

CORPORATIONS AND SECURITIES PANEL

ANNUAL REPORT 1991-92

**CORPORATIONS
AND
SECURITIES PANEL**

25/09/92

The Honourable M J Duffy
Attorney General
Parliament House
Canberra ACT 2600

Dear Minister,

I have the honour to submit to you, in accordance with section 183 of the Australian Securities Commission Act 1989, this report on the operations of the Corporations and Securities Panel for the period 1 July 1991 to 30 June 1992.

This report is the first report on the operations of the Panel, the Panel having been established on 1 January 1991 did not come into being until 3 July 1992 with the appointment of its first members.

Yours sincerely

David Hoare
President
Corporations and Securities Panel

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1. The Role of the Panel

The Panel was introduced into Australian regulatory life with the Corporations Law on 1 January 1991. It is partly a response to concerns of the legislature and the business community that the previous regulator of the market for control of Australian companies, the National Companies and Securities Commission (NCSC) ran the risk of being perceived as prosecutor, judge, jury and executioner. The Panel is also partly a move to bring the concept of peer review to the difficult concept of acceptable behaviour and market integrity.

Panel members are selected for their knowledge of, or experience in, business, the administration of companies, the financial markets, law, economics and accounting. They are persons who have practical experience in the operation of business and who will bring to the Panel's deliberations on unacceptable circumstances their experience and expertise and also, importantly, knowledge of the standard of behaviour which the market expects of its participants.

The Panel's role is to consider applications from the Australian Securities Commission (ASC) for a declaration that an acquisition or acquisitions of shares in a company or conduct engaged in by a person in relation to shares in, or the affairs of, a company is or are unacceptable. The concept of unacceptable conduct or acquisition is related to "unacceptable circumstances" which are defined in s732 of the Corporations Law (Law) and are based on the "Eggleston Principles" which were set out in the Company Law Advisory Committee's Second Interim Report to the Standing Committee of Attorneys-General of February 1969 and chaired by R M Eggleston. In determining whether an acquisition or conduct is unacceptable the Panel must consider whether unacceptable circumstances have occurred, any other matters which the Panel considers relevant and whether it is in the public interest to declare the acquisition or conduct to be unacceptable.

In performing its role the Panel is empowered to hold hearings, hear evidence, require persons to appear or to produce documents, to make declarations of unacceptability, and to make legally binding orders that it thinks necessary or desirable to protect the rights or interests of persons in a takeover or to negate the effects of unacceptable conduct or acquisitions referred to the Panel.

2. The Structure of the Panel

Members

The Panel is made up of at least five members who may be full or part time members. It was considered by the legislature that part time membership would allow active members of the business community to participate on the Panel, widening the range of potential members and ensuring that the Panel reflected current standards of the securities market.

The Panel currently has fourteen part time members, appointed by the Governor General on the nomination of the Minister. Members are appointed for a period of no more than five years. The relevant Ministers from the States and Territories may give the names of suitable nominees to the Minister for consideration.

President

One member of the Panel is appointed by the Governor General to be the President of the Panel. Mr David Hoare has been appointed to be the President of the Panel.

Establishment and Commencement of the Panel

Although the Panel was established with the proclamation of the Law and the Australian Securities Commission Law (ASC Law) on 1 January 1991, its first members were not appointed to the Panel until 3 July 1991.

Sitting Panel

The Panel, for the performance of its functions in relation to a particular application by the ASC, is constituted by three members as determined by the President of the Panel. Those three members then constitute the "Sitting Panel" and may hold hearings and exercise the powers of the Panel.

Reporting

The Panel is required under s183 of the ASC Law to prepare a report as soon as practicable after 30 June and in any case before 31 October each year and give a copy of the report to the Minister. Many of the reporting requirements in the Department of the Prime Minister and Cabinet are not appropriate for small bodies or are included in the Annual Report of the Australian Securities Commission.

Staff

Under the provisions of section 11(2) of the ASC Law, the ASC has the function of providing such staff and support facilities to the Panel as are necessary for the performance by the Panel of its functions and powers. The ASC has provided the Panel with a senior officer to act as secretary to the Panel and has provided other services as required such as the hearing room and other facilities necessary for the holding of the hearing in the Panel's sole referral in 1991-92.

3. The Work of the Panel in 1991-92

The Panel received one application under s733(1) of the Law from the ASC in 1991-92. It was on 4 July 1991, one day after the Panel's first members were appointed.

Titan Hills

The matter related to what is generally referred to as a reverse takeover by Precision Data Holdings Ltd (PDHL) of Titan Hills Australia Ltd (THAL or Titan Hills) by means of THAL making a scrip takeover bid for all the shares in PDHL whereby the owners of shares in PDHL would become the majority shareholders in THAL.

The ASC alleged, inter alia, that the shareholders of THAL had received insufficient information as to the value of PDHL for them to be able to make an informed decision on whether to approve the acquisition by certain PDHL shareholders of a substantial interest in THAL. THAL was a "cash box" company being the renamed remains of the publicly listed Budget Corporation Ltd. It contained significant amounts of cash and had several legal actions for damages pending in relation to the public float of Budget. PDHL was a data processing company associated with Mr Godfrey Cullen and others.

The hearing of the application was delayed by an action in the High Court as to the constitutional validity of the Panel's empowering legislation and it was not finally heard until December 1991. At the final hearing the ASC reduced the number and complexity of the acquisitions and conduct for which it applied to the Panel for declaration. On completion of the hearing the Panel determined that unacceptable circumstances had occurred, in that the shareholders of Titan Hills were not supplied with enough information to enable them to assess the merits of a proposal whereby a person acquired a substantial interest in Titan Hills.

Following negotiations between the ASC and interests associated with Mr Godfrey Cullen, certain ameliorating conduct was proposed to be undertaken by the Cullen interests whereby the members of Titan Hills not associated with Mr Cullen would receive certain distributions of shares, money and possible proceeds from the legal proceedings relating to the floatation of Budget Corporation Ltd. The ASC advised the Panel that it considered the ameliorating conduct was such as to produce a not unacceptable resolution of the matter.

The Panel determined that unacceptable circumstances had occurred but that having regard to the ameliorating circumstances it was not in the public interest to declare the conduct or acquisitions to be unacceptable.

Panel Procedures

In its first determination of an application the Panel found many complicating factors in its path to a conclusion and the process through which the Panel attempted to reach its determination has been criticised by some as being too cumbersome and legalistic. The Panel had to consider, inter alia, issues of conflict of interest and interpretation of the legislation and encountered many delaying factors. Such problems were to be expected.

The Panel is, however, concerned that what should be, and is directed in the legislation to be, as informal and expeditious a process as possible, can become unnecessarily protracted and ponderous. The President of the Panel is looking at the processes the Panel is required to follow with a view to making recommendations as to their improvement to ensure that they do meet the legislative criteria of informality, expedition and minimal technicality.

The Panel is also concerned to ensure that a person who gives undertakings to the Panel as to his or her future actions is legally bound to carry out those undertakings.

4. Litigation

During the course of the determination of the Titan Hills application the Panel and its legislation were the subject of a number of pieces of litigation. Although this litigation caused some delay in determining the Titan Hills application, the Panel considers that most of the litigation was likely to have occurred over time as new legislation is tested and case law established. To this end the Panel considers that the time and delay incurred have not been wasted and have settled a number of important points clearing the path of the Panel in future determinations of several significant matters.

High Court Matters

The validity of the legislation giving the Panel its powers was challenged in *Precision Data Holdings Ltd & Ors v Wills Adler and Jooste* (1991) 6 ACSR 269. The basis of the challenge was that the Panel's legislation purported to confer judicial powers on the Panel. The Panel received notice of the action on 26 July 1991. The full court of the High Court decided on 24 October 1991 in a unanimous and firm decision that the legislation conferring the Panel's power is constitutional and that the Panel does not exercise judicial powers in an adjudication of a dispute about existing rights but the Panel creates a new set of rights and obligations following the Panel's consideration of the facts before it based on matters of policy, including commercial policy.

Federal Court Matters

Extension of Time

On 2 August 1991, the Panel applied to the Federal Court for an extension of time within which to make a declaration of unacceptability following the institution of the challenge in the High Court to the validity of the Panel's empowering legislation. The Panel had decided that it should not proceed with its hearing of the Titan Hills matter while the High Court had a matter before it concerning the Panel's constitutional validity.

Jenkinson J (unreported), under s733(4)(c) extended the time within which the Panel might make a declaration of unacceptability to the lesser of 12 months or 60 days after the handing down of the High Court's decision.

Following the High Court's decision, the Panel called for submissions on the matters before it and commenced a hearing but soon decided that the time left before it may not allow it to conclude its hearing within the time set by Jenkinson J. The Panel applied for a further extension of time *Wills Adler and Jooste v Australian Securities Commission & Ors* (1992) 10 ACLC 236 which was granted by Northrop J.

Gallivan Investments Ltd lodged an appeal with the Federal Court against the decision of Northrop J but later withdrew it.

Interim Orders

Having had a question of law raised by parties before it as to whether the Panel could make interim orders under s735(2) of the Law before the Panel had made a declaration under s733(3), the Panel referred the question to the Federal Court for decision.

Wills Adler and Jooste v Australian Securities Commission & Ors (1991) 9 ACLC 1,440 Ryan J ruled that the Panel did have the power to make an interim order prior to having made a declaration of unacceptability because otherwise the Panel could have the subject matter of its determination removed from it. He decided that there was no specific provision preventing this interpretation of the Law and that the ASC had made an application for a declaration under section 734 in its initial application to the Panel. He considered that the legislature intended the Panel to be able to make interim orders to preserve the status quo while it considered the matter and that without that power the intention of the legislature would be frustrated.

The matter was appealed to the full bench of the Federal Court Cullen & Ors v Wills Adler and Jooste (1991) 9 ACLC 1,450 which reversed the decision of Ryan J saying that the legislation envisaged a two stage procedure and there was no specific provision of the Law which provided the Panel with power to make interim orders prior to having made a declaration of unacceptability and in the absence of such a specific provision it determined that the Panel did not have that power.

Administrative Appeals Tribunal Matters

The Administrative Appeals Tribunal in Re Gallivan Investments Ltd and Australian Securities Commission (1991)14 AAR 238 determined that the decision of the ASC to refer a matter to the Panel is not a reviewable decision because it is not a decision determinative of a person's rights but is an enabling decision allowing the Panel to consider the matter and to make a final determinative decision.

The decision of the AAT is an important one because it reduces the potential delays in matters being referred to and being determined by the Panel. Matters should come before the Panel and be determined as expeditiously as practicable for the Panel to be a credible part of an efficient commercial market.

5. Legislation

The legislation under which the Panel operates is in Part 6.9 of the Law and Part 10 of the ASC Law. Part 6.9 sets out the definition of unacceptable circumstances, and the provisions relating to the making of declarations and orders by the Panel. Part 10 of the ASC Law sets out the procedures of the Panel in its operations and hearings.

Following the decision of the full bench of the Federal Court that the Panel could not make interim orders prior to having made a declaration of unacceptability, the Attorney General introduced amending legislation in the Corporations (Unlisted Property Trusts) Amendment Bill 1991 to ensure that the Panel has power to make interim orders prior to the making of a declaration of unacceptability. The Panel considers that this amendment is very important to its effective operation. It is essential that the Panel be able to ensure that the subject matter of its determination is not removed from it by the actions of an interested party. To this end, interim orders preventing such behaviour are essential to the Panel's operation.

The amendments are included in sections 733A, 73313, 735(2), 735(2A) and 735(3).

8. Future Directions

The work of the Panel is primarily determined by the complexity and number of matters referred to it by the ASC. There is a small amount of informational and policy development work required but this is minor compared to that required by even a single application.

The Panel considers that its experience in its single referral to date has been an important development and learning process for all concerned. Future applications will be conducted in light of the lessons learned in Titan Hills.

The Panel is keen to ensure that its mode of operation is not one of perceived adversarial, quasi-legal manner but an informal, practical manner with Panel members acting as persons with business and market expertise rather than as inquisitors or judges.

6. Panel Expenditure

The Panel's funding comes through the ASC budget. The ASC allocated to the Panel \$249 000 for the year 1991-92.

The Panel's expenses for the year 1991-92 were \$231,753. This includes accounts payable of \$37,236 remaining on hand at 30 June 1992.

Operational Expenses

The operational expenses of the Panel for the year were **\$132 025**. This was wholly comprised of the Titan Hills determination.

Members' Annual Fees

Members are paid an annual fee for membership of the Panel. The total expenditure on membership fees for the year (calculated pro-rata for members who were members for less than a full year) was **\$22 335.06**.

Remuneration

The current Remuneration Tribunal determination is:

Members

Annual Fee	\$1514
When Engaged on Panel Business	\$411 per day
Travelling Allowance	\$300 per day (max)

President

Annual Fee	\$5514
When Engaged on Panel Business	\$511 per day
Travelling Allowance	\$300 per day (max)

8 Appendix A - Panel Members

Name	Organisation	Date of Appointment
Mr David Hoare	BT Australia Ltd	3 July 1991
Mr Ross Adler	Santos Ltd.	3 July 1991
Ms Elizabeth Alexander	Price Waterhouse	3 July 1991
Mr Ian Clark		3 July 1991
Mr David Elsum AM	AAT	12 December 1991
Mr Ronald Evans	Spotless Group Ltd.	3 July 1991
Mr Warwick Higgs		24 September 1991
Mr Stuart Hornery AO	Lend Lease Corporation Ltd.	3 July 1991
Mr Peter Jooste	Parker & Parker	3 July 1991
Mr Russell Miller	Sly & Weigall	3 July 1991
Mr Peter O'Donohue	Nicholas O'Donohue & Co	25 July 1991
Mr Graham Stanford	AAT	12 December 1991
Mr Geoffrey Torney	Byrne Jones & Torney	24 September 1991
Mr Dean Wills AM	Coca-Cola Amatil Ltd.	3 July 1991

Panel Secretary and Contact Officer: -

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9. Appendix B

**Corporations Securities Panel
Financial Statement
1 July 1991 to 30 June 1992**

	Note	\$	\$
Budget Allocation 1991/92			249,000
Less: Administrative Expenses (Titan Hills)			
Members' per diem fees		15,588	
Members' travel costs		19,653	
Legal fees		49,803	
Operational costs		<u>9,745</u>	
			94,789
Salary Related Expenses			
Members' Annual Fees		22,335	
Staff Salaries (incl below-line costs)		71,421	
Employer Superannuation		4,972	
Workers Compensation		<u>1,000</u>	
			<u>99,728</u>
Expenditure to 30 June 1992			194,517
Add: Accounts Payable	(1)	37,236	<u>37,236</u>
Total Expenses Incurred to 30 June 1992			<u>231,753</u>
Balance of Allocation			17,247

Note: Accounts totalling \$37,236 remained on hand as at 30 June 1992.

9. Appendix C - Panel Publications

The Panel published its decision and reasons in relation to the Titan Hills referral in the ASC Digest. Because the Panel made no declaration, the decision and reasons were not published in the Gazette.