

# Corporations and Securities Panel

Annual Report  
1999-2000

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The Takeovers Panel

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14 December, 2000

The Hon Joe Hockey MP  
Minister for Financial Services and Regulation  
Parliament House  
Canberra ACT 2600

Dear Minister

**ANNUAL REPORT 1999-2000**

I have the honour to submit to you, in accordance with section 183 of the Australian Securities & Investments Commission Act 1989, the 1999-2000 Annual Report on the operations of the Corporations and Securities Panel ('Panel') for presentation to the Parliament. The report has been prepared in accordance with section 70 of the *Public Service Act 1999*.

This report encompasses the Panel's previous role, which was to consider applications from the Australian Securities & Investments Commission and its current expanded role as the primary dispute resolution forum for takeover bids.

The Panel's expanded role, which became effective on 13 March 2000, is a result of the Government's Corporate Law Economic Reform Program ('CLERP').

Yours sincerely



Simon McKeon  
President



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# Introduction and guide to the report

This Annual Report reports on the Panel's activities in

- (a) its previous role, in considering applications for declarations of unacceptable conduct or acquisitions from the Australian Securities and Investments Commission (ASIC); and
- (b) its current expanded role as the primary forum for resolution of takeovers disputes.

The primary activity of the Panel in the first part of 1999-2000 was considering ASIC's application for declarations of unacceptable acquisition and conduct in relation to a takeover bid for Wesfi Limited.

During the latter part of 1999-2000, the focus of the Panel's activities was on preparing for its substantially expanded role which became effective on 13 March 2000. The Panel dealt with five applications in this period.

## Other sources of information

The Panel publishes all its public documents on its website. These include media releases, final decisions on disputes lodged with the Panel, its annual report, current policies and rules.

The Panel invites visitors to its website and to join its mailing list for notification when new items have been posted on the website.

The Panel's website address is: [www.takeovers.gov.au](http://www.takeovers.gov.au)

## Enquiries

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## Review by the President

With the major expansion of the Panel's role as part of the Government's Corporate Law Economic Reform Program, (CLERP) the past year has been the most significant in the Panel's history. The Panel has benefited from a large influx of new and talented members. We have established permanent premises. We have commenced a program to articulate public policy in a number of areas to provide the takeovers market greater certainty and confidence. Finally, we have resolved a number of complex takeovers disputes in a timely and commercially responsive manner.

We have been encouraged in having received positive feedback from parties who have come before us and market participants generally.

These early successes have been the result of a great deal of hard work by the Panel members, the Minister, the Department of Treasury and, in particular, the Panel Executive.

## Corporate Law Economic Reform Program

The major feature of 1999-2000 was the commencement of the *CLERP Act 1999* on 13 March 2000. It had several major effects on the role of the Panel and has:

- made the Panel the main dispute resolution forum for a takeover bid during the life of the bid;
- largely removed the opportunity for tactical litigation by preventing parties taking civil takeover disputes to the Court during the bid period;
- made the Panel the primary review body for takeover modification and exemption decisions by ASIC;
- expanded the range of persons who can bring matters to the Panel from solely ASIC, to persons whose interests are affected by the circumstances;
- created a Review Panel process;

- changed the focus of the Panel's declarations from the criticism of *unacceptable conduct* to the more neutral, problem solving focus of *unacceptable circumstances*;
- introduced the principles of an informed, efficient and competitive market as part of the Panel's specific goals; and
- provided for the Panel to set out the rules for the conduct of simplified and less formal proceedings.

## Relationships

The Panel is a body which operates in a necessarily complex legal and regulatory environment. Its success as an organisation and as a public regulator will depend very much on the quality of its relations with other regulators, market participants, the Courts and other stakeholders.

The Panel has entered into a Memorandum of Understanding with Treasury, and is negotiating a Memorandum with ASIC. In March, 2000, the Panel took the opportunity to support a visit to Australia by Mr Peter Lee, Deputy Director General of the London Panel on Takeovers and Mergers. The Panel has commenced regular liaison meetings with market practitioners and industry participants around Australia as part of its regular Panel member meetings. The Panel Executive has regular informal contact with officers of Treasury, ASIC, the Australian Stock Exchange, the New Zealand Takeovers Panel and other industry organisations such as the Investment Funds and Superannuation Association.

## Panel members

At the time of the commencement of CLERP, a significant number of new members were appointed to the Panel to take its complement to 28 (see page 28). The new members were essential to enable the Panel to deal with its expanded workload. Our experience with the post-CLERP environment indicates that a further increase in the number of Panel members is desirable, and we understand the Government is currently considering this.

The new members have brought with them a wide range of experience and skills. They have integrated very quickly with the existing Panel members.

Panel members, both new and existing, have attended a series of internal workshops on the new legislation and on the operation of the Panel in its first few proceedings. We intend to continue these workshops which play an important part in maintaining consistency in Panel decisions, developing policy, inducting new members as they are appointed and maintaining good communication with market and industry participants.

## Wesfi

The Panel received one application for a declaration of unacceptable conduct and or unacceptable acquisition in 1999-2000 in relation to circumstances surrounding Bristle's offer for Wesfi. There were 11 pieces of litigation connected with the application and proceedings.

The Panel members, Alice McCleary, Simon Mordant and Nerolie Withnall, took evidence from 13 witnesses over 3 days in September and published its decision on 12 October 1999. It decided that the conduct and acquisitions were not in relation to a 'substantial interest' and therefore the Panel's jurisdiction was not attracted. It gave the market some material guidance for future cases on a number of issues raised in the application.

The Wesfi application was arduous and time consuming for the sitting members. The Panel appreciates the significant work and commitment of the Wesfi Panel.

## Post-CLERP

The Panel received 5 applications between 13 March and 30 June 2000. Details of those applications are set out in Appendix A.

The applications were in relation to the Australian Infrastructure Fund's bid for Infratil and Smorgon Steel's bid for Email.

The AIF matter involved an application by AIF for review of an ASIC takeover decision and an application by Infratil for a declaration of unacceptable circumstances in relation to AIF's bid.

The Smorgon matter involved an application for interim orders restraining dispatch of the Smorgon bidder's statement, a declaration of unacceptable circumstances and final orders requiring further disclosure by Smorgon. It also involved the first application for a Review Panel to consider the sitting Panel's decision not to restrain dispatch of the Smorgon bidder's statement under interim orders.

Both sets of proceedings were resolved expeditiously and allowed the takeovers to proceed without significant delay. The Panel strongly believes that takeover decisions should be made by shareholders, rather than by the Courts or by the Panel.

## Looking ahead

The past year has been one of significant change and development. The coming year will focus more on consolidation and putting runs on the board.

Although we are encouraged by the positive responses we have had from market participants in the first months of our expanded role, we realise that we are on a steep learning curve and will inevitably make some mistakes. Part of living with, and learning from, those mistakes is the very important process of conducting post-mortems with parties who have had direct experience with a Panel matter. We believe that frank discussion with parties will enable us to monitor our progress and learn from mistakes. It should also give the market greater confidence in the quality and responsiveness of Panel processes.

The challenges that lie before us include

### *Policy*

- We intend to be more pro-active in 2000-2001 in addressing market issues in Panel Policy documents before they get to the Panel as applications. We will seek the market's views on which issues are currently important and are generating uncertainty or lack of confidence.

### ***More members***

- We look forward to working with new members of the takeovers and business community to be appointed to the Panel to deal with our increasing workload. In Australia's small business community, conflicts are always likely to restrict the number of members of the Panel who are available to sit on any particular matter, so a wider Panel membership will be advantageous.

### ***Consistency***

- The Panel's consistency in decision making and policy will be the main driver for increased certainty and confidence for the market. We will be working diligently in 2000-2001 to maintain our consistency, especially as the number of Panel members increases.

### ***Relationship with Courts***

- The Panel will be working very hard to ensure that we have a co-operative and effective relationship with the Federal and Supreme Courts. The privative clause in section 659B of the Law and its interpretation will be very important to the Panel's future success, and we are keen to see some instructive case law developed in the area to add certainty to the Panel's role.

# Overview

The Panel was transformed in 1999-2000, from a little used quasi-disciplinary body, into a relevant and highly responsive dispute resolution forum playing an integral role in Australia's takeovers market.

In addition to material changes to its legislation, the Panel gained seventeen new members, a permanent office and an expanded, full time executive. The new and existing members are set out on pages 28 and following.

## Role and functions

Section 659AA of the Corporations Law ('Law') describes the post-CLERP Panel as the main resolution forum for resolving disputes about takeover bids during the lifetime of those bids.

In addition, the Panel reviews certain decisions by ASIC in relation to takeover bids.

The Panel also has a significant policy development function. In part this is through rules it may make under section 658C of the Law, in part through its decisions and in part through policy documents it publishes on unacceptable circumstances and related matters.

### *Main dispute resolution forum*

Under section 659B of the Law, private parties to a takeover may not commence civil litigation, or seek injunctive relief from the Courts in relation to a takeover, while the takeover is current. The majority of disputes which were previously resolved in the civil jurisdiction of the Courts are now resolved by the Panel.

### *Unacceptable circumstances*

The Panel has an expanded jurisdiction over cases of unacceptable circumstances. A wider range of persons may apply to the Panel for a declaration of unacceptable circumstances under section 657A of the Law than prior to CLERP. In addition, the negative, critical concepts of unacceptable conduct or acquisition have been replaced with the more

neutral, problem solving concept of unacceptable circumstances as the Panel's primary declaration.

### *Review of some ASIC and Panel decisions*

The CLERP Act gave the Panel the power to review certain decisions of ASIC to grant exemptions or modifications during the life of a takeover. This function had previously been carried out by the Administrative Appeals Tribunal. The decisions which the Panel may review are ASIC's decisions under section 655A of the Law to exempt from, or modify, Chapter 6 of the Law and decisions under section 673 of the Law to modify the substantial shareholding provisions (if those decisions are made in relation to a takeover target). The review powers are set out in section 656A of the Law.

Under section 657EA of the Law, the Panel also has a function in reviewing its own, first instance, decisions. However, a Panel reviewing the first instance decision of another Panel is comprised of a fresh group of members. There may be only one review of an original Panel decision.

The Panel has an additional review function if a matter is referred from the Court, under section 657EB of the Law.

The Panel received one application under section 656A and one under section 657EA during 1999-2000.

# The Panel Program

## Objective

To improve the certainty, efficiency and fairness of Australia's takeovers market by resolving disputes in a timely, consistent and sound manner and by publishing clear, well developed policies to assist market participants.

## Operations

The main matters to come before the Panel during 1999-2000 were Wesfi pre-CLERP and Infratil and Email post-CLERP. The individual matters are described in more detail in Appendix B.

### *Development*

Consistency of decision making will be one of the primary criteria for success of the Panel. It will always be a difficult goal to work towards where three individuals from a body of close to 30 or more are selected to sit on a matter with different facts to previous decisions. However, it is a goal which the Panel members take very seriously and have committed significant time and resources to achieving.

In 1999-2000, the Panel held four workshops, two in Sydney, one in Canberra and one in Melbourne, to discuss policy and develop a cohesive view on the role and policies of the Panel. These meetings were also used to brief existing Panel members on the changes introduced with the CLERP legislation and to induct new Panel members into their role and the legislative and policy framework they will be working within.

The Panel was fortunate to have several practitioners attend these sessions to discuss takeovers and procedural issues. In particular, we thank Mr Justice Santow of the Supreme Court of New South Wales, Mr Braddon Jolley of Freehills, Mr Norman O'Bryan of Counsel and Mr Ron White of Coudert Brothers for their time and input.



## *Policy*

A significant part of the Panel's role is to promote certainty for market participants in the operation of the takeovers provisions. In part this is done through the Panel's decision making and incorporated in its reasons. However, the Panel believes it should be more pro-active and state its policy views in a more general and widely usable form than case specific statements in its reasons for decisions.

The Panel has released its views on the operation of section 621(3) of the Law to assist the market understand the Panel's likely views on matters that come before it.

The Panel has published two policies for consultation with the public and market participants on Making Rules and on Review of Decisions.

In addition, the Panel has published for consultation its draft Rules for Proceedings (made under section 195 of the ASIC Law). Given the potential for tension and dispute over the Panel's duties to act expeditiously and to afford procedural fairness, the Panel has sought the assistance of Professor Cheryl Saunders to assist it review its draft Rules for Proceedings.

The Panel has consulted with Treasury and ASIC in developing its policies.

## *Liaison*

The Panel has commenced discussions with the major regulators in the takeovers area to ensure that its regulatory role fits appropriately with theirs. The Panel has entered into a Memorandum of Understanding (MOU) with Treasury to ensure that the Panel functions appropriately. The Panel has also commenced MOU negotiations with ASIC and has had discussions with Australian Stock Exchange to establish a framework within which we can work together in what may frequently be overlapping circumstances.

The Panel has commenced a liaison program as part of its member meetings. The Panel invites members of the local takeovers community to its members' meetings in State capital cities to discuss the Panel's role and policies and to gain feedback from the market on current takeovers issues and the Panel's operations and policies. The Panel also maintains contact with organizations such as the Law Council of Australia.

The Panel President, Panel members and Panel Executive have attended and spoken at a range of industry meetings and education sessions.

The Panel's website has been one of the major ways that the Panel has projected its policies and presence to the takeovers community. The Panel has used the website for contact, publishing its documents and consulting with the takeovers market on policy documents.

The Panel was pleased to support the visit to Australia of Mr Peter Lee, the Deputy Director-General of the London Panel on Takeovers and Mergers. Mr Lee was in Australia to appear before the Parliamentary Joint Committee on Corporations and Securities. Mr Lee was able to hold several meetings with Australian Panel members to discuss takeovers issues common to both Panels.

## Organisational structure

The Panel's funding is included in the Treasury budget, and the Panel Executive are currently employees of Treasury. Consequently, the Panel uses much of Treasury's administrative infrastructure and processes.

### *Panel members*

Panel members are appointed by the Governor General, on the nomination of the Minister, under section 172 of the ASIC Law. The members are currently all part time members. They are nominated by the Minister on the basis of their knowledge or experience in one or more of: business, the administration of companies, the financial markets, law, economics and accounting.

The relevant State Ministers may give the Federal Minister submissions on nominations to the Panel. The Panel is intended to have an appropriate mix of professions, business expertise, geographical and gender representation.

One member is appointed by the Minister to act as President. Mr Simon McKeon is currently the President of the Panel. The Minister has also appointed Ms Nerolie Withnall and Mr Simon Mordant, under section 182(1)(b) of the ASIC Law, to act as President when the President is absent from office.

## *Executive*

The Panel has established a permanent Executive of four staff based in Melbourne to assist and support the larger number of members and the Panel's expanded role. The Panel wishes to thank ASIC and its Chairman, Mr Alan Cameron, for their assistance and goodwill in supporting the Panel in its earlier role, and in providing substantial support and experienced staff in the transition to the Panel's new role.

A material role for the Executive is ongoing liaison with market practitioners discussing current takeovers matters and issues in order to provide a real time perspective on the Panel's policy and decisions as they may apply to current takeovers. The Executive also maintains active communications with ASIC's takeovers staff.

## *Premises*

A major role for the Panel's new Executive has been to establish premises and infrastructure in Melbourne to support the Panel's operations. The Panel has held one hearing in its new premises. The Panel intends to use its IT infrastructure to assist it in its hearings and proceedings wherever appropriate. Where possible hearings will be held in Melbourne, but the Panel will hold its hearings wherever the circumstances of particular matters require.

# Corporate governance

## *Panel*

The Panel itself is made up of part-time members appointed by the Governor-General (see pages 28 -29 for Panel members). One of those members, Mr Simon McKeon, has been appointed to be President of the Panel. The President's responsibilities include:

- liaising with Minister, Government, Treasury, Stakeholders;
- reviewing the performance of the Panel Executive;
- making Panel Rules;
- appointing members to constitute 'sitting Panels'; and

- considering the interests of sitting Panel members for possible conflicts.

### *Executive team*

Mr Nigel Morris is Director of the Panel's Executive. His background includes senior policy and operational takeovers roles with ASIC for several years and managing one of ASIC's market enforcement teams. His responsibilities include managing the Panel's Executive and budget, carriage of proceedings before sitting Panels and review of policy development.

Mr George Durbridge is the Panel's Counsel. His background includes more than 10 years as ASIC's General Counsel. He is a widely respected counsel in the takeovers area as well as many areas of the law. His responsibilities include providing legal advice to the Panel, carriage of proceedings before sitting Panels and review of policy development.

At 30 June, 2000, the other members of the Executive team were Ms Nicole Calleja — Lawyer (on secondment from Arthur Robinson and Hedderwicks) and Ms Silvia Hajas — Office Manager

### *Treasury accountability*

The Director provides monthly reports on the Executive's financial and operational issues to the Panel President and to the Executive Director Markets Group in Treasury, Mr Gary Potts.

### *Planning and review*

The Executive has regular policy and operational review meetings with the Panel President. The performance of Executive staff is reviewed as part of Treasury's performance appraisal program.

The Panel applies the Australian Public Service (APS) Values and Code of Conduct to the conduct of Panel members and Executive staff.

### *Audit*

As the Panel's appropriation comes via the budget of the Department of Treasury, its operating result is consolidated into the Department's financial statements which are subject to Audit by the Australian National Audit Office. The Panel is also subject to Treasury's internal audit processes. The Panel was subject to similar internal and external audit processes under ASIC.

## *Executive remuneration*

Senior staff are remunerated under Australian Workplace Agreements negotiated under Treasury's remuneration procedures.

## Outcome and output information

### *Outcome and output structure*

In 1999-2000 the Panel's functions contributed to the Outcomes and Outputs of both ASIC and Treasury.

Pre-CLERP, the Panel's operations contributed to ASIC's Outcome 1 of

*'A fair and efficient market characterised by integrity and transparency and supporting confident and informed participation of investors and consumers.'*

Post-CLERP, the Panel's operations contributed to Treasury's Outcome 3

*'Well functioning markets.'*

The Panel has characterised the outputs of its functions into two classes:

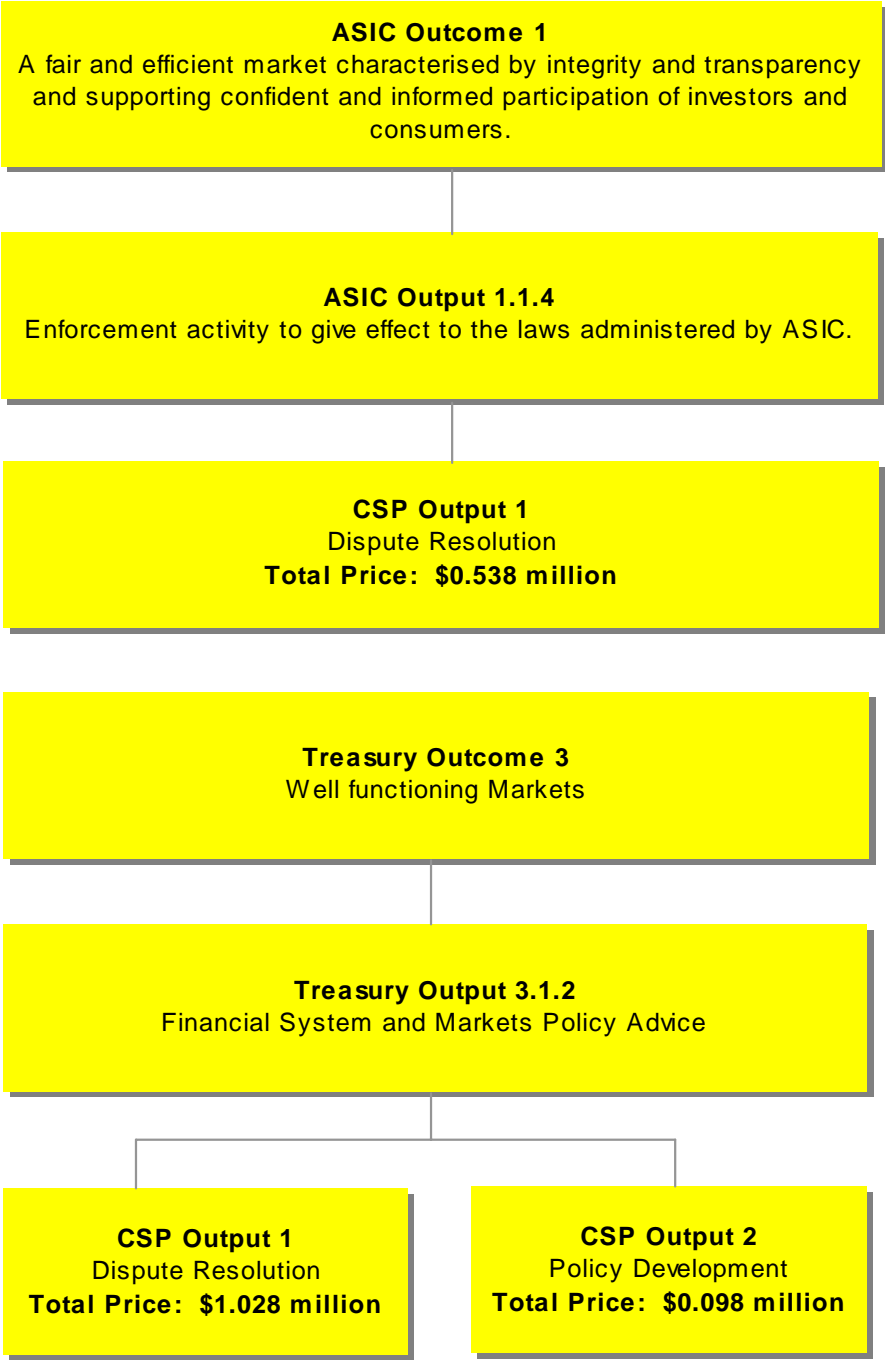
1. Dispute Resolution (including review of decisions); and
2. Policy Development.

The best fit for ASIC's and Treasury's outputs to which the Panel's outputs contributed are:

ASIC Output 1.1.4 — *'Enforcement activity to give effect to the laws administered by ASIC'*; and

Treasury Output 3.1.2 *'Financial system and markets policy advice.'*

**Chart I: Outcome and output flowchart**



**Table 1: Resources for outcomes Corporate Governance and Accounting**

	Actual 1999-00 (\$'000)	Budget Estimate 2000-01 (\$'000)
<b>Administered appropriations</b>		
Annual appropriations	0	0
Special appropriations		
<b>Total administered appropriations</b>	0	0
Output 1 — Dispute resolution — 2.5 ASL		
Output 2 — Policy development — 0.5 ASL		
<b>Total revenue from Government (appropriations) contributing to price of agency outputs</b>	2,308	1,761
<b>Revenue from other sources</b>		
Output 1 — Dispute Resolution	13	0
<b>Total revenue from other sources</b>	13	0
<b>Total price of agency outputs</b>	1,126	2,282
<b>Total estimated resourcing for outcome 1</b>	1,028	1,902
<b>Total estimated resourcing for outcome 2</b>	98	380
	1999-00	2000-01
<b>Average staffing levels (number)</b>	3	3

## Performance information

### *ASIC Output 1.4 — Enforcement activity (Wesfi Referral)*

- Timely decision making.
- Decisions contribute to fair and efficient markets.
- Decisions raise the standards of market participants.

### *Treasury Output 3.1.2 — Financial system and markets policy advice*

- Dispute resolution decisions are timely, consistent, procedurally fair, and based on sound policy considerations.
- Policy is timely, soundly based, developed in close consultation with stakeholders, and meets market participants' needs.

## 1999-2000 outcomes

The Panel's contributed to a fair and efficient market in its Wesfi proceedings by conducting the proceedings quickly, with as minimal formality as allowed by the circumstances and in as transparent a manner as possible consistent with the commercial issues involved.

The Panel's decision in Wesfi contributed to the integrity and transparency of the takeovers market by setting out clear guidelines on the market practice characterised as 'side running'. Side running is where an associate of a bidder is purchasing shares in the market *alongside* the offeror, and feeding the shares into the bid.

The Panel's consideration of proceedings in the post-CLERP regime has contributed to well functioning markets by providing timely, clear, and well articulated decisions.

The Panel's published policies and rules have contributed to the certainty of market participants by providing guidance to supplement and clarify the operation of the Corporations Law and the ASIC Law.

## Evaluations

The Panel conducts post-mortems with parties involved in its proceedings, after the takeover has been completed. It has a pro-forma questionnaire to elicit feedback on a range of issues designed to cover all material aspects of its, and its staff's, operations and functions. These reviews ensure that the Panel receives direct and timely feedback on the process and content of its proceedings.

The Panel also maintains an active liaison with market participants through regular Panel meetings in capital cities. These meetings allow feedback from key clients on a regular basis on the effectiveness of the Panel's policies and operations.



# Financial Statements<sup>1,2</sup>

**Table 2: Operating Statement — unaudited  
Corporations and Securities Panel  
for the period ended 30 June 2000**

	Treasury 1999-00 1/02/00 – 30/06/00 \$	ASIC 1999-00 1/07/99 – 31/01/00 \$	Consolidated 1999-00 \$
<b>Operating revenues</b>			
Revenues from Government	1,770,000	538,296	<b>2,308,296</b>
Other revenues <sup>3</sup>	12,900		<b>12,900</b>
<b>Total operating revenues</b>	<b>1,782,900</b>	<b>-</b>	<b>2,321,196</b>
<b>Administration expenses</b>			
Printing	1,189		<b>1,189</b>
Travel	20,483	44,934	<b>65,417</b>
Catering/Entertainment	1,296	1,791	<b>3,087</b>
Postage	63		<b>63</b>
Consultants	14,500		<b>14,500</b>
Advertising	15,332	6,138	<b>21,470</b>
Legal	11,228	301,892	<b>313,120</b>
Other administration expenses	54,181	1,362	<b>55,543</b>
<b>Total administration expenses</b>	<b>118,272</b>	<b>356,117</b>	<b>474,389</b>
<b>Employee expenses</b>			
Salaries	214,049	54,000	<b>268,049</b>
Employer superannuation	7,336	36,011	<b>43,347</b>
Members annual fees — sitting fees	61,135	92,168	<b>153,303</b>
<b>Total employee expenses</b>	<b>282,520</b>	<b>182,179</b>	<b>464,699</b>
<b>Other operating expenses</b>			
Depreciation <sup>4</sup>	2,640		<b>2,640</b>
Set up costs	162,796		<b>162,796</b>
Low value asset purchases	20,084		<b>20,084</b>
Repairs and maintenance	1,300		<b>1,300</b>
Total other operating expenses	186,820	-	<b>186,820</b>
Total expenses incurred to 30 June 2000	587,612	538,296	<b>1,125,908</b>
<b>Balance of allocation</b>	<b>1,195,288</b>	<b>-</b>	<b>1,195,288</b>

## Notes

1. This operating statement has been prepared on an accrual basis and in accordance with the historical cost convention. Except where stated, no allowance is made for the effect of changing prices on the results.
2. The Panel's expenses for 1999-2000 are also recorded in the financial statements of ASIC and Treasury for the periods 01/07/1999-31/01/2000 and 01/02/2000-30/06/2000 respectively.
3. Other revenue comprises:
  - a. parties' contribution to expert advice in the Email matter; and
  - b. costs recovered from parties as shared costs of transcript printing in the Email matter.
4. Depreciation costs do not take into account acquisition of the following additional assets which were acquired to set up the Panel's offices. These will be depreciated over their useful economic life commencing in the 2000-01 financial year:
  - a. \$110,720 in furniture, fittings and equipment;
  - b. \$30,600 for video conferencing facilities;
  - c. \$15,900 for photocopying facilities; and
  - d. \$101,732 in IT hardware and software.

# Management and accountability

## External scrutiny

The Panel's decisions are subject to review by the Federal Court under the *Administrative Decisions (Judicial Review) Act* and by the High Court under section 75(v) of the Constitution. Its decisions are not reviewable by the Administrative Appeals Tribunal (see section 1317B(1) of the Law).

Much of the role for reviewing the Panel's decisions in relation to unacceptable circumstances and subsequent orders is taken by the Review Panel process. Under section 657EA of the Law, parties to a matter may apply for review of Panel decisions by a Review Panel, where those decisions relate to a declaration of unacceptable circumstances or consequent orders. However, the Panel's review of decisions by ASIC are not subject to review by a Review Panel.

In addition, the Panel may voluntarily refer questions of law to the Court and the Court may refer matters back to the Panel (see section 657EB of the Law).

### *Courts*

The Panel was not subject to any judicial review during 1999-2000. However, in the *Bristle-Wesfi* matter there were a number of applications to the Court and Court decisions of relevance to the Panel. These are discussed in the review of the *Wesfi* matter and in Appendix C.

The Panel was not subject to any reports by the Australian National Audit Office or the Parliamentary Committees in 1999-2000.

### *Ombudsman*

The Panel was not subject to any reports by the Commonwealth Ombudsman in 1999-2000.

## Management of human resources

At 30 June 2000, the Panel's executive staff consisted of three full-time permanent staff and one legal secondee.

Careful consideration has been given to the structure of the Panel's staffing requirements to ensure the right mixture of skills and expertise is present. The Department of Treasury advertised widely for appropriately qualified staff.

### *Secondments*

The small number of permanent staff on the Panel executive is intended to be supplemented by a series of secondees from law firms, and in the future from other types of professional firms.

The Panel considers that the interchange of experience and expertise with market participants by its use of the secondees will assist it provide timely and commercially sensible decisions.

## Staffing information

The following table presents the number of permanent Panel staff, by classification and gender. Permanent staff are employed under the *Public Service Act 1999*.

**Table 3: Operative staff by classification and gender**

Classification	Permanent Full Time		Total
	Male	Female	
APS5		1	1
SEB1	1		1
SEB2	1		1
<b>Total</b>	<b>2</b>	<b>1</b>	<b>3</b>

A description of each acronym used in the above table can be found in the Abbreviations and Acronyms on page 39. Details for permanent staff refer to substantive classifications and do not recognise those staff acting at a higher classification.

### *Senior executive staff changes*

Two appointments/promotions at the SES level were the main changes during the 1999-2000 financial year and they are as follows:

- Nigel Morris was on a temporary transfer from ASIC until 18 April 2000, when he was promoted to Senior Executive Band 1.
- George Durbridge was on a temporary transfer from ASIC until 18 April 2000, when he was promoted to Senior Executive Band 2.

There were no cessations during this period.

**Table 4: SES commencements**

Reason for Commencement	SES Band 3	SES Band 2	SES Band 1	Total
Appointment				
Promotion		1	1	2
Transfer				
Return from Temporary Transfer				
Return From Leave				
<b>Total</b>	<b>0</b>	<b>1</b>	<b>1</b>	<b>2</b>

### *Australian Workplace Agreements*

Treasury offers Australian Workplace Agreements (AWAs) to all SES staff and some non-SES staff. All SES staff on the Panel Executive are on AWAs. The Agreements and associated performance based bonuses for the Panel staff will be dealt with during the performance appraisal cycle, which will take place in the next financial year.

There were no performance-based bonuses paid during 1999-2000.

### *Staff development*

As a new organisation within the Treasury's portfolio, it was a crucial period for the Panel staff to develop their knowledge and expertise in Treasury's IT systems, Human Resource Management (HRM) functions, records management, financial databases and any associated policies and procedures.

Preparation for the performance appraisal cycle in the new financial year was undertaken by conducting discussions via teleconference and workshop attendance in Canberra.

There was no external training undertaken this financial year, however, development plans are underway for staff to attend the E-Commerce Corporate Law Workshop, 2000 Corporate Law Workshop, Orientation for SES and further training in Financial Database Reporting and Management and HRM functions and procedures.

### *Remuneration for Non-SES*

There were no remuneration payments for Non-SES in this financial year, as it is linked to the performance appraisal cycle, which for the Panel will occur for the first time in the next financial year.

## Workplace diversity

Although the Panel consists of only 4 staff members, it has an equal split in gender. One female staff member is a senior lawyer and they are both of ethnic backgrounds.

The Panel adopts Treasury’s policies and procedures in relation to Equal Employment Opportunity (EEO) and therefore, does not have direct representation on EEO Target Groups nor Appointments on Boards.

**Table 5: Operative and paid inoperative staff by Equal Employment Opportunity target group**

Classification	Female	NESB-1	NESB-2	AATSI	Disability
Cadets					
APS1					
APS2					
APS3					
APS4					
APS5	1	1			
APS6					
EL1					
EL2	1				
SESB1					
SESB2					
SESB3					
<b>Total</b>	<b>2</b>	<b>1</b>			

**Table 6: Equal Employment Opportunity in appointments to boards**

	Total Positions filled as at 30 June	Number from EEO Target Groups	Number of appointments made during the year	Number of appointments from EEO target groups
Corporations and Securities Panel	27	13	17	8

In this table, the only EEO target group notified was women.

## Industrial democracy

Prior to 13 March 2000, the Panel's sole staff member was provided by ASIC and was subject to ASIC's Industrial Democracy policies. Industrial Democracy issues were dealt with by ASIC's National Consultative Committee.

After 13 March 2000, the Panel adopted Treasury's Certified Agreement, Performance Management System and Treasury Management Model.

## Occupational health and safety

As employees of Treasury, Panel staff and members have the benefit of Treasury's Occupational Health and Safety programs and functions.

The Panel has adopted the Employee Assistance Program, an external service organized by Treasury for employees and their families.

## Consultants and competitive tendering and contracting

### *Consultants*

The Panel has engaged only one consultant this financial year (excluding legal secondees who are treated as staff, and legal advisors who are considered under the Panel's legal expenses). In the Email and Smorgon matter, the Panel engaged Grant Samuel & Associates for a total cost of \$10,800. Grant Samuel & Associates provided advice on the valuation methodology, assumptions and application in valuing convertible

appliance preference shares that were being offered by Smorgon as consideration for Email shares.

The Panel reviewed the market for consultancy firms with appropriate experience in the field and availability. The available field was narrowed as many of the firms with suitable expertise and experience were either unavailable or had a conflict of interest in the particular matter. This is frequently likely to be the case when the Panel is seeking consultants, given the small number of experts in the specialised areas of the Panel's proceedings, and the high probability that those most suitable will have been engaged by the parties well before a matter is referred to the Panel.

The costs incurred by the Panel in engaging Grant Samuel & Associates have been recovered from the parties.

### *Competitive tendering and contracting*

The major contract let by the Panel this financial year was for fitout of its new premises. Interiors Australia drafted tender documents according to Commonwealth tender guidelines and put the tender out for competitive quote in consultation with Treasury's contract management division.

## Discretionary grants

The Panel granted one discretionary grant in 1999-2000. In June 2000, the Panel assumed responsibility from Treasury for the prize for the best student in the Mergers and Acquisitions subject in the Securities Institute of Australia Graduate Diploma program. The prize was for the sum of \$200 and was awarded to Andrew Sypkes. The Panel has advised the SIA that it would consider supporting the prize next year if asked.

## Advertising and market research

The Panel did not undertake any advertising or marketing research campaigns.



## Freedom of information

### *Corporations & Securities Panel – Statement under Section 8 of the Freedom of Information Act 1982*

The Corporations & Securities Panel is an agency within the Treasury portfolio, and was established under section 171 of the ASIC Law.

### *Organisation, functions and powers*

The Panel's organisation, functions and powers are set out in previous sections of this report.

### *Arrangements for outside participation*

Given the commercially sensitive nature of matters being considered, and the time pressures imposed on the Panel by its legislation, proceedings are generally held in private. However, the Panel has the power to invite submissions from any person, and to advertise for persons to make submissions in relation to specific proceedings.

The Panel considers that its policy development should generally be undertaken with full opportunity for public consultation and input. The Panel publishes all its policy documents in draft form for public comment and consultation and approaches specific special interest groups where they are likely to be materially affected or may provide specialised input to the Panel's policy. The Panel publishes all its documents, including reasons for decision on its website and invites visitors to join its mailing list to be advised of all publications.

### *Categories of documents held by the Panel*

The Panel maintains the following categories of documents:

- lodged applications;
- correspondence and submissions relating to the application;
- independent expert advices;
- reasons for decisions;
- press releases;
- rules for proceedings;

- policy development;
- administrative and financial documents relating to the Panel's operations; and
- general correspondence.

The documents accessible to the public for viewing are the Panel's decisions, media releases, policy developments and rules for proceedings.

### *Access to documents*

Access to documents may be obtained by visiting the Panel's premises by appointment at the address below. Office hours are 9.00 am to 5.00 pm (except public and public service holidays). The Panel's address and contact information are available on the Panel's website, and the Panel has taken active steps to have its internet address placed on all Government directories and other internet sites where interested persons are likely to search for it.

### *Freedom of information applications and initial contact points*

Freedom of Information (FOI) inquiries are to be directed to:

Nigel Morris  
Director  
Corporations & Securities Panel  
Level 47, 80 Collins Street  
Melbourne VIC 3000  
Ph: 03-9655-3501  
Fx: 03-9655-3511

FOI inquiries are referred to the Treasury's FOI Officer for action.

### *Freedom of information activity in 1999/2000*

The Panel did not receive an application for access to documents under the *Freedom of Information Act 1982* in 1999-2000.

## **Regulatory Impact Statements**

The Panel did not submit any Regulatory Impact Statements in 1999-2000.

## Panel members

**The members of the Panel on 1 July 1999 were**

<b>Name</b>	<b>Organisation</b>
Mr Simon McKeon (President)	Macquarie Bank Ltd, Melbourne
Mr Ross Adler	Santos Ltd, Adelaide
Ms Elizabeth Alexander AM	PricewaterhouseCoopers, Melbourne
Mr Denis Byrne	Denis Byrne & Assoc. Pty Ltd, Brisbane
Mr Brett Heading	McCullough Robertson, Brisbane
Ms Meredith Hellicar	Corrs Chambers Westgarth, Sydney
Mr Graham Kelly	Freehill Hollingdale & Page, Sydney
Ms Alice McCleary	Consultant and company director, Adelaide
Mr Simon Mordant	Caliburn Partnership Pty Ltd, Sydney
Mr John O'Neill	Australian Rugby Union Ltd, Sydney
Ms Fiona Roche	Estates Development Co. Ltd, Perth
Ms Nerolie Withnall	Minter Ellison, Brisbane

**The members of the Panel who were appointed in 1999-2000 are:**

<b>Name</b>	<b>Organisation</b>
Ms Robyn Ahern	Consultant and company director, Perth
Dr Annabelle Bennett SC	Sydney Bar, Sydney
Mr Michael Burgess	KPMG, Adelaide
Mr Peter Cameron	Allen Allen & Hemsley, Sydney
Ms Maria Manning	Queensland Cotton Ltd, Brisbane
Ms Louise McBride	Delloitte Touche Tohmatsu, Sydney
Ms Marian Micalizzi	Consultant and company director, Brisbane
Professor Ian Ramsay	The University of Melbourne, Melbourne
Ms Maxine Rich	Consultant and company director, Sydney
Mr Trevor Rowe	Salomon Smith Barney Ltd, Sydney
Mr Jeremy Schultz	Finlaysons, Adelaide
Ms Jennifer Seabrook	Gresham Partners, Perth
Mr Valentine Smith	Dobson Mitchell & Allport, Hobart
Mr Leslie Taylor	Commonwealth Bank of Australia, Sydney
Mr Michael Tilley	Merrill Lynch International (Australia) Ltd, Melbourne
Ms Karen Wood	Bonlac Foods Ltd, Melbourne
Mr Peter Young	ABN-AMRO Australia Ltd, Sydney

## **Resignations**

Mr Ross Adler resigned in February 1999-2000. Ross has been an active and very supportive Panel member since the Panel's inception. Ross served on the very first Panel application, in relation to Titan Hills (previously the car rental firm Budget) and has his name in the Panel's High Court decision establishing the constitutional validity of the Panel's then legislation (*Precision Data Holdings Ltd v Wills Adler & Jooste* (1992) 10 ACLC 1; (1991) CLR 167). We thank him for his generous contribution of his time and expertise.

Mr Graham Kelly also resigned in 1999-2000 due to other public service commitments. We thank him for his time and contribution.

## Panel applications

The table below sets out the applications received by the Panel in 1999-2000.

**Table A1: Pre-CLERP applications**

Date	Type of Application	Principal Parties	Description of alleged problems	Decision & Date
09/08/99	Unacceptable conduct and Unacceptable acquisition – under s733	Wesfi Ltd (target); Blend Investments Pty Ltd (bidder); Bristol Ltd; Innerhaden Ltd; CP Ventures Ltd	Cash acquisitions above the value of the cash and scrip bid consideration, and acting in concert to affect the outcome of the takeover bid unfairly	No substantial interest involved, therefore no jurisdiction 12/10/99

**Table A2: Post-CLERP applications**

Number & Date	Type of Application	Principal Parties	Description	Decision & Date
001/00 01/05/00	Review of ASIC decision under s656A	Infratil Ltd (target); Australian Infrastructure Fund (bidder); Macquarie Infrastructure Fund	Review of ASIC decision not to vary policy to allow early dispatch of bidder's statement	ASIC decision affirmed 03/05/00
002/00 09/08/99	Unacceptable circumstances, under s657C	Infratil Ltd (target); Australian Infrastructure Fund (bidder); Macquarie Infrastructure Fund (bidder)	Alleged deficiencies in AIF's bidder's statement including forecasts and tax analysis	Consent undertakings for further disclosure— no declaration

**Table 8: Post-CLERP applications (continued)**

Number & Date	Type of Application	Principal Parties	Description	Decision & Date
003/00 12/05/00	Unacceptable circumstances, under s657C, and interim orders under s657E	Email Ltd (target) Smorgon Distribution Ltd (bidder)	Alleged deficiencies in Smorgon's bidder's statement, contravention of section 621(3), and other procedural problems with the bid proposal	Refusal to restrain bidder's statement 17/05/00 Consent undertakings for further disclosure – no declaration 01/06/00
004/00 19/05/00	Review of Panel Decision under s657EA	Email Ltd (target) Smorgon Distribution Ltd (bidder)	Alleged error by sitting Panel in allowing bidder's statement to be released	Restraint of dispatch until matter concluded 22/05/00
005/00 20/06/00	Unacceptable circumstances, under s657C	Email Ltd (target) Smorgon Distribution Ltd (bidder)	Alleged deficiencies in a substantial shareholding disclosure notice by Smorgon.	Withdrawn



### *Panel members on sitting Panels*

<b>Panel</b>	<b>Members</b>
Wesfi	Nerolie Withnall (sitting President) Simon Mordant (deputy President) Alice McCleary
001/00 Infratil	Brett Heading (sitting President) Alice McCleary (deputy President) Jennifer Seabrook
002/00 Infratil	Brett Heading (sitting President) Alice McCleary (deputy President) Jennifer Seabrook
003/00 Email	Annabelle Bennett (sitting President) Michael Tilley (deputy President) Karen Wood
004/00 Email	Brett Heading (sitting President) Les Taylor (deputy President) Maria Manning
005/00 Email	Withdrawn

## Operations

### *Pre-CLERP*

ASIC referred one matter to the Panel in 1999-2000. It related to acquisitions and conduct surrounding the bid by Bristile (through its subsidiary Blend Investments) for all the issued shares in Wesfi. The application was made and considered under the pre-CLERP Corporations Law provisions.

The three Panel members who made up the sitting Panel were Ms Nerolie Withnall (sitting President), Ms Alice McCleary and Mr Simon Mordant (deputy President).

ASIC's application stated that it appeared to ASIC that unacceptable circumstances may have occurred in relation to:

- (a) an acquisition and proposed acquisition of shares in Wesfi by CP Ventures; and/or
- (b) the conduct of CPV in relation to shares in Wesfi.

In the application, ASIC alleged that:

- (a) CPV, a company closely connected with or an associate of Bristile, acquired 1.9 per cent of the shares in Wesfi on market and sold them into Bristile's bid, and proposed to acquire up to another 7 per cent to 8 per cent of the shares in Wesfi for the same purpose (the CPV Purchases).
- (b) the CPV Purchases should be properly characterised as 'side running'. CPV was purchasing shares in the market *alongside* the offeror, Bristile, and feeding the shares into the Bristile bid.

Bristile was, at the time of the CPV purchases, prohibited by section 667 of the Law from purchasing shares on market unless it offered a full cash alternative.

ASIC alleged that the 'side running' by CPV allowed Bristle to acquire the shares on market, without having to offer cash to all other Wesfi shareholders.

### *Declaration/orders sought*

ASIC sought orders under section 734(2) of the Law that Bristle be required to offer a cash alternative under its bid, equal to the highest price paid by CPV for the shares it purchased, or be required to cancel the acceptances by CPV, return the Wesfi shares and require CPV to divest those shares.

### *Proceedings*

The proceedings were strongly contested, and were the subject of a number of Court proceedings (see Appendix C). Issues of procedural fairness and issues over evidence and the Panel's procedures caused material delays and litigation. The Panel held oral hearings (both directions and evidence) in Perth on two separate occasions and took oral evidence from thirteen persons.

The sitting Panel concluded that the conduct by the parties was not sufficiently firm to constitute a 'proposal' and the shares acquired did not constitute a substantial interest. Therefore, there was no scope for the Panel to find that 'unacceptable circumstances' existed, as defined in the Law.

However, the sitting Panel noted that it should not be taken that the conduct and acquisitions would not be unacceptable in the event that the acquisitions and conduct had been in relation to a substantial interest.

The cost of the proceedings (\$430,000 approx.) was of some concern. Over half the costs were attributable to legal services. One reason for this was the amount of litigation which necessitated the Panel seeking advice from external solicitors and senior counsel. Further, the Panel's solicitors in Perth provided administrative facilities, particularly for the receipt and circulation of documents. We do not expect costs for future inquiries to be as high under the new Panel arrangements where the Panel now has its own Executive.

A useful adjunct of the considerable amount of litigation associated with the Inquiry was the resulting case law.

The Wesfi proceedings tested the Panel's ability to deal with parties widely separated geographically. In this case, Panel members were based in Brisbane, Sydney and Adelaide, the parties to the proceedings in Perth and the Panel Secretariat in Melbourne. Telephone hookups were used to communicate between members and, where necessary, witnesses were interviewed by video conference.

### *Post-CLERP*

The Panel received 5 applications in 1999-2000 under its new legislative regime. The details are set out in Appendix A. The two most significant matters related to Infratil and to Email.

### *Infratil*

The Panel considered two applications in relation to Australian Infrastructure Fund's (AIF) bid for Bristle. The first was a review of ASIC's decision not to shorten the requirement for two weeks delay between lodging and dispatching a consolidated original and supplementary bidder's statement. The Panel affirmed the decision, in part because it considered it could settle the substantive issues in the period before the consolidated bidder's statement could be dispatched.

The second was an application by Infratil alleging deficiencies in AIF's consolidated bidder's statement. The Panel's decision reviewed the need for forecasts in bidder's statements offering scrip consideration and the disclosure requirements of section 713(2), amongst other issues. The Panel and the parties reached agreement on some supplementary disclosure that would ensure that Infratil shareholders received sufficient information to allow them to assess the merits of the AIF offer. The Panel did not need to make a declaration or orders. It accepted AIF's undertaking to publish the additional material.

## *Email*

Email applied to the Panel for a declaration and orders in relation to Smorgon's bid for Email. Smorgon had bought Email shares for \$2.89 cash in the four months prior to its bid and was offering a Convertible Appliance Preference share (CAP) and \$1.85 cash for each Email share. For Smorgon's bid to comply with section 621(3), the CAPs had to be worth not less than \$1.04. Email contended that the bid did not comply, and further contended that Smorgon's bidder's statement contained a number of disclosure deficiencies.

The Panel considered a range of evidence on a number of issues at a conference in Melbourne, and took expert valuation advice from Grant Samuel and Associates. It decided that there was insufficient evidence to reject as erroneous the expert opinion of SG Hambros Australia that the value of the CAPs lay between 87c and \$1.21, and that the mid-point of \$1.04 should be taken as the value of the CAPs.

Email had requested the sitting Panel to restrain the dispatch of Smorgon's bidder's statement by an interim order under section 657E of the Law. The sitting Panel declined this, on the basis that it could not see evidence of sufficient harm that would be caused by allowing dispatch of the document (even if it later needed supplementation) that could not be remedied by later supplementary statements. Email sought review of that decision under section 657EA of the Law. That caused the formation of the first Review Panel under the new regime. Following further submissions by both parties, and some new evidence, the Review Panel considered that the balance of convenience no longer lay with allowing the document in contention to be dispatched before the sitting Panel completed its considerations.

Later in the bid, Email was concerned about some disclosure issues in relation to substantial shareholding notices by Smorgon. However, the parties resolved the issues early in the process and Email withdrew its application.

## Litigation

The following is a list of decisions associated with the Wesfi application and proceedings.

CP Ventures (CPV) Ltd v McKeon [1999] FCA 1272.

CP Ventures Ltd and Australian Securities and Investments Commission [1999] AATA 662.

CP Ventures Ltd and Australian Securities and Investments Commission [1999] FCA 1436.

CP Ventures Pty Ltd v Withnall [1999] FCA 1437.

Corporations and Securities Panel v Bristle Investments Pty Ltd and Ors [1999] WASC 183.

There was no litigation related to post-CLERP Panel matters.

## Abbreviations and acronyms

APS	Australian Public Service
ASIC	Australian Securities & Investments Commission
AIF	Australian Infrastructure Fund
AWA	Australian Workplace Agreement
CAP	Convertible Appliance Preference Share
CLERP	Corporate Law & Economic Reform Program
CSP	Corporations & Securities Panel
CPV	CP Ventures
HRM	Human Resources Management
EEO	Equal Employment Opportunity
FOI	Freedom of Information
SEB	Senior Executive Band
SES	Senior Executive Service

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