances or to ensure (as far as possible) that a bid proceeds as if the unacceptable circumstances had not occurred.<sup>8</sup>
17. A remedial order<sup>9</sup> includes an order:
  - (a) restraining the exercise of voting or other rights attached to securities
  - (b) restraining the acquisition or disposal of securities
  - (c) directing the disposal of securities
  - (d) vesting securities in ASIC
  - (e) cancelling or declaring voidable a contract or offer related to a takeover bid or acquisition of securities and

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<sup>6</sup> The Panel must take into account the actions of the directors in having regard to the purpose set out in s602(c)

<sup>7</sup> Section 657D(1)

<sup>8</sup> Section 657D(2)

<sup>9</sup> Section 9

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- (f) directing a person to give specified information to shareholders.
18. Other orders the Panel has made include orders to:
- (a) extend the bid period
  - (b) establish withdrawal rights for shareholders who have accepted a bid and
  - (c) make a payment to any person or group of persons who are or are likely to be affected by the circumstances.
19. The Panel may expressly or impliedly reprimand a party or adviser, for example, in the Panel's published reasons for its decision or, less commonly, through a media release.<sup>10</sup>
20. The Panel receives its power from the Corporations Act and the Australian Securities and Investments Commission Act 2001 and cannot exercise judicial power. Judicial power of the Commonwealth may only be vested in a court. Accordingly, the Panel cannot make punitive orders.<sup>11</sup>
21. While the Panel does not seek to punish when deciding on a remedy, the remedy may adversely affect a person, provided it is not unfairly prejudicial. So, for example, the Panel may take away an advantage obtained through unacceptable circumstances (say, by way of a payment order) for the purpose of preventing or correcting the effect of unacceptable circumstances on the market in securities or on a bid or to protect investors adversely affected by the circumstances, but not for its own sake or as punishment.
22. In the event of non-compliance with a Panel order, the Panel, ASIC, a party or a person to whom the order relates may apply to the Court for an order to secure compliance.<sup>12</sup> The Court may make any orders it considers appropriate to secure compliance with the Panel's order.
23. The Panel may order a party or another person to bear costs.<sup>13</sup> However, the Panel's approach to cost orders, generally speaking, is to allow a party to make, or resist, an application once without exposure to a costs order, provided it presents a case of reasonable merit in a businesslike way.

### RECOMMENDATIONS

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24. In addressing the inquiry's terms of reference, we have focused on a type of banning order known as a cold shoulder order and the availability and use of mechanisms to recover wrongful gains in the form of a disgorgement order.

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<sup>10</sup> See for example the Panel's media release in the case of *Skywest Limited 03R* [2004] ATP 20: [http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=media\\_releases/2004/082.htm&pageID=&Year=2004](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=media_releases/2004/082.htm&pageID=&Year=2004)

<sup>11</sup> See *Austral Coal Limited 02RR* [2005 ATP 20 at [306] and *Rinker Group Limited 02R* [2007] ATP 19 at [122] quoting *Precision Data Holdings* (1999) 173 CLR 167 at [188] and [192] and *Australian Pipeline Limited v Alinta Limited* [2006] FCA 1378

<sup>12</sup> Section 657G

<sup>13</sup> Section 657D(2)(d)

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### Cold Shoulder Order

25. A cold shoulder order is effectively an order that prevents a person who has failed to comply with a law or an order from engaging in financial markets for a period of time.
26. The purpose of a cold shoulder order is to ensure that other market participants are not exposed to the trading activities of those who have demonstrated that they are not willing to comply with laws or orders.
27. Cold shoulder orders are available in other jurisdictions which follow a takeovers panel model like Australia such as the United Kingdom and Hong Kong. In both jurisdictions, a cold shoulder order is considered a serious sanction and is imposed infrequently. In the United Kingdom, for example, a cold shoulder order has only been used on two occasions. For a summary of the comparative sanctions available to the Panel on Takeovers and Mergers in the United Kingdom and the Takeovers and Mergers Panel in Hong Kong and the process for imposing such sanctions, see Appendix A.
28. In the context of the Panel's jurisdiction, a cold shoulder order would require certain professionals (such as Australian financial services providers,<sup>14</sup> for example) not to act or continue to act in their professional capacity for a person for whom such an order applies (or any corporation controlled by such person) either in a transaction subject to Chapter 6, 6A, 6B or 6C or, possibly, in any transaction. The order would be for a specified period of time determined by the Panel to be appropriate in the circumstances.
29. A person subject to such an order would be a person whose conduct or action has resulted in, or contributed to, unacceptable circumstances.
30. We would consider guidelines for when it is appropriate for the Panel to make such an order. We would expect a cold shoulder order to be made very rarely and only in circumstances where there has been a serious contravention of Chapter 6, 6A, 6B or 6C, a breach of an order of the Panel or other egregious circumstances. Examples of such circumstances may include:
  - (a) a bidder who makes a takeover bid without the funding to pay for such bid
  - (b) the forging of acceptances in a takeover bid and
  - (c) share 'warehousing'.
31. These are circumstances where the market should be protected from a person engaging in these action. In addition to protecting the market, a cold shoulder order provides a genuine deterrent to persons intent on engaging in such circumstances. The availability of the order would provide the Panel with an additional tool which would enhance the effectiveness of the Panel, in addition to bringing it into line with other comparable jurisdictions.

### Disgorgement Order

32. A disgorgement order is an order requiring a person to repay gains (or losses avoided) that arise from wrongdoing. The purpose of the order is to ensure that

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<sup>14</sup> An Australian financial services provider would include any Australian financial services licensee under s913B and any representative of a licensee under s910A(a)

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such persons do not profit from their wrongdoing. It is different from a payment order which the Panel can make to correct the effect of unacceptable circumstances by making a payment to affected persons. Disgorgement prevents the unjust enrichment of the wrongdoer.

33. Disgorged money may be paid to the government, directed to compensation funds or into investor education or advocacy programs.
34. Disgorgement is available in many jurisdictions. For example, in the United States, the Securities and Exchange Commission has legislative authority to enter an order requiring accounting and disgorgement in any proceeding in which it or the appropriate regulatory agency may impose a penalty.<sup>15</sup>
35. We consider a disgorgement order as an appropriate order for the Panel in certain matters where it has made a declaration of unacceptable circumstances and orders that protect the rights and interests of persons affected, but such orders either leave the person the subject of the order with a financial gain or the Panel's orders themselves result in such financial gain.
36. For example, where the Panel makes a divestment order for shares that were acquired illegally, it may be appropriate that any profit which is made by the person the subject of the order be directed to a third party (such as the company, the company's shareholders or the Commonwealth).
37. A disgorgement order may be viewed as protective given that it deprives the wrongdoer of an advantage obtained by the wrongdoing, in particular, where the gains are disgorged to recipients in circumstances that mitigate the detriment recipients suffered from the wrongdoing.<sup>16</sup> However, it is possible that such an order may be viewed as punitive if the gains are directed to the Commonwealth. The validity of the power of the Panel to make a disgorgement order would need to be properly considered.
38. Making available a disgorgement order would strengthen the Panel's role which is to *"look not only at the letter of the Corporations 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"*.<sup>17</sup> There is often a sense of frustration within the business community when a wrongdoer is allowed to benefit from the wrongdoing as is the case where the wrongdoer makes a profit upon divestment of its shares. In addition, a disgorgement order would have considerable deterrent effect.

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<sup>15</sup> Section 21B(e) of the Securities Exchange Act of 1934. For a discussion regarding the availability of disgorgement in other jurisdictions, see ASIC Report 387 Penalties for corporate wrongdoing at [65]-[69]: <http://download.asic.gov.au/media/1344548/rep387-published-20-March-2014.pdf>

<sup>16</sup> See *ASIC v Yandal Gold Pty Ltd* 32 ACSR 317 at 354-355 per Merkel J at first instance. Approved by the Full Court on appeal in *Edensor Nominees v ASIC* [2002] FCA 307 at [50]: "We also reject the contention put on behalf of Edensor that, in making the order for the disgorgement by Edensor of the sum of \$28.5m, the primary judge was imposing a fine or penalty upon Edensor... The focus of the primary judge... was upon making an appropriate remedial order, including relevantly an order depriving Edensor of the benefit it received...." Also see *Metals Exploration v Samic* (1994) 12 ACLC at [43]

<sup>17</sup> *Attorney-General of the Commonwealth of Australia v Alinta Limited & Ors* [2008] HCA 2 at [45]

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**Appendix A**

**Hong Kong**

1. In Hong Kong, the Takeovers Code and the Share Buy-backs Code (the **Codes**) are administered by the Takeovers Executive (the Executive Director of the Corporate Finance Division of the Securities and Futures Commission (**SFC**) or any delegate of the Executive Director). The Executive undertakes the investigation of takeovers, mergers and share buy-backs and monitors related dealings. It gives rulings on all matters to which the Codes apply. While the Executive may act of its own volition, rulings are more often requested by an interested party.
2. The Takeovers and Mergers Panel (the **HK Panel**) is a committee of the SFC. The Panel reviews rulings by the Executive at the request of any party dissatisfied with such a ruling. It also considers, at first instance, novel, important or difficult cases referred to it by the Executive.
3. The Executive may also institute disciplinary proceedings before the HK Panel when it considers that there has been a breach of a Code or of a ruling of the Executive or the HK Panel. A disciplinary action is treated as a separate action from requiring compliance with, or requiring that action be taken to remedy a breach of the Codes. In such a case, the Executive invites the person concerned to appear before the HK Panel. If the HK Panel finds there has been a breach, it may impose any of the following sanctions: *(asterisked items are powers that Australia's Takeovers Panel currently has)*
  - (a) issuance of a public statement which involves criticism\*
  - (b) public censure
  - (c) a cold shoulder order requiring licensed corporations, representatives, institutions or individuals for a stated period not to act or continue to act in any or a stated capacity for any person who has failed to comply, or intends not to comply, with either the Codes or a ruling
  - (d) banning advisors from appearing before the Executive or the HK Panel for a stated period\* or
  - (e) requiring further action as the HK Panel thinks fit.\*
4. The Executive may itself deal with a disciplinary matter if the party agrees to the disciplinary action proposed to be taken by the Executive.
5. The Executive or the HK Panel may report a person to other regulatory authorities or professional bodies even though there has been no finding of a breach if the person is governed by rules, regulations or standards of professional conduct of the relevant regulatory authority or professional body and the Executive or the HK Panel has reasonable grounds for believing that the conduct of the person may have contravened such rules, regulations or standards of professional conduct.
6. A failure of a licensed corporation, representative, institution or individual to comply with a cold shoulder order is a breach of the Codes and may also result in disciplinary proceedings.

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7. In May 2015, the SFC launched a public register of cold shoulder orders.<sup>18</sup> The register is intended to facilitate compliance by intermediaries with cold shoulder orders and enable them to more readily identify clients or potential clients who are subject to such an order.
8. All disciplinary hearings of the HK Panel are informal and in the interests of transparency are heard in public save in exceptional circumstances where it (or the Chairman of the hearing) considers it necessary to hear a matter in private in order to preserve commercial confidentiality such as price sensitive information. In contrast, all non-disciplinary hearings are held in private.
9. An example of a recent public censure by the SFC was against Goldman Sachs in February 2016 after it breached several takeover rules by publishing research and trading in the shares of a client, Wing Hang Bank, Limited while acting as its financial adviser in relation to a voluntary general offer for Wing Hang Bank.<sup>19</sup>

### United Kingdom

10. The UK City Code on Takeovers and Mergers (the **UK Code**) is administered by the Panel on Takeovers and Mergers (the **UK Panel**). The UK Panel assumes overall responsibility for the policy, financing and administration of the UK Panel's functions and for the functioning and operation of the UK Code. The Executive of the UK Panel has the power to make rulings and exercise other powers of the UK Panel. (This is in contrast to Australia's Takeovers Panel where the Executive has no such powers.) The UK Panel also operates through a number of Committees, including the Hearings Committee.
11. In addition to reviewing rulings of the Executive of the UK Panel and hearing unusual, important or difficult points at issue at first instance, the Hearings Committee hears disciplinary proceedings instituted by the Executive when the Executive considers that there has been a breach of the UK Code. The Executive may itself deal with a disciplinary matter where the person who is to be subject to the disciplinary action agrees the facts and the action proposed by the Executive.
12. The UK Panel has a published statement on disciplinary proceedings including the criteria that will be taken into account by the Executive when considering whether to initiate disciplinary action and in proposing the appropriate sanction to the Hearings Committee. The person concerned is informed in writing of the alleged breach and of the matters which the Executive will present to the Hearings Committee. The Hearings Committee considers the matter entirely afresh. Proceedings before the Hearings Committee are informal and held in private, unless the chairman of the hearing, at his or her discretion, directs otherwise.
13. If the Hearings Committee finds a breach of the UK Code or of a ruling of the UK Panel, it may: *(asterisked items are powers that Australia's Takeovers Panel currently has)*

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<sup>18</sup> See <http://www.sfc.hk/web/EN/news-and-announcements/decisions,-statements-and-disclosures/current-cold-shoulder-orders.html>

<sup>19</sup> See [http://www.sfc.hk/web/EN/files/CF/pdf/Public\\_censure/Public%20Censure%20\(ENG\).pdf](http://www.sfc.hk/web/EN/files/CF/pdf/Public_censure/Public%20Censure%20(ENG).pdf)



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- (a) issue a private statement of censure\*
  - (b) issue a public statement of censure
  - (c) suspend or withdraw any exemption, approval or other special status which the UK Panel has granted to a person, or impose conditions on the continuing enjoyment of such exemption, approval or special status, in whole or in part (there is no equivalent to this in Australia)
  - (d) report the offender's conduct to a UK or overseas regulatory authority or professional body (most notably the Financial Conduct Authority (FCA)) so that that authority or body can consider whether to take disciplinary or enforcement action (for example, the FCA has power to take certain actions against an authorised person or an approved person who fails to observe proper standards of market conduct, including the power to fine)\* or
  - (e) publish a statement indicating that the offender is someone who, in the Hearings Committee's opinion, is not likely to comply with the UK Code (a cold shoulder order). The statement will normally indicate that this sanction will remain effective for only a specified period. The rules of the FCA and certain professional bodies oblige their members, in certain circumstances, not to act for the person in question in a transaction subject to the UK Code. For example, the FCA's rules require a person authorised under the relevant financial services legislation not to act, or continue to act, for any person in connection with a transaction to which the UK Code applies if the firm has reasonable grounds for believing that the person in question, or his principal, is not complying or is not likely to comply with the UK Code.
14. The cold shoulder sanction has only been used on two occasions. Most recently, in July 2010, the UK Panel published a statement ordering banks and brokers to "cold shoulder" three investors after the Hearings Committee found that the three investors had been secretly working together as a so-called 'concert party' to buy shares in a trust company and circumvent the rule requiring the investors to make a mandatory bid for the company when their aggregated shareholding reached 30 per cent or more.<sup>20</sup>
15. Public statements of censure are also not often ordered by the UK Panel. The most recent example in February 2015 involved an investor who had previously been granted a waiver by the UK Panel of the obligation to make a mandatory cash offer for shares in a company. At a later time, however, the investor arranged for his sons to acquire further shares in the company in order to avoid making a mandatory offer. The UK Panel ruled that the sons were acting in concert with the investor. In addition to ordering the investor to make a cash offer, the UK Panel published a public censure in light of the breaches of the UK Code being particularly egregious in the context of earlier private censures of the investor for UK Code breaches.<sup>21</sup>

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<sup>20</sup> See [http://www.fca.org.uk/static/pubs/public/takeover\\_panel\\_cold0710.pdf](http://www.fca.org.uk/static/pubs/public/takeover_panel_cold0710.pdf)

<sup>21</sup> See <http://www.thetakeoverpanel.org.uk/publication/view/20153-armor-group-plc>