

# Chapter 4

## Oversight of the Takeovers Panel

4.1 This chapter discusses the committee's inquiries into the Takeovers Panel (the Panel) as required under paragraph 243(a)(i) of the *Australian Securities and Investments Commission Act 2001* (ASIC Act). It also considers some academic work evaluating the Panel.

4.2 The committee previously reported on the Panel in its oversight report in November 2014.<sup>1</sup> The committee also reported on the annual report of the Panel in its report on the 2016–17 annual reports of bodies established under the ASIC Act.<sup>2</sup>

### About the Takeovers Panel<sup>3</sup>

4.3 Following implementation of the *Corporate Law Economic Reform Program Act 1999*, the Panel was established in its present form on 13 March 2000 by Part 10 of the ASIC Act. Its purpose is to resolve disputes arising in the course of takeovers in an efficient, effective, fair and speedy manner. The Panel was established, at least in part, because of a concern that disputes could be lodged in court during a takeover as a strategic measure, or, as a delaying tactic, and that the nature of legal processes encouraged this behaviour.<sup>4</sup>

4.4 Now, however, under section 659B of the *Corporations Act 2001* (Corporations Act), private parties to a takeover no longer have the right to commence civil litigation or seek injunctive relief from the courts while a takeover is in progress. Instead, a party to a takeover bid may make an application to the Panel to seek a resolution of a dispute.

4.5 The Panel is composed of part-time members who are specialists in mergers and acquisitions, such as investment bankers, lawyers, company directors or other professionals. This composition reflects the Panel's focus on commercial and policy issues rather than legal issues.

4.6 A takeover under Chapter 6 of the Corporations Act is defined as the acquisition of control over voting shares or voting interests in listed companies,

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1 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory Oversight of the Australian Securities and Investments Commission, the Takeovers Panel and the Corporations Legislation*, Report No 1 of the 44<sup>th</sup> Parliament, November 2014.

2 Parliamentary Joint Committee on Corporations and Financial Services, *Report on the 2016–2017 annual reports of bodies established under the ASIC Act*, July 2018.

3 Except where otherwise indicated, material in this section is derived from The Takeovers Panel website, especially *About the Panel*, [https://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=about/about\\_the\\_panel.htm#role](https://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=about/about_the_panel.htm#role) (accessed 12 February 2019).

4 Michael Hoyle, 'An overview of the Role, Functions and Powers of the Takeovers Panel' in Ian Ramsay ed., *The Takeovers Panel and Takeovers Regulation in Australia*, Melbourne University Press, 2010, p. 47.

unlisted companies with more than 50 members, and listed managed investment schemes.

4.7 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. The Panel can establish orders to remedy those circumstances. There is no definition of 'unacceptable circumstances': it is up to the Panel. Its orders protect the rights of persons or groups (especially shareholders in the target company) and attempt to ensure that a takeover proceeds as it would have done if the unacceptable circumstances had not occurred.

4.8 The Panel acts in response to an application by a person who has standing in a takeover process as a bidder, target, or otherwise affected party, or by the Australian Securities and Investments Commission (ASIC). It also has power to review some decisions by ASIC, and matters may be referred to it by a court. The Panel cannot proceed on its own motion.

4.9 A sitting Panel consists of three members of the Panel nominated by the chair when an application is received. It usually comprises a lawyer, an investment banker, and a company director or market professional.<sup>5</sup> Its decisions may be reviewed by a new sitting Panel comprising three other members of the Panel.

4.10 The sitting Panel, on receiving an application, first decides whether to investigate the issue. If it does investigate, it proceeds informally: it is not bound by the rules of evidence, and it does not have to conduct hearings. It may call for submissions from interested parties.

4.11 The Panel issues Guidance Notes on various topics to help applicants and other parties. There are 18 current Guidance Notes.

4.12 Panel members are appointed by the Governor-General on the nomination of the Minister. Appointments are made on a part-time basis, usually for a period of three years. There must be a minimum of five members. At 8 November 2018, the Panel had 43 members.

4.13 The Panel operates under a memorandum of understanding (MOU) with ASIC, which was reviewed in March 2017. The effect of the review was to make the MOU an agreement between ASIC and the Panel executive, rather than the Panel itself, because that is where the liaison occurs. Other changes streamlined the MOU because experience showed that the level of prescription in the first MOU was unnecessary.<sup>6</sup>

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5 Mr Allan Bulman, Director, Takeovers Panel, *Committee Hansard*, 16 February 2018, p. 1.

6 Mr Allan Bulman, Director, Takeovers Panel, *Committee Hansard*, 16 February 2018, p. 9.

## The work of the Panel

4.14 The number of applications to the Panel fluctuates, but is partly dependent on the amount of merger and acquisition activity taking place. This, in turn, is partly a function of local and overseas economic conditions. A high level summary of the Panel's work is presented in Table 4.1.

**Table 4.1: Work of the Takeovers Panel, 2013–14 to 2017–18**

	2013–14	2014–15	2015–16	2016–17	2017–18
Applications	26	20	20	23	29
Matters where the Panel conducted proceedings	13	5	13	9	16
Matters where the Panel declined to conduct proceedings	13	12	6	11	12
Average days between application and decision	19.2	11.3	19.2	16.3	14.8

*Source:* Annual Reports of the Takeovers Panel, 2013–14 to 2017–18.

4.15 The average number of applications since 2000 has been 29 a year. Since 2009, that average has fallen to 23 a year. However, in 2017–18 the number of applications was back up to the long-term average. This probably reflects favourable global and local economic activity, and possibly fluctuations in commodity prices. However, Mr Allan Bulman, the Director of the Takeovers Panel, warned the committee that it was difficult to make simple connections because of the small number of cases coming before the Panel.<sup>7</sup>

4.16 Over the five years for which data are shown in the table, the Panel has conducted proceedings in roughly half of the cases. There does not seem to be any trend in the propensity to conduct proceedings in recent years, however as previously scrutinised by the committee, the rate at which the Panel declined to conduct proceedings did increase steadily from around 6 per cent to over 50 per cent during its first decade. The Panel argues that this probably reflects experience and growing confidence in being able to read the circumstances of a takeover.<sup>8</sup> In general, the Panel encourages the parties to sort out issues themselves if possible.<sup>9</sup>

4.17 Towards the end of 2017, the Panel had dealt with nearly 500 applications in total. Of those:

- 80 were concerned with the content of the bidder's statement in a takeover bid;

<sup>7</sup> Mr Allan Bulman, Director, Takeovers Panel, *Committee Hansard*, 16 February 2018, p. 5.

<sup>8</sup> Mr Allan Bulman, Director, Takeovers Panel, *Committee Hansard*, 16 February 2018, p. 8. This matter was also discussed in the Oversight report No. 1 of 44<sup>th</sup> Parliament, cited above, pp. 4–5.

<sup>9</sup> Mr Allan Bulman, Director, Takeovers Panel, *Committee Hansard*, 16 February 2018, p. 5.

- 55 alleged breaches of the 20 per cent threshold, above which an acquirer has to make a general offer for the shares of a company; and
- 74 alleged that parties were acting in association in order to obscure that the 20 per cent threshold was being breached.<sup>10</sup>

4.18 An important reason for the Panel's existence is its ability to deal quickly with applications. It has three months from when the circumstances occurred, or one month from the date of the application, to make a decision.<sup>11</sup> Since 2000, the Panel has taken an average of 16 days to make a decision. As the table shows, the time for the Panel to make a decision has been above that average in two of the last five years, but in general the time elapsed does not appear to have increased.

4.19 Applications alleging association are the most resource intensive, because the investigation requires 'almost a forensic audit within a month'. Occasionally, the Panel has expanded its resources by taking on contractors in such cases.<sup>12</sup>

4.20 Decisions of the Panel are open to judicial review, but there had been only about six applications for review to the end of 2017.<sup>13</sup>

### **Views of the Panel's performance**

4.21 The Takeovers Panel does not attract a great deal of public scrutiny, presumably partly because of the informality of its processes. Occasionally its decisions are analysed in the media. The case of Taurus Funds Management and Finders Resources, a Panel decision which was then judicially reviewed, attracted comment that was not entirely favourable to the Panel.<sup>14</sup>

4.22 The Panel has also been criticised for declining to conduct proceedings in what became a notorious insider trading case involving a US congressman.<sup>15</sup>

4.23 However, a comprehensive stakeholder survey conducted for the Panel found a very high 89 per cent of respondents were satisfied with the conduct of the Panel. Criticisms recorded during the survey included:

- sitting panel members' experience with mergers and acquisitions;
- the handling of novel issues; and

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10 Mr Allan Bulman, Director, Takeovers Panel, *Committee Hansard*, 16 February 2018, p. 2.

11 Mr Allan Bulman, Director, Takeovers Panel, *Committee Hansard*, 16 February 2018, p. 3.

12 Mr Allan Bulman, Director, Takeovers Panel, *Committee Hansard*, 16 February 2018, p. 3.

13 Mr Allan Bulman, Director, Takeovers Panel, *Committee Hansard*, 16 February 2018, p. 6.

14 For example: Matthew Stevens, 'Taurus Funds Management earns a big win in losing Takeovers Panel appeal', *Australian Financial Review*, 7 June 2018, <https://www.afr.com/business/mining/copper/taurus-funds--management-earns-a-big-win-in-losing-takeovers-panel-appeal-20180607-h113sj> (accessed 12 February 2019).

15 Myriam Robin, 'ASIC, Takeovers Panel missed red flags on Chris Collins at Innate Immunotherapeutics', *Australian Financial Review*, 12 August 2018, <https://www.afr.com/brand/rear-window/asic-takeovers-panel-missed-red-flags-on-chris-collins-at-innate-immunotherapeutics-20180812-h13v1d> (accessed 12 February 2019).

- the relatively gentle sanction when association is found, where the remedy the Panel usually applies is to vest the shares in breach of the 20 per cent rule with ASIC for on-sale. (The Taurus Funds Management case mentioned above involved a remedy along these lines).<sup>16</sup>

4.24 There has been a body of academic analysis of the Panel. Dr Emma Armson of the University of New South Wales has published assessments of the Panel against the three criteria of speed, flexibility and certainty.

4.25 With respect to speed in decision-making, Dr Armson notes that this was one of the main aims of establishing the Panel in its current form. She assessed the speed of the Panel's decision making to June 2016 by comparing the time it has taken against benchmarks applied to courts and other tribunals. She found that the Panel is a good deal faster than courts, taking an average of 16.6 days to make its decisions and 46.1 days from application to the publication of reasons (or, where judicial review is involved, 62.3 days), compared with a range of 11 months to 3.5 years for the courts. She concluded that the objective of speed has been met.<sup>17</sup>

4.26 Dr Armson examines flexibility in two dimensions, procedural and substantive, which are reflected in the informality which is part of the Panel's operations. The Panel has been designed for procedural flexibility: its powers, its processes, and the expertise of members. In particular, the Panel's proceedings are to be as informal as is consistent with fairness and speed. Substantive flexibility has to do with whether the Panel's approach to the use of discretion rather than rules. In essence, this involves a commercial and pragmatic approach rather than a legalistic one, and achieves its outcomes through negotiation rather than orders where possible. Dr Armson found that the Panel's arrangements result in a 'strong form of procedural flexibility'. She used a case study of the development of the Panel's frustrating action policy to conclude that there is also a strong form of substantive flexibility.<sup>18</sup>

4.27 The notion of certainty in decision-making has two key elements, consistency and finality. Dr Armson examined consistency through a case study of Panel decisions relating to ASIC's 'truth in takeovers' policy.<sup>19</sup> She noted that there has been criticism of the Panel because there was uncertainty as to whether it would apply the policy.

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16 Mr Alan Bulman, *Committee Hansard*, 16 February 2018, p. 3.

17 Emma Armson, 'Speed in decision-making: an assessment of the Australian Takeovers Panel', *Company and Securities Law Journal* 352, 2017, UNSW Law Research Series 2018, pp. 12–21.

18 Emma Armson, 'Flexibility in decision-making: an assessment of the Australian Takeovers Panel', *UNSW Law Journal*, vol. 40, no. 2, May 2017.

19 ASIC's 'truth in takeovers' policy is contained in ASIC Regulatory Guide 25, Takeovers: false and misleading statements. According to Michael Gajic and Ratha Nabanidham, 'ASIC Regulatory Guide 25 provides that a person who makes a statement in relation to a takeover bid should be held to that statement, and cannot depart from the statement, unless the person clearly and expressly qualifies it at the time of making it': Michael Gajic and Ratha Nabanidham, Minter Ellison, 'The continued erosion of ASIC's 'truth in takeovers' policy—is there now a new way to avoid the policy?', <https://www.minterellison.com/articles/the-continued-erosion-of-asics-truth-in-takeovers-policy> (accessed 12 February 2019).

The Panel has said that it would not automatically apply the policy, and that it would consider other matters including reasonableness and new circumstances. Dr Armson found that differences between ASIC's and the Panel's interpretations of events are explicable in terms of the different roles of the two bodies. The Panel's decisions displayed a high level of consistency over time. With respect to finality, Dr Armson examined court decisions involving judicial review of Panel decisions. She noted that there have not been many judicial reviews (four), but that the courts have overturned half the Panel decisions. Overall, Dr Armson concluded that the Panel has achieved a medium to high level of certainty.<sup>20</sup>

4.28 At its hearing in February 2018, the committee asked representatives of the Takeovers Panel whether they had views about reforms to the law and whether, in the course of their operations, they analysed information about the cases they processed in order to advise Treasury and legislators as to how the law might be improved.

4.29 Mr Bruce Dyer, Counsel to the Panel, responded:

There have been various reforms suggested by different people over the years. Generally, the Takeovers Panel, as you saw from the stakeholder survey results, has been well-received by the market and those who are most actively involved in this area. As a result, there is a bit of a hesitation about changing what seems to be working very well. You can have lots to reform ideas, but once you start to change something you don't know what the flow-on effects of that might be.<sup>21</sup>

4.30 Mr Dyer further noted that much of the Panel's policy is contained in its Guidance Notes, and the panel members meet twice a year to look at policy issues that can be dealt with within the broad power to declare circumstances unacceptable.<sup>22</sup> In developing or changing Guidance Notes, the Panel consults Treasury and ASIC.<sup>23</sup>

### **Committee view**

4.31 The committee notes the favourable views of the Takeovers Panel from its stakeholder survey and from academic analysts. It considers that the Takeovers Panel is working effectively.

## **Mr Michael Sukkar MP**

### **Committee Chair**

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20 Emma Armson, 'Certainty in decision-making: An assessment of the Australian Takeovers Panel', *Sydney Law Review* 17, vol. 38, no. 3, 2016, <http://www.austlii.edu.au/au/journals/SydLRev/2016/17.html> (accessed 12 February 2019).

21 Mr Bruce Dyer, Counsel, Takeovers Panel, *Committee Hansard*, 16 February 2018, p. 6.

22 Mr Bruce Dyer, Counsel, Takeovers Panel, *Committee Hansard*, 16 February 2018, pp. 8–9.

23 Mr Allan Bulman, Director, Takeovers Panel, *Committee Hansard*, 16 February 2018, p. 9.