



# The Takeovers Panel Five Years On and some current issues

Nigel Morris - Director



# Challenges for the Panel

- Five Years Ago
  - Consistency
  - Workload
  - Constitutional
  - Jurisdictional
  - Power
  - Scope



# Challenges for the Panel

- Four years ago
  - consistency
  - timeliness - fitting into members' day jobs
  - commerciality of decisions
  - hearings - practical difficulties
  - costs
  - exercising quite strong powers
  - Implementing & responding to parties & market feedback



# Challenges for the Panel

- Three Years Ago
  - Maintain **consistency** of its decisions;
  - Deliver decisions quickly, within the **timeframes** of commercial takeovers;
  - Deliver **guidance** in areas where the market is looking for future confidence;
  - Maintain **ASIC** relationship to ensure consistent responses from the two regulators;
  - Continue to seek **feedback**; and
  - Bring the newly appointed Panel **Members** into the Panel as quickly as possible.



# Five Years On

- Consistency
  - Panel decisions are consistent with:
    - Previous decisions
    - Guidance Notes
    - Section 602 of Corporations Act  
(the 4 Eggleston Principles and the “efficient, competitive and informed market” principle)
  - Not inconsistent with courts’ thinking



# Five Years On

- Consistency
  - Each Panel decision is based on its individual circumstances
    - So exact comparability is hard sometimes
  - “Unpredicted” Panel decisions are usually those where the Panel hasn’t been asked to decide on the issue before
    - Pinnacle 5 - Frustrating Action
    - AMP Property Trusts - Pre-emptive rights
    - Village 03 - Major s/holder voting on buy-back
    - InvestorInfo - Rights Issue



# Five Years On

- Consistency
  - The Panel is no more “unpredictable” than other fora when they are asked new questions
  - The Panel’s “unpredictable” decisions are consistent with the takeovers principles
  - The Panel has published a lot of material in decisions, Guidance Notes, and fora like this one, to show how it will think about decisions where it hasn’t been asked to decide on the issue before. This increases predictability.



# Five Years On

- Timeliness - Decisions
  - Maintained relatively consistent period
    - Many matters drag at the end when parties are negotiating the terms e.g. what additional disclosure is required
  - Parties are not complaining
  - We would like to do better
  - Mechanics do not allow much shorter period
  - A few long periods usually affect stats each yr





# Five Years On

- Timeliness - Reasons
  - Much improved last couple of years
  - We would like to do better
  - Our media release announcing the decision nowadays has the core of the Panel's reasons, at the time the decision is announced.
  - A few long matters usually affect the statistics each year



# Five Years On

- Guidance
  - 16 published so far - most still are process
  - 10 revised this year as part of review process
  - Significant decisions prompt Guidance Notes
  - Guidance Notes promote:
    - Confidence in the market
    - Predictability of Panel decisions
    - Consistency of Panel decisions



# Five Years On

- Guidance – Substantive notes
  - Guidance Note 7 – Break Fees –
    - Different emphasis in reasoning
    - Not anti-competitive, Not coercive
    - Primary focus is the effect on an efficient, competitive and informed market
  - Funding
  - Frustrating Action
  - Broker Handling fees
  - Trust Schemes



# Five Years On

- Panel / ASIC relationship
  - MOU published on website (2000)
  - Regular informal contact
  - Positive relationships at staff level
  - The Panel members are determinedly independent
  - Policy consultation works well so far
  - No material complaints about different policy positions by the two different regulators



# Five Years On

- Feedback / Liaison
  - Panel members are from the market, so Panel already exposed to the market and its views
  - External members on policy sub-committees
  - Consultation drafts on new Guidance Notes
  - Response to consultation posted when final Guidance Note published
  - Post-mortems after each Matter
  - Fora such as CCLSR forum



# Five Years On

- Members
  - Very lucky with quality of members, and generosity of time & other inputs of members
  - 43 members makes consistency a bit harder
  - Three “Panel Days” a year, and work on policy sub-committees improves consistency



# Future

## Challenges for the Panel - 2005

- Consolidation
- Policy
- Members
- Relationships
- Legal
  - Constitutional
  - Litigation
  - Scope
- Process
  - Consistency
  - Timeliness
  - Efficiency
  - Commerciality
  - Informality



# Future

- Challenges with Members

- Consistency with 43 members
- Achieve single view with 43 members
  - that is not merely motherhood
  - that can be accepted by all
    - » example is Break Fees Policy
- Maintain interest , collegiality with 43 members
- Maintain acceptance of robust view of conflicts
- Service the needs of members diverse range of takeovers experiences and geography





# Challenges for Parties

- Applications
  - discharging burden of persuasion
  - raising actionable grounds (i.e. how are the circumstances unacceptable)
- Commercial Negotiation - not Court
- Addressing Business People - not judges
- Timing



# Previous Issues

- Conditions in bids
- Break Fees
- Frustrating Action
- Trust Schemes
- Funding in bids
- Pre-emptive rights in trust assets
- Broker inducement fees



# Previous Issues

- Conferences
- Timeliness of reasons
- Insufficient declarations of unacceptable circumstances
- Prospective rulings
- Constitutionality
- Insufficient consequences of unacceptable circumstances



# Current Issues

- Rights Issues
  - Surge in recent matters
  - Next major guidance project
  - Interaction of takeovers policy with commercial wants of companies
  - InvestorInfo guidelines have proven fairly robust
    - But no real weighting or priority – depends on the factual circumstances



# Current Issues

- Rights Issues
  - Genuinely accessible
    - Continuing standard from InvestorInfo
  - Disclosure standards
    - if disclosure document required
    - if no disclosure document required
  - Onus where control transaction
    - placed a greater onus on the Emperor board to ensure that the interests of non-DRD shareholders were not adversely affected by the structure and execution of the Rights Issue



# Current Issues

- Rights Issues
  - Underwriting
    - Risk
    - Purpose
    - Contract with issuer
  - Shortfall Facilities
    - Underwriting?
    - Not a Panel requirement
  - Renounceability



# Current Issues

- Rights Issues
  - Frequently decided on the overall balance of a number of different factors
  - Each factor receives weighting that is appropriate to the circumstances of the matter
  - Renounceability is frequently highly weighted
  - Harm to shareholders is also highly weighted
    - Harm from preventing rights issue
    - Harm from allowing it through



# Current Issues

- Bidder's Statements
  - "Wrap" information
  - Committing to printing during Panel proceedings (or when some material likelihood)
  - "Sell" "Don't Sell" statements
  - Market comparisons





# Current Issues

- Wrap Information
  - If it's material, give it to the target, with the bidder's statement
  - Presentation does count – so consider whether the proposed presentation is material
  - 636(1)(m) only addresses “information”
  - However, s602(b)(iii) may require other material statements to be included
  - 633(6) almost by definition relates to non-material information



# Current Issues

- Committing to printing
  - So far the Panel has not required a bidder's statement or target's statement to be reprinted
  - Some developing brinkmanship ?
  - Where a corrective statement/ supplementary bidder's statement appears inadequate, the Panel will require a new bidder's statement
  - Applicants do need to justify delays



# Current Issues

- “Sell” “Don’t Sell” statements
  - Wrap decision now limits bidders
  - Universal decision makes it a bit similar for targets now
  - Balanced and sustainable communications to target shareholders
  - Panel won’t interfere with parties’ opinions, but will require them to be supportable
  - Can’t rely on other publications as support



# Current Issues

- Market Comparisons
  - Consents for average broker valuations
    - Panel and ASIC need a dialogue to give market certainty
  - Price comparisons
    - Most recent is likely to be required every time
    - Updating requirement is somewhat unresolved
  - Appropriate selection/ discounting
    - Need to disclose carefully the basis for selecting/ discounting



# Applicants

	2000	2001	2002	2003	2004	2005
Nos per year	22	32	22	47	31	24



# Challenge

- To be fully effective the Panel must enjoy the support of the whole business community - Senator Chapman 12/5/99
- The Panel will be a test of the goodwill of the business community in Australia in taking some responsibility for its own actions - Mr Joe Hockey MP 3/6/99



# Five Years On

- Conclusion
  - Reasonable support of the business community, but perhaps largely unnoticed because it is working well.
  - The business community in Australia has taken some responsibility for its own actions, both in terms of being prepared to join the Panel and in accepting its existence and decisions.



# Five Years On

- Conclusion
  - Panel has been a success
  - A growing body of decisions and guidance allow the market more confidence
  - The policy of section 602 remains the primary basis for Panel decisions
  - Consultation remains important
  - Managing processes is becoming more important to maintain timeliness etc