



Australian Government

Takeovers Panel

The Takeovers Panel - An update 2011

Allan Bulman
Director

Alan Shaw
Counsel



Topics

1. Purpose
2. Reminder of Panel background
3. The market last year
4. Overview of Panel's process & work
5. What's new
6. Discussion



Part 1

Purpose



Purpose of today's session

Meet with practitioners

Explain some recent developments

Discuss issues

Receive feedback

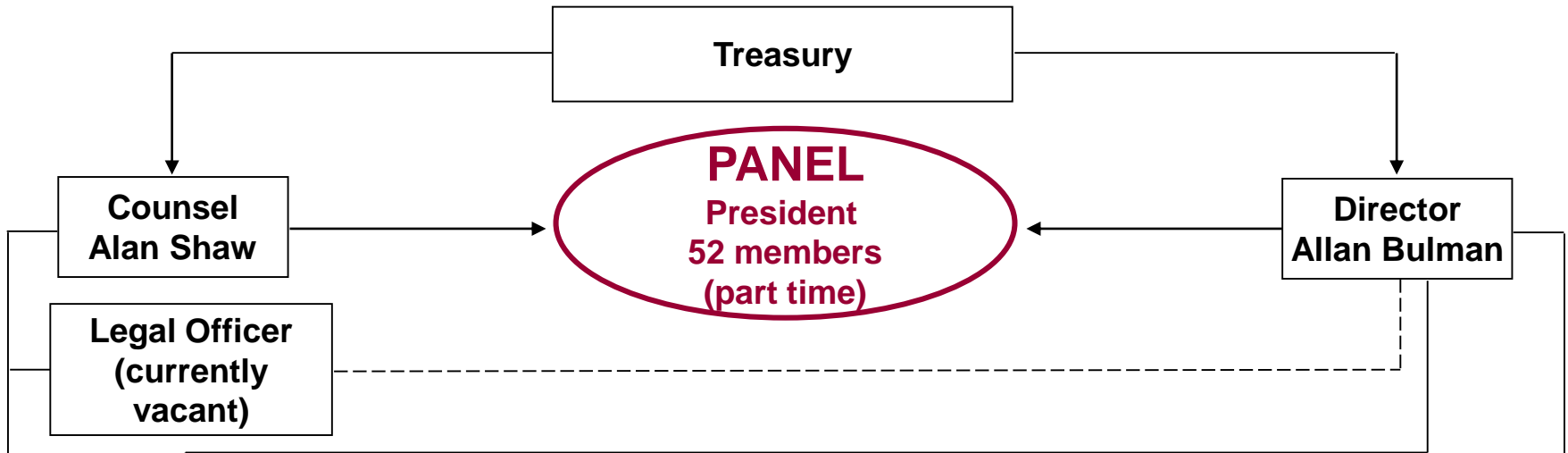


Part 2

Reminder of Panel background



Panel organisation



Secondees
Kate Johnson
Grant Lawler

Change every 8 months



Manager
Karolina Danger

Assistant
Rebecca Banhelyi



Welcome Kathy Farrell

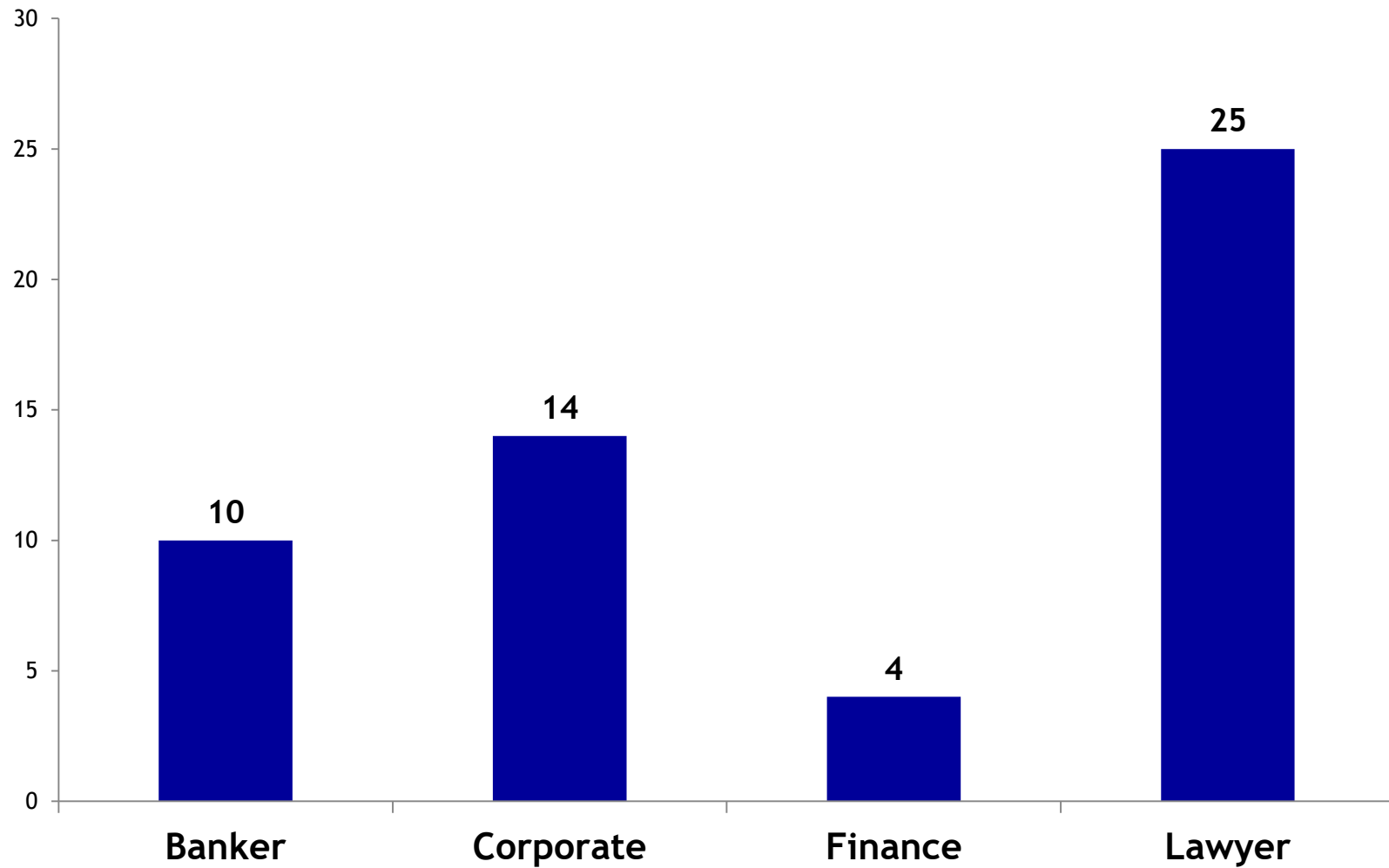
We welcome Kathy Farrell as our new President

Kathy was previously a member from 2001 to 2010

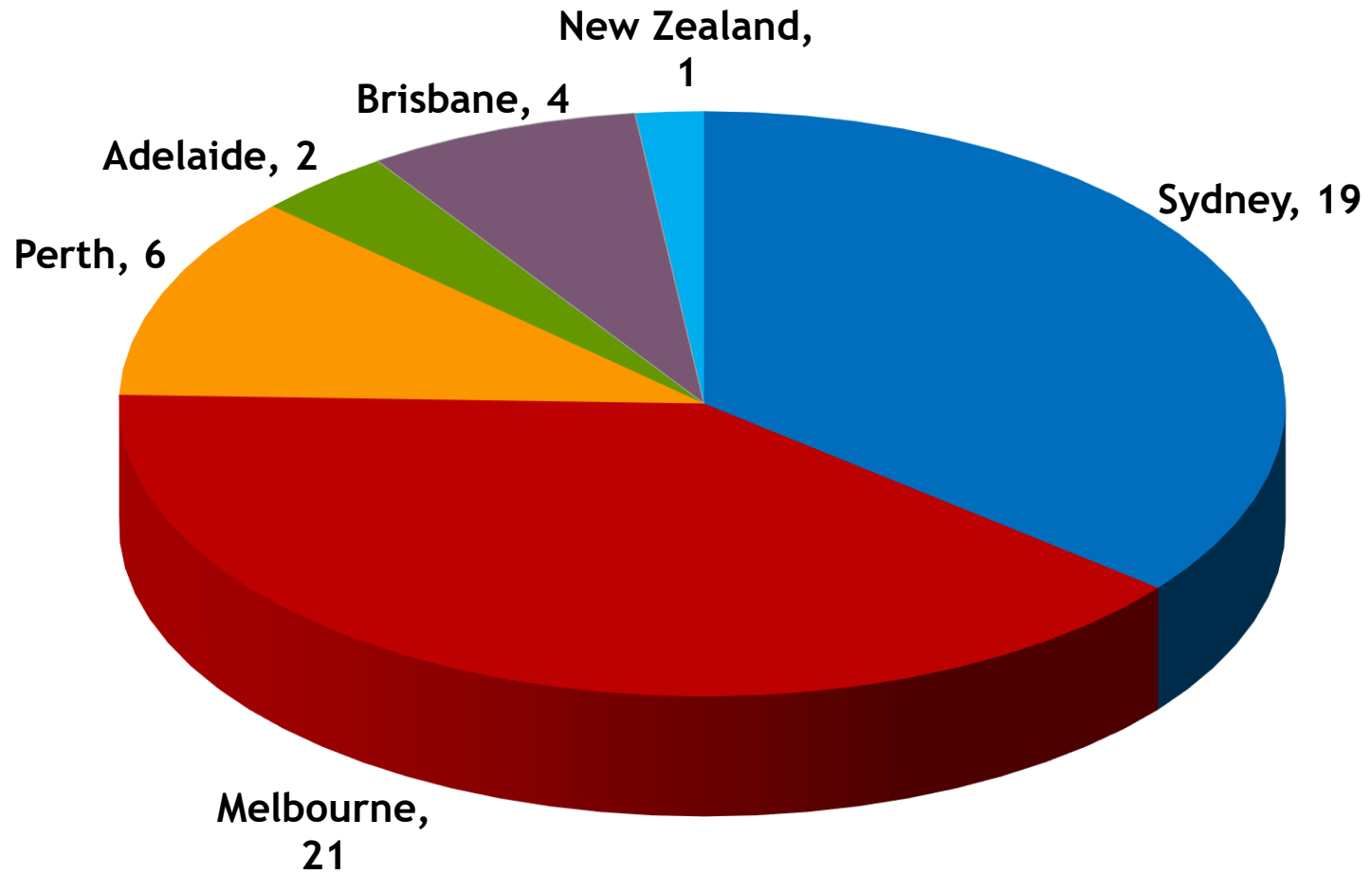
She has had considerable experience as a lawyer in Mergers and Acquisitions and policy



Panel members – by profession



Panel members – by location

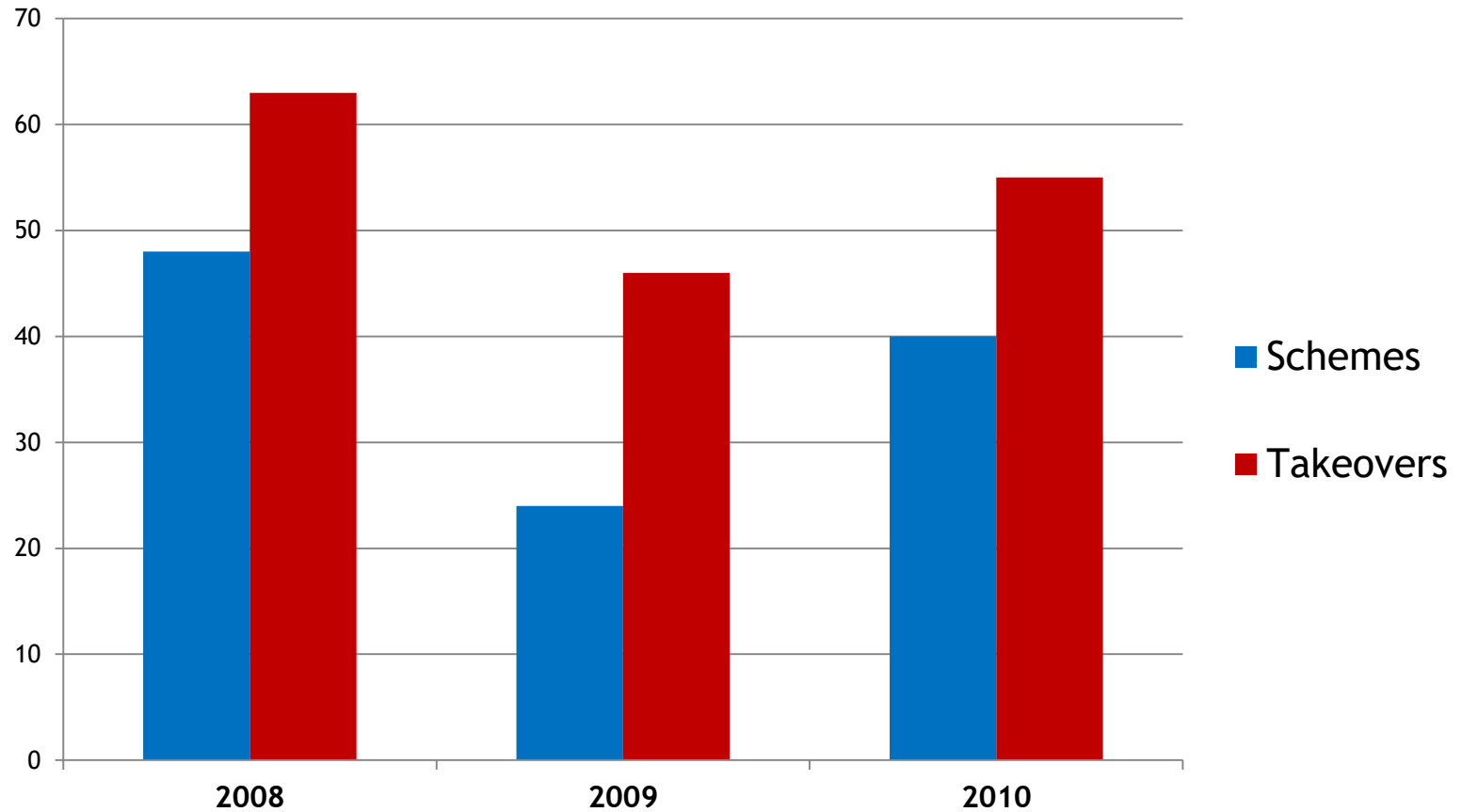


Part 3

The market last year



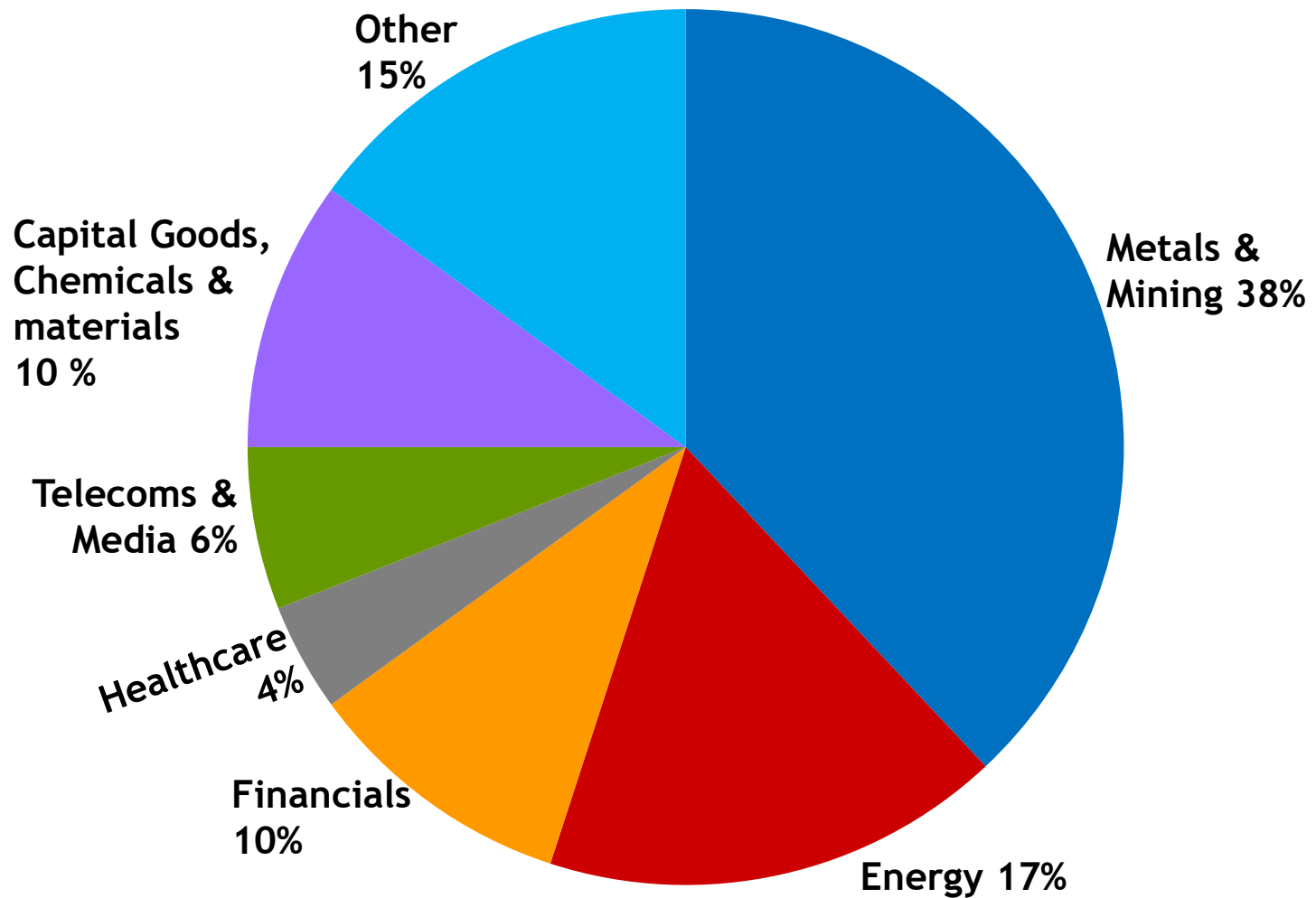
Control transactions 2008-2010



Source: Freehills 2010 Public Mergers & Acquisitions Report



Deals by sector in 2010 - industries

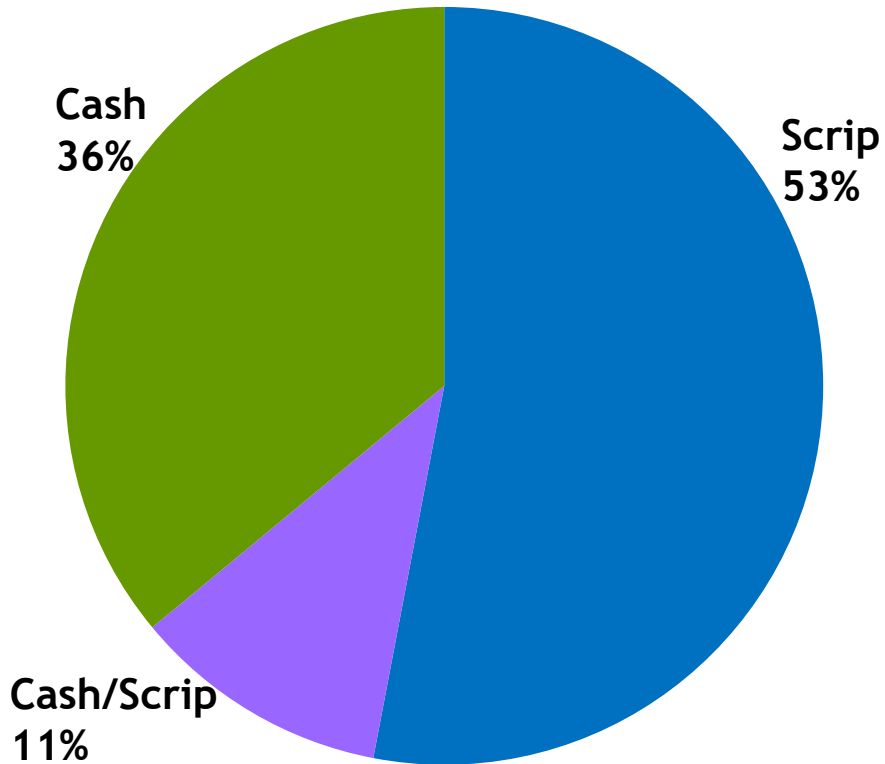


Source: Freehills 2010 Public Mergers & Acquisitions Report

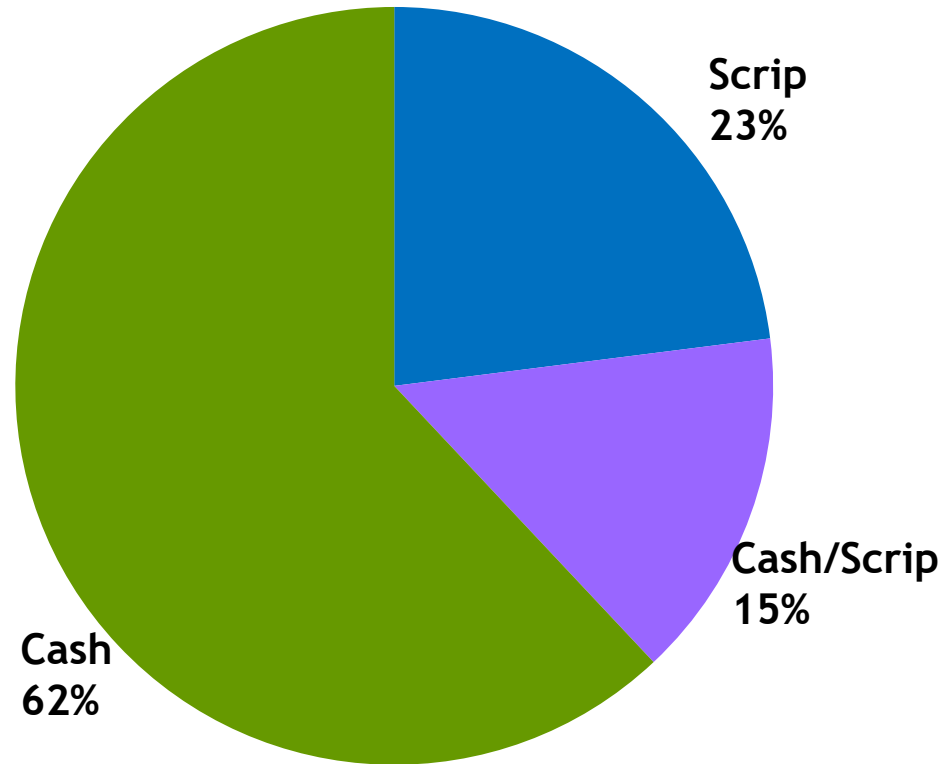


Type of consideration

2009



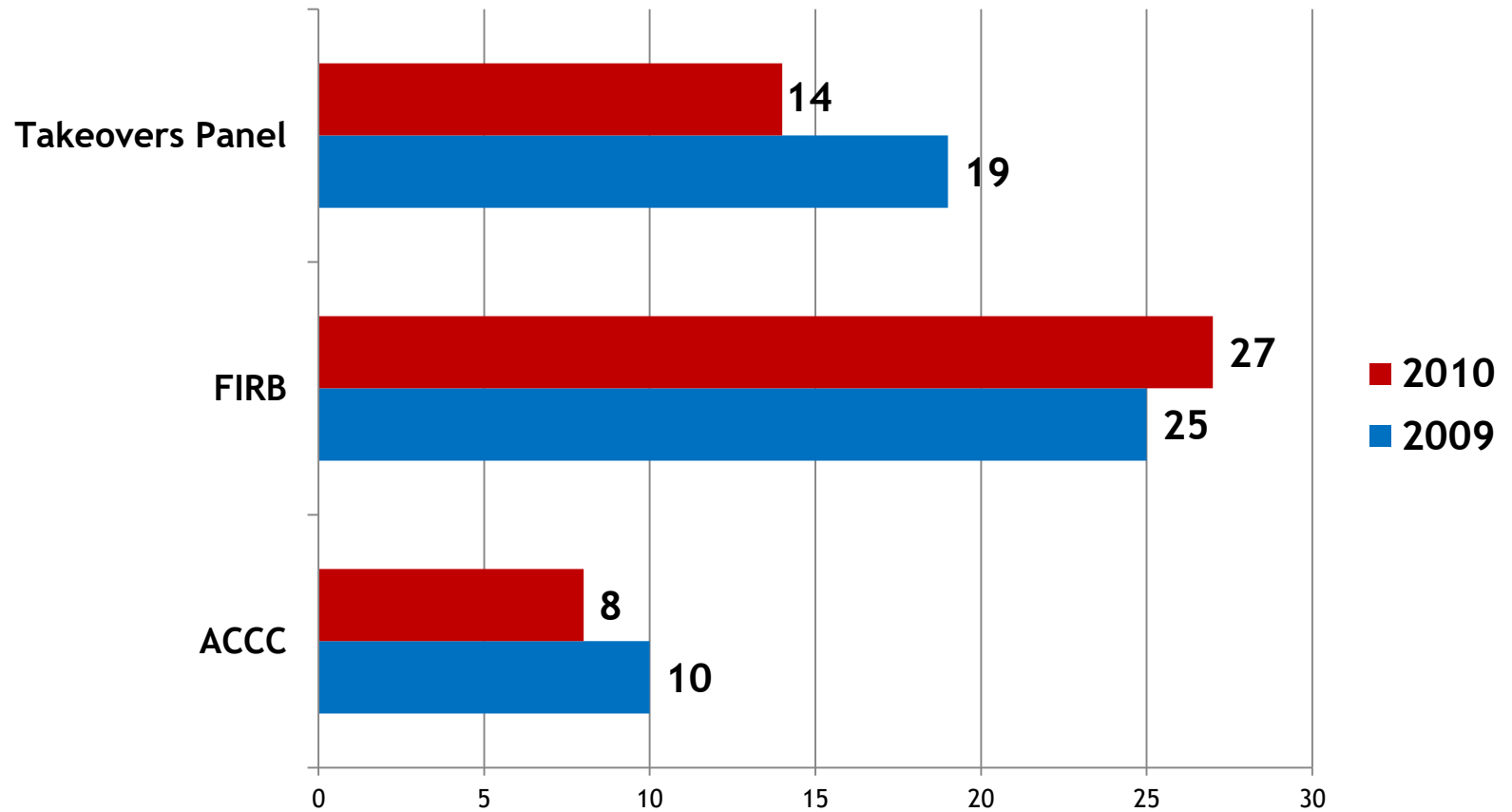
2010



Source: Freehills 2010 Public Mergers & Acquisitions Report



Regulatory involvement 2009-2010



Source: Freehills 2010 Public Mergers & Acquisitions Report



Part 4

Overview of Panel's process & work



Panel process



- Procedural rules - new rules effective 1 June 2010
- Media canvassing and confidentiality
- Applications:
 - Length - limit in rules
 - Attachments - size, limit number, extract relevant parts, properly identified



How an application runs

- Choosing 3 Panel members - conflicts
- Process letter/ Declaration of interests
- Conduct proceedings?
- Brief, submission, rebuttals
- Conferences
- Decision, reasons and media releases



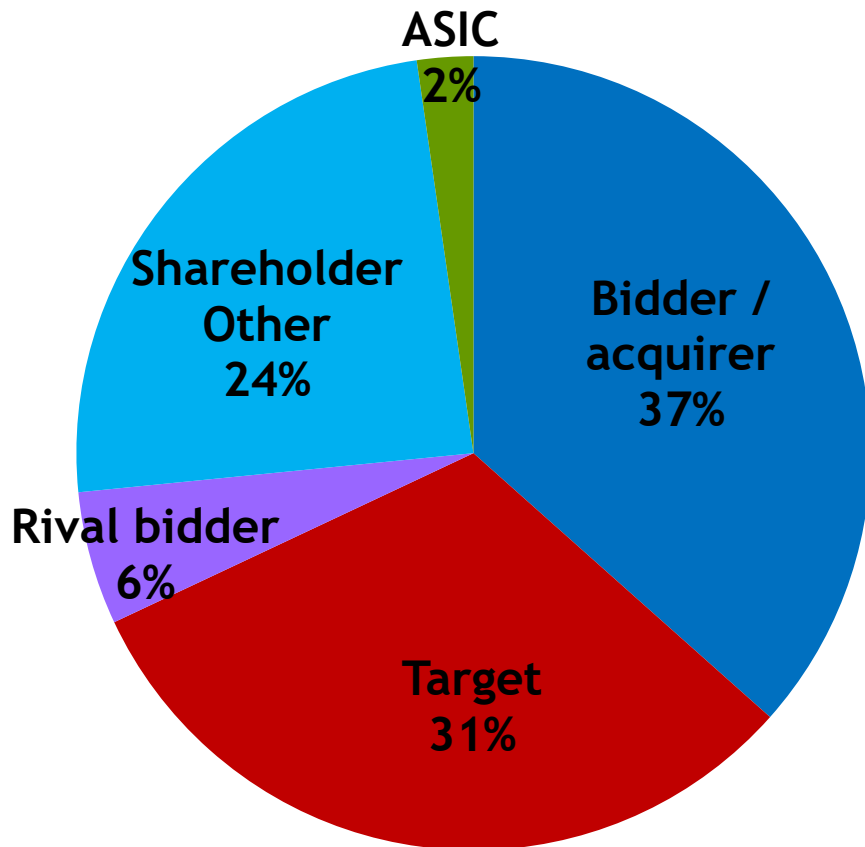
Procedural changes

- Naming legal and financial advisers to parties in reasons - aids market transparency
- Website upgrade:
 - GN 3 Making Rules and GN 10 Public Consultation - withdrawn
 - More discussion on processes, how quickly applications move, statistics, summary of takeover provisions
- ASIC referrals - more public
- Possible consultation on GN 4 re undertakings as to damages
- Post matter reviews - earlier

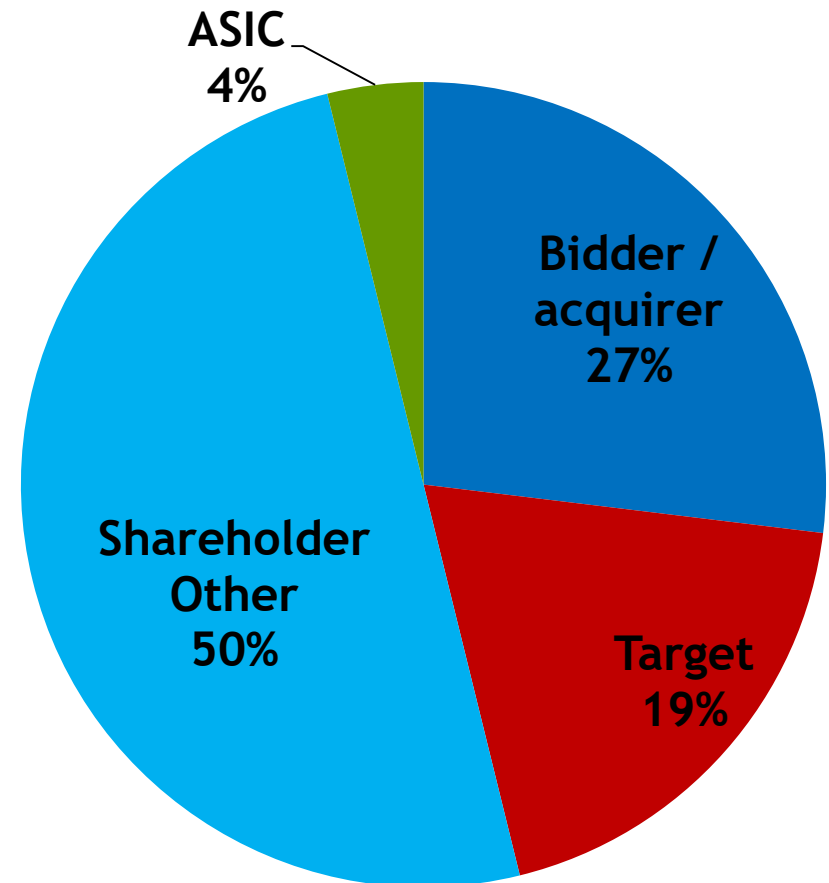


Panel applicants

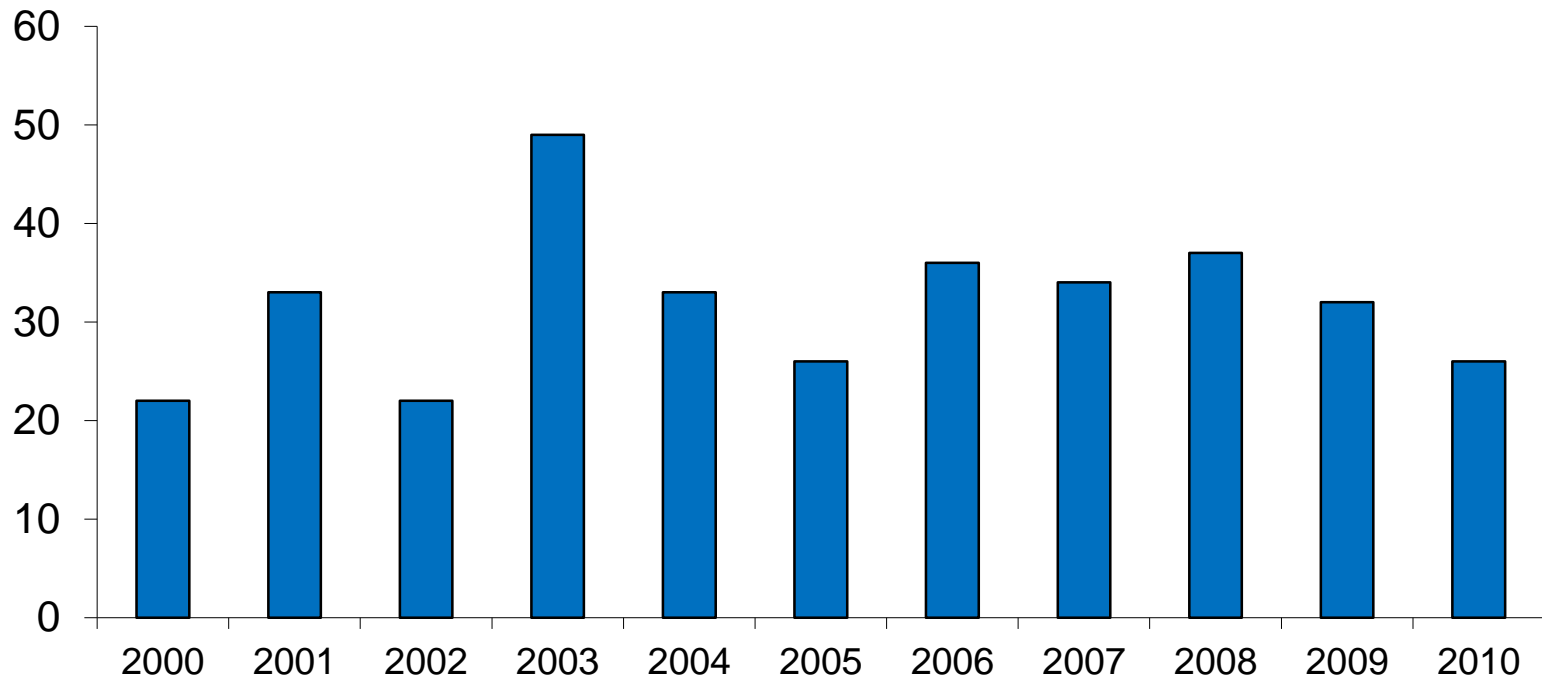
2000 – 2010
(350 applications)



2010
(26 applications)

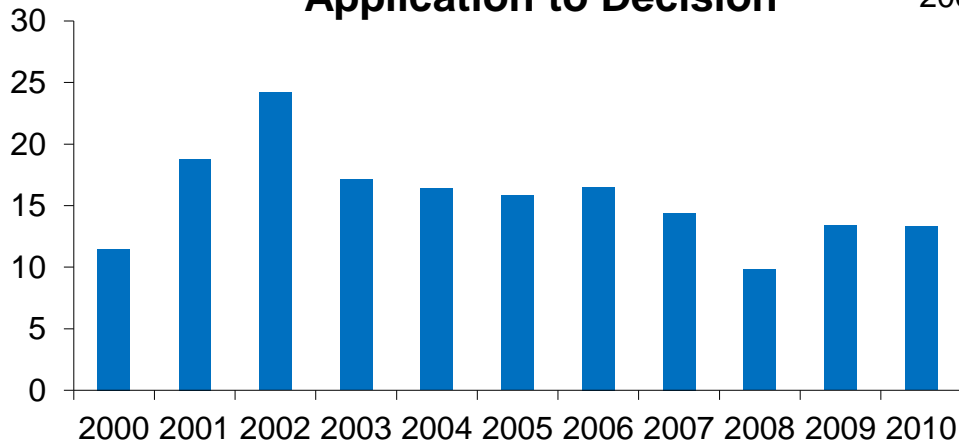


Panel applications by year

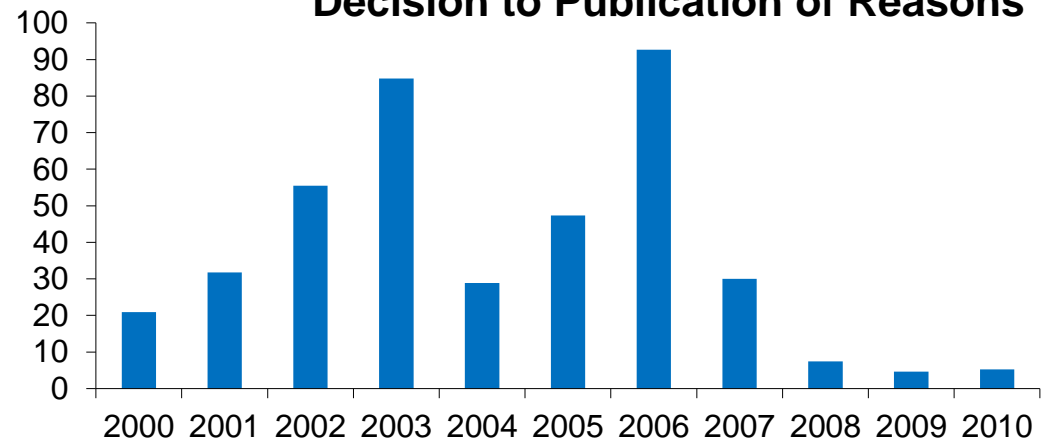


Panel matters by decision

Average Days from Application to Decision



Average Days from Decision to Publication of Reasons



Part 5

What's new



Nearly finished the GN rewrites

Issued a revised GN 1 - Unacceptable circumstances

- Provided some guidance on reverse takeovers

Consulted on three Guidance Notes rewrites:

- GN 6 - Minimum bid price
- GN 13 - Broker Handling Fees
- GN 15 - Trust scheme mergers
- Should finalise GNs in the next month



Frustrating action

Transurban Group [2010] ATP 5

- An announced rights issue did not frustrate scheme proposals
- The proposals did not constitute potential bids because they were proposed schemes that were rejected
- The revised proposal was not conditional on the rights issue proceeding

Amendments to GN 12 - Frustrating action

- Acknowledging Transurban
- Allowing for a limited form of private 'put-up or shut-up' regime



New policy

GN 22 - Recommendations and Undervalue Statements

- Follows *Origin Energy Limited 02* [2008] ATP 23 and *Tully Sugar Limited* [2009] ATP 26
- Allows a holding statement (eg ‘wait for more information’)
- The reasons for an undervalue statement should be clearly disclosed
- Directors must provide shareholders with some guidance as to the value of the target



New Issues – Association

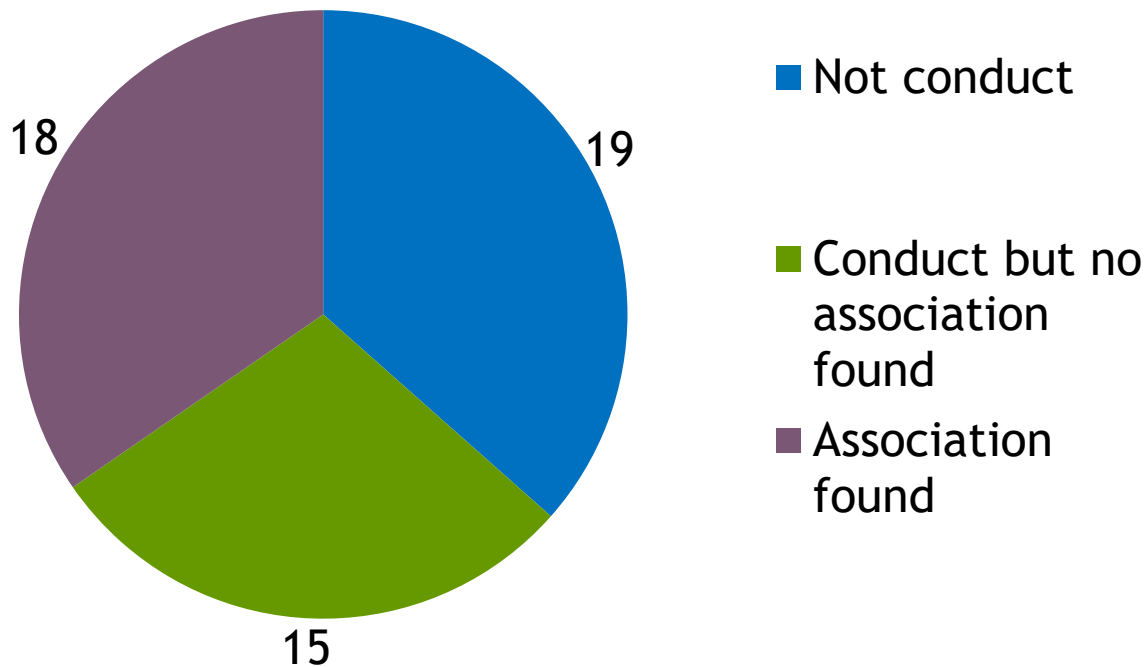
The Panel has considered a number of association applications in the last 12 months:

Matter name	Conduct on association?	Declaration of UC?	Orders?
<i>Mesa Minerals Limited</i> [2010] ATP 4	✓	✓	Divestment, restricting voting, disclosure
<i>Mesa Minerals 01R</i> [2010] ATP 6	✓	Declaration varied	Set aside original orders as parties had accepted into bid
<i>Vesture Limited 02</i> [2010] ATP 15	✗	n/a	n/a
<i>Viento Group Limited</i> [2011] ATP 1	✓	✓	Divestment, restricting voting, disclosure
<i>Brockman Resources Limited</i> [2011] ATP 3	✓	✗	n/a
<i>CMI Limited</i> [2011] ATP 4	✓	✓	Divestment, disclosure
<i>CMI Limited 01R</i> [2011] ATP 5	✗	Declaration stands	Orders stand



New Issues – Association

Association matters at Mar 2011



Association - questions for future policy?

Use rebuttable presumptions in relation to association?

- UK or Hong Kong models?
- Family relationships?
- Other categories?
- Indicators of association rather than rebuttable presumptions?

Should the Panel expect a certain standard for association applications?



GN 7 – Overview

Lock-up device	Panel guidance
Break fees	<ul style="list-style-type: none">• 1% of equity value of target• Break fee within guideline may still be unacceptable (eg if triggers unreasonable)
No-shop	<ul style="list-style-type: none">• Longer period, more anti-competitive• Generally does not need fiduciary out
No-due-diligence & no-talk	<ul style="list-style-type: none">• Fiduciary out generally required• May be less anti-competitive if auction process conducted first
Notification obligations & matching rights	<ul style="list-style-type: none">• Increase the anti-competitive effect of restrictions



RHD - Deal protection measures

...deal protection measures need to be subject to certain basic structural requirements to ensure that they do not unreasonably hinder competition for control of the target company.

Ross Human Directions Ltd [2010] ATP 8 at [28]

- The Panel queried the terms of the deal protection measures in the scheme implementation agreement
- Parties undertook to amend the agreement to address the Panel's concerns



Deal protection measures - outcome?

- Not necessarily a “precedent”
- Cap on liability?
- Period of matching rights?
- Drafting?
- Are deal protection measures evolving too far?
- What is the onus on Target directors?
- Experience in other jurisdictions - UK



UK watchdog tries to ward off foreign takeovers

Takeover Panel proposes series of reforms making it more difficult for overseas predators to seize British companies in wake of Cadbury affair

Richard Wachman
guardian.co.uk, Thursday 21 October 2010 19.29 BST
Article history



The takeover of Cadbury by rules. Photograph: Christo

BBC

NEWS BUSINESS

21 October 2010 Last updated at 14:41 GMT

Takeover Panel proposes tougher rules

UK firms should have greater ability to defend themselves from hostile takeover bids, the Takeover Panel has proposed.

Its conclusion follows a review of existing regulation in light of UK confectioner Cadbury being bought by US group Kraft Foods in February.

The Takeover Panel, the independent body that regulates takeovers, recommends new measures such as bidders having to reveal their financing plans.



The Takeover Panel's review came after Cadbury's takeover by US group Kraft Foods

James Quinn

Takeover Code changes: the right price is now only the start

There is a certain amount of unease in the City this weekend over a number of the recommendations from the Takeover Panel's code committee on the new rules of the financial game.



Protests about Kraft's takeover of Cadbury sparked the Takeover Panel's review. Photo: AFP

By James Quinn 9:00PM BST 23 Oct 2010
Comments



Independent expert reports

We think [the expert's] report was long and would not have been clear to shareholders. In the instances where matters were raised, this was only remedied by the corrective disclosure we required. While an expert report is often technical, which can make it difficult to simplify, it would be more helpful to shareholders if written with them clearly in mind...

Northern Energy Corporation Limited [2011] ATP 2 at [112]



Other issues before the Panel

Representation of directors' independence

North Queensland Metals Limited 02 [2010] ATP 7

Gladstone Pacific Nickel Limited [2010] ATP 12

Downstream acquisitions

Leighton Holdings Limited 01, 02 and 03 [2010] ATP 13

Leighton Holdings Limited 02R [2010] ATP 14

Interpretation of a force majeure condition

NGM Resources Limited [2010] ATP 11



Law reform

A number of proposals for reform being ventilated, including:

- Members' schemes
- Increasing takeover threshold
- Abolishing or reducing “creep”
- Abolishing prohibition for escalators
- Including long equity derivative positions in substantial holding disclosure and the calculation of voting power for the purposes of s606
- Timetable reforms



Takeovers Panel Book

- *The Takeovers Panel and Takeovers Regulation in Australia*
- Edited by Ian Ramsay
- Published by Melbourne University Publishing
- Chapters written by practitioners



Thank you.

Discussion

