

**CORPORATIONS AND SECURITIES  
PANEL**

**ANNUAL REPORT 1997-98**

C O R P O R A T I O N S  
A N D  
S E C U R I T I E S P A N E L

Our Reference:

2 October 1998

The Hon Peter Costello MP  
Treasurer  
Parliament House  
Canberra ACT 2600

Dear Minister,

I have the honour to submit to you, in accordance with section 183 of the Australian Securities and Investments Commission Act 1989, this report on the operations of the Corporations and Securities Panel for the period 1 July 1997 to 30 June 1998.

This report is the seventh report on the operations of the Panel. The Panel was established on 1 January 1991 but did not come into being until 3 July 1991 with the appointment of its first members.

Yours sincerely

John Pascoe AM  
President  
Corporations and Securities Panel

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## **Introduction to the Corporations and Securities Panel**

The Corporations and Securities Panel was established under the Australian Securities and Investments Commission Act 1989 (ASIC Act) on 1 January 1991.

The Panel's role is to consider applications from the Australian Securities and Investments Commission (ASIC)<sup>1</sup> for a declaration that an unacceptable acquisition of shares in a company has occurred or that there has been unacceptable conduct in relation to shares in, or the affairs of, a company. ASIC makes such applications if it considers that unacceptable circumstances as defined in section 732 of the Corporations Law have occurred. The provisions in section 732 embody the general policy and spirit of the takeovers provisions of the Corporations Law. They underpin the more detailed and prescriptive provisions of Chapter 6 of the Law which governs mergers and acquisitions activity in Australia.

The Panel's purpose is to provide a mechanism for peer review of mergers and acquisitions activity. Panel members are selected on their knowledge and experience in areas relating to the administration of companies, financial markets, law, economics and accounting. They are able to utilise their extensive commercial and business experience when assessing the matters brought before them.

The procedures which the Panel must follow are prescribed at sections 184 to 201A of the ASIC Act and regulations 13 to 43 of the ASIC Regulations. The objectives of the procedures are to ensure that Panel inquiries are conducted in a timely, fair and reasonable manner, with as little formality as possible.

In performing its functions the Panel may hold inquiries, take submissions, hear evidence, require persons to appear or to produce documents and issue legally binding orders.

### **Panel Activities 1997-98**

The Panel received the third referral since its inception during this financial year. On 15 August 1997, ASIC sought a declaration that unacceptable conduct had occurred in relation to:

- (a) an acquisition of shares in John Fairfax Holdings Ltd by Brierley Investments Ltd (BIL); or
- (b) as a result of conduct in relation to shares in, or the affairs of, Fairfax engaged in by BIL and subsidiary companies, and Merrill Lynch (Australia) Futures Ltd (MLAF) and MLAE Nominees Pty Ltd.

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<sup>1</sup> Formerly the Australian Securities Commission

The members of the Panel appointed to hear the matter were Mr Denis Byrne (President), Mr Warwick Higgs (Deputy President) and Mr Graham Stanford.

ASIC applied for a declaration following the entry by a BIL subsidiary into swap contracts with MLAF on 27 March 1997 for 4.9 % of Fairfax shares. At the time the contracts were entered into, BIL held 19.98% of the issued shares of Fairfax.

ASIC considered that unacceptable circumstances occurred because the market was generally unaware of the existence of the swap contracts and, accordingly, Fairfax shareholders did not have the same advantage that MLAF had of knowing in advance that the BIL companies would be in the market place on the relevant contract valuation dates in June 1997.

ASIC also contended that, because of the conduct of the BIL and Merrill Lynch companies, other shareholders in Fairfax were denied the opportunity to sell Fairfax shares to BIL to enable BIL to acquire a further 3% in Fairfax.

On 21 August 1997, the BIL companies unsuccessfully sought orders of review in the Federal Court (see below).

The Panel decided to hold a public hearing into the matters raised in the application. After hearing submissions, the Panel announced on 29 September 1997 that it was not satisfied that unacceptable circumstances had occurred. Among other things, it considered that ASX market activity on the contract valuation days was not abnormal and that all persons, as well as Merrill Lynch and BIL, had the opportunity of trading in Fairfax shares on those days. The Panel further considered that it would not be in the public interest to make such a declaration as the disclosure of the swap contracts would not have had any material effect on the market price of Fairfax shares during the relevant periods in June.

The Panel stated that, in other cases, the operation of swap agreements may well constitute unacceptable conduct if the company was much smaller and had a lower traded stock base or where circumstances were materially different.

The Panel was required under section 733(3) to make its declaration within 30 days after the day on which ASIC's application was made or any other period as the Court ordered. As part of the Federal Court Proceedings, Emmett J ordered that the date for the making of the Panel's declaration be extended up to and including 29 September 1997.

## **Federal Court Proceedings**

On 21 August 1997, the BIL companies sought orders of review in the Federal Court in relation to:

- (a) the decision of ASIC to seek a declaration of unacceptable circumstances;
- (b) the decision of Mr J Pascoe, President of the Corporations and Securities Panel, to appoint Messrs Higgs and Stanford to the Panel, notwithstanding disclosure by them to Mr Pascoe that they held Fairfax shares; and
- (c) the decision of Messrs Byrne, Higgs and Stanford to hold an inquiry into the matter.

On 5 September 1997, Emmett J dismissed BIL's application with costs. *Brierley Investments Ltd and Others v ASC and Others* (1997) 148 ALR 158.

## **Future Directions**

In July 1998, the Government introduced a Bill into the House of Representatives which proposed a significant restructure of the Panel. Under the proposal, the Panel would take the place of the courts as the principal forum for resolving most mergers and acquisitions disputes under the Law. The Bill lapsed with the calling of the Federal election to be held on 3 October 1998.

## **Structure of the Panel**

Provisions regulating the structure of the Panel are set out in the ASIC Act. The first members of the Panel were appointed on 3 July 1991.

## **Membership of the Panel**

The Panel must have at least five members who may be full or part time members. Part time membership allows active members of the business community to participate, ensuring that the Panel reflects the current standards of the securities market.

The members are appointed by the Governor General on nomination by the Minister for a period of no more than five years. The relevant Ministers from the States and Territories may provide the names of suitable nominees for consideration. At 30 June 1998, the Panel had 16 members.

## **Membership Changes**

Two new members were appointed during this financial year:

Mr Denis Byrne, who practised as a commercial lawyer for over 20 years and is now a corporate consultant; and

Mr Brett Heading, who has been a partner with McCullough Robinson for 14 years and is an experienced corporate law practitioner.

Six members indicated that they did not wish to be reappointed: Mr William Gibson, Mr Stuart Hornery AO, Ms Helen Lynch AM, Mr Peter O'Donohue, Dr Kerry Schott and Mr Geoffrey Torney. The Panel extends its sincere thanks to these members for their contribution to the Panel.

## **President**

One member of the Panel is appointed by the Governor General to be the President of the Panel. Mr John Pascoe AM was reappointed as President on 1 November 1997.

## **Staff**

ASIC provides staff and support facilities to the Panel for the performance of its functions. ASIC provides a senior staff officer to act as Secretary to the Panel. When not involved in Panel activities that person undertakes other duties for ASIC.

## **Reporting**

The Panel is required under section 183 of the ASIC Act to prepare a report as soon as practicable after 30 June and in any case before 31 October each year and give a copy to the Minister.

## Appendix A - Panel Members <sup>2</sup>

<b>Name</b>	<b>Organisation</b>	<b>Date of Appointment</b>
Mr John Pascoe AM	George Weston Foods Ltd	1 November 1994
Mr Ross Adler	Santos Ltd	3 July 1991
Ms Elizabeth Alexander AM	Price Waterhouse	3 July 1991
Mr Denis Byrne	Byrne & Associates	21 August 1997
The Hon Mr Jerrold Cripps QC		4 March 1994
Mr David Elsum AM	AAT	12 December 1991
Mr Ron Evans	Spotless Group Ltd	3 July 1991
Mr Brett Heading	McCullough Robinson	21 August 1997
Mr Warwick Higgs	Chartered Accountant	24 September 1991
Mr Peter Jooste QC		3 July 1991
Ms Judith Kelly		11 October 1994
Mr Donald Magarey	Blake Dawson Waldron	11 October 1994
Mr Russell Miller	Deacons Graham & James	3 July 1991
Mr Michael Sharpe AM	Coopers & Lybrand (Securities) Ltd	11 October 1994
Mr Graham Stanford	Company Director	12 December 1991
Prof Peter Wolnizer	Deakin University	11 October 1994

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<sup>2</sup> At 30/6/98



## Appendix B - Panel Expenditure

The Panel's funding comes via the ASIC budget. ASIC allocated from its budget \$549,845 to the Panel for the year 1997-98.

The Panel's expenses for the year 1997-98 were \$324,730.

### Remuneration

The current<sup>3</sup> Remuneration Tribunal determination is:

Remuneration Tribunal determination is:

#### Members

Annual Fee	\$1,820
When Engaged on Panel Business	\$ 485 per day
Travelling Allowance	\$ 320 per day (max)

#### President

Annual Fee	\$6,000
When Engaged on Panel Business	\$ 600 per day
Travelling Allowance	\$ 320 per day (max)

### Audit

The Panel's expenditures are audited by the Australian National Audit Office as part of ASIC's financial statements.

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<sup>3</sup> The Panel's 1997/98 remuneration is set by Determination No 14 of 1996

## Appendix C - Financial Statement 1997-98

### Financial Statement 1 July 1997 to 30 June 1998

	\$	\$
<b>Budget Allocation</b>		549,845
<b>Administrative Expenses</b>		
Printing		438
<b>Fairfax Inquiry</b>		
Members Daily Fees	40,039	
Travel costs	23,409	
Legal fees	125,218	
Operational costs	<u>31,478</u>	
		<u>220,144</u>
<b>Salaries</b>		
Members Annual fees	33,300	
<b>Employee expenses</b>		
Salaries	58,628	
Employer superannuation	<u>12,220</u>	
		<u>104,148</u>
Subtract accounts unpaid at 30/06/97	nil	
Add accounts unpaid at 30/06/98	nil	
<b>Total Expenses Incurred to 30 June 1998</b>		<u>324,730</u>
<b>Balance of allocation</b>		<u>225,115</u>

## **Appendix D - Panel Secretariat and Contact Officer**

Panel Secretary and Contact Officer:

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Australian Securities and Investments Commission  
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