Takeovers Panel

Issues Paper
Collateral Benefits

09 November 2005

The Takeovers Panel invites comment on the following policy issues which are under consideration regarding collateral benefits in takeovers transactions.

Legislative Policy

1. In performing its functions under the *Corporations Act 2001*[1], the Panel is required to have regard to the purposes and provisions of Chapter 6 of the Act. Among the purposes of Chapter 6 are to ensure that:

   (a) an acquisition of control over voting shares in a company[2] takes place in an efficient, competitive and informed market; and

   (b) so far as practicable, all holders of shares in a class have reasonable and equal opportunities to participate in benefits received by any holder of shares in that class under any proposal by a person to acquire a substantial interest in the relevant company.[3]

2. Section 623 is an important support of these policies. It has two elements: it prohibits a bidder (or associate) from:

   (a) giving (or offering or agreeing to give) a shareholder (or associate) a benefit not provided for under the bid;

   if

   (b) the benefit is likely to induce the shareholder to accept the relevant bid or otherwise dispose of bid class securities.[4]

3. Given that section 623 is limited to benefits offered or given during an offer period, this paper does not deal with collateral benefit issues about transactions before a bid, for example, pre-bid acceptance agreements, option agreements and share acquisition agreements[5].

Unacceptable Circumstances

4. In any case in which it is alleged that a collateral benefit was given in relation to a bid, whether the Panel should make a declaration or order depends on whether it finds that the bid is affected by unacceptable circumstances. The Act

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[1] In this discussion paper, unless otherwise specified, legislative references are to this Act.

[2] For brevity, references to companies include other bodies and registered schemes to which Chapter 6 applies, references to shares include interests and we have generally omitted references to the exceptions, to associates of bidders and of shareholders, to offers and agreements to give benefits and to disposal of shares.

[3] Paragraphs 602(a) and (c).

[4] Section 623 does not apply to benefits offered under the takeover bid or a variation of the bid, to on-market buying in the ordinary course of trade or to a bid for a second class of securities in the same target.

[5] See *In the matter of Austral Coal Limited 03 [2005] ATP 14*

does not define this concept, but directs the Panel to determine whether circumstances are unacceptable, having regard to their effect on substantial acquisitions in, and control of, companies, to breaches of the takeovers code and to the objects and provisions of the takeovers code.

5. In general, the Panel is likely to treat as unacceptable a breach (or avoidance) of section 623, or of a related provision such as section 619, 621, 622 or 651A. Unacceptable circumstances may exist without a breach of any of those provisions.

6. In a simple case, it would be unacceptable for a bidder to induce a shareholder to accept its bid by giving the holder something of value, in addition to the price which it offered to all shareholders under the bid, and which is all that the other holders will receive, if they accept. If it finds that such a dealing has occurred, the Panel is likely to declare that unacceptable circumstances exist and set aside the dealing, the acceptance or both. This happened in *Skywest 04*[6], where the Panel found that a bidder had offered to acquire options from some holders of bid class shares to induce them to accept offers under its bid.

7. For brevity, in the questions in this paper, it is assumed that the side dealing takes the form of the sale of an asset of the target to the holder of a material parcel of shares, who is referred to as "the shareholder" or "the relevant shareholder". Broadly similar issues arise where it is proposed that:

   (a) the bidder sell an asset to the shareholder;

   (b) the shareholder sell an asset to the bidder or target;

   (c) a loan be made, repaid or guaranteed; or

   (d) a licence, joint venture or other ongoing business relationship be entered into, varied, continued or terminated.

   If any of those proposals raises special problems which we should take into account, please mention them.

8. The Panel notes that prevention of unacceptable circumstances is always preferable to attempting to cure them after the event. On that basis, where they are unsure whether or not a proposed transaction would breach section 623, or cause unacceptable circumstances, bidders and their associates are always well advised to consider consulting ASIC for its consent to an exemption or modification of section 623, prior to the transaction or commencing the takeover bid.

9. ASIC has published a policy statement on collateral benefits. At PS 35.17-18 ASIC indicates the kinds of circumstances where it would be minded to give relief (i.e. pre-existing rights, necessary to allow a bid to proceed, and benefits received by parties other than in their capacity as shareholders).

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[6] [2004] ATP 26

Aspects of the Policy: Benefit and Inducement

10. The underlying policy has two aspects which correspond with the elements of section 623: the giving of a benefit and inducement to accept a bid.[7] The Panel may find that a dealing between a bidder and a shareholder does not cause unacceptable circumstances if the Panel is satisfied that the dealing was unlikely to have influenced the shareholder's decision about accepting the bid (for instance, continuation of an existing joint venture), because of the absence of an inducement to accept the bid. The Panel may first, however, inquire into the dealing to ensure that any benefit to the shareholder does not operate as an inducement to accept the bid (for instance, whether the joint venture is on commercial terms).

Test is Objective

11. In assessing whether a dealing between a bidder and a shareholder has caused unacceptable circumstances, the Panel is concerned with its own assessment whether the dealing in fact has conferred a benefit which was likely to induce the shareholder to accept the bid and whether those circumstances are unacceptable. The bidder's own intention and its assessment of the benefit and of its effect are not directly relevant to the existence of benefit, inducement or unacceptable circumstances, but may be relevant as evidence.

Intentions

12. Strictly, neither section 623 nor the equal opportunity policy depends on a bidder's intentions.[8] However, several decisions of Courts and the Panel have taken into account the consideration that the bidder appeared not to have intended the relevant transaction to induce an acceptance.

    - In *Ampolex*,[9] a bidder offered to acquire convertible notes of the target company, while its takeover bid was open. The Court described it as a *bona fide* offer to acquire the notes, regardless of whether or not they were held by shareholders.

    - In Normandy *(No. 4)*,[10] the Panel made similar remarks about one bidder making two simultaneous, related takeovers for different companies. It gave reasons why the pairing of the bids would have been an ineffective and inefficient way of providing inducements to accept.

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[7] Paragraphs 602(a) and (c) are relevant to any proposal to acquire a substantial interest, but the present inquiry is restricted to takeover bids.

[8] Subsection 623(1A) and *Aberfoyle Ltd v Western Metals Ltd* (1998) 16 ACLC 1335.

[9] *Ampolex Ltd v Mobil Exploration & Producing Australia Pty Ltd* (1996) 19 ACSR 354 at 385 – 6.

[10] *In the matter of Normandy Mining Limited (No. 4)* [2001] ATP 31 at [24], [33] and [34]. This decision was upheld on review: *In the matter of Normandy Mining Limited (No. 6)* [2001] ATP 32.

- In *Bridge Oil*,[11] a bidder agreed to provide inducements to target company executives (who held immaterial numbers of shares) to join the bidder after the takeover. Sheppard J held that the bidder had agreed to give the benefits to the executives "in their capacity as employees, not shareholders", which implies that the agreement was not primarily designed to induce the executives to accept the bid.

Questions:

(a) Should a Panel be more ready to infer that a dealing was not likely to induce a shareholder to accept a bid if the Panel is satisfied that the bidder's primary intention was something other than inducing the relevant shareholder to accept the bid?

(b) In deciding whether a bidder's primary intention in offering the benefit was something other than inducing offerees to accept the bid or not unacceptable, is it reasonable for the Panel to take into account whether the benefit was an effective means of inducing the shareholder to accept the bid, for reasons such as:

(i) the bidder offered the same benefit to people who were not shareholders;

(ii) a shareholder could obtain the benefit without accepting the bid for their shares; or

(iii) the shareholders to whom the benefit was offered did not control a material number of shares.

For instance, where a bidder offers to acquire convertible notes of the target, is it relevant whether:

(iv) the bidder offers to acquire the notes from anyone who holds them, whether or not they hold shares,

(v) it is possible to accept an offer for the convertible notes, without also accepting an offer for shares,

(vi) the convertible notes are mainly held by people who do not hold shares.[12]

(c) In deciding whether a benefit tends to induce acceptances, should the Panel take into account objectives of the bidder which relate to the takeover, but in ways other than directly inducing shareholders to accept offers under the bid? Examples:

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[11] *Gantry Acquisition Corp v Parker & Parsley Petroleum Australia Pty Ltd* (1994) 14 ACSR 11 at 14 and 20, per Sheppard J. Burchett J concurred in the result; Beazley J dissented, but neither dealt with this point. This reasoning was applied in *Normandy (No. 4)* at [35] – [37].

[12] Assume that the offer for the notes is not a takeover bid covered by paragraph 623(3)(c).

(i) the target operates on co-operative lines and the bidder offers member-users a new supply arrangement;

(ii) the bidder offers to acquire another class of equity or convertible securities of the target, where some people hold both classes;

(iii) the bidder offers benefits to induce staff of the target (some of whom hold shares in it) to work for it after the bid.

(d) In assessing intentions of the kinds mentioned in paragraph (c), should the Panel inquire whether the benefit is proportionate to the bidder's stated objective, or excessive relative to the value of the relevant supply, securities, staff etc?

Materiality

13. It is sometimes an issue whether a dealing causes unacceptable circumstances, even if it involves a breach of section 623 or the giving of a benefit which may have at least an indirect influence on a shareholder's decision to accept a bid, if the value of the benefit or the parcel of shares held by the beneficiary is immaterial.[13]

Questions:

(a) Is any dealing in breach of section 623 unacceptable, regardless of whether the parcel of shares, the benefit, or both, are material?

Selectivity

14. A threshold issue to the remainder of this issues paper is whether unacceptable circumstances exist whenever a bidder gives a shareholder something of value which it does not offer to other shareholders and which may induce that shareholder to accept the bid, regardless of whether the shareholder gives up anything in return. For instance, a 30% shareholder in the target is willing to sell its holding into a bid, but only if it is able to buy a particular asset from the target, at full value.

Questions:

(a) Is it simply unacceptable, regardless of price, that the benefit would be given to one shareholder, but not others?

(b) Or does unacceptability depend also on the terms of the side dealing, and on the value the holder gives up to acquire the benefit relative to the value of the benefit and to the value of the shares?

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[13] A benefit is material if the shareholder may take it into account in making its decision whether to accept the bid. Benefits were disregarded as speculative in *Primac Holdings Ltd v IAMA Ltd* (1997) 15 ACLC 208 and *Boral Energy Resources Ltd v TU Australia (Queensland) Pty Ltd* (1998) 16 ACLC 1199 and as immaterial in *SA Liquor Distributors* and *Normandy (No. 4)*. Subsection 618(2) treats non-marketable parcels favourably, in the context of proportional bids.

(c) If the answer to (a) is that the transaction is simply unacceptable, is that because of the effect of the transaction on:

(i) that shareholder's disposition to accept the bid; or

(ii) the funds the bidder has available for, or is prepared to devote to, the acquisition; or

(iii) fairness to other shareholders; or

(iv) something else, and if so, what?

Offsets and Detriments

15. Additional issues arise where, although a dealing between a bidder and a shareholder is of such a nature and value as to be material to the shareholder's decision to accept and although the relevant parcel is material, the shareholder gives consideration which offsets the value of the benefit they receive.

Questions:

(a) Is a dealing less likely to cause unacceptable circumstances if the terms given to the shareholder are fair vis-à-vis other shareholders, i.e. not generous to that shareholder? If so, are the terms of a side dealing fair for this purpose if the shareholder pays:

(i) the price for which the asset could be sold at auction; or

(ii) the amount a willing but not anxious buyer with adequate information might pay to a willing but not anxious seller; or

(iii) the value that the benefit gives to the shareholder in its particular circumstances or in the particular circumstances of the bid; or

(iv) some other price, and if so, which?

(b) If the terms are fair in this sense, may the circumstances nonetheless be unacceptable if the asset:

(i) is more valuable to the relevant shareholder than to other possible buyers (for instance, the asset is land or a business and there are synergies available only to that shareholder, because it has a neighbouring property or a related business), or

(ii) is unique, so that there should arguably be a premium for the opportunity to acquire it? In this case, is the issue:

(A) whether the shareholder is receiving a benefit in the form of the opportunity to enter into the transaction, in addition to the asset for which it is paying a fair price, or

(B) simply that it is hard to be confident that the price of a unique asset is in fact fair?

Fair Price

16. If a transaction between a target and a shareholder may be acceptable, provided that terms are fair vis-à-vis other shareholders (in the examples above, if the asset is sold at a fair price), a Panel needs to determine what terms are fair for this purpose. In particular, a Panel must determine whether the critical factor is whether the target receives an adequate price for the asset, or the shareholder derives any benefit from the transaction.

Questions:

(a) To avoid unacceptable circumstances because other shareholders will not be able to participate in the benefit, should the price be set so high that the shareholder does not obtain any overall benefit from the side dealing i.e. the value of both any particular synergies and any unique opportunity is captured in the price? In the example in 15(b)(i), should the bidder refuse to sell the asset to the shareholder, unless it pays more than anyone else would pay?

(i) If so, how should the price be determined?

(ii) Would a policy to this effect tend to prevent a bid being made if the bid involved collateral benefit issues, even if the bid would be beneficial to shareholders in general?

(iii) Is it preferable that bids not be made, which are affected by such collateral benefit issues?

(b) Is such a transaction likely to be unacceptable, if the price given by the shareholder is less than might possibly be obtained by private negotiation with the shareholder if there had been adequate time and opportunity to conduct that negotiation? Does it affect the answer if the price is as much as might be obtained at auction, in the time available?

Pre-Existing Rights

17. Where there is a pre-existing contract or relationship between the target and a shareholder, it may appear necessary or expedient to the bidder and shareholder to enter into a transaction which is related to the bid, but which is not entered into simply to give an additional benefit to induce the shareholder to accept the bid. Unless exempted, such a dealing may breach section 623. It also has the potential to cause unacceptable circumstances. However, such a dealing may make the bid economically or otherwise feasible, thereby giving shareholders an opportunity to receive an offer which they would not otherwise have. The questions below ask how the analysis of fair terms is affected by pre-existing contracts and relationships between the shareholder and the target.

18. Examples of existing contracts or relationships might include:

    (a) a substantial shareholder in the target is also a major lender to the target and will not accept the bid unless the bidder agrees to pay off the loan. The more favourable the terms of the loan to the target (or the riskier the status of the loan from the perspective of the shareholder), the more beneficial it is to the shareholder to have it paid off, but the more reasonable it is for the shareholder to insist that it be paid off; or

    (b) a substantial shareholder in the target relies in its business on a business or property of the target (**the asset**), and will not sell its shares, until it has purchased the asset, or otherwise arranged to continue to use the asset.

19. In each case described above, if the shareholder accepts a takeover bid for its shares, it risks exposing itself to a material detriment (to which no other shareholder would be subject unless, at the same time, it reaches agreement with the bidder as to the existing contract or relationship. On that basis, a collateral agreement could be looked at as removing a potential detriment, to which no other shareholder would be subject, rather than giving a benefit which no other shareholder would receive.

20. Clearly, however, such a collateral transaction could easily disguise an inducement to accept a bid by providing a benefit which more than offset or prevented the detriment. Differentiating between the two types is therefore central to the issues raised in the Panel's consideration of collateral transactions.

Questions:

(a) Is a transaction more likely to be acceptable if it merely removes (or compensates the shareholder for) a detriment which would result from accepting a bid and would not affect other shareholders than if it rewards the holder for accepting the bid? Is this distinction maintainable in practice? See the examples above.

(b) Where an asset cannot be sold for what would otherwise be its full market value, because the market value of the asset is affected by a pre-existing right conferred by the target company (or another situation created by it) which is triggered by a change of control, such as in a joint venture or a licence:

    (i) is it unacceptable for a person to acquire the asset for less than the price which might be obtained for the asset in the absence of the pre-existing right?

    (ii) would you expect the pre-existing right to have been reflected in the price of the bid class shares?

    (iii) is such a transaction less likely to be acceptable if the target has failed adequately to disclose the existence of the pre-existing right, or if the relevant shareholder was involved in that failure?

Necessary Collateral Transactions

21. Similarly, it sometimes appears necessary or expedient to a bidder and a shareholder to enter into a transaction (**Necessary Collateral Transaction**) which is related to the bid, but which is not entered into because of any pre-existing contract or relationship. Such transactions are also likely to cause similar section 623 and unacceptable circumstances concerns, particularly if the side benefit to the shareholder is material and may strongly influence the shareholder's decision whether to accept the bid. Such a dealing may also benefit other shareholders, however, by satisfying a defeating condition of the bid, thereby giving them a realistic opportunity to receive an offer, or higher bid consideration, which they would not otherwise have.

22. Two examples of collateral transactions which might be put forwards as being "necessary" might be:

    (a) a bidder is required by a regulator, such as the ACCC, to divest some elements of the target, and the only logical buyer of the elements to be divested is a substantial shareholder of the target; or

    (b) a bidder doesn't have the financial capacity to acquire the whole of a target company, but if it can "pre-sell" assets of the target to an existing substantial shareholder of the target, the bidder's banks will provide finance for the bid.

23. However, in putting forward the concept of a Necessary Collateral Transaction, the Panel would not wish to open too easy a pathway to avoidance of the policy of section 623. An example of an existing relationship or contract which might be put forward as a Necessary Collateral Transaction might be where a person who is interested in acquiring an asset of the target acquires a blocking stake in the target and will not accept the bid, unless the bidder will agree to cause the target to sell the asset to the shareholder. The Panel does not consider that such a relationship would have any basis for treatment as a Necessary Collateral Transaction and should be examined purely under the net benefit or fair price criteria.

Questions:

(a) Should the Panel find that the inequality of a dealing of this kind is not unacceptable because other shareholders are in some way benefited by it? For instance, might an inequality be acceptable because it enables a bid to proceed which might not otherwise have proceeded, even though the particular shareholder receives both the benefit offered and the benefit of receiving the takeover offer?

    (i) What evidence would the Panel need to assure itself that this "benefit of a bid" did indeed depend on the side dealing?

(ii) Taken to its extreme, does the argument imply that the Panel should allow any collateral benefit which facilitates or removes a block to a takeover bid, on the basis that the other shareholders have benefited?

(iii) How should the Panel compare the value of the "benefit of the bid" to the value of the side dealing?

(b) If so, is it relevant or decisive if:

(i) it was reasonable of the bidder, the shareholder or both to require that the side dealing be done before the bid was completed, or

(ii) the side dealing relates to pre-existing affairs of the target, rather than to position-taking relating to the bid itself, or

(iii) the side dealing satisfies a pre-existing right or interest of the shareholder, particularly if that right has been disclosed, or

(iv) the side dealing was necessary to satisfy a defeating condition of the bid, which was reasonably necessary for the bidder's protection, or

(v) the side dealing fulfils a requirement of competition or other government authorities (and if so, is it relevant whether there was another way to satisfy that requirement), or

(vi) another bid by another bidder might have been able to proceed without the side dealing?

(c) Assuming that the side dealing is beneficial to the relevant shareholder:

(i) is it reasonable to compare that benefit with the value of the resulting benefit to other target shareholders (i.e. a realistic opportunity to accept the bid), particularly as the relevant shareholder receives the benefit of the bid, as well as the other shareholders?

(ii) can a quantitative comparison be made?

(iii) if not, how should the Panel approach the comparison?

(d) Is it relevant or necessary for such a dealing to be acceptable that there be a good commercial reason to enter into it, other than to induce an acceptance?

(e) If so, is it a good reason that the dealing is connected with the bidder's objectives under the bid in some way other than inducing an acceptance (such as the inducements offered to retain senior staff of Bridge Oil, or the offers to acquire convertible notes in Ampolex, mentioned earlier)?

(f) To what extent, and on what basis, would it be appropriate for the Panel require the bidder to demonstrate the "necessity" of the transaction, and the "necessity" of the transaction to include a substantial shareholder in the target?

(g) Is a dealing acceptable, if the reason for the dealing relates only to an objective of the shareholder to participate in the bid in some way other than as an offeree?

(h) Ought such a decision always be left to shareholders in the target company?

(i) Would a side dealing be acceptable (or more likely to be acceptable), if the dealing or the bid was conditional on one or other of:

  (i) acceptances for a majority of the shares, or

  (ii) the side dealing being approved at a meeting of bid class shareholders on the analogy of a resolution under item 7 of section 611, or

  (iii) the side dealing being approved by a ballot of bid class shareholders (for example if the ballot papers were distributed with the bidder's statement or an electronic voting facility was put in place),

with shares held for the bidder, the relevant shareholder and their respective associates being excluded in each case?[14]

(j) Should the Panel be more willing to accept shareholder approval of a dealing, if the dealing appears not to confer a benefit on one shareholder which is unfair to other shareholders, in the view of the Panel, ASIC, the directors of the target or an independent expert retained by the target?

(k) If a meeting or ballot is held:

  (i) should the majority be higher than 50%;

  (ii) should the majority be based on votes actually cast (consistent with item 7) or on votes which might be cast;

(l) Would it be preferable in some or all cases to structure the takeover as a scheme of arrangement?

(m) Is one of these mechanisms preferable to the others, and is each of them workable, particularly if the target does not co-operate?

(n) Do the practical difficulties suggested by the range of issues listed above indicate that such collateral transactions should not be facilitated at all by the Panel?

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[14] Compare Note 2 to Rule 16 of the City Code, which states that the UK Panel will generally consent to the sale of an asset of the target company to a shareholder of the target company, if the target's adviser states that the terms of the transaction are fair and reasonable and independent shareholders of the target company approve the transaction at a meeting.

Panel Process

24. A number of possible resolutions mentioned in this paper depend on an assessment of the value of an asset (which might be a discrete asset, a business, a licence, entry into a joint venture etc) and perhaps of the consideration given for that asset. That value may have to be determined on market values, or taking into account particular value to a particular buyer. On occasion, the relevant value or values may be agreed by parties or otherwise fairly readily determined. In general, however, the Panel may have to make a judgement about value.

Questions:

(a) Where the Panel must make a judgment about valuation, what approach should the Panel adopt in determining whether the terms of a side dealing are fair?

(i) Should it simply ask the parties best placed to know to provide what information they can which is relevant to the issue?

(ii) Are there any cases in which there is a presumption in favour of, or against, the fairness of a dealing?

(iii) Can the Panel ever or always rely on the terms having been negotiated at arm's length?

(b) Should the Panel ever or always require that an auction be held, for instance on the basis that whichever bidder is successful in taking over the target will enter into a side deal on the terms settled by the auction?

(c) Is an auction a reasonable way to test whether the terms of a side deal are fair, when the auction itself is connected with the bid?

(d) Should an independent expert be retained in some or all cases to report on whether the terms are fair and if so, by whom, particularly if shareholder approval of a side dealing is required?

(e) For these purposes, should the target ever be compelled to allow an expert or a prospective buyer (even if it is a competitor) access to information about the asset? If so, in what circumstances and what protections might be needed?

(f) Might any of these proposed procedures enable spoiling tactics designed, for instance, to drive up the cost of the bid to the bidder?

(g) How should the Panel seek to assess the value of the benefits and their proportionality in the time frames of Panel proceedings and the inquisitory powers that are reasonably available to the Panel within those times?

Timetable/Process

25. The body of this Issue Paper comprises a series of propositions, followed by questions relating to those propositions.

26. Submissions are sought in response to the propositions and the questions by 5.00 pm on Friday, 24 February 2006.

27. Please send submissions to the Panel, attention Nigel Morris (Tel: (03) 9655 3501; Email: nigel.morris@takeovers.gov.au) and George Durbridge (Tel: (03) 9655 3553; Email: george.durbridge@takeovers.gov.au).

28. **The propositions outlined in this Issues Paper do not represent settled Panel guidance.** The questions are intended to be prompts for discussion and are not exhaustive of the issues that the propositions may raise. You should feel free to address only selected questions, make general submissions that address an issue as a whole rather than the individual questions, or raise other issues that you consider relevant to the Panel in formulating a guidance note in regard to unacceptable circumstances in the context of collateral benefits.

29. Following receipt of public submissions in regard to this Issues Paper, the Panel will consider whether or not it is appropriate to prepare a draft Guidance Note based on the propositions contained in this paper and considering the submissions received. If the Panel decides to prepare a draft Guidance Note it will be circulated for public comment before being finalised and published as formal Panel guidance. It is Panel policy to review Guidance Notes periodically after they have been issued.

30. **The Panel's policy is that all submissions received may be posted on the Panel's website, or otherwise made public, unless the person making the submissions specifically requests that they be confidential.**

Annexure A

The following list comprises some examples of Panel decisions considering the issue of collateral benefits:

- *Taipan Resources NL 10* [2001] ATP 5;
- *Alpha Healthcare Limited* [2001] ATP 13;
- *Normandy Mining Limited 04* [2001] ATP 31;
- *Normandy Mining Limited 06* [2001] ATP 32;
- *S.A. Liquor Distributors Ltd* [2002] ATP 22;
- *PowerTel Limited 03* [2003] ATP 28;
- *Forest Place Group Limited* [2004] ATP 03;
- *Mildura Co-operative Fruit Company Limited* [2004] ATP 5;
- *Skywest Limited 04* [2004] ATP 26; and
- *Austral Coal Limited 03* [2005] ATP 14.