

# **Takeovers Panel**

**Annual Report**

**2007-2008**

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\* Kirby J in *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2 (31 January 2008) at [45]. Printed by permission of the High Court of Australia.

A copy of this document appears on the Takeovers Panel website. The website address is: [www.takeovers.gov.au](http://www.takeovers.gov.au).

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24 September 2008

The Honourable Wayne Swan MP  
Treasurer  
Parliament House  
Canberra ACT 2600

Dear Treasurer

**ANNUAL REPORT 2007-08**

In accordance with section 183 of the *Australian Securities and Investments Commission Act 2001*, I submit the 2007-08 Annual Report of the Takeovers Panel for presentation to Parliament.

The report has been prepared in accordance with section 70(2) of the *Public Service Act 1999*.

Yours sincerely

A handwritten signature in black ink that reads 'Simon McKeon'.

Simon McKeon  
President



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## SECTION 1 — INTRODUCTORY

### Introduction

The Takeovers Panel was established in January 1991. Material changes to its structure and role were made in March 2000. Relevant legislation is:

- Part 6.10 of the *Corporations Act 2001* (Corporations Act);
- Part 10 of the *Australian Securities and Investment Commission Act 2001* (ASIC Act); and
- Part 3 of the *Australian Securities and Investments Commission Regulations 2001*.

### Sources of information

The Panel publishes on its website ([www.takeovers.gov.au](http://www.takeovers.gov.au)) among other things:

- media releases;
- final decisions on matters;
- annual reports;
- Guidance Notes; and
- Rules for Proceedings.

Interested persons may join the Panel's mailing list to be notified when new items are posted on the website.

## Contact

Enquiries regarding this report may be directed to:

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## Review by the President

2007-08 was a busy and significant year for the Panel.

The most important defining issue was the unanimous decision of the High Court in *Alinta*.<sup>1</sup> The Court declared that the Panel's power under section 657A(2)(b)<sup>2</sup> to make a declaration of unacceptable circumstances based on a contravention was constitutional.

It is pleasing to note that the High Court also recognised the considerable value of the specialist knowledge Panel members bring in resolving disputes. For example Justice Kirby stated that:

*Certainly, it was open to the Federal Parliament to conclude that the nature of takeovers disputes was such that they required, ordinarily, prompt resolution by decision makers who enjoyed substantial commercial experience and could look not only at the letter of the Act but also at its spirit, and reach outcomes according to considerations of practicality, policy, economic impact, commercial and market factors and the public interest.*<sup>3</sup>

The Panel received 40 applications in the current period. This made 2007-08 a significantly busier year than usual (the average number of matters per year is around 30). Some of those applications raised significant issues concerning Top-up Notes, association and fallout from the Opes Prime collapse. I am pleased to report that even with the increase in the number of applications and the complexity of many of them, there was a significant reduction in the time taken to make decisions and publish reasons.

The Panel appointed Mr Allan Bulman as Director to replace Mr Nigel Morris, who resigned to consider other challenges. Nigel served with great distinction as Director since the Panel's inception and the Panel is grateful for the energy and professionalism he brought to the task. Allan has considerable experience of takeovers and government, having worked at the Australian Securities and Investments Commission for 12 years and we welcome him.

The other senior Panel executive member is Mr Alan Shaw, the Panel's Counsel. Together, Alan and Allan are continuing the high standards of the

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1 *Attorney-General of the Commonwealth of Australia v Alinta Limited & Ors* [2008] HCA 2.

2 Since 13 March 2007 amendments, see section 657A(2)(c) of the Corporations Act. All references, unless specified, are to the Corporations Act.

3 [2008] HCA 2 at [45].

Panel's inaugural senior executive team in Mr Nigel Morris and Mr George Durbridge.

The Panel has 52 members, having continued to recruit members of an extremely high quality. The willingness of people to serve demonstrates the continued commitment of the Australian takeovers community to the idea of a Takeovers Panel.

### *The year ahead*

The Panel will have four major goals next year:

- review and simplify its procedures;
- staff development, particularly with the appointment of a mid-level lawyer to the staff;
- policy development as needed; and
- deliver decisions that are timely, commercial and consistent.

The primary aim is to continue the Panel's good record of timely and commercial decision-making. Timely decision-making is a hallmark of the Panel model. It benefits market participants and reduces resort to the Panel for tactical advantage. Commerciality, another strength of the Panel model, means that decisions are understood by, and in tune with, the market. Consistency is a desirable attribute of formal decision-making and helps people arrange their affairs to avoid creating unacceptable circumstances.

Sitting Panels are regularly asked to decide new and difficult questions. I am confident that the Panel will continue to deal with matters in a timely, commercial and consistent manner.

The Panel is grateful to the Federal Government for its commitment to a robust, principles-based panel regime and for its ongoing support.

## SECTION 2 — THE PANEL

### Introduction

During a takeover bid, the Panel is the main forum for dealing with issues that arise.<sup>4</sup> Only ASIC and other public bodies can commence court proceedings during the bid period.<sup>5</sup>

### Role

The Panel has two main roles:

- making declarations of unacceptable circumstances under section 657A, and orders under section 657D to remedy those circumstances; and
- reviewing decisions of ASIC under section 656A (modifications of, or exemptions from, Chapter 6) and, during a takeover bid, section 673 (modifications of, or exemptions from, Chapter 6C).

To support these roles the Panel issues Guidance Notes (available on its website under Guidance), and publishes its reasons (available on its website under Reasons for Decision).

### *Unacceptable circumstances*

The Panel's main work involves deciding applications for declarations of unacceptable circumstances. The Panel must consider the principles in section 602, the provisions of the takeovers chapter and the public interest. In the current period there were 34 applications for a declaration at first instance.

If the Panel finds unacceptable circumstances, it may make orders to protect the rights of persons affected by the circumstances or to ensure, as far as possible, that the takeover proceeds as if the unacceptable circumstances had not occurred.

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4 Section 659AA.

5 Section 659B.

The Panel reviews decisions of the Panel made at first instance (in relation to declarations of unacceptable circumstances).<sup>6</sup> The review is a merits review. A review Panel comprises three different members to an initial Panel. There may be only one review of a Panel decision. In the current period there were five applications for review.

### *Review of ASIC decisions*

The Panel may review ASIC decisions.<sup>7</sup> In the current period there was one review of an ASIC decision brought to the Panel.

### *Other reviews*

The Panel has an additional review function if a matter is referred from the Court.<sup>8</sup> There were none in the current period.

## **Executive**

The role of the executive is to assist the Panel make good decisions. It includes:

- administrative and legal support for Panel members;
- liaison with market practitioners and ASIC's takeovers staff; and
- providing an interface to prospective parties (for example, discussing issues and providing a perspective on takeovers policy as it may apply to current takeovers).

The Panel's executive comprises:

- Director (Mr Nigel Morris until 2 January 2008, Mr Allan Bulman since 2 January 2008);
- Counsel (Mr Alan Shaw);
- two legal secondees. The Panel's normal process is to staff its office, in part, with secondees from major law firms around Australia. The secondees have ably assisted the executive. The Panel appreciates their contributions and the willing support of their firms. During the year, the

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6 Section 657EA.

7 Section 655A.

8 Section 657EB.

secondees included Ms Judy Yeung (Deacons, Sydney), Ms Jaclyn Backhouse (Freehills, Sydney), Mr Andrew Crean (DLA Phillips Fox, Melbourne) and Mr Trent Schupp (Blake Dawson, Sydney). At 30 June 2008, the secondees were: Mr Andrew Hensher (Chang, Pistilli & Simmons, Sydney) and Mr Sean Huber (Corrs Chambers Westgarth, Sydney); and

- two administrative staff: Ms Rebecca Whitehead as Office Manager until April 2008 (when she went on maternity leave), Ms Karolina Danger as Office Manager from April 2008, and Ms Rebecca Banhelyi as Executive Assistant.

## Office

The Panel maintains an office in Melbourne. During 2007-08 the Panel provided the use of its offices and conference room to Treasury, the Board of Taxation and other agencies when they required facilities in Melbourne.

The Panel's current lease expires in March 2009.

## Members

### *Appointment of members*

At 30 June 2008 the Panel had 52 members (Appendix 1). Members are appointed by the Governor-General on the nomination of the Minister.<sup>9</sup> State Ministers may give the Minister submissions on nominations.

Members are nominated on the basis of their knowledge and experience in one or more of the following fields:

- business;
- administration of companies;
- financial markets;
- financial products and financial services;
- law;
- economics; and
- accounting.

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9 Section 172 of the ASIC Act.

As well as a mix of expertise, geographical representation and gender representation is considered.

All members are appointed on a part-time basis, usually for three years. They may be re-appointed.

In the current period, 14 members were re-appointed:

Mr Michael Ashforth;  
Mr Stephen Creese;  
Mr Hamish Douglass;  
Ms Susan Doyle;  
Mr John Fast;  
Mr Alastair Lucas;  
Mr Andrew Lumsden;  
Mr Peter Mason AM;  
Ms Alice McCleary;  
Mr Simon McKeon;  
Mr Simon Mordant;  
Mr John O'Sullivan;  
Mr Peter Scott; and  
Mrs Nerolie Withnall.

In the current period, five new members were appointed:

Ms Diana Chang, Partner, Chang Pistilli and Simmons – Sydney;  
Ms Paula Dwyer, Company Director – Melbourne;  
Ms Vicki McFadden, Non Executive Director – Sydney;  
Mr Mike Roche, Managing Director, Head of Mergers and Acquisitions, Deutsche Bank AG – Sydney; and  
Mr Andrew Sisson, Managing Director, Balanced Equity Management Limited – Melbourne.

In the current period, Ms Meredith Hellicar completed her term as a Panel member and did not seek re-appointment. The Panel appreciates her significant contribution.

### *Work of members*

When a party makes an application, a sitting Panel of three members is appointed by the President to consider the application. In recent years, the Panel has received approximately 30 applications each year. Thus, each member is called on to sit on two matters per year, on average, subject to

conflicts, workload and other factors affecting availability. Panel members participate in the development of Guidance Notes and meetings where parties provide feedback to the Panel.

The Panel also holds full day, roundtable sessions each year. Panel members value these meetings. As they reside in different cities these sessions are an opportunity for them to get together and discuss past proceedings, policy issues and market developments.

The firms of the Panel members allow their key people to devote time and resources to the Panel and they host the Panel's roundtable days each year. The Panel appreciates this support.

## Legislation

The Panel operates under the Corporations Act and ASIC Act.

There have been no amendments relevant to the Panel in the current reporting period. However, amendments to minor policy and procedural areas are under consideration.

## Litigation

There were two key pieces of litigation involving the Panel in the current period:

- *Attorney-General of the Commonwealth of Australia v Alinta Limited & Ors* [2008] HCA 2; and
- *Cemex Australia Pty Limited v McKeon & Ors*.

## Alinta

The decision of the High Court in Alinta was the most significant judicial decision for the Panel in 2007-08.

It arose out of a dispute between the Australian Gas Light Company, Alinta Limited and the Australian Pipeline Limited. APL applied to the Panel for a declaration of unacceptable circumstances in connection with an acquisition by AGL. The Panel made a declaration and orders. Alinta sought judicial review of the Panel's decision. One ground was that section 657A was invalid. Alinta was unsuccessful at first instance, but on appeal the Full

Federal Court (Gyles and Lander JJ, Finkelstein J dissenting) declared that the Panel's power to make a declaration of unacceptable circumstances under what was then section 657A(2)(b), based on a contravention of Chapters 6, 6A, 6B or 6C of the Corporations Act, was invalid as an exercise of the judicial power of the Commonwealth. The Full Federal Court had also raised doubts on the constitutional validity of section 657A(2)(a), without making a finding on the issue. Details are in last year's annual report.

The Commonwealth Attorney-General had intervened in the Full Federal Court to support the validity of section 657A. He was granted special leave to appeal to the High Court. Before the appeal was heard, Alinta and APL settled their underlying commercial dispute. The Court accepted that there still remained a 'matter' (that is, the controversy about the validity of section 657A(2)(b)) and the Attorney-General was a party to that controversy having intervened in the court below.

The High Court unanimously disagreed with the majority in the Full Federal Court.

Several members of the High Court endorsed the description of judicial power given by Kitto J in the *Tasmanian Breweries Case*:<sup>10</sup>

*[A] judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist.*

The High Court considered that it was not uncommon for a tribunal to find it necessary to form an opinion as to the existence of the legal rights of the parties as a step in arriving at its ultimate decision. The Panel is required to consider whether making (or refusing) a declaration is not against the public interest after taking into account any policy considerations that the Panel considers relevant. Thus the Panel's declaration of unacceptable

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10 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, at 374, cited at [12] (Gummow J), [94]-[96] (Hayne J), [153] (Crennan and Kiefel JJ).

circumstances is a 'statement of the Panel's conclusion that, having regard to the circumstances created by the contravention and to the public interest, it considers something needs to be done about those circumstances'.<sup>11</sup>

Rather than resolving a dispute about existing rights, the Panel's order constitutes the new charter of rights and obligations of the parties. And the Corporations Act 'operates upon the order to give its provisions the force of law, and thus to alter the law for the future in relation to the particular case'.<sup>12</sup>

## Cemex

Another significant case, *Cemex*, is pending in the Federal Court. It was heard on 19 and 20 May 2008 and the decision reserved.

CEMEX Australia Pty Ltd made an off market takeover bid for Rinker Group Ltd. On 10 April 2007 it announced an improved offer and stated that its offer was its 'best and final' offer in the absence of a superior proposal. On 7 May 2007 it announced (among other things) that it would allow accepting Rinker shareholders to retain the A\$0.25 final dividend that Rinker had declared on 27 April 2007.

ASIC applied for a declaration of unacceptable circumstances and an order for payment to shareholders who sold on market of the A\$0.25 paid to Rinker shareholders. The initial Panel made a declaration and ordered that CEMEX pay Rinker shareholders who sold between the two announcements the equivalent of Rinker's dividend (A\$0.25) per share for the net number shares disposed of during the period. CEMEX sought a review. The review Panel made a similar declaration and orders. CEMEX sought judicial review.

CEMEX claimed (among other things) in the Federal Court that the power to make a declaration was exercised improperly, or was exercised unreasonably, or that the Panel had erred in law because CEMEX had retained a discretion to pay the dividend notwithstanding the best and final statement, or that the Panel had erred in law because the best and final statement had been qualified and was not departed from.

CEMEX also claimed that the Panel did not have the power to make the orders it made, and that section 657A and section 657D were invalid as

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11 [169] (Crennan and Kiefel JJ).

12 [96] (Hayne J), quoting from *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, at 378.

purporting to confer the judicial power of the Commonwealth on the Panel. This last claim was abandoned following the decision in *Alinta*.

The matter was argued before the Court principally by ASIC, the Panel having adopted the role of a tribunal as laid down in *R v Australian Broadcasting Tribunal; Ex parte Hardiman*.<sup>13</sup>

At the date of printing this report the decision is pending.

## Matters

As in previous years, the Panel resolved matters as quickly and as informally as a proper consideration of the issues permitted. Timeliness remains one of the key performance indicators for the Panel.

Appendix 3 lists the applications in the current period.

Many applications did not result in a formal decision, but were resolved by:

- undertakings to the Panel;<sup>14</sup> or
- the Panel declining to conduct proceedings. Relevant factors in deciding whether to conduct proceedings include whether the circumstances complained of would give rise to a declaration if established, the strength of the evidence, and the remedies that might be available. As in previous years, the Panel does not conduct proceedings merely because an application has been made.

## Issues covered by decisions

Disclosure is a common issue raised by applications and the current period was no exception. Other issues that the Panel considered included:

- association – Mount Gibson Iron, BigAir Group;
- control questions – Bowen Energy;
- extension of offer period – Allegiance Mining, Gosford Quarry Holdings 01 and 01R;

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13 (1980) 144 CLR 13 at 35.

14 Section 201A of the ASIC Act.

- mistake – Golden West Resources 03 and 04, and 04R;
- stock lending and disclosure – BioProspect 01;
- truth in takeovers policy – Rinker Group 02R; and
- top-up notes – Consolidated Minerals 03 and 03R.

## Guidance

The Panel publishes Guidance Notes to assist the market in relation to takeovers matters and to assist Panel members to make consistent decisions.

In the current period the Panel published two Guidance Notes (see details below):

- GN 20 Equity Derivatives (11 April 2008); and
- GN 21 Collateral Benefits (14 April 2008).

The Panel also updated seven Guidance Notes as follows:

- GN 1 Unacceptable Circumstances (18 April 2008) – updated references and added an example to paragraph 1.18 dealing with the exception in section 609(7);
- GN 4 Remedies (11 September 2007) – updated for the Corporations Amendments (Takeovers) Act 2007, and to reflect current thinking that the Panel’s power to make orders includes a power to make an order that a person do something contrary to a relevant provision in the Corporations Act, although not to do something contrary to another law;
- GN 7 Lock up Devices (13 November 2007) – adjusted the Guidance Note to reflect multiple lock-up arrangements, added guidance on agreements affecting dealings with rival bidders, added recent matters as examples, and clarified that the principles will be applied to any arrangement which has the effect of fettering the actions of a target, a bidder or a substantial shareholder;
- GN 8 Matter Procedures (18 December 2007) – explained how the Panel addresses timing of applications, including the possible prejudice that lateness might have caused to parties;
- GN 16 Correction of Takeover Documents (18 December 2007) – updated to provide guidance on the Panel’s approach to disclosures offered to the Panel as bases for it declining to conduct proceedings;

- GN 17 Rights Issues (18 December 2007) – updated to include rights issues under section 708AA; and
- GN 19 Insider Participation in Control Transactions (18 December 2007) – a reference to the Full Federal Court decision in *Alinta* was removed after the High Court decision.

## *GN 20 Equity Derivatives*

Guidance Note 20 follows a draft Guidance Note and Discussion Paper published on 10 September 2007. Submissions were due by 7 December 2007. The Panel received six submissions.

The Guidance Note deals with disclosure of derivative positions, primarily in control transactions. It had been in development since 2005, following examples in the Australian market of alleged use of equity derivatives to avoid substantial holding disclosure, developments overseas and the experience of Panel members.

Key changes from the draft included:

- the Panel has referred in the Guidance Note primarily to control transactions (which it defines) although it acknowledges that there may be some circumstances involving the use of equity derivatives that are unacceptable in the light of the principles in section 602 outside the context of a control transaction;
- the amount of disclosure expected was reduced;
- an exception for market makers was included; and
- the drafting was simplified.

## *GN 21 Collateral Benefits*

On 9 November 2005 the Panel invited comments on policy issues which were under consideration regarding collateral benefits in takeovers. It received five submissions.

The Guidance Note went through a number of iterations before being finalised and published.

## *Guidance Note sub-committees*

Guidance Notes are generally developed by sub-committees of Panel and non-Panel members.

Appendix 2 lists sub-committee members. The Panel thanks them for their contributions.

### *Future guidance*

The Panel is reviewing all its Guidance Notes with a view to updating and simplifying them.



## SECTION 3 — PERFORMANCE REPORTING

### Objective

The principal objective of the Panel is to improve the certainty, efficiency and fairness of Australia's takeovers market. It does this by:

- resolving disputes in a fair, timely, consistent, informal and sound manner; and
- publishing clear, well-developed guidance to assist market participants.

### Operations

In 2007-08, the Panel received 40 applications. The average number of applications received by the Panel in a year is around 30, and this financial year was one the Panel's busiest.

### *Development*

To help maintain consistency of decision-making, the Panel holds regular full-day, roundtable sessions. In the current period, seven were held: two in Sydney, three in Melbourne, one in Brisbane and one in Perth.

### *Matter reviews*

As part of its commitment to continuous improvement and stakeholder relations, after each matter the Panel invites the parties to give feedback to the Panel. The feedback is made available to the applicable sitting Panel and President, and more broadly matters of general interest are raised to the wider Panel.

Discussion of the issues raised in matters also takes place at Panel days.

### *Policy*

To help promote certainty for market participants, the Panel gives guidance about how it is likely to view particular issues. It does this through Guidance Notes. As noted, it issued two new Guidance Notes and updated seven existing Guidance Notes in the current period.

Guidance Notes also help sitting Panels approach issues consistently.

The Panel develops its Guidance Notes in consultation with Treasury, ASIC, industry bodies, relevant interest groups and the market generally.

The Panel publishes discussion papers, draft Guidance Notes, response documents and final Guidance Notes on its website.

### *Liaison*

The Panel liaises with the major regulators in the takeovers area, in Australia and overseas. Liaison with Australian regulators (ASIC, with which we have an MOU, ASX and ACCC) ensures that the Panel has effective working relations and its regulatory role fits appropriately with theirs. The Panel held regular liaison meetings with ASIC staff to discuss policy developments and recent issues. Liaison with overseas regulators helps keep practices in line with international practices.

The Panel also maintains contact with organisations such as the Law Council of Australia, the Australian Institute of Company Directors and FINSIA. The Panel discussed with FINSIA its proposals for amendments to the takeovers provisions.

Panel members and the executive also attend and speak at industry meetings, education sessions and seminars.

### *Website*

The Panel's website is <http://www.takeovers.gov.au>.

The Panel uses its website for establishing its presence, inviting contact, publishing documents, and consulting on Panel policy. The website includes a unique collection of source material on Australian corporate law since 1980.

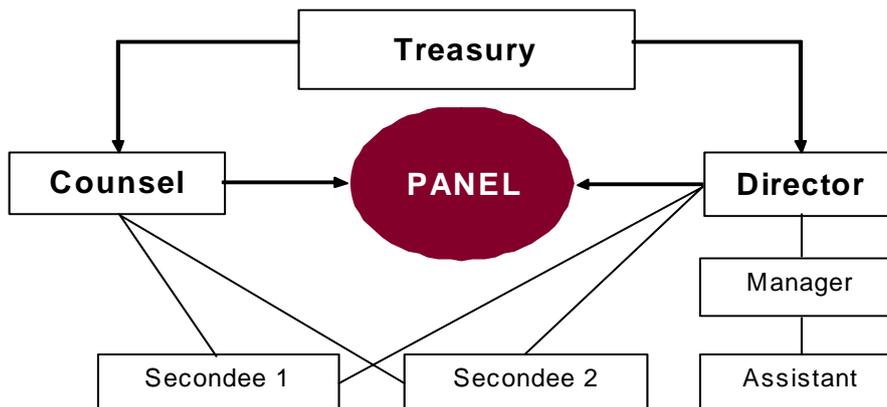
### *Announcements and media releases*

Panel decisions are published. They are announced by media release. If the entity involved is listed, they are published to the Company Announcements platform of ASX. Panel decisions are also made known through the Panel's website and through the Panel's mailing list.

## Organisational structure

The Panel's funding is included in Treasury's budget. The Panel benefits from Treasury's administrative infrastructure and processes.

**Chart 1: The Panel's organisation structure**



## Corporate governance

### *President*

Mr Simon McKeon has been appointed President of the Panel. His responsibilities include:

- liaising with the Minister, Government, Treasury and stakeholders;
- reviewing the performance of the executive;
- appointing members to constitute sitting Panels; and
- considering the interests of sitting Panel members for possible conflicts.

The Minister has appointed<sup>15</sup> the following members to act as President when the President is absent from office or unable to act:

- Mrs Nerolie Withnall;
- Mr Simon Mordant;

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15 Section 182(1)(a)&(b) of the ASIC Act.

- Mr Graham Bradley; and
- Professor Ian Ramsay.

### *Treasury accountability*

The Director provides monthly reports on financial and operational issues to the President and to the Executive Director, Markets Group in Treasury.

### *Planning and review*

The executive holds regular operational review meetings with the President.

Executive staff performance is reviewed as part of Treasury's performance appraisal program.

The Panel applies the APS Values and Code of Conduct to Panel members and executive staff.

### *Fraud control*

The Panel is covered by the Department of Treasury's Fraud Control Plan 2007-2008.

### *Executive remuneration*

One executive staff member is remunerated under an Australian Workplace Agreement negotiated under Treasury's remuneration procedures.

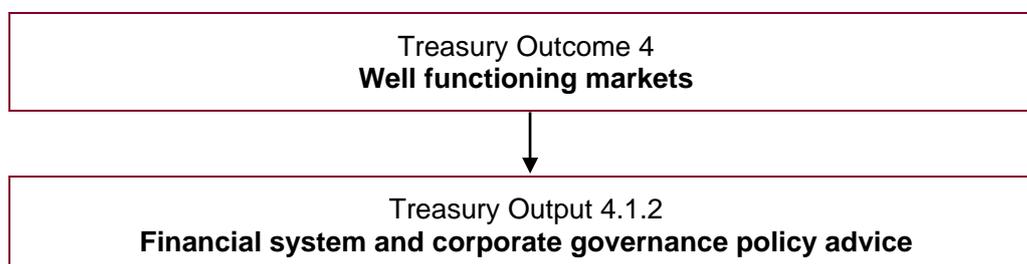
## **Outcome and output information**

### *Outcome and output structure*

In the current period, the Panel's functions contributed to Treasury's Outcome 4: *'Well functioning markets.'*

The best fit for Treasury's output to which the Panel's outputs contribute is Treasury Output 4.1.2: *'Financial system and corporate governance policy advice.'*

**Chart 2: Outcome and output flowchart**



**Table 1: Resources for outcomes corporate governance and accounting**

	Budget Estimate 2007-08 (\$'000)	Actual 2007-08 (\$'000)	Variation	Budget Estimate 2008-09 (\$'000)
<b>Revenue for agency outputs</b>				
Revenue from Government (appropriations) contributing to price of agency outputs	\$1,800	\$1,800	0	\$1,764
Revenue from other sources	295	50	245	245
<b>Total revenue for agency outputs</b>	<b>2,095</b>	<b>1,850</b>	<b>245</b>	<b>2,009</b>
<b>Price of agency outputs</b>				
Resourcing for agency outputs	2,095	2,046	49	2,009
<b>Total price of agency outputs</b>	<b>2,095</b>	<b>2,046</b>	<b>49</b>	<b>2,009</b>
			<b>2007-08</b>	<b>2008-09</b>
Average staffing levels (number)			6	6

## Performance information

### *Treasury outcome 4*

The Panel contributed to well functioning markets by providing:

- timely, clear and consistent decisions in line with market practice;
- guidance to assist market participants regarding takeover aspects of the Corporations Act and ASIC Act; and
- procedural rules for fair, timely and cost-effective resolution of disputes.

### *Treasury output 4.1.2*

The Panel contributed to financial system and corporate governance policy advice by basing its decisions on sound policy considerations and by meeting market participants' needs with its policy guidance.

## Evaluations

The Panel invites each party to a matter to meet it or otherwise give feedback on a proceeding after it has ended. The feedback can be on any aspects of the Panel's operations and functions. These reviews seek to ensure that the Panel receives frank, direct and timely feedback on its procedures and decisions.

## Financial information

### Schedule of Revenues and Expenditures

**Table 2: Schedule of Revenues and Expenditures (unaudited) for the year ended 30 June 2008**

	\$
<b>Revenues</b>	
Revenues from Government (appropriations)	1,800,000
Other	49,630
<b>Total revenues</b>	<b>1,849,630</b>
<b>Employee expenses</b>	
Salaries	913,491
Employer superannuation	125,066
Members' annual retainer and sitting fees	517,344
<b>Total employee expenses</b>	<b>1,555,901</b>
<b>Operating expenses</b>	
Printing	5,105
Travel	149,510
Official entertainment	11,937
Advertising	22,412
Legal	100,735
Telephone charges	21,678
Rent	134,167
Other expenses	44,204
<b>Total operating expenses</b>	<b>489,748</b>
<b>Total expenses incurred to 30 June 2008</b>	<b>2,045,649</b>
<b>Balance of allocation after operating expenditure</b>	<b>(196,019)</b>

## Audit

As the Panel's appropriation comes from Treasury's budget, its operating result is consolidated into Treasury's financial statements, which are subject to audit by the ANAO.

The Panel's operations are also subject to review under Treasury's internal audit program.

The information has been compiled to assist the Panel with reporting under section 183 of the ASIC Act, and has not been audited.

## *Notes to the Schedule of Revenues and Expenditures*

### **Statement of accounting policies**

The significant accounting policies, which have been adopted in the preparation of this financial information, are:

#### **a) Basis of preparation**

The financial information is special purpose financial information, prepared for inclusion in the Takeovers Panel Annual Report for the year ended 30 June 2008. The financial information has been prepared on an accruals basis and on the basis of historical costs. The financial information consists of a Schedule of Revenues and Expenditures.

#### **b) Revenue recognition**

##### *Government appropriations*

Revenues from Government appropriations are recognised when received or declared by the Treasurer in the Federal Budget. Revenue appropriated from Government includes \$1,800,000 classified as revenue.

#### **c) Expenses**

Expenses are recognised as they accrue. The Panel's expenses for 2007-2008 are also recorded in Treasury's audited financial statements for the period 01/07/2007 – 30/06/2008.

#### **d) Balance of allocation after operating expenditure**

The balance of allocation after operating expenditure for the period 01/07/2007 – 30/06/2008 was a deficit of \$196,019.

This deficit was partly due to legal expenses associated with litigation in relation to the Panel's Cemex proceedings. Due to the infrequent and uncertain nature of litigation in which the Panel is involved, the Panel makes minimal provision in its budget for litigation costs, except where a known case is in progress at balance date, in which case a best estimate for provisions would be recorded. The Panel advises the Department of Treasury when litigation costs appear to be pending.

**e) Salaries and members annual and sitting fees**

Salaries and member sitting fees are recognised as they accrue.

Salaries for the current financial year include payments to firms for secondees' services. The payments are treated as payments for employees, not consultants.

**f) Acquisition of assets**

All assets greater than \$2,000 including property, plant and equipment are initially capitalised at their cost at the date of acquisition, being the fair value of the consideration provided plus incidental costs directly attributable to the acquisition. No assets were purchase during the year ended 30 June 2008.

**g) GST**

Revenues and expenses are recognised net of goods and services tax.

## SECTION 4 — MANAGEMENT AND ACCOUNTABILITY

### External scrutiny

Panel decisions are subject to:

- internal review by another Panel<sup>16</sup> in relation to unacceptable circumstances and orders. This is available to any party to the proceeding or ASIC. A small percentage of decisions are reviewed. Most of the reviews of Panel decisions end with the review Panel process;
- judicial review on administrative law principles;
- judicial review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*; and
- judicial review by the High Court.<sup>17</sup>

Panel decisions are not reviewable by the Administrative Appeals Tribunal.<sup>18</sup> Reviews of ASIC decisions are not reviewable by a review Panel as they are themselves considered to constitute a review process.

In addition, the Panel may refer questions of law to the Court.<sup>19</sup>

### Courts

As noted, the Panel was subject to review in *Australian Pipeline Limited v Alinta Limited* [2006] FCA 1378, which ultimately led to *Attorney General (Cth) v Alinta* in the High Court. The Panel is currently subject to review in *Cemex Australia Limited v McKeon and Ors* in the Federal Court.

### Government scrutiny

The Panel was not subject to any reports by the ANAO or the Parliamentary Committees in 2007-08.

The Panel attended hearings of the Senate Standing Committee on Economics Estimates.

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16 Section 657EA.  
17 Section 75(v) of the Constitution.  
18 Section 1317B(1).  
19 Section 659A.

## *Ombudsman*

The Panel was not subject to any reports by the Commonwealth Ombudsman in 2007-08.

## *Management of human resources*

### *Staffing*

At 30 June 2008, the executive comprised four permanent full time staff, one of whom is on maternity leave, one non-ongoing staff member and two legal secondees. 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	
APS2		1	1
APS4		1	1
SEB1	1		1
SEB2	1		1
Total	2	2	4

Note: Acronyms in the table can be found in Appendix 4.

### *Secondments*

The small number of permanent staff on the executive is supplemented by secondees from law firms and other professional firms. The interchange with market participants helps the Panel keep current with market practice and helps educate market practitioners about Panel practice.

### *Australian Workplace Agreements*

One SES staff on the executive is employed under an Australian Workplace Agreement.

### *Staff development*

The Panel seeks to ensure that its staff develop their core skills and keep up-to-date with changes in legislation and the financial sector.

In the current period staff attended workshops and training sessions in the areas of corporate law, financial management and business administration.

### *Remuneration for SES*

All SES Panel staff are part of the Treasury SES salary model that determines pay levels within each SES level based on performance. Details and statistics on SES remuneration are included in Treasury's Annual Report (Part 3: Management and Accountability, Management of Human Resources).

The Panel did not make any specific performance pay or bonus payments.

### *Remuneration for non-SES*

The Treasury Certified Agreement 2006-09 determines salary rates for non-SES Panel staff. Details and statistics on non-SES remuneration are included in the Treasury Annual Report (Part 3: Management and Accountability, Management of Human Resources).

There was no movement in APS levels during the current period.

### *Workplace diversity*

The Panel adopts Treasury's policies and procedures in relation to EEO. Details and statistics on operative and paid inoperative staff by EEO target group and EEO appointments to the Panel are included in the Treasury Annual Report (Part 3: Management and Accountability, Workplace Diversity).

### *Industrial democracy*

The Panel has adopted Treasury's Certified Agreement Performance Management System and Treasury Management Model.

Industrial democracy issues are dealt with by Treasury's Workplace Relations Committee.

### *OH&S*

Panel staff and members have the benefit of Treasury's OH&S programs and functions. Services provided to the Panel for the year included health checks and flu injections for the Panel executive, which contributed to a low absentee rate in the office. There were no reported accidents or dangerous occurrences during the year.

The Panel has adopted Treasury's Employee Assistance Program, an external and confidential counselling service for Treasury staff and their families.

### *Commonwealth Disability Strategy*

The Panel has adopted Treasury's policies and procedures in relation to the Commonwealth's disability strategy.

## Consultants and competitive tendering and contracting

### *Consultants*

In line with the Commonwealth Procurement Guidelines, the Panel engaged accounting firm KPMG to prepare the financial information for the Panel's 2006-07 annual report.

The Panel engaged a consultant to scope a project for the creation of an index for the Panel's Guidance Notes and decisions.

The amount spent on consultants in 2007-08 was \$5,625.

### *Competitive tendering and contracting*

The Panel did not enter into any tenders or contracts during 2007-08.

## Discretionary grants

The Panel did not make any discretionary grants in 2007-08.

## Advertising and market research

The Panel did not enter into any advertising or market research during 2007-08.

## Environmental performance

The Panel undertakes energy saving and recycling by:

- using power save mode on all office equipment;

- turning off desktop computers at the end of each business day;
- switching off lights in unused areas during business hours and all lights at the end of the business day; and
- recycling aluminium, paper and cardboard.

The Panel does not operate any cars.

## Freedom of information

### *Statement under section 8 of the Freedom of Information Act 1982*

The Panel is an agency within the Treasury portfolio, and was established under section 171 of the *Australian Securities Commission Act 1989*.

### *Organisation, functions and powers*

These are set out elsewhere in this report.

### *Arrangements for outside participation*

Policy development is generally undertaken with full opportunity for public consultation.

Commercial sensitivity and time pressures under the legislation mean that proceedings are generally conducted in private. However, the Panel has power to invite or accept submissions from any person, and to call for persons to make submissions.

The Panel publishes:

- information about each matter, including its reasons for decisions; and
- guidance documents in draft and final form.

The Panel undertakes consultation about individual matters (with the parties, after completion) and general policy or procedural issues. It publishes the main comments received on policy documents and the reasons for adopting or rejecting those comments. It approaches interest groups if they are likely to be materially affected or may provide specialised input.

## *Categories of documents held by the Panel*

The Panel maintains the following categories of documents:

- lodged applications;
- correspondence, evidence and submissions relating to proceedings;
- independent expert advices;
- reasons for decisions;
- press releases;
- rules for proceedings;
- guidance development;
- administrative and financial documents relating to the Panel's operations;
- general correspondence; and
- resources (that is, internet links to: Australian legislation and regulations; relevant Parliamentary reports; international regulators; Australian corporate law websites and relevant law reform projects).

The documents accessible to the public for viewing are the Panel's decisions, press releases, Guidance Notes, rules for proceedings, takeover resources and annual reports.

## *Access to documents*

The primary way to access Panel documents is the Panel's website. The Panel seeks to ensure that all publicly available documents are on its website.

Other documents, if available, may be accessed at the Panel's office by appointment. Office hours are 9:00 am to 5:00 pm (except public and public service holidays). The Panel's address and contact details are on its website. The Panel has taken steps to have its internet address placed on Government directories and other internet sites where interested persons are likely to search for it.

### *FOI applications and initial contact*

Freedom of information inquiries should be directed to:

Mr Allan Bulman  
Director, Takeovers Panel  
Level 47, 80 Collins Street  
Melbourne Vic 3000  
Ph: 03 9655 3500, Fax: 03 9655 3511

The Treasury handles freedom of information matters for the Panel.

### *FOI activity*

The Panel did not receive any applications for access to documents under the *Freedom of Information Act 1982* in 2007-08.

### **Regulatory Impact Statements**

The Panel did not submit any Regulatory Impact Statements in 2007-08.

## APPENDIX 1 — PANEL MEMBERS

### MEMBERS OF THE PANEL ON 30 JUNE 2008 WERE:

Mr Simon McKeon (President)	Ms Irene Lee
Ms Robyn Ahern	Mr Rodd Levy
Mr Martin Alciaturi	Mr Alastair Lucas
Ms Elizabeth Alexander AM	Mr Andrew Lumsden
Mr Guy Alexander	Mr Peter Mason AM
Mr Michael Ashforth	Mr Kevin McCann AM
Mr Tom Bathurst QC	Ms Alice McCleary
Mr Garry Besson	Ms Marie McDonald
Mr Graham Bradley	Ms Vicki McFadden
Ms Catherine Brenner	Ms Marian Micalizzi
Mr Geoff Brunson	Mr Simon Mordant
Ms Diana Chang	Mr Norman O'Bryan AM SC
Mr Stephen Creese	Mr John O'Sullivan
Mr Hamish Douglass	Mr Mark Paganin
Ms Susan Doyle	Mr Chris Photakis
Ms Paula Dwyer	Professor Ian Ramsay
Ms Kathleen Farrell	Mr Mike Roche
Mr John Fast	Mr Peter Scott
Ms Teresa Handicott	Ms Jennifer Seabrook
Mr Brett Heading	Mr Andrew Sisson
Mr Robert Johanson	Mr Robert Sultan
Mr Braddon Jolley	Mr Anthony Sweetman
Mr David Jones (New Zealand)	Mr Simon Withers
Mr John Keeves	Mrs Nerolie Withnall
Mr Byron Koster	Ms Karen Wood
Ms Alison Lansley	Ms Heather Zampatti

**NEW MEMBERS APPOINTED TO THE PANEL IN 2007-08 WERE:**

Ms Diana Chang  
Ms Paula Dwyer  
Ms Vickki McFadden  
Mr Mike Roche  
Mr Andrew Sisson

**MEMBERS WHO CEASED THEIR MEMBERSHIP OF THE PANEL IN 2007-08 WERE:**

Ms Meredith Hellicar

## APPENDIX 2 — GUIDANCE NOTE SUB-COMMITTEE MEMBERS

**Table 4: Sub-committees**

Guidance Note	Sub-committee members	
	Panel member	External member
Equity Derivatives	Mr Garry Besson	Ms Susan Bray (ASX)
	Mr Hamish Douglass	Mr Andrew Williams (UBS)
	Mr Alastair Lucas	Mr Christopher Madden (UBS)
	Mr Andrew Lumsden	
	Mr Chris Photakis	
	Ms Kathleen Farrell	
Collateral Benefits	Mr Braddon Jolley	Mr Tim Bednall (Mallesons Stephen Jaques)
	Mr Byron Koster	Mr John Green (Macquarie Bank)
	Ms Alison Lansley	
	Mr Simon Withers	

## APPENDIX 3 — PANEL APPLICATIONS

**Table 5: Applications received by the Panel in 2007-08**

	<b>Matter No.</b>	<b>Section</b>	<b>Matter name</b>	<b>Decision</b>	<b>Decision date</b>
1	2007/18	657A,D&E	Magna Pacific (Holdings) Limited 05	Decline to commence proceedings	5/07/2007
2	2007/19	657EA	Rinker Group Limited 02R	Declaration and Orders	13/08/2007
3	2007/20	657A&D	Auspine Limited	Refuse application due to undertakings	8/08/2007
4	2007/21	657A&D	Consolidated Minerals 01	Declaration and Orders	28/08/2007
5	2007/22	657A&D	Consolidated Minerals 02	Decline to commence proceedings	29/08/2007
6	2007/23	657A&D	Bowen Energy Limited	Decline to commence proceedings	5/10/2007
7	2007/24	657A,D&E	GoldLink Growthplus Limited	Decline to commence proceedings	18/10/2007
8	2007/25	657A&D	Consolidated Minerals 03	Declaration and Orders	31/10/2007
9	2007/26	657A,D&E	Resource Pacific Holdings Limited	Decline to commence proceedings	31/10/2007
10	2007/27	657A,D&E	Golden Circle Limited 02	Decline to commence proceedings	29/10/2007
11	2007/28	657A&D	Golden West Resources Limited	Refuse application	22/11/2007
12	2007/29	657EA	Consolidated Minerals Limited 03R	Affirm Panel decision	12/11/2007
13	2007/30	657A,D&E	Consolidated Minerals Limited 04	Withdrawn	14/11/2007
14	2007/31	657A,D&E	Financial Resources Limited	Decline to commence proceedings	7/11/2007
15	2007/32	657A,D&E	Mackay Permanent Building Society Limited	Withdrawn	20/11/2007
16	2007/33	657A&D	Midwest Corporation Limited	Refuse application	14/12/2007
17	2007/34	657A&D	Golden West Resources Limited 02	Withdrawn	27/11/2007
18	2008/01	657A&D	Sybmion Health Limited	Withdrawn	18/01/2008
19	2008/02	657A,D&E	Golden West Resources Limited 03	Refuse application	12/02/2008
20	2008/02	657A,D&E	Golden West Resources Limited 04	Refuse application	12/02/2008
21	2008/03	657A,D&E	Allegiance Mining NL	Declaration and Orders	22/02/2008
22	2008/04	657EA	Golden West Resources Limited 03R	Withdrawn & refuse application	20/02/2008

8 **Table 5: Applications received by the Panel in 2007-08 (continued)**

	<b>Matter No.</b>	<b>Section</b>	<b>Matter name</b>	<b>Decision</b>	<b>Decision date</b>
23	2008/04	657EA	Golden West Resources Limited 04R	Refuse application	20/02/2008
24	2008/05	657A,D&E	Mt Gibson Iron Limited	Declaration and Orders	1/04/2008
25	2008/06	657A,D&E	Goldlink IncomePlus Limited	Decline to commence proceedings	7/04/2008
26	2008/07	657A,D&E	BioProspect Limited	Declaration and undertaking	22/04/2008
27	2008/08	657A,D&E	Programmed Maintenance	Refuse application due to undertakings	21/04/2008
28	2008/09	657A,D&E	BioProspect Limited 02	Refuse application due to undertakings	17/04/2008
29	2008/10	657A,D&E	Programmed Maintenance 02	Declaration and Orders	6/05/2008
30	2008/11	657A,D&E	DoloMatrix International Limited	Decline to commence proceedings	16/05/2008
31	2008/12	657A,D&E	Gosford Quarry Holdings Limited	Decline to commence proceedings	23/05/2008
32	2008/13	657A,D&E	BigAir Group Limited	Decline to commence proceedings	29/05/2008
33	2008/14	657EA	Gosford Quarry Holdings Limited 01R	Decline to commence proceedings	30/05/2008
34	2008/15	657A,D&E	Midwest Corporation Limited 02	Declaration and Orders	21/06/2008
35	2008/16	657A&D	Lion Selection Limited	Decline to commence proceedings	16/06/2008
36	2008/17	657A,D&E	InterMet Resources Limited	Commenced proceedings, no declaration	24/06/2008
37	2008/18	657A&D	Lion Selection Limited 02	Decline to commence proceedings with undertakings	23/06/2008
38	2008/19	657A&D	MacarthurCook Limited	Declaration and Orders	09/07/2008
39	2008/20	656A&B	Primebroker Securities Limited	Withdrawn	11/07/2008
40	2008/21	657A&D	Indophil Resources NL	Decline to commence proceedings	04/07/2008

## **APPENDIX 4 — ABBREVIATIONS AND ACRONYMS**

ACCC	Australian Consumer and Competition Commission
ANAO	Australian National Audit Office
APS	Australian Public Service
ASIC	Australian Securities and Investments Commission
ASX	Australian Securities Exchange
CLERP	Corporate Law Economic Reform Program
EEO	Equal Employment Opportunity
FINSIA	Financial Services Institute of Australasia
OH&S	Occupational Health and Safety
SEB	Senior Executive Band
SES	Senior Executive Service

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