

Corporations Bill : Explanatory Memorandum : Corrigendum to  
Paragraphs 2248-2262 – Declarations of Unacceptable  
Acquisition or Conduct in Takeovers and Related Matters

Paragraphs 2248-2262 of this explanatory memorandum indicate that the ASC would, as did the NCSC under CASA, have power to declare certain acquisitions or related conduct unacceptable and to make certain temporary freezing orders where such declarations were made. However, it was envisaged, as indicated in paragraph 357 of the explanatory memorandum to the ASC Bill, that the Minister would direct that the above ASC powers be conferred on the Corporations and Securities Panel established under that Bill.

As indicated in the corrigendum to the ASC Bill, the Panel jurisdiction will be conferred directly by specific provision in the Corporations Bill itself. The main elements of this approach are as follows:

- the Panel will have the same power to make declarations as the NCSC had under CASA (see cl.733);
- before making a declaration, the Panel must be satisfied that unacceptable circumstances have occurred (see cl.732 – based on CASA sub-ss.60(1) and (3)) and that a declaration is in the public interest having regard to any relevant matters including those set out in cl.731, e.g. the desirability of an efficient, competitive and informed market for the acquisition of shares (see para.733(3)(b));
- where the Panel makes such a declaration, it will be able, on the application of the ASC, to make any orders it considers necessary to, among other things, protect the rights of persons affected by the acquisition or conduct, including remedial orders of the type which were available to the Court under CASA sub-s.60(4) (sub-cl.734(2)). The Panel will also be able to make interim orders pending determination of an application for an order under sub-cl.734(2) (sub-cl.735(2));
- it will be an offence for a person to contravene an order made by the Panel (sub-cl.734(5));
- Panel decisions will be reviewable by the Court under the Administrative Decisions (Judicial Review) Act, but not otherwise;
- the declaration powers of the Panel will be exercisable on the application of the ASC which must apply within 60 days of the acquisition or conduct or within (up to) an extra 30 days if the Panel allows. The Panel, unless the Court extends the period, must decide within 90 days of the acquisition or conduct or within 30 days of the application, whichever is the later period (sub-cl.733(2)); and
- hearings in relation to acquisitions and conduct must be held in private (see sub-cl.185(3) of the ASC Bill).

ASC Bill : Explanatory Memorandum – Corrigendum to Para.357 –  
Conferral of Powers on the Corporations and Securities Panel

Paragraph 357 of the explanatory memorandum indicates that the Minister will be able to direct that the Corporations and Securities Panel (established under Part 10 of the Bill – see cl.171) exclusively perform specified functions and powers of the ASC or the Companies Auditors and Liquidators Disciplinary Board. It was envisaged that the initial area of power referred to the Panel would be the proposed power to declare certain acquisitions or takeover conduct unacceptable and to make consequential freezing orders.

This approach has been modified. Conferral of powers on the Panel will now be achieved by specific legislative amendment when considered appropriate. This will ensure that conferral of powers on the Panel will be subject to full Parliamentary scrutiny and exposure.

However, because of the importance of ensuring that the unacceptable acquisition or conduct declaration powers under Part 6.9 of the Corporations Bill are exercised by a body that is independent of the investigating authority (the ASC), that Bill now confers immediate exclusive power on the Panel to make such declarations (see corrigendum to that Bill's explanatory memorandum for further details). This achieves in a more immediate and direct manner the result which, as foreshadowed in paragraph 357 of the explanatory memorandum, was planned to have been achieved by Ministerial direction.

Conferral of a hearings power in respect of this declaration power and in respect of any other power legislatively conferred on the Panel will also be achieved in a more explicit way in Part 10 of the ASC Bill (see Division 3 (cls.184-198)). Whereas it was previously envisaged that any conferral of power on the Panel would pick up by reference the ASC's general hearings powers, this method provides for a specific hearings power for the Panel. Although these provisions are generally based on the ASC's hearings powers, a major distinguishing feature is that all Panel hearings must be held in private (sub-cl.185(3)).

As a result of these changes, the numbering of clauses of the Bill has also changed.

The explanatory memorandum should be read as if:

- references to cl.175 were omitted;
- references to cls.176-184 were references to cls.175-183;
- references to cls.185-196 were references to cls.199-210; and
- references to cls.197-223 were references to cls.212-238.