

**A REPORT ON STAKEHOLDER
ASSESSMENT OF THE TAKEOVERS PANEL**

Project 2694

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Prepared for:

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1. EXECUTIVE SUMMARY

1.1 Background

This report presents the findings from research conducted to explore stakeholder feedback on the performance of the Takeovers Panel over the past six years. The research was commissioned by the Takeovers Panel as part of the Takeovers Panel completing its fifth year of operation.

The research was qualitative and involved a series of face to face depth interviews with a variety of stakeholders including representatives from the legal community, investment banks, fund managers, stockbrokers, the corporate market, regulators, journalists, and a shareholder association. In total, 37 respondents from 33 organisations were interviewed (in some interviews two respondents were present).

Detailed findings are presented in the body of this report. A summary of the main findings is presented below.

1.2 Main Findings

- 1. Involvement with the Takeovers Panel:** The lawyers and regulators in the sample had frequent direct dealings (formal and informal) with the Panel. Investment bankers were fairly frequently involved with Panel matters, but mostly indirectly via their legal representatives. The members of every other stakeholder segment had either no direct formal dealings, or only infrequent ones with the Panel, often with the Executive staff only.
- 2. Mode of learning about the Takeovers Panel:** Thus, for many of the sample not directly involved with Panel submissions and rebuttal, views about the Panel were formed from indirect communications and views put by their professional advisers (legal and investment banking) and articles about (mainly high profile and disputed) takeovers appearing in the financial press.

- 3. Understanding of Panel objectives:** Some stakeholders, particularly some of the fund managers, seemed almost unaware of the Panel's objectives. Other respondents in explaining their understanding of Panel objectives generally referred first to the Panel's role in ensuring commercial outcomes, rather than to issues to do with market standards and fairness (although these were discussed later in the interviews).
- 4. Assessment criteria:** In identifying appropriate assessment criteria, most respondents referred to their understanding of the objectives of the Panel, saying that assessment should be on the basis of the Panel's success in achieving those objectives.
- 5. Assessment of the Panel:** The overall view was that the Panel had performed very well. Of the 33 organisations in this research, 25 rated the performance of the Panel favourably or very favourably, and only four unfavourably or very unfavourably.
- 6. Overall effectiveness of the Panel:** Nearly all interviewees felt that the Panel had been effective in improving the speed of dispute resolution and reducing tactical litigation surrounding takeovers.
- 7. Improvement in market standards:** Many felt that overall standards of disclosure in takeovers had improved, because:

 - Bidders did not want to be subject to disputation and Panel involvement, with associated costs and potential delays;
 - Those involved as parties to a Panel proceeding were sources of advice to other professionals in their firms about the likely stance the Panel would take if a particular takeover documentation was being scrutinised by a Panel.
- 8. Panel processes:** Almost all respondents concluded that the system works fairly well, and the process was well managed. Opinions relating to specific aspects of the process were:

 - Balance between speed and investigatory depth:** Most of the sample commented that the process struck a good balance in this regard.
 - Too much reliance on written submissions:** A few lawyers strongly suggested that the Panel should move away from a sole dependence on written submissions from parties, arguing that a conference (or private hearing) was better in some cases, particularly novel cases.

- **Appeal processes:** A few respondents felt there was insufficient confidence in the appeal process, because they believed there was a strong view that a second Panel would not be open to arguments put at appeal, and consequently few appeals were made against Panel decisions.
 - **Communications:** Most thought the Panel did a good job in communicating with the involved parties, and in part this was seen to be due to the Panel's reliance on informal communication in pursuit of a speedy resolution.
 - **Timeliness:** Most believed the Panel operated in a timely way; delivering commercial speed to resolve impasses, while at the same time not setting unrealistic deadlines for information supply or responses to issues raised.
- 9. Submission process:** Most of the sample felt that the submission process (including the gathering of initial facts and argument as well as gathering rebuttal arguments) worked reasonably well. Many attributed this to the fact that the vast majority of cases were about disclosure. Some people mentioned a small number of cases where they felt the Panel may not have reached the right conclusions.
- 10. Panel decisions:** There was almost universal agreement that the Panel reached fair decisions and conclusions in almost all of the matters it has dealt with. Many felt that the vast majority of disputes involved the Panel in attending to disclosure issues, and almost all of the decisions and outcomes involving disclosure orders or undertakings met with market approval, including the approval or acceptance of the protagonists.
- **Commerciality and practicality of decisions:** Many respondents stressed that the Panel was intended to reach pragmatic decisions and speedily resolve takeovers disputes, and believed it had delivered these things very well.
 - **Consistency of decisions:** Most interviewees felt that decisions and reasons were "consistent enough". It was recognised that the Panel is not a court of Law and therefore a different (lower) level of consistency was quite acceptable, especially to bankers and fund managers.
 - **Timeliness:** It was seen to normally take two or three weeks to obtain the Panel decision, and this was regarded as quite acceptable. Some respondents mentioned some occasions where the decision process was much slower than this, but these were seen to be exceptions. It was accepted that if decisions were reached any faster, proper weighing of the evidence and application of the principles may be jeopardised.

- **Communicating decisions:** The Panel was generally seen as communicating its decisions and reasons in an effective manner.
- **Some criticisms:** There were some criticisms of Panel decisions, often associated with particular takeover circumstances (tardiness in the appearance of reasons, lengthy and convoluted reasons, and/or some instances of inconsistencies in decisions or reasons between matters).

11. Guidance Notes: Most felt that Guidance Notes were useful, as they assisted protagonists in making their submissions, but more importantly, were likely to result in fewer takeovers reaching a disputation stage. There was some criticism of Guidance Notes in that they could take a long time to come out, and did not necessarily explain exactly why a decision was taken.

12. Post mortems: Many were unaware of the availability of post mortems. Amongst those who were aware, there was little value perceived in a post mortem process, and there were several strong barriers to participating in one because:

- There was a belief that a post mortem would probably not achieve any changes in procedures.
- A post mortem would not have any impact on outcomes, and participants were focused on moving onto their next issue.
- There was a perceived risk of upsetting one's relationship with the Panel Executive.

13. Panel structure: Most viewed the mix of Panel members very positively, with Panel members generally being viewed as having a high level of expertise. There were some criticisms about lack of transparency in how Panel members were selected to be appointed to the Takeovers Panel, and some concerns about the "political correctness" of some appointments.

14. Panel composition: The use of part time Panellists was supported by most as a means of accessing the very best and most accomplished intellectual resources in this area.

15. Full or part time President? Responses were fairly evenly divided on this question, although there most did not hold strong views either way. A small majority of interviewees thought that there may **not** be a case for a full time President (or overall Chairman) for the Panel, because the Panel has worked smoothly without one.

16. Conflicts of interest: Despite it being perceived as difficult for the Panel to avoid conflicts, most people felt this was handled very efficiently.

- 17. Executive staff:** Executive staff were viewed as being well known, accessible and approachable. The Executive was seen to be extremely effective, although some concern was expressed about the power of the Executive, given the part-time peer model of the Panel. There was a view that the Executive sometimes effectively channelled Panel members into a decision or a set of logic, rather than the Panellists using first principles to determine the course of a proceeding.
- 18. Liaison processes:** Overall, interviewees thought that the Panel interacted with its stakeholders adequately. The main forms of liaison activity mentioned were the annual dinner, and occasional luncheons put on by the President of the Panel. These activities served to communicate the quality of Panel members, facilitated communications by making stakeholders aware of Panel members and Executive staff, and provided a forum for discussing policies and processes of the Panel.

2. CONCLUSIONS

The major conclusions emanating from this research include:

1. **The Panel is Successful:** The Panel is successful and is generally viewed positively by its stakeholders. This assessment included not only the Takeovers Panel as a regulatory model (using part time expert practitioners on the Panel with a full time Executive), but also its performance in terms of both outcomes and efficiency of the processes it deploys. In particular, the Panel was seen as:
 - Professionally run, and using part time professionals as Panel members quite well.
 - Pragmatic, resulting in a faster resolution of disputes than was possible under the previous court system.
 - Following principles designed to ensure equity and fairness for shareholders in takeover situations.
2. **Success Attributed to Senior Personnel:** A number of stakeholders felt that a key reason for the success of the Panel has been the very good reputation and competency of the President and the two most senior members of the Executive – the Director and Counsel. Many of those who held this view were a little apprehensive about the future of the Takeovers Panel, given that these three people will eventually move away from the organisation.
3. **Room for Improvement:** Several issues were each mentioned by more than a small minority of stakeholders as worthy of some attention, although none of these were seen as critical for the continued functioning of the Panel. They included:
 - The selection of Panellists (although the current Panel members were widely seen as acceptable and doing a good job, some felt that the process of selecting them was not transparent and may not be based on sound merit based principles).
 - The Executive was seen as under-resourced for the task at hand, especially given the peak loading which occurs in takeovers from time to time, and the need to develop more policy/guidance notes (see below).

- A number of stakeholders felt that the Executive plays a major role in guiding Panellists to the issues and may on occasions have an unduly high influence on Panel decisions and reasons. This was because of the part-time peer model deployed by the Panel.
 - There was a call for more policy development in the form of Guidance Notes for the market to use. Guidance Notes were seen as not only useful in assisting compliance in takeover disclosure, but also in facilitating consistency and predictability surrounding decisions in the future.
4. **Absence of Widely Held Major Criticisms:** Overall, it is considered significant that there were no widely held views that serious changes need to be made in the way the Panel operates. The above matters (within point 3) were all seen as things the organisation can address without necessarily engaging in major structural or other changes.
5. **A Very Small Minority Called for Major Change:** A very small minority (several individuals) held strong negative views about the Panel as a model. As a consequence, they made a series of suggestions as to what major changes should occur. These views were not shared by the vast majority of stakeholders interviewed in this research, and thus cannot be seen as key outcomes of it.
6. **Potential for Quantitative Measures of Performance of the Panel:** If the Panel wishes to collect quantitative measures from the stakeholder group, then the current research suggests this would be possible, but only if:
- The measures sought are general in nature and restricted in number, since few people have a broad and deep knowledge of the wide range of topics covered by the research in this report, and therefore non-participation and non-participation bias could easily be introduced if more than a dozen or so measures are included.
 - Stakeholders are asked to submit their scores electronically (to minimise time and effort involved).

Obtaining a representative sample of the stakeholder categories of interest will be quite difficult, and thus we recommend that a convenience sample is used. For each respondent, data will need to be collected about the segment to which the participant belongs (lawyer, banker and so on) as well as the extent to which the participant has been directly and indirectly involved with Panel proceedings and the level of satisfaction with the outcomes from proceedings with which they have been involved.

All of this data will be useful in analysing the general views of the Panel by various sub-groups, although the expected relatively small sample size will almost certainly preclude statistically significant differences to be detected between stakeholder segments.

A convenience sample may be assembled via the following sources/methods:

- The 320 stakeholders on the Panel's press release list.
- Advertisements encouraging interested parties to register for participation in the exercise as part of the review of the Takeovers Panel. Suitable publications for such advertisements may include the Australian Financial Review, as well as magazines and newsletters of relevant professional bodies. It would be prudent to devise and use a suitable method for recording the number of participants recruited by each method/from each publication, so that future quantitative studies can replicate and/or improve on the sample achieved in the initial survey.

3. INTRODUCTION

The Takeovers Panel, re-launched in 2000, is the primary forum for resolving disputes about a takeover bid until the bid period has ended. 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 has been established to reduce tactical litigation in takeovers, reduce the costs of takeovers, and to support the purposes of the takeovers legislation (set out in section 602 of the Corporations Act) which encompass the four Eggleston principles that have guided takeovers policy in Australia for over thirty years. These principles include:

-] The acquisition of control over voting shares/interests in listed companies and certain other bodies¹ takes place in an efficient, competitive and informed market;
-] The shareholders and directors of the company know the identity of any person who proposes to acquire a substantial interest in the company, and are given a reasonable time to consider the proposal and enough information to enable them to assess its merits; and;
-] As far as practicable, the shareholders all have a reasonable and equal opportunity to participate in any benefits accruing to shareholders through such a proposal.

The Panel wished to gain stakeholder feedback on its performance over the past six years, and commissioned Chant Link & Associates to undertake this review. The purpose of the review was:

-] To gain feedback on the Panel's performance over the past 6 years as part of the Panel's ongoing development process;
-] To provide an opportunity for the Panel to engage some parts of the market who might not normally do so, in thinking about the Panel;
-] To provide an opportunity for the Panel to engage those parts of the market with which it commonly deals, in a conversation about the Panel and in an overall assessment of the Panel's performance;

¹ A company with more than 50 members, a listed body, or a listed managed investment scheme.

] To indicate to stakeholders that the Panel is an organisation that is interested in its performance and effectiveness, and in continuous improvement.

The outcomes of this review are the subject of this report.

4. RESEARCH OBJECTIVES

The objectives of this research were as follows:

1. Determine stakeholders' views of the performance of the Takeovers Panel:
 - Overall performance of the Panel;
 - Effectiveness of the Panel;
 - Predictability/consistency of Panel decisions;
 - Appropriateness of public/private cooperation in takeover dispute resolution (eg having some market participants sitting as Panel members, the balance on the Panel);
2. Determine stakeholder views of the processes of the Panel:
 - Timeliness;
 - Legalism and tactical litigation;
 - Appropriateness of level of informality, fairness, and cost effectiveness;
 - Information gathering processes used by the Panel;
3. Determine stakeholder views of the Panel Decisions:
 - Commerciality, investor protection, and balance;
 - Bidder versus target friendliness of Panel approach and decisions;
 - Actions and outcomes (eg balance between Panel declarations and orders versus accepting undertakings from market participants);
 - Effects on market standards;
4. Determine stakeholder views of the Panel's submission processes;
5. Determine stakeholder views of the Panel's reasons and decision explanations;
6. Determine stakeholder views of the Panel's published Guidance Notes;
7. Determine stakeholder views of the Panel membership (awareness of, quality, skill and background balance);

8. Determine stakeholder views concerning conflicts of interest that occur in setting Panel membership where a takeover dispute occurs – and resulting Panel membership issues;
9. Determine stakeholder views of the Executive staff (awareness of, appropriateness of skill level and skill mix, impartiality, helpfulness, professionalism, secondees and their appropriateness for staffing the Panel Executive);
10. Determine stakeholder reactions to the concept of a full-time Panel President as opposed to the current part-time regime;
11. Determine stakeholder views of the Panel's stakeholder liaison processes and effectiveness;
12. Gather stakeholders' general comments and suggestions regarding the Panel and its overall operations and effectiveness.
13. Determine how stakeholder views on the above topics vary with level and nature of involvement with the Panel.
14. Determine the main manner in which information about the Panel is currently communicated to stakeholders, and the frequency/efficiency of such communication.

5. RESEARCH APPROACH

The research approach involved:

Workshop: A workshop with the Takeovers Panel Executive was held in order to:

-] Provide Chant Link & Associates with a briefing about the Panel's activities;
-] Reach agreement on the research objectives;
-] Reach agreement on the sample structure, and to identify appropriate individuals from whom a research sample could be drawn.

Interviews: Face to face depth interviews were conducted with participants from the legal community, investment banks, fund managers, stockbrokers, the corporate market, regulators, journalists, and shareholder representatives. In total, 37 respondents from 33 organisations were interviewed (in some interviews two respondents were present).

The sample is described more fully in Section 6.1.

Analysis and reporting: The information collected in these interviews was analysed and collated. The current report presents the outcomes of that analysis.

6. MAIN FINDINGS

6.1 About the Sample

The sample was selected from a larger list of stakeholders suggested by the Takeovers Panel Executive. The list comprised members from the following segments (including Panel members and past Panel members):

-] Legal firms
-] Investment banks
-] Fund managers
-] Stock brokers
-] Regulators
-] Shareholder Association
-] Listed companies
-] Financial journalists

In all cases, the potential participants were listed because of their known involvement with, or interest in the mergers and acquisitions area.

Thus, the final sample was comprised as follows.

Exhibit 1: Structure of the Sample of Interviewees

Segment	Panel Members	Non Panel Members	Total
Legal Firms	3	6	9
Investment Banks	1	6	7
Fund Managers	0	6	6
Stock Brokers	0	1	1
Regulators	0	1	1
Shareholders' Association	0	1	1
Listed Companies	2	3	5
Financial Journalists	0	3	3
Total	6	27	33

Where more than one person at an organisation attended an interview, that has been recorded above as one interview.

A list showing the names of the majority of the participants is given in Appendix B. In some cases, participants did not wish to be identified.

6.2 Involvement with the Takeovers Panel

There were major differences among the respondents in their level and nature of involvement with the Panel.

Lawyers: Within the lawyer segment, the level of recent involvement with the Panel was partly determined by whether the respondent was a current Panel member, a past Panel member or neither. However, irrespective of Panel membership, the legal respondents tended to be more frequently involved with the Panel than others in the sample, and were the main group having formal dealings with the Panel - in line with their role as specialist mergers and acquisitions lawyers.

Investment bankers: Among investment bank respondents, formal dealings with the Panel (e.g., lodging applications, informal inquiries, Panel proceedings or post mortems) were not conducted directly with the Panel, but instead, via their Merger & Acquisitions (M&A) lawyers who were usually from large legal firms, but also included in some cases, in-house specialist M&A legal teams. Thus, the bankers' views about the Panel were largely formed by comments and discussion with such lawyers, but also via articles in the financial press and in other stakeholder liaison with the Panel. Some of the investment bankers, however, explained that they had occasionally spoken with the Director, Counsel and/or President for a preliminary indication of how the Panel may approach a particular issue or to express their views to the Panel about a decision that has affected their clients.

A few investment bank respondents said that while Panel contact was typically handled by the firm's lawyers, they had personally had direct contact with the Panel in certain cases. These respondents usually had a legal background in M&A work. One such respondent was also involved with the Law Council of Australia's Corporations Committee which provided comments on Guidance Notes to the Panel.

Where investment banking professionals contacted the Executive informally, it was often in advance of a takeover matter being launched, and was to attempt to avoid the potential for a dispute.

“Upon George’s² advice most times we’ve managed to keep ourselves out of the Panel [as a result of] knowing where the Panel is likely to come from. An explanation of the issues as the Panel would see the issues, without being definitive.”

Stock Brokers and Listed Corporations: Stock brokers and senior executives in listed corporations tended to have a limited set of dealings with the Panel, forming most of their views either from a single case with which they had been involved and/or second hand from legal and investment banking professionals in (or used by) their organisations, as well as via the financial press.

Fund Managers and Shareholders Association: The fund managers and Shareholders Association representative tended to have mainly formed their views by reading about the Takeovers Panel in the financial press. In some cases, however, they had been involved in first hand dealings with Panel Executive staff by being co-opted to Panel working sessions to review certain aspects of policy associated with the Panel. For example, ASA³ office holders had been involved on a working party determining the nature of disclosure required in Rights Issues documentation.

The fund managers tended to have few or no dealings with the Panel⁴. Where such respondents had been dealing with the Panel in any way, it had been in other or former roles as investment bankers, rather than as fund managers, and usually through a legal intermediary.

“Direct exposure has been nil to small. We have been involved in a couple of takeovers situations that have been referred to the Takeovers Panel.”

Journalists: In contrast to lawyers and investment bankers, journalists (selected because of their experience and specialisation in writing about takeover matters) tended to have less direct dealings with the Panel, but still made contact to receive clarification on points of fact associated with topical cases about which they wrote. This type of contact was described as fleeting, infrequent and not substantial - limited by the confidential nature of the Panel’s dealings.

“I have got assistance and information when I needed it, and they (Panellists and Panel Executive staff) observe appropriate secrecy and discretion, as you would expect from them.”

² Mr George Durbridge – Panel Counsel.

³ ASA: Australian Shareholders Association.

⁴ This meant that it was in fact quite difficult to identify fund managers who were willing to talk about their views of the Panel, as many felt they had insufficient knowledge to provide an informed opinion.

Some journalists occasionally spoke with Panel members, but their main sources of information about the Panel were the central players in takeover situations, who made contact with journalists when they had points they deem worthy of publicising in the financial press.

On some occasions the President of the Panel had contacted journalists, for example, to explain issues that he felt the journalist may not have covered well or accurately enough in their recent article on a takeover matter.

Regulators: The regulators in this sample (i.e., staff in ASIC⁵) tended to have frequent dealings with the Panel, in liaising and advising about policy matters associated with mergers and acquisitions. ASIC has a Memorandum of Understanding (MoU) with the Panel requiring regular liaison meetings, which do occur.

Total sample: In addition to the contact described above, many of the respondents had been involved in lunches with Panel members and the Panel Executive staff, and the annual dinner arranged by the Panel. This aspect is discussed further in Section 6.14 which deals with relationships between the Panel and its stakeholders.

Summary: The lawyers and regulators in the sample had frequent direct dealings (formal and informal) with the Panel. Investment bankers were fairly frequently involved with Panel matters, but mostly indirectly via their legal representatives. The members of every other stakeholder segment had either a single direct experience with the Panel, no direct formal dealings, or only infrequent experience with the Panel, often with the Executive staff only.

⁵ ASIC: Australian Securities and Investments Commission.

6.3 Knowledge and Understanding of the Takeovers Panel

As a result of the nature and frequency of contact with the Takeovers Panel, the various respondents displayed widely disparate levels of knowledge and understanding of the roles and processes used by the Takeovers Panel, in dealing with takeovers and other matters.

For example, most of the lawyers, regulators and corporation directors interviewed in this research knew the roles of the Panel and its processes fairly well from their direct experiences with the Panel.

For most of the balance of the sample (investment banks, shareholders association representatives, journalists, some of the fund managers) their indirect or infrequent dealings with the Panel or its Executive staff, coupled with their inherent interest in the Panel's dealings as reported in the press, or via legal representatives or contacts, had resulted in patchy knowledge of the roles and processes deployed by the Panel.

At the other end of the knowledge spectrum, a few of the fund managers knew little of the Panel and its processes, (and thus were unable to comment on the effectiveness or otherwise of the Panel).

The researchers concluded that the Takeovers Panel should not assume that stakeholders have a uniformly high awareness and knowledge of its roles and procedures, and this is reinforced by some of the following comments, which were made by various senior staff in Fund Managers.

"I've had very little (to do with the Panel). After twelve years of doing this, very little. Quite frankly I don't really know what their charter is. So it is really quite hard to say whether they should be higher or lower profile or whether they have the right profile or even if they are doing a good job."

"The reality is, when you get into one of these tussles, the companies are represented by a team of investment bankers and lawyers and it's unlikely that we would say – nobody is representing our interest as a shareholder in the right way. Therefore we haven't needed to make a direct approach to the Panel. ...if we really felt that shareholders interest weren't being looked after we'd investigate doing that, but we've never had that situation."

“I really don’t have any idea about who is on it, what their processes are, what they are really looking at and to be honest it really it doesn’t come into play for me personally; unless they knock back something it is not going to impact. So it is almost like in certain situations you see it as procedural. You just go through the process..... No I am not even clear on Patrick’s... what was the role of the Takeovers Panel on Patrick’s?”

6.4 Overall Opinion of the Takeovers Panel

Positive opinions overall: Generally speaking, most respondents gave a favourable assessment of the performance and impact of the Takeovers Panel during its first six years of operations.

For example, some of the lawyers in the sample said they had been cynical about the Panel when it was instituted, but now believe it has performed quite well. Likewise, the financial journalists tended to make the following points quite strongly, and these were largely shared by the majority of respondents:

-] There have been few or no strong criticisms of the Takeovers Panel in the market, and so people have, thus far (by and large) not mounted an attack on the Panel.
-] Most things the Takeovers Panel reviews are concerned with disclosure issues, which are not considered life-changing to respondents, or to bids, so there is little controversy about them.
-] The Takeovers Panel is fair and errs on the side of more disclosure, which helps shareholders to obtain a fairer deal.

Whilst there were some deviations from this view, and the Panel was not entirely without criticism by some respondents in the sample, criticisms tended to be relatively minor, and related to specific aspects of the way the Panel operated, rather than to perceptions of the overall performance of the Panel. It did not diminish the favourable overall perception of the organization as:

-] Professionally run, and using part time professionals as Panel members quite well.
-] Pragmatic, resulting in a faster resolution of disputes than was possible under the previous court system.
-] Following principles designed to ensure equity and fairness for shareholders in takeover situations.

“My view is overall it does achieve (its) objectives. You can criticise particular decisions or particular directions that the Panel may go in from time to time, but that’s very much at the edges and it does actually achieve each of (its) objectives.”

“My view is that the Panel has performed very well to date, and has by and large fulfilled its objective . . . which was to establish a commercial, sensible, quick resolution of disputes in takeovers without going through the long, tedious process of courts. I think that as a dispute resolution mechanism in takeovers it's been very effective in its approach . . . it has produced... sensible results and enhanced the operation of the markets. So I think it's worked fairly well.”

“I think the Panel has been held in high regard. It operates in a rapidly developing area . . . which requires a lot of materials and opinions to be generated . . . which they do in a timely and professional basis . . . As a practitioner, my view from the inside is how urgent and quick to attend one needs to be in order to operate real-time. The Panel has been held in high regard for being able to respond in a timely manner and also in a professional and considered way . . . some of the criticisms that one might level at organizations like the Takeovers Panel include – Are they market savvy? Are they timely? Is there a reasonable consistency in their approach? – The Panel has actually done a pretty good job across all those fronts.”

The segments which were the most critical were the investment banking sector, and to some extent, fund managers and financial journalists. A small number of lawyers also were critical of some aspects. However, even in these segments, the overall impression given of the Panel was almost always favourable or very favourable.

The particular criticisms are discussed in detail in the relevant sections of the balance of this report. The most important of these concerned:

-] **Panellist selection:** A feeling held by some respondents that the selection of Panellists was not transparent, and may not be based on sound principles.
-] **Under resourcing:** A reasonably common view that the Executive were of high calibre, but were seriously under resourced.
-] **Influence of Executive:** A view held by some respondents that decisions and reasons given were probably influenced by the Panel Executive rather than the Panel members, because the Panel members are part time and time poor, and the process of documenting the brief, the Panel decisions and reasons was, of necessity, undertaken by Executive staff rather than Panel members. Some respondents therefore recommended an approach similar to the UK model be considered. This was described as a model where Executive staff are full time professional peers who hear all of the cases and make decisions, with only decisions that go to appeal being put to a part time Panel of peers.

-] **Guidance Notes:** Policy setting through more (or better quality) Guidance Notes was seen by a few respondents, as a good objective for the Takeovers Panel to pursue in the future, although it was recognised this may require a larger Executive resource.
-] **Incomplete proposals:** A few respondents felt unsure about the Panel's ability to take action where an incomplete proposal is put as a takeover (i.e., where effectively no "scheme" is set down within a takeover bid).

At least one lawyer felt that the Panel had not materially decreased the time taken to resolve disputes when compared to the court system, and may well have not reduced the number of disputes.

Again, it was stressed by the majority of those who held these negative views and those who had suggestions to make, that the Takeovers Panel had performed very well, and that these criticisms needed to be considered in that light. Looking to the future, they thought the implications of these issues may become more apparent and may detract from the future effectiveness of the Panel.

There were several corporate players in the sample who had been adversely affected by the outcomes of one or more takeovers in which the Panel had been involved. In several of these cases, the interviewees were negative about aspects of Panel processes, believing that improvements or reforms to the process may have resulted in different and more favourable outcomes for them. The areas of complaints or reservations from one such respondent, largely because of events surrounding a single matter that went to Panel proceedings, included:

-] The Panel had been unable to enforce its decision in a recent case, in the sense other factors had delayed the Panel's decision being complied with and thus allowed marketplace events to overtake the original course of the planned takeover.
-] It was too easy (low cost) for parties to take a matter to the Panel and use this as a delaying tactic.
-] The Panel had initially made a decision to declare circumstances to be unacceptable, but eventually allowed the bid to proceed. This was seen as the Panel "caving in" on its initial principle based decision. (The Panel took into account that while waiting for one piece of information to assist it in its decision, different information became available in the marketplace which made waiting for the original information irrelevant.) The respondent also felt the Panel had been remiss in not making public its initial decision.

-] Because of the need to avoid conflicts of interest, the Panel took ten days to convene a Panel, which was considered too long in a commercially sensitive dispute.
-] In the same matter, the time from initial application to final decisions was regarded as too long, and thus the Panel had failed to meet one its key goals – timeliness in dispute resolution.

The overall impression received from the majority of respondents, however, was that even if no changes are made, the Panel is expected to perform as well in the next five years as it has in the past.

“On the whole, the Panel has done a good job, and continues to do a good job in pretty difficult, stressful circumstances.... Interviewer: ‘If the Panel continued to operate over the next five years in the same way it has for the last five years, would you be satisfied with that?’ Yes, I would be relaxed about it....And if it took on board some of those changes I suggested (it would be even better, and) I’m sure other people would also have other constructive points.”

“I think they are doing a great job. I think it is more than the government could ever have hoped from it. I think that the market reaction generally has been incredibly positive. And I must admit I started out as a sceptic - I thought you could have a specialist court that could achieve all of this.... I said I didn’t think it would work. But it was policy, so we had to make it work and it did. It has worked much better than I ever thought it would.”

6.4.1 Summary of Respondents’ Overall Opinions

In relation to the Panel performance, across the 33 interviews:

-] 16 were very favourable towards the performance of the Panel;
-] 9 were favourable;
-] 2 were neutral to favourable;
-] 1 was neutral;
-] 1 was neutral to negative;
-] 3 were unfavourable.
-] 1 was very unfavourable.

Thus, the majority view was very positive towards the Takeovers Panel.

The table overleaf summarises the views of each respondent, so that the reader can obtain a quick overall impression of some of the key issues raised, by stakeholder segment.

Exhibit 2. Overview of Opinions of the Takeovers Panel

Segment ⁶	Selected Key Comments
Lawyer	<ul style="list-style-type: none">] Timelines for submissions often too short.] Too many irrelevant questions asked in Panel brief.] Conferences may short circuit much of this.
Lawyer	<ul style="list-style-type: none">] Concerned about the way Panel members are nominated by Treasury.] Panel Executive seen as high calibre, but under-resourced.] Very few Panel decisions have been incorrect.
Lawyer	<ul style="list-style-type: none">] Preference on occasion for face to face conferences rather than reliance on written submissions.] Large amount of paper work generated which is probably never read.] Although Panel processes and decisions are reasonably consistent, difficult to maintain consistency with very large Panel size.] Panel process is not sufficiently defined and followed, which can undermine its overall effectiveness.
Lawyer	<ul style="list-style-type: none">] Panel process was seen as longer than an equivalent court process.] Every Panel proceeding was seen as tactical, so the reduction in tactical litigation hypothesis was rejected.] Prefers the formality of “proper court proceedings”.] Believes that the Panel brief does not follow the legislation.] Thinks that market standards are gradually improving, but would have equally done so under a court based system.

⁶ For anonymity & privacy reasons, the segment description for each participant has been limited to one of the following: banker, lawyer, fund manager, and “other”. “Other” includes stock brokers, listed corporations, financial journalists, regulators and shareholder associations.

Segment ⁶	Selected Key Comments
Lawyer	<ul style="list-style-type: none">] Would like a reformed approach to brief – shorter, much more focussed set of questions.] Reasons need to be much shorter than at present.] Recommends more effort is put into rules or Guidance Notes, to ensure greater clarity, consistency and compliance.
Lawyer	<ul style="list-style-type: none">] Executive staff very helpful and very professional.] The model works because the people are high calibre, and succession planning is required.] Decision reasons are too long and convoluted.
Lawyer	<ul style="list-style-type: none">] Market is generally satisfied with Panel decisions] Would like the Panel to be more rigorous in assessing whether they will commence proceedings.
Lawyer	<ul style="list-style-type: none">] Takes a pragmatic approach to resolving disputes.] The Panel is restricted in the sanctions it can apply, and some corporations / lawyers are not concerned by a declaration of unacceptable circumstances.
Lawyer	<ul style="list-style-type: none">] The Panel has not reduced tactical litigation.] The Panel's rulings are inconsistent and unpredictable.] The Panel has not reduced the amount of time required to resolve an issue (relative to court proceedings).
Investment Bank	<ul style="list-style-type: none">] Little direct exposure to the Panel.] Panel is doing well compared to the litigious US model.] Concerned that the Panel cannot handle “incomplete proposals”.
Investment Bank	<ul style="list-style-type: none">] Panel has improved quality of market disclosure.] Would like the process of avoiding conflicts of interest to be tighter, more formal.] Believes there are circumstances where conferences instead of or in addition to written submissions should be used.

Segment ⁶	Selected Key Comments
Investment Bank	<ul style="list-style-type: none"> <li data-bbox="539 376 1930 416">] Panel has been market savvy, timely and fairly consistent. <li data-bbox="539 416 1930 496">] Would like to see greater robustness in addressing potential conflicts of interest – for the future. Not seen as a critical current issue. <li data-bbox="539 496 1930 560">] Believes the Panel is sometimes too bidder-friendly – a better balance needs to be reached. Again, not seen as a major or persistent flaw.
Investment Bank	<ul style="list-style-type: none"> <li data-bbox="539 576 1930 639">] Suggestions at the margins only, included: Use more post mortems, extend timelines for submissions by 24 hours, make use of conferences (teleconferences) and reduce the time taken to publish reasons for decisions.
Investment Bank	<ul style="list-style-type: none"> <li data-bbox="539 655 1930 695">] Panel size at 43 may be too cumbersome. <li data-bbox="539 695 1930 759">] Would like Panel member appointments to be less political, less “mates” driven, in order to remove any potential for criticism of the Panel.
Investment Bank	<ul style="list-style-type: none"> <li data-bbox="539 775 1930 855">] Thinks the Panel struggles with novel cases, needs more anticipatory policy development, but sees that this may require decision making power to be conferred to Executive. <li data-bbox="539 855 1930 895">] Panel’s information gathering processes particularly good. <li data-bbox="539 895 1930 919">] Panel has the right balance between speed and investigatory depth.
Other	<ul style="list-style-type: none"> <li data-bbox="539 935 1930 975">] Some inconsistencies evident in Panel decisions. <li data-bbox="539 975 1930 1015">] Therefore need more policy development (Guidance Notes). <li data-bbox="539 1015 1930 1046">] Has experienced Executive staff having a little too much influence in Panel decision making.
Other	<ul style="list-style-type: none"> <li data-bbox="539 1062 1930 1102">] Decisions are fast and all levels of documentation were satisfactory. <li data-bbox="539 1102 1930 1142">] Bidders can, and do use the Panel to slow down proceedings. <li data-bbox="539 1142 1930 1174">] The Panel system is still faster (and better) than the old system.
Other	<ul style="list-style-type: none"> <li data-bbox="539 1190 1930 1262">] Panel provides an efficient, effective and final method of dealing with disputes, and has taken the acquisition of public companies out of the court system <li data-bbox="539 1262 1930 1294">] Across Panel members there is a very good depth of talent and expertise

Segment ⁶	Selected Key Comments
Fund manager	<ul style="list-style-type: none"> <li data-bbox="544 376 1930 411">] Time to convene his Panel was excessive. <li data-bbox="544 416 1930 451">] Overall time to resolve his issue had been too long. <li data-bbox="544 456 1930 491">] Panel had not stuck to its original decision in his case, disadvantaging him.
Fund Manager	<ul style="list-style-type: none"> <li data-bbox="544 499 1930 571">] Panel Executive praised for efforts to resolve complaints informally, and for its concern for broader market standards. <li data-bbox="544 576 1930 611">] Individual Panel decisions are inconsistent due to personal biases of Panel members. <li data-bbox="544 616 1930 691">] Would like more publicity about the Appeals process (seen as between steps 11 and 12 on the Panel process list.) Further, would like the Panel to be more flexible in hearing Appeals, rather than dogmatic on a single course.
Fund Manager	<ul style="list-style-type: none"> <li data-bbox="544 699 1930 734">] Little direct exposure to the Panel, but believes it does a good job. <li data-bbox="544 738 1930 774">] Concerned that many senior business people and professionals are still unaware of the Panel's role. <li data-bbox="544 778 1930 850">] Concerned that private equity buyouts will soon become widespread and involve major companies. Concerned that the Panel may not be ready, may not be able to deal with this trend of "public to private" bids.
Fund Manager	<ul style="list-style-type: none"> <li data-bbox="544 858 1930 893">] Would like funds management industry to have greater representation on the Panel. <li data-bbox="544 898 1930 933">] Felt that the Panel needed to educate parts of the market (eg Fund Managers) about its role. <li data-bbox="544 938 1930 975">] Thinks decision reasons need to be more succinct, in plainer English.
Fund Manager	<ul style="list-style-type: none"> <li data-bbox="544 983 1930 1018">] No direct experience with the Panel. <li data-bbox="544 1023 1930 1058">] Relatively unaware of the Takeovers Panel structure, objectives and processes.
Fund Manager	<ul style="list-style-type: none"> <li data-bbox="544 1066 1930 1101">] Unaware of the Panel in any detail at all. <li data-bbox="544 1106 1930 1182">] Commented that had he been aware, his organisation may have approached the Panel in relation to various takeovers matters in the past.
Fund Manager	<ul style="list-style-type: none"> <li data-bbox="544 1190 1930 1262">] Would like Panel to demonstrate leadership in the market in terms of approach to valuing take over targets; market takes very short term view which is detrimental to shareholders. <li data-bbox="544 1267 1930 1302">] Panel has reduced amount of litigation but is sometimes used tactically by lawyers to delay proceedings. <li data-bbox="544 1307 1930 1337">] Composition of Panel should cover a broader cross section of investor interests.

Segment ⁶	Selected Key Comments
Fund Manager] Panel helps ensure that decisions are made by well informed shareholders, with sufficient time and without undue pressure.
Other] Decisions may be too fast, but reasons are too slow to be issued.] Overall informality of the process is an improvement on the courts system.] Panel Executive are high calibre but there are succession issues.
Other] Influenced by a case that negatively impacted him.] Felt the Panel lacked stock market expertise.] Panel seen as biased in ASIC's favour.] Panel seen as taking too long to make some decisions.
Other] Structure and processes of Panel seem to work well.] Individual Panel decisions seen as unpredictable.] Guidance Notes seen as timely, but often open to too much interpretation.
Other] Big improvement in fairness of takeovers has occurred since Panel inception.] Tactical litigation and associated costs have significantly dropped.
Other] Panel has done very well.] Virtually no participants complain about process.] Market disclosure standards have lifted under the Panel.
Other] Would like to see more policy development.] Favours a full time President because it will facilitate more policy development.
Other] Favoured full time Panel of peers and larger Executive.] Should aim to reduce influence of Executive on Panel decisions.

6.5 Criteria Used to Assess Panel Performance

6.5.1 Unprompted View of the Panel's Objectives

Expeditious commercial outcomes: Many respondents thought that the Panel's main objective was to take takeover related dispute matters away from the courts and to reduce tactical litigation. This was because tactical litigation can introduce delays, and in addition, the courts "had an uncommercial view".

There were many variations on this theme, such as:

"To speed up the process of reviewing issues in disputed takeovers."

"To develop a group of peers (that is knowledgeable working practitioners in M&A) and use them to take a real world approach to expeditiously deal with takeover matters that were in dispute."

"To avoid highly complex court actions."

"It is there to get rid of the courts, have quick resolution and make takeovers faster."

Thus, the top of mind view of the Panel's objectives was more about commercial outcomes than market standards and fairness, for many stakeholders interviewed.

"I think it's primarily there to arbitrate disputes in the takeovers context when....there is more than one bidder and the other bidders may come along to complain about something, or it could be particular groups of shareholders within the target company, or it could be the corporate regulator itself, ASIC... it's in an area that was previously quite litigious and quite prone to people using the dispute mechanism as a strategic weapon in a highly charged environment, its [purpose is] to provide an alternative form of dispute resolution in order to reduce the use of the dispute mechanism as a strategic weapon."

The issue of fairness and allowing shareholders to make the ultimate decision was however, raised (unprompted), by a few respondents:

"I think the main thing to ensure is that there is not protracted defence to a takeover through tactical litigation, whereby an incumbent board can seek to preserve its position by drawing out the bidding process beyond that a bidder is prepared to accept and therefore hope that the bidder will drop off. ...there has to be a point in time where just blocking is not acceptable to the market and at the end of the day you should let a bid go to the market and let the market decide whether it's a good bid or not. ..."

...I think they've been quite good inasmuch as they've let the bids go to the market and let the market decide whether it's a good bid or not. Don't let the directors think there is something slightly wrong with it we won't put it to our shareholders, let the shareholders decide."

A few respondents also felt that part of this pragmatism was a sub-goal of achieving **uniformity in decisions** and outcomes, and a few lawyers also felt that its goal should include **certainty of outcome, or predictability** in its decisions, an allied concept. Some thought that maintaining (rather than increasing) certainty or predictability of outcome (when comparing the Panel operations and outcomes with those of the previous court based system) was important.

Policy setting: A small number of respondents stressed that a key role or objective of the Panel was (or should be) to lay down policies that would prevent disputation arising. An example was the need to clarify the position in cases where derivatives are used to gain control of a company (as in Glencore, and in BHP's takeover of WMC, where it was felt that if the Panel had already issued Guidance Notes on this, both matters would have been resolved faster with less mess and without going to court).

"The Panel was set up to actually look at the underlying policy of the legislation... focus on what should be happening, rather than what you could achieve by getting around the letter of the Law."

"Check that things are not too far outside the spirit of the Law, because ASIC can't do this, and the NCSC used to do it via its unacceptable circumstances rulings."

Educating the market on takeover standards: A few interviewees mentioned that the Panel's role included educating the market on takeover standards, which is, arguably, an extension of the policy setting role.

"Providing guidance on what is acceptable and what is not – education, not regulation."

Ensuring fairness: A few interviewees who were not Panel members, stressed that the Panel's job was also to ensure fairness to various parties, as evidenced in the following comments.

"Get the parties to work through a set of rules, which should suit both target and bidder."

"Make sure the parties get the right information."

The idea of putting the decisions back to fully informed shareholders, or to ALL shareholders was not generally volunteered as a Panel goal, although several did agree with this as a goal for the Panel, emanating directly from its role in enabling a commercial solution to takeover disputes:

“The primary objective is to bring a commercial approach to market activity as opposed to a black letter law approach. It is not about feeding litigants. This is important because takeover activity is about transfer of value to shareholders.”

Few respondents, other than current or recent Panel members listed a set of objectives which resembled the official Takeovers Panel objectives. These are given in 6.5.3 below. Panel members tended to speak about empowering the shareholders with information, and some of the other notions embraced by the Eggleston Principles, in addition to introducing a faster more pragmatic process devoid of tactical litigation.

Some fund managers emphasised the role of the Panel in addressing the first of these principles; i.e., *to put takeover decisions in the hands of properly informed shareholders.*

ASIC interviewees also added that the Panel had the power to review ASIC’s relief decisions in takeover matters – a major “crossover area” with ASIC.

Unaware of the role: Some stakeholders seemed almost unaware of the Panel’s *raison d’être*, or any of its objectives. These respondents were mostly fund managers, although not all fund manager interviewees lacked an appreciation of the Panel’s roles:

“I really don’t have any idea about who is on it, what their processes are, what they are really looking at and to be honest it really it doesn’t come into play for me personally unless they knock back something it is not going to impact. So it is almost like in certain situations you see it as procedural. You just go through the process From an industry point of view (fund management) we should be more aware. Maybe communications has broken down and so (we know they exist) somewhere but logically they have only engaged people they are trying to help and they may not be as effective as they could be.”

6.5.2 Reactions to Prompted Panel Objectives

Are the Objectives Appropriate? The official Takeovers Panel objectives, as put to respondents following discussion of the above matters, are as follows:

-] To put takeover decisions in the hands of properly informed shareholders.
-] To reduce tactical litigation and its associated costs in takeovers;
-] To support the following principles⁷ in guiding takeover policy:

⁷ These are generally known as the Eggleston Principles.

- The acquisition of control of listed companies or listed managed investment schemes takes place in an efficient, competitive and informed market.
 - Shareholders are to be treated equally and fairly, recognising that a sale of control alters and to some extent, sells some of every investor's participation in the corporation. Thus, whenever a controlling shareholder sells its shares, every other holder of shares of the same class is entitled to sell its shares (all or a proportion) on substantially the same terms;
 - The shareholders and directors of a company should know the identity of any person who proposes to acquire an interest in the company;
 - The shareholders and directors of a company should have a reasonable time in which to consider any proposal under which a person would acquire a substantial interest in the company;
 - The shareholders and directors of a company should be supplied with sufficient information to enable them to assess the merits of any proposal under which a person would acquire a substantial interest in the company.
-] In non takeover situations (eg rights issues), ensure the acquisition of voting shares takes place in an efficient, competitive and informed market.

Almost all respondents accepted these objectives as being worthwhile for the Panel to aim at. The only reservations of any note included:

-] Some felt that it would be difficult to put takeover decisions in the hands of all shareholders and many did not wish to exercise their voting rights – especially private investors.
-] A very small number of respondents felt that the objective concerning “(Ensuring) the acquisition of control of listed companies or listed managed investment schemes takes place in an efficient, competitive and informed market” was too broad and that the Panel should be limited to pursuing the Eggleston principles to avoid an over zealous approach by the Panel.

“I would recast the section 657A criteria so that they are termed in an effects based approach, linking them specifically back to the Eggleston principles which would make it easier for the Panel to do its job... “

“The problem that the Panel has, especially in the last two years, is an obsession with that formulation of an ‘efficient, competitive and informed market’. And they believe that if the circumstances that occurred are such that if they occurred differently the market would have been more efficient, more competitive or more informed the situation in which the circumstances actually occurred were not an efficient, competitive or informed market. So, if it could have been better, then it wasn’t good enough.”

To reiterate, however, the vast majority accepted the stated objectives as being appropriate for the Panel to pursue.

Does the Panel Meet its Objectives? Almost everyone felt that the Panel was making reasonable inroads towards achieving all of these objectives.

Subsequent sections of this report show that some people (a minority) felt the Panel could improve in some areas of its processes, and in particular that:

-] Consistency of rulings could be improved as a result of this.
-] The costs associated with takeovers was beginning to creep back up, despite a reduction in tactical litigation. This was because of tactical use of the Panel.

“...I suspect that we are now seeing a second stage of this exercise where people are beginning to resort to the Panel as a useful tactic ... whereas for a while it did not happen, people thought ‘oh, there is no point going to the Panel’, but now they are starting to say ‘oh, maybe we should just go to the Panel’.”

Some bankers saw this as a result of the use of legal rather than banking advisers when dealing with the Panel.

However, for most of the sample, there was no seriously negative assessment of the Panel’s performance in meeting these objectives.

6.5.3 Unprompted Criteria for Assessing the Panel

Respondents were asked what criteria they believed should be used to assess the performance of the Panel. In most cases, respondents referred to their understanding of the objectives of the Panel, saying that assessment should be on the basis of the Panel’s success in achieving those objectives.

Specific factors mentioned as appropriate assessment criteria included:

-] Ability to provide a quick resolution of disputes in takeovers;

-] Ability to respond in a professional and considered way;
-] The commerciality of judgements / a pragmatic approach to resolving disputes;
-] A reasonable consistency in approach;
-] Integrity and acceptability of decisions and explanations;
-] Ensure a fair outcome for all parties;
-] Ensure takeover decisions are in hands of properly informed shareholders;
-] Effect a reduction in tactical litigation;
-] Effect a reduction in the use of tactics to gain unfair advantage;
-] Avoidance of conflict of interest / the appearance of conflicts of interest;
-] Efficiency of the Panel's administration.

Some respondents suggested broader assessment criteria, such as "people's confidence in them", "lack of complaints by practitioners", or "overall efficiency and effectiveness", but these were usually expanded into a set of criteria covered in the above list.

And again, as noted above and discussed in more detail in subsequent sections, the Panel was seen by most respondents, to have performed very well on these measures.

One lawyer felt that the Panel should be subject to ongoing review, initiated by Treasury:

"I think there would be merit in having a review . . . to have the Panel's processes, outcomes and its performance subject to assessment on an ongoing basis by a combination people from government and the private sector. In addition to having the courts being able to review certain cases, having the Panel subject to review both from government—because it is an instrument of government—and from the market place. If you like - a 360 degree review. It should be a committee, presumably convened by Treasury, on which there are two or three Treasury people, three or four people from the market."

6.6 Panel Structure

Interviewees were encouraged to comment on the appropriateness of the Panel structure, from two perspectives – firstly the mix of 43 Panel members, and secondly, the expertise and experience of the three members on particular Panels.

6.6.1 The Panel of 43

There were several themes to the responses on Panel structure, and these are described in turn.

Seem very impressive and appropriate group: Many interviewees said they had met some of the Panel members at lunches and dinners arranged by the Panel as a liaison exercise with stakeholders. Comments associated with this were always favourable, as illustrated by the following typical remarks.

“Meeting the Panel members has revealed to me a very impressive group of people, in terms of their intellect and their sense of wanting to make the takeovers area work fairly and smoothly. They are all very good technically... it seemed like they were from all over the country (therefore representative of all parts of commerce), and seem to have an appropriately high and uniform (i.e., evenly spread) level of expertise.”

Favourable publicity: Interviewees felt that the publicity and general opinion in legal circles was that the Panel members were properly chosen and appropriately representative of the relevant areas of expertise.

“It’s very cleverly constituted. 45 members (selected) from every firm, every investment bank, a few corporates thrown in for good measure, from all the states. So there’s such a buy in through it’s constitution. And it’s got such an important position in takeovers practice ... the discretions conferred by legislation are so broad that it’s very unusual for anyone to criticise it publicly. ... all the newspapers articles ever written about the Panel are – ‘big tick for the Panel - great success (according to) practitioners’. And you get this self fulfilling thing about what a wonderful job the Panel’s done and isn’t it fantastic compared to what the courts did.”

Mix of expertise: Some commented that trained lawyers made up the majority of the Panel, and that this was appropriate. Others seemed to know in more detail that a mix of lawyers and investment bankers was involved, with a few “commercial” or corporation people. This mix was seen as appropriate by those who mentioned it.

A small number of interviewees said they would like to see more corporate people – those who have been involved in recent takeover activity, so that the Panel would display a more rounded feel, rather than being heavily weighted towards corporate advisers (legal and investment banking).

Some high flyers: It was felt that the Panel needed a number of high profile practitioners in it, and this was seen to be the case.

Need to maintain a large Panel: Most respondents agreed that the Panel needed to retain a large Panel because:

-] In many situations many Panellists could be “conflicted out” of a matter, and the pool needed to be sufficiently large to avoid the situation of no suitable Panellists being available.
-] A Panel was often bought together at very short notice, and a substantial pool of Panellists was necessary to ensure that sufficient people were available to convene a Panel as required.

Some Panellists lack exposure to takeovers: A few interviewees felt that the Panel was too large, and that consequently a few appointees had been selected who lacked experience in takeover matters. This was sometimes mentioned as “an early criticism” of the Panel and sometimes as a continuing problem. However, those with this view did not conclude that any Panels have been incompetent or not up to the task.

“There are over 40 Panel members – the matters are farmed out and they try to get them all involved. Some Panellists have little to do with takeovers.”

The selection process lacks transparency: Most people did not know exactly how the Panel was selected, although most assumed it was by merit, and conducted solely by the President. Even Panel members commented they had no idea how they were selected, by whom and on what criteria.

A few people (investment bankers and lawyers) mentioned that the relevant Minister (the Federal Treasurer) nominated the candidates to the Panel President, but that the process lacked transparency. This led to a few areas of concern which were thought to have potential to become more apparent in the future:

-] “Political Correctness” being taken too far:

“...there is a clear direction that there must be equal geographic representation...even though the bulk of takeover activity occurs in Melbourne and Sydney. There is obviously a clear direction in terms of other type of demographics, the gender mix, the mix of where people come from, like corporations, investment banks etcetera, the reality is that the most highly respected takeovers Practitioners are people who work in this area are either in Sydney and Melbourne, with a few in Perth and Brisbane and Adelaide and the reality is...that they are either working with investment banks or law firms, and they're male, waspish and all the rest of it. Because that's just the nature of what you are dealing with. So a little bit of political correctness is fine, but I think there's a little bit too much political correctness in the way that they've approached what you'd call the demographic and geographic equality type of concerns. That is one type of political interference I would like to see done away with.”

] The appointment of “Mates” to the Panel over people with more relevant expertise:

“...The other (problem) is where the mates are appointed. ... There has only been two that I'm aware of. But it's interesting because it's actually quite evident because [those people] amongst their peers wouldn't be regarded as being at the height of their powers ... (This) is very dangerous and should definitely be done away with.”

“It's never been a practical issue. It's only an issue when the Treasurer announces the new Panel members and there's a general laugh and joke that goes around, “Oh, so-and-so has done his 20 years in investment banking, he'll be appointed to the Panel despite never having done a takeover . . . he's done his time and he's well connected in Canberra”.

“If I were doing this... (I) would have the nominations and the decisions as to who gets appointed made more transparent.”

To correct or avoid this problem, the following ideas were suggested by a small number of interviewees:

1. The nomination process needed to be made more transparent;
2. There needed to be more scrutiny applied to the Treasurer's nominations;
3. The Panel members should match the general demographic of people involved in takeovers, in that they are generally male, work in either Sydney or Melbourne, and work in either investment banks or large law firms.

“Look, the reality is that most takeovers take place in either Sydney or Melbourne, and that most expert practitioners in that area and are either in Investment banks or the big law firms, and that they are mainly going to be male. Sorry guys, but that’s just the way it is. But I’m sure no one has the political guts to do that.”

Most who held these views also commented that because individuals alone did not have a significant impact on Panel decisions (decisions were made at the group level), the current system still functions quite well. The risk of inappropriate individual appointments to the Panel was mitigated by the number of highly respected people on the Panel and its strong Executive team.

“...It’s a highly competent, highly skilled Executive team, so things are OK at the moment...you’ve got to have checks and balances to make sure that the right things are done.”

Need for judiciary involvement: One interviewee (a former Panel member) advocated (without fervour) the addition of members of the judiciary to the Panel, because:

-] It would be excellent for them to see a more commercial process than they normally do;
-] Involving judges on Panels would ensure the judiciary accepts the processes, findings and standing of the Takeovers Panel.

M&A players’ perspective: Some regulator interviewees felt that the Panel was only representative of “the M&A community” as opposed to a broader group. However, this was accepted as part of the model here.

“...it’s a niche technical area, so we’re in favour of a specialist body reviewing our decisions for instance. We have no real issues except that the perspective is more an M&A players’ perspective rather than a broad constituent model. That’s inherent in the model, though.”

Need for investor involvement: A few fund managers felt that institutional investors or private client brokers should be represented on the Panel, so that the investors’ views are considered, “to ensure that all parties are looked after”.

Need for More Corporate Players: One of the stock brokers felt that there were “too many adviser types as opposed to director types... too many lawyers and accountants (bankers)...”

6.6.2 Mix & Expertise of Individual Panels (of 3)

Not sure who sits: Many interviewees said they were unsure who sat on particular Panels, or that overall, they did not know the make-up of a series of Panels in a particular period, and so could not comment on the appropriateness of individual Panels.

Balance of expertise, matched to the case: Some people knew that the President usually appointed a Panel with a balance of legal, banking and commercial experience on it, and this was generally supported, where known.

“The Panel appoints three types of individual as I see it; business people, bankers and lawyers. Whether this is formal or this is informal I don’t know. But logically speaking every Panel that is constituted tends to take one from each of those groups. The people who are doing it [the selection] whether it’s the Panel Executive, whether it’s Simon, also tend to get, when it’s a very difficult situation, the most senior Panel members involved. So they are doing well in terms of matching skills to issue.”

“Super Panels”: Some interviewees commented that “Super Panels” were emerging. By this, they meant Panels with particular individuals – described as “high flyers” on them. This was thought to be because the Takeovers Panel trusted these Panel members more (than other Panellists) to withstand intense public scrutiny that accompanies the larger takeover matters/cases.

Uniformity of competence level: Most interviewees felt that participants knew that Panellists are all very competent and they accept them (including the Panels that are not “Super Panels”) without question as being up to the task.

“All the Panels look OK. They have such deep experience on the overall Panel, it’s fine.”

“You don’t see any fall off of quality of decisions, or any rise in complaints without the Super Panel in place.”

However, as noted in 6.6.1, some interviewees held the opposite view – that some Panel members lacked experience and involvement in takeovers in their day jobs, and thus were potentially unsuitable or at least sub-optimal Panel members. However, this was not put forward by any interviewee as a serious current problem for the Panel.

*“I wouldn’t say it’s a concern. Overall I give the Panel very high marks. They’ve done a great job. You **would not** [respondent’s emphasis] want to see them go away. It’s fantastic. That (uniformity of quality of Panel members) is potentially one of the areas you may want to tweak.”*

Panels have performed well: Many less involved people simply commented that the Panels have performed well, and concluded that the structure must therefore have been acceptable, or better.

6.6.3 Management of Potential Conflicts of Interest;

Conflicts well handled: Despite it being perceived as difficult for the Panel to avoid conflicts, most people felt this was handled very efficiently.

Those who were not directly involved with the Panel assumed conflicts were properly identified and avoided in Panel membership. Those who had been involved confirmed that this is the case.

“They would put up their hands if they were conflicted.”

“The Panellists are accustomed to ruling themselves out to avoid conflicts.”

Those who were directly involved in Panel affairs said that conflicts were definitely well managed, for a variety of reasons:

-] Many Panel members were employed by large firms which already had conflict systems (and resources) in place, making it relatively easy for individuals to check whether there was likely to be a conflict with any given takeover case.
-] Panel members placed great importance on their own and their firm’s reputations, and were careful to ensure that potential conflicts were avoided.
-] In the respondents’ experience the Panel Executive accepted Panel members’ advice if there was a potential conflict of interest.
-] Finally, due to the publicity surrounding takeovers, there was a high level of awareness of the affected parties and stakeholders involved, and thus greater opportunity for potential conflicts to be addressed proactively.

“There’s a number of safeguards. To me it’s a good system which works well as long as everyone is aware of what they’ve got to do and they do it properly, and as long as there is monitoring of that...it is a small community and everyone is concerned about their own reputation.”

Concerns about conflicts: However, there were a few interviewees who were concerned about this governance aspect of the Panel’s operations. They variously made the following points:

-] A few cases recently have stimulated “rumblings” about conflicts of interest, including the Glencore proceedings. Also, for example, “X” was on the “Z” Panel despite having prior involvement with some related issues, *“but I don’t doubt that “X” acted properly.”*
-] Some felt there was a need for more rigour in the process of managing conflict. *“It could be tighter. At the moment, the Panel procedures rely primarily on participants in the Panel proceedings saying whether or not the individual has a conflict. There are two legs to the management of conflict. The first leg is when the Panel member is asked to participate, that Panel member should identify his own conflicts. Self regulate. Secondly, the parties to the proceedings are asked if they have a problem with XYZ; [i.e.] is there a reason why he shouldn't be a member of a Panel? That second leg is a good step in filtering out a lot of potential conflicts. But the parties to a proceeding won't necessarily know who's conflicted and why. So that means that the first leg of that process, that self-regulation, becomes much more important. And to be honest, I'm not sure if other people have [done proper self regulation]. ...I also think it might be worthwhile considering something like a formal declaration by Panel members to the Panel saying. "I've conducted an internal investigation of my organization's potential conflicts, and I don't believe I have any." I think that step would be valuable. I think there should be more rigour around it. Having said that, I'm not aware of any situation where it [a conflict of interest] has been a problem.”*
-] One lawyer felt that conflicts did result in some Panel members sitting on cases where they did not have the necessary seniority or expertise. This, he felt, resulted in sub-optimal and inconsistent decisions between various Panels. He advocated a takeovers court to address this problem. This respondent’s view was that the current system was flawed (by the implications of avoiding conflicts) but was held together by three excellent people – the current President, the current Director and the current Counsel.

6.6.4 Market Participants Sitting as Panel Members

Support for current practitioners: The majority felt there was no question that currently practising legal and investment banking people were the best people to be sitting as Panel members, because:

-] They know the principles and their implications on all aspects of a matter.

-] They know the matters that will be of most concern to an expeditious outcome.
-] They know what will be able to implemented in a practical sense.
-] They are actively involved in a rapidly changing environment, so they are more able to see the practical issues than retired practitioners or academics.
-] The marketplace knows that the Panellists are current practitioners, and accepts that requests for information and for certain elements of enhanced disclosure are, indeed, possible to produce, and in the requested timelines. That is; having market participants sitting as Panel members gives the players confidence that they will be dealt with in a practical way, so they are likely to comply with Panel decisions and guidelines without questioning them. A few interviewees disagreed with this:

“We don’t have a tight knit peer review mentality here, but they at least all speak the same language.”
-] There is a broad enough base of objective, high quality legal minds available to avoid the conflicts that could otherwise plague such a model.

Support for part time Panellists: The use of part time Panellists was supported by most for the reasons given above. Essentially, if the Panel members are to be current practitioners, then by definition they must be part time in their Panel roles. Overall, most interviewees were comfortable with part time Panel members as a means of accessing the very best and most accomplished intellectual resources in this area.

Some support for full time Panellists: There were a few respondents who argued that there were evident problems with the use of part time market participants, including:

“Panellists come to this stuff at the end of the day and therefore the Panel Executive staff have a very big say in what decisions are taken. I understand they (Panellists) are fed a lot of information and possible positions by Nigel and George⁸. This means the Panellists are not fully in control. It is different in the UK, where the decision makers are initially actually the full time Executive, who are in turn, peer people who are in the regulatory body for a period full time (e.g., a year). You only go to the Panel of part timers in an appeal situation.”

⁸ Mr Nigel Morris – Panel Director, and Mr George Durbridge, Panel Counsel.

These respondents argued that a full time Panel would have a greater chance of eliminating inconsistencies in the application of the principles or interpretation of the Law. In addition, full time Panellists would be more likely to be serious about what they are doing and:

“Take a serious interest and involvement rather than flitting in at the end of the day and basically knuckling under to what the Executive serves up or what a strong and active Panel member may be pressing for.”

Those who held this view thought that this was a significant issue.

“What we have got in the absence of (a full time Panel) is the Executive, (especially) the Director and the General Counsel of the Panel, having a disproportionate influence. And their experience is not all that significant either. Both of them have only really been bureaucrats..... But frankly it’s not what was ever advertised as what the Panel would be about. And the fact that you haven’t got a full time Chairman with real experience exacerbates the problem.”

“I am watching this closely and I’m not sure it is working as well as it should or could. Glencore showed flaws, although it has not totally undermined the Panel.”

6.6.5 Full Time Panel President?

The respondents were asked to comment on the concept of having a full time Panel President, instead of the current part time position. The responses were fairly evenly divided on this question, although most did not have a strongly held view either way.

Retain part-time President role: A small majority of interviewees thought that there may not be a case for a full time President (or overall Chairman) for the Panel, because the Panel has worked smoothly without one. It was noted that this may not be the case if and when the current President/Chairman steps down and/or if the two most senior Executive staff members were to leave the organisation.

“There is no evidence to say it is not working.”

Move to full time President/Chairman: A number of interviewees felt there was a case for a full time President of the Panel, because of one or more of the following:

-] The Panel needs to increase its policy setting activities and this requires a high level full time leader;
-] There is a need to attract more, and higher level Executive staff (according to some interviewees);

] There is a need for a strategic management approach, and for greater attention to succession planning surrounding the top positions in the Panel Executive.

“A full time Chairman would add more drive to the place - push things along a lot harder than at present, particularly in the policy setting (Guidance Notes) area, which is largely for the Executive team to do.a full time President would deliver a higher importance and priority on policy setting, and if the right high profile and very competent President was in place, this would attract and keep more and better quality Executive staff.”

“And I think you would have somebody who might (look at issues such as) where am I going to find the next Nigel⁹? Where is the next George? Are we managing the flow of it all? It is hard when you are cutting the grass every day and the grass is growing all around you to see the landscape. I think that Nigel, George and Simon have done a great job. There is no criticism.”

“The success of the Panel is to some extent a function of the fact that we were very lucky in getting the right people, those three in particular. They were all kind of in the right place at the right time and interested in doing it. What is it going to look like in ten years time? How do we put this on the right track so that in ten years time it will be as effective? To me that's the single issue. The rest is just ornaments on the Christmas tree.”

Some also stressed that a full time President may improve staff management and promotion.

“A full time Chairman or President would (assist) staff management and promotion.”

Common chairman for each Panel: Several respondents felt a better question for consideration may be whether there is a need for a single (common) Chairman of every one (or most) of the individual takeover Panels – for consistency in decisions. This was not strongly advocated by many, and most were not asserting any evidence existed of inconsistency – merely that in theory, this would be a better question to address than full time Panel members or a full time chairman of the overall Panel.

“(A full time chairman) would be improving predictability, because at the end of the day, George and Nigel are not members of the Panel. They can say ‘this is different, this is an outlier, this isn’t consistent’, and I know they have from time to time, but the Panel is saying ‘hmmm this is how we want to deal with it’, so they (the Executive) have to do what they are told.”

6.6.6 Selection Process for Panel Members

Opaque process: Most interviewees said they did not know exactly how the selection process was undertaken. This is discussed earlier in Section 6.6.1.

Process assumed to be satisfactory: Several others commented that the selection process was more than acceptable, in that the resultant Panel seems very good, even though they were uncertain of the exact process used to identify likely candidates. (eg Did the President ask each legal firm for several suggestions, or did he simply do his own identification of candidates based on observation?)

President dependant process: The current President was seen as having excellent experience and outstanding judgement. However, it was widely felt that the selection process (whatever it is exactly), may be open to more questions when he retires.

“Currently Simon is semi-retired, so he is not questioned regarding his Macquarie Bank role or his personal likes and dislikes. It does need someone who is a bit removed from day to day matters, and Simon fits this nicely.”

Comparisons with a representative model: On prompting, the interviewees were mixed in their views on the relative merits of a representative model (eg the UK selection model) versus the Australian model.

Comments favouring the Australian model

The most consistently made point was that the current process aims to select the best and most experienced people for the task, whereas a representative model may result in some Panels containing less experienced and less competent people.

“I don’t know exactly how they do identify a list and how they select the best ones, but it seems to work.”

“There is no evidence to say selections are not right. The people there are high quality, so I am satisfied the process works well there.”

“The trouble with a representative model is you end up with an Adelaide accountant because the rules say you need one.”

Some people felt that while a UK model may work well, the merit based Australian model had been shown to deliver good enough results to warrant its retention.

⁹ Mr Nigel Morris, Panel Director; Mr George Durbridge, Panel Counsel; Mr Simon McKeon, Panel President.

“If Panel membership has to be determined by whether or not it meets representative criteria, that would be a bit of the worry.... The national Australian demographic doesn't reflect the people who actually know about takeovers. There is a risk that politicians will be tempted to play the political game in getting membership. That's one concern I have. Otherwise I think the current Panel body membership has a high degree of expertise and is appropriately constituted.”

“We get the best of both worlds. We get the best people (practitioners) of the day – not just practitioners who put their hand up to become umpires for a while.”

A few people said that the UK model (like ours) delivers some inconsistent outcomes, but is more bureaucratic than the Australian model. For these reasons, the local model was favoured by such people.

Query as whether the Australian model is really merit based

A few interviewees wondered whether our model is completely merit based, or if it is somewhat representative of sectors and geographic regions, and is thus a hybrid merit-representative based system.

“The perception I have is that all the Panel members have not been hand picked because we think they are the best 45 people in Australia. I think there are some limiting factors. They've been careful to select some people from each major law firm, each major investment bank. On top of that you've also got each major city in Australia with people on it, and there's a pretty fair gender split. It's no accident that's the result.”

Comments favouring a representative model

“A representative model may be preferable and less dangerous than putting the wrong person into the chair. The Panel has largely worked because Simon has the trust of the markets in his selection of Panel members and his overall chairmanship of the Panel.”

6.7 Panel Processes

6.7.1 Overall Comments about Processes

Procedures known only to participants: Only interviewees who had been involved as a Panel member, or as a directly involved (with the Panel) party to a dispute knew, either in outline or in detail, the Panel's full procedure.

Results suggest Panel process is robust: Many comments were made indicating the stakeholders believed that the process has delivered good results overall, and therefore must be at least adequate, if not a good process.

Public hearings: Lawyers, and to a lesser extent investment bankers, felt that a public or a closed hearing at which the parties and the Panel were present would very likely be a more efficient procedure than relying solely on a submissions and rebuttals in the mainly hard copy process often used at present by the Panel. This is discussed in more detail below.

One of the journalists commented that the enabling legislation for the Panel assumed totally public hearings would always occur¹⁰. It was felt this was not being followed, to the detriment of a free and efficient market.

Excessive secrecy or breaches of confidentiality? Secrecy was raised as an issue by journalists. The parties were often forbidden from talking to the press. It was felt that where information was given to the Panel in confidence, then it was right and proper that this should be kept secret, but information was not always provided in confidence.

“But where a party puts their case to the Panel and is happy to have it published openly - what is the problem with that?”

In contrast, one of the investment bankers mentioned that breaches of confidentiality have occurred in the midst of proceedings. He felt such breaches had been addressed “vehemently” at the time by the Panel, but he wondered whether the Panel felt it had sufficient power to enforce confidentiality in such instances.

¹⁰ While this was the case for the Panel's legislation as originally enacted, successive amendments to the Panel's legislation have expressly moved away from the Panel's decisions being based on public hearings to now explicitly being based primarily on written submissions. Awareness of these amendments was low in the sample.

Reactions to the Panel's actual processes: Once each respondent had given an overall impression of the Panel's processes, the actual process (as shown overleaf) was provided as a basis for more detailed discussion. The elements that most appealed to a sense that the overall process was robust and yet appropriately pragmatic were usually:

-] The interaction that is built into the review and debate involving both parties, plus the Panel of experts.
-] The high levels of expertise of Panel members;
-] Conflicts of interest are resolved before the process begins;
-] Parties have multiple opportunities to make submissions;
-] Parties are always involved.

For many who were not directly involved with formal Panel proceedings, it was thought highly improbable that the process could be improved.

Many of those who had direct dealings with the Panel were very satisfied with its processes.

However, some respondents who had direct dealings with the Panel were strongly of the view that public hearings or meetings with the parties together with the Panel should be used (or used more often if they are already being used). This is discussed further below.

Exhibit 3. Takeovers Panel - Processes

A: Preliminary Assessment

1. Initial general inquiry, then application is finalised (from the applicant's solicitors).
2. Takeover Panel Executives make inquiries about auditors / advisors / financiers in order to identify any potential conflicts.
3. A Panel of three is selected from the overall Takeover Panel membership.
4. The Panel decides whether to commence proceedings.

B: Proceedings

5. Takeover Panel Executive drafts a brief and settles it with Panel members.
6. Panel sends brief to involved parties.
7. Parties provide submissions to the Panel. Submissions sent to all parties and rebuttal arguments gathered.
8. Panel reviews submissions and may ask for further submissions or information, and may provide its preliminary thinking to parties for comment.
9. A conference may be held to resolve outstanding issues in the dispute,
10. Panel delivers decisions and reasons.
11. Resolution may be via:
 - Undertakings from parties may be asked and accepted (i.e. no declaration required).
 - Unacceptable circumstances may be declared (i.e. a decision made).
12. A post-mortem is offered to the parties to review the process (not the outcomes).

Missing steps: Respondents identified a further three steps in the process not shown in Exhibit 3.

Preparation of summary of issues: Some interviewees thought an extra step that is carried out within step 8 involved the preparation of a summary of the issues.

For example, the Panel Executive picks out the elements it thinks are relevant from the submissions, summarises them and sends these off to the three Panel members. While the Panel gets everything (for example, they may receive two arch lever files full of the submissions) they also receive a three page summary, which logically becomes a very important document in shaping the outcome of the matter. This issue was considered important since a number of respondents felt that as a result of this step, the Executive staff may have undue influence on the agenda of issues to be addressed, and also on the overall decisions emerging from a matter.

Appeals: One respondent suggested that the opportunity for appeals was missing in this process.

"I think you're missing one step—there's always the appeal process [sarcastic laughter]! It should occur between step 11 and 12. There have been a few decisions changed on appeal, but not many. I do think at times the Panel becomes a bit committed to a path. Some practitioners have questioned whether going through an appeal is worthwhile because the institution is committed to a path . . . An appeal process is important because sometimes people make mistakes ..."

General enquiry: One respondent stressed that the Panel Executive made itself available for general inquiry prior to (or in lieu of) a review application, which was highly regarded.

"It is appreciated that the Panel Executive are open to general inquiry, more than is probably suggested here [Card B]. You can quite often have a discussion with the Panel Executive members about matters of interpretation. That's extremely valuable."

6.7.2 Information Gathering

A number of aspects of the Panel's processes were explored, with the following findings emerging.

Balance between speed and investigatory depth: Most of the sample commented that the process struck a good balance in this regard. Some said it can be frustrating to the parties waiting two weeks for a decision, but that this was fair and reasonable.

"When we talk to people – even those who feel disadvantaged by the intervention or the outcomes – they are fully satisfied that the process was fair and a good outcome."

Some of the lawyers said they were aware of others who held the view that the old court system was more thorough and hence fairer, but almost every interviewee was convinced that the Panel achieved an acceptable level of fairness while providing a much faster, and thus better, result.

"It hasn't always struck the right balance (between informality and thoroughness). As a general rule, I think the answer is yes. It's inevitable that there are individual instances. I can think of individual instances where the Panel has not been sufficiently legalistic; they have been too commercial. There have been one or two – a very small number – I can think of ...where the participants thought, 'what a bunch of cowboys!' The decision was not legally supportable. It was made because of what the Panel thought was the right outcome commercially. They are exceptions, on the fringe."

A few people felt that getting this balance right or otherwise was entirely in the hands of parties themselves (bidder, target, or their legal and banking advisers). And because the interests between these three parties were co-aligned, the process usually "worked very well".

"And from the shareholders' perspective, the market hates uncertainty, so a fast resolution is extremely important to shareholders."

An exception to this occurred where cases were deliberately delayed by either the bidder or the target, for tactical reasons, and not through any fault of the Panel.

"Market participants recognize that there is effort and appropriate results. If you see complaints in the market about the Takeovers Panel taking too long to do things, those comments are tactical rather than practical in most cases....Bankers will often look for a conflict to either avoid a difficult issue or keep options open."

Thus, it was considered that there was a balance to be engineered by the Panel between fairness/completeness and speed.

"The Panel can be too fair in allowing an ongoing process of submissions and rebuttals. (It) needs to be careful not to be manipulated for gain."

"If you are cunning, you can game the process and I have quite successfully dragged the process out beyond dates (on which proceedings) would otherwise have ended with no discernable benefit to the protagonists, except for my client who wanted to it to take longer. And because there is so much process, you can do that. So it needs to be harder...a little rougher in its justice.... (Against this) I think the concern has been ...the Panel (may be) vulnerable on its process, (as) Emmet showed."

Overall, the involved parties mainly sought speed of resolution, and this led the majority to accept that the Panel was a better option than the court system.

“The need for speed is one of the critical objectives of the Panel, and the need for peer review is another objective. And because of those two criteria, it is always going to be a form of rough justice, it’s peer review of people not necessarily legally trained...”

One lawyer dissented from the majority view on this (and many other) measures of Panel performance. He felt that the way the Panel approached getting evidence was “embarrassingly inept”, and he saw that as being a product of the Panel Executive.

“In other words, they’re bureaucrats. They have never really applied their minds to the question of how a tribunal should deal with the matter of evidence. It doesn’t need to go into the formalities the courts do, but ... it ought to do more than it does.”

The same lawyer felt that it takes the Panel the same amount of time to deal with an Application as the courts, although when the Panel was originally created, the courts could neither allow a takeover bid to proceed while addressing a complaint, nor order a bidder or target to attach a Supplementary Statement to address disclosure gaps. He felt that the courts are now able to do these things too, so there is no time advantage in using the Panel system compared with the courts.

Communications; keeping relevant parties “in the loop”: Respondents (including Panel members) said the Panel did a good job in communicating with the involved parties, partly because they were dealing with their peers, who understood their constraints and abilities time-wise, but also because the parties usually realised the Panel relied on informal communication in pursuit of a speedy resolution.

“I think communication is ok . . . I think that one of the problems is some participants don’t communicate with the Panel, and that’s their own fault. My experience is the Panel process is pretty open, and the Panel Executive are generally helpful make themselves available for discussions, and are helpful on discussions on process, and what they expect and so forth. So I don’t have that as an issue because I’ve encouraged people who are involved to talk to the Panel on a regular basis to get a feeling from the Panel as to what they’re thinking. Possibly, some participants adopt a too much of a legalistic type approach and don’t have communication . . . for me personally, that’s not an issue, I think communication is pretty well managed.”

Timeliness: Most of the evidence suggested to respondents that the Panel operated a timely process – delivering commercial speed to resolve impasses, while at the same time not setting unrealistic deadlines for information supply or responses to issues raised.

“Their peers (Panel members) are part of the process – they set the requests which are seen to be ‘not impossible’.”

Timeliness issues were mentioned by a few interviewees in relation to:

] **Requests for information in an unrealistic timeframe:** For example one interviewee had heard of a party receiving a request to supply information on Friday evening, to be supplied by Sunday afternoon or Monday morning. Another respondent – a lawyer and investment banker - felt that the Panel placed too much emphasis on speed. This type of comment was rare, however.

“One of the issues I do have about the Panel is sometimes the parties are cajoled into responding too quickly, and they don’t have enough time to respond, to examine all the pluses and minuses and all the arguments. There is a huge amount of pressure, particularly on the lawyers . . . The Panel comes up with its Panel briefs which are in some ways inordinately long and a bit ill conceived which just takes time to respond to them. You can get 80, 90, 100 issues that you have to respond to. It takes the Panel a long time to draft them, it takes the parties obviously a long time to respond to them and so on. The Panel brief is obviously intended to focus the parties on what the main issues are but I don’t know that sometimes the Panel’s got the issues clearly enough defined, and it does go off with tangential issues, which results in more time being taken. Maybe that’s something that could be sorted out.

There isn’t much time. And that applies to the Panel as well. The Panel Executive which is relatively small doesn’t have much time either to prepare itself. And the Panel members probably don’t have much time to consider the issues. But I suppose the objective is speed . . . in some ways I think undue speed.... The time limits seem to be generally 48 to 72 hours to respond . . . I would have thought another day, another 24 hours? People might say, ‘what difference does 24 hours make?’. But it does enable you to give some more considered thought to some of the issues and to prepare properly.”

] **Time to convene a Panel:** A few respondents said that it could take a long time to convene a Panel for a specific case. This was certainly not seen to be the norm, but it did create problems when it occurred. It was regarded as particularly annoying when participants were given only a short time to prepare their submissions, and then had to wait for a response.

“We had 4 days to do a submission and rebuttal, and then it took 10 days to get a decision. It took that long because they couldn’t get a Panel together. If they can’t meet immediately after the submissions go in, then they should choose a different Panel. Or if it’s going to take longer they should give us longer to prepare our submissions. ... This sort of delay is unacceptable. It played into the hands of the target company.” [There was no suggestion that this was the Panel’s intention.]

-] **Lack of time for proper Panel investigation or deliberation:** A few lawyers felt the Panel made inappropriate compromises, on some occasions, in pursuit of a speedy outcome.

“Panel members work full time – and are very busy. (They) can say ‘we are just not equipped / don’t have the resources to investigate certain issues.’ For example – associations (which can be a pretty technical area)... That’s an area where the justice can be very rough.”

-] **Inappropriate or flawed briefs:** Allied with this kind of complaint, a few respondents felt that the brief which is sent to the involved parties contains far too many questions, that a lesser number of questions, or a system of tagging the likely key questions would enable protagonists to more efficiently meet what are otherwise very onerous timelines for submissions, and/or formulate higher quality of argument in submissions.

“I think that the brief the Panel prepares often is part of the problem in proceedings, and when I say the problem it is something that is time consuming, and is also the genesis (of) Panel reasons being one hundred and fifty pages long¹¹, full of interesting navel gazing on totally irrelevant issues rather than capturing in a very short pithy way that (enables) the market ... to understand and assimilate the real reasons for the decision.”

Against this, a number of people felt that the timelines were quite acceptable, given the nature of most of the issues.

¹¹ The Panel responded that the longest reasons that the Panel has published were the Austral Coal 02RR reasons which were 80 pages and the vast majority of reasons are less than 40 pages long.

"... the attempt is to make (the requested information) as (easily) accessible and easily assembled [as possible]. People generally seem to put together their cases pretty smartly, but that is because there aren't really all that many issues anyway ... typically the issues are; Has someone been misinformed? Has someone behaved unacceptably? Because the Panel's decisions are about those things, I have not heard people complain that they have not had time to address their case."

A number were very positive, arguing that the Panel managed cases much more quickly than would have been the case using the old court system.

"I think that they do a take a very pragmatic, in some cases almost expedient approach to issues of principle. Some purists complain about that. ...more senior lawyers will say the Panel sometimes just drives a truck through chapter six, but from my perspective, personally that's what they were intended to do, they broke the black box of takeovers law and regulation that had led to a sort of small cabal of practitioners running arcane actions that would delay takeovers for weeks and sometimes months."

] **Reasons for decisions and Guidance Notes.** Timeliness relating to these issues are discussed in 6.8 and 6.9 respectively.

Informality and cost effectiveness: Most of the sample was very sure that informality and cost effectiveness had been set appropriately within the current system.

"The system is very pragmatic. Pragmatism delivers timeliness and issues of judgement. The balance is always on the side of delivering more disclosure to the parties and to the market (i.e., shareholders)."

In comparison to the old system (of court cases), the current Takeovers Panel system was seen by the majority as so much better – cheaper and fairer.

"Timeliness says they are doing it well. The process has to be this way. You want a situation where people make their case on the principles, and this is what the current system delivers."

Informality was seen as the correct and optimal way to manage the affairs of the Panel.

"I saw this in the Rights Issues matter – they cut to the chase and don't go through legal precedents and so on. It really is efficient and fairer (than courts)."

6.7.3 Impact of the Glencore Decisions

There were fairly divergent views about the likely impact of Glencore.

Little likely impact: While to some, Glencore can be viewed as setting an unpleasant example, it was not quite seen as a fundamental challenge to the Panel's role, for the following reasons.

-] It has taken quite a few years for the courts to be drawn in like this. This was a rare case, and one example displaying a challenge to the Panel does not condemn a good system.
-] Glencore had an aggressive party, a large economic quantum involved and a complex set of issues. In essence, these were preconditions that were all conducive to a court challenge being worthwhile for the protagonists. In most cases, parties have not tried to question issues via the courts because they like the Panel model. Further, this will continue to be the case, according to many legal and other interviewees.

"There's not that many takeover decisions where you'd bother appealing to a court."

-] Historically, court action in takeovers has mainly been target driven – often as a delaying tactic. In Glencore, it was the bidder who went to court because they felt aggrieved by the Panel, not the target, and this also made Glencore a rare case.
-] The Glencore decisions may have unwittingly helped the system by:
 - Showing there is a way to escalate a matter to the courts. Thus, *"the Panel has been shown to not be a law unto themselves"*.
 - It may result in the Panel being a little more careful in fact-gathering, especially in bigger cases.

"I don't believe Emmett (i.e., his decision) will jeopardise informality and cost effectiveness too much. Emmett basically told the Panel they do have ground rules and they need to follow them. It was salutary."

Several people said that Glencore may prompt more parties to seek court reviews of Panel decisions, but nonetheless, the Panel should not alter its approach, as this would risk losing the value of pragmatic peer driven resolution of takeover disputes. As one lawyer commented:

"I would be fearful of the Glencore dagger hanging over my neck. I think if they are going to have that view about it they are really going to grind to inertia. I think they have got to say 'well we have got a job. We will do it as best we can. We still want to do it quickly. If we get it wrong and it is materially wrong and someone carts us in – they cart us.'..."

Too early to say: In any event, most felt that it was too early to say whether or not Glencore will have any lasting effect on the Panel.

"It might a bit of a wait and see question, it's a bit hard to know at this stage."

"Definitely Justice Emmett's decision raises some issues for the way the Panel is operating, we don't necessarily agree with Justice Emmett and we are supportive of the informal process, the swift process..."

"I think it's a little bit early to say what the long term impact will be... one thing that it might result in is more threats of people saying that if they are potentially disappointed with a Panel decision well, we'll go off to the Federal Court and we'll argue the same arguments that were made in the Glencore decision, and that gets you back to the same tactical litigation problem that the Panel was designed to stop."

Detrimental impacts will occur: There were, however, some lawyers and investment bankers who felt that Glencore was likely to have a detrimental effect on the Panel, or rather on takeover dispute resolution, on the following grounds:

-] Tactical litigation will increase as a result of the Glencore precedent, allied with a lessening of confidence in Panel decisions, which will make Australian capital markets less efficient.
-] The Panel will probably be challenged, as in Glencore, on the grounds that it hasn't properly specified the effect of its decision on various stakeholders, that it hasn't properly obtained and weighed up evidence sufficient to enable it to judge the effect of a particular transaction on the market.
-] Such challenges could start to undermine the gains in speed of dispute resolution that the Panel has made, as it will need to spend more time gathering and weighing evidence and argument.

“It’s a guess, but if a senior group of members have had their decision overturned by a Federal Court judge and then it has been remitted and a decision made then that’s again gone to the Federal Court and again been overturned it’s got to make members say I am not prepared to sign off on the written reasons of the decision made two months ago and until I’ve gone through and dotted every ‘i’ and crossed every ‘t.’”

] The case highlighted the fact that the Panel was limited in its ability to stop unacceptable behaviour.

“I think there is still a bit of a deficiency in what the Panel can do in regards to recalcitrant targets. ... There is very little a Panel can do to stop the malevolent behaviour of targets. ...the Panel relies on the unacceptable circumstances construct being something that the participants take very seriously; that it’s quite an affront to one’s organisational brand to declare your conduct unacceptable... but we’ve found a lot of corporates and even some investment banks aren’t really fussed by the declaration of unacceptable circumstances. ... The problem is of course is that nothing actually flows from the declaration of unacceptable circumstances other than the orders. ...It makes it very easy for corporate advisors and/or their clients to say to just wear it because it is worth the detriment because of the benefit we get. ... (Glencore) really gives comfort to those who say we don’t care if there is a declaration of unacceptable circumstances because at the end of the day we can always appeal and there are certain judges of the Federal Court who are happy to go and overturn a decision, so I think that legislative certainty is required if the Panel wants its decisions to be taken as they are and not as an intermediate step where you go an appeal routinely to the Federal Court.”

Thus the envisaged impacts of Glencore were concerned with loss of faith in the Panel, and/or a slowing down of the Panel processes if it was to attempt to delve more thoroughly into every issue to avoid a court challenge.

“One of the things that does worry me, as a practitioner, is the impact of the Glencore decision.... which is going to inject from the participants and from the Panel a more legal focus. The Panel is going to become more conscious of what the court said it should do with the result that its consideration of matters is going to be more legalistic, with the possible concern that it will result in more delay or delays (and by implication an increase in costs). The process will slow down as a result of the Glencore decision, which is obviously a disadvantage.”

“..There’s always been scope to go to court to challenge Panel decisions and no-one did it. The first person who did it in 5 years won. ...(this) may lead to increased pressure by companies that have seen one person do it. They’ll now be more inclined to think about going to court.”

One Panel member said that he thought that Panel decision reasons were taking longer to be formulated and released since Glencore, because the Panel *“has got a bit more careful about the way it articulates reasons now.”*

Legislate a solution: A number (including many who felt that Glencore would not change the Panel’s approach too much) nonetheless suggested that because of Glencore, the Law should be changed to reflect the intended peer decision model of the Panel. This is because the current legislation is not consistent with the way the Panel has been set up.

“If the Panel is a peer review body then the legislation should give it the authority to act as a peer review body. It shouldn’t be held accountable if it doesn’t meet the standards the court would follow.

“It’s not a peer review body if the peers can’t simply make a decision based on their own expertise.”

Several respondents felt that if amending legislation cannot be obtained, then the Panel would regrettably need to change its approach, mainly on thoroughness of evidence sought and evaluated.

“I think that the right course of action for the Panel is to seek amending legislation. And my understanding is that is what the Panel is seeking. If we can’t get amending legislation, then the Panel will need to devise more precise ways of operating that meet the Glencore decision.”

“... What the court said when it reviewed their decisions is that there are some limitations on how they make their decisions ... I think it would be helpful if there were some legislative changes to clarify that. ... It would be good for the Panel to arrange for that to happen if they can. ... There hasn’t been a second case yet but if there is a pattern of people going to court it will have quite an impact on the way the Panel manages things.”

6.7.4 Submission Processes

Does the submission process work effectively? Most of the sample felt that the submission process worked reasonably well.

There were a few exceptions, however, as follows:

-] **Shortcomings of initial brief:** A few people (not directly involved in the case) suggested that Glencore, despite three Panel hearings, fell down because the initial brief from the Panel Executive lacked detail.
-] **Excessive influence of Panel Executive:** There were a few strong criticisms or reservations about the fact that the Executive plays an almost dominant role and can direct or over-ride Panellist decisions or judgement, due to its secretarial and communication controlling role. This view was held by a few people in each segment, and was also alluded to by current and past Panel members.

“I think the Executive drafts the brief and has a big say on how things are presented. The Panel probably decides to live with whatever the Executive has written (even if they may harbour some doubts about the decisions or issues because the deviations from their views are at the margin), just to keep the process simple and moving. I think this probably applies to decisions and reasons too.”

Does the Panel accept appropriate matters for review? Most interviewees who were close to the Panel’s processes felt that it was rare for the Panel to refuse a case. A few argued that the Panel should be more selective in the cases that it accepted.

“Panels are reluctant to let anything go – they’ll look at it if you raise it, generally.”

“I think they could increase the threshold on where they decide to commence proceedings. ... they should tell people if they’ve got a cruddy case; you should not encourage people to commence proceedings that don’t appear to have merit.”

The only occasions where the Panel has refused a case, they have been justified, according to most.

“... If (a party) makes an application for a review too late (eg just before a statement goes out), the Panel will say ‘no’, and quite rightly so – it is abuse of the system for tactical (delaying) reasons.”

Many people took this issue to be concerned with the principles and detailed arguments that were canvassed from the players in a particular takeover matter.

And on this point, many said they did not really know. Those not involved in a matter do not see the submissions, but the two way dialogue with the parties, and the decisions and guidance notes suggested to many, that the right issues are addressed.

Again, many mentioned the fact that participants are happy, and this suggests the Panel performs well on this point.

“There is little or no angst and emotion among participants, suggesting all is well on this.”

Do submission processes provide parties with sufficient protection against incorrect decisions? Some people mentioned a small number of cases in which the Panel may not have reached the right conclusions. For example, the Pasmenco decision caused a lot of discussion without consensus. Other cases mentioned in this vein included National Foods, Brisbane Broncos, Anaconda and BreakFree.

“I think there have been occasions where the Panel has determined that it wants a particular result. For example, in the National Foods – San Miguel takeover where they found an association between Fontera and . . . Yoplait or someone like that . . . I think they determined that there was an association between the parties and that had certain ramifications . . . I’m not quite sure whether that was the correct answer, and I don’t know whether a court would have found that . . . but I don’t know whether any change in the process would have caused the Panel to change it’s view . . . I mean what can you do [within the process]? You can just say .. ‘you’re wrong lots of times’ . . . I wasn’t involved in that application, it just struck me as a curious decision ...”

“In the Glencore decision, you ... got the feeling that the Panel had determined—even though they were careful to couch that decision and apply it to that particular circumstance - the Panel had reached a decision that particular equity swaps should have been disclosed, and then found a rationalization to justify their decision, and the courts subsequently found the decision....was wrong. Now what could they have done to get it right? I don’t know. People get things wrong . . . Other judges or review Panels or courts might overturn a decision . . . it happens all the time...These are just one-off cases . . . in the main I don’t have a problem . . . the issues are (usually) about the level of disclosure and so on, it’s all pretty boring stuff, and it doesn’t (usually) affect the outcome of a takeover.”

Thus, the examples given were seen as the few exceptions to an otherwise good record of “correct” decisions.

For those who believed that Panel’s record in reaching the right issues and conclusions was good, this was largely attributed to the fact that the vast majority of cases were “*simply about more disclosure*”.

A small number of procedural changes were suggested (in each case by a minority) to improve the coverage of salient matters in particular cases. These included:

] Improving the appeal process;

] Using conferences or public hearings more frequently;

These are now discussed in turn.

Appeal processes: Several respondents stressed that there should be more confidence in the appeal process. At present, they felt there was a strong view that a second Panel would not be open to arguments put at appeal, so few appeals were made against Panel decisions.

A few investment banking respondents concluded that if the Panel process left a party unhappy, there was always the ability to take the matter to court.

“The legal system offers built-in protection against bad decisions – you can always appeal – as the Glencore ruling shows.”

“I would feel very uncomfortable if it’s [the Panel’s] decisions are final and binding.... Not that I lack confidence in the Panel... It’s really a matter of principle, of having a higher body you can appeal to, whether it’s ASIC, the Supreme Court, etc...”

“The fact that there is submit, resubmit, rebut allows for protection against error of fact. It may not protect events against error of judgement. And error of judgement won’t be protected against by this process. It will only be protected against by having the right sitting Panel, who are prepared to debate it amongst themselves, by having an effective Executive who are prepared to lead and work with the Panel, and by having a review mechanism should there be a decision that’s objectionable.”

Too much reliance on written submissions? Several lawyers strongly suggested the Panel should move away from a sole dependence on written submissions from parties. They argued that a conference (or private hearing) was better in some cases. It was acknowledged that the Panel encourages some parties to talk to each other (especially if there were incorrect statements in bidders or target’s statements). Also, if that occurred, the Panel was known to be “upset” if the parties did not meet and talk it over, since this might indicate that a party was using the process for delaying or other tactical reasons – a practice that the whole Panel model is trying to eliminate.

However, a hearing in which the Panel was present was strongly argued for by a few interviewees for some cases, and the following detailed comments explain the rationale – concerning efficiency.

“You could argue they could be more judicious in using meetings a bit more than they do already, with the aim of getting a faster result than they do, but I think they do it well anyway.”

“My main complaint about their process is to do with submissions. They send out the brief and the brief would normally recite some of the facts from the application and then ask a series of questions which might be - provide a copy of the documents. That’s easy. It might be – how do you think the Eggleston principles are advanced or not advanced by this conduct. It might be policy questions. It might require explanation about why something’s happened or what market precedents there are. So it’s quite a lengthy list. Then you’re given 24 or 36 hours to respond in writing on every question, and at the same time that you’re doing that every other party is responding, usually to the same questions. At the moment of the deadline you press the send button and the emails go out and then you get another 12 or 18 hours to issue your rebuttal submission. So you work furiously to do that and then every party in the Panel ends up with a whole lot of submissions and documents. Even though it’s called rebuttal it’s rare in my experience that it’s actually directly rebutting an argument or point. It’s quite an inefficient process. It’s very time consuming and because it all happens in a mad rush it’s very hard to work out what’s really important. ...

...There might be questions where the answer’s really obvious, so then you’re (wondering, in the absence of a face to face hearing if it is important or not.) ... (In contrast) if I’m in a conference and I’m saying – ‘this is what we think’, and they say – ‘we agree’ – what do you (other party) think of that, and they say – ‘it’s not right because of this’...when you have a conference it distils everything down and you very quickly work out who’s telling the truth, what the Panel thinks is important, and that’s something you just cannot do through written submissions.”

It was pointed out that when a decision was resolved and the Panel drafted up a press release, the parties didn’t fully understand why a decision was taken – although a later press release did provide some information about this.

In contrast, where there was a conference, it is clear what the Panel was thinking and on what basis a decision was made.

“They’re sitting across the table from you saying no, or you’re right, or that evidence is rubbish.”

Some respondents argued that novel cases were an example of where a conference, whether face to face, or by teleconferencing may be a better way of having the parties discuss the issues at hand with the three Panel members. While such cases may only represent five percent of all current cases, it was expected that these will proportionally increase in the next few years.

