

Takeovers Panel

Annual Report 2008-2009

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15 October 2009

The Honourable Wayne Swan MP
Treasurer
Parliament House
Canberra ACT 2600

Dear Treasurer

ANNUAL REPORT 2008-09

In accordance with section 183 of the *Australian Securities and Investments Commission Act 2001*, I submit the 2008-09 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) among other things:

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

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

Contact

Enquiries regarding this report may be directed to:

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Mr Simon McKeon
President of the Panel

Review by the President

2008-09 was an eventful year for the Panel. The current period has witnessed dire global economic conditions, and this has affected the nature of the Panel's work.

The Panel has dealt with complex and challenging issues including reverse takeovers, standstill agreements and share splitting. This has also been a period in which our existing guidance has been tested. With companies increasingly in need of funds, the Panel has considered issues relating to the control impact of rights issues and alleged frustrating actions.

The Panel's response to these issues has been flexible and prompt. The number of days to reach a decision and publish reasons has been well within the average, which is pleasing given the complexity of matters the Panel has had to engage with.

The Panel continued to focus on finding an outcome for the parties which is commercially sensible and practical while consistent with the principles of Chapter 6 of the Corporations Act. The executive has continued the work to simplify and shorten the Panel's reasons and to rewrite the Panel's guidance notes. Our aim is for company directors and executives to be able to read these documents directly rather than have them interpreted.

A significant event in this period was the unanimous decision of the Full Court of the Federal Court¹ dismissing CEMEX's appeal from Justice Stone's decision in the Federal Court² on review of the Panel's decision in Rinker Group Limited 02R (see litigation section). It was pleasing to see that the Court reflected the High Court's emphasis in *Alinta*³ on the "specialist nature of the Panel and the public interest considerations which underpin its role".⁴

1 *Cemex Australia Pty Ltd v Takeovers Panel* [2009] FCAFC 78.

2 *Cemex Australia Pty Ltd v Takeovers Panel and Another* [2008] FCA 1572.

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

4 *Cemex Australia Pty Ltd v Takeovers Panel* [2009] FCAFC 78 at [84].

The Panel has also focussed on ensuring that it continues to be understood by the market. This year the executive conducted a 'roadshow' to explain the Panel's objectives and processes and to provide particular insights into how a Panel application is handled so that participants can better understand the process. The executive continues to make itself available by phone and in person to participants. It invites applicants and other parties to a 'post matter review' to discuss their perspectives on how the matter was conducted.

The Panel is very ably supported by Alan, Allan and their small, but highly competent, executive team.

At 30 June 2009, the Panel is made up of 53 members, having continued to recruit members of an extremely high quality. It is with regret that I note the recent passing of one of its members, Mr Chris Photakis, who was appointed in 2001 and provided wonderful service and commitment to the Panel.

The year ahead

The Panel will have four major goals next year:

- Staff development and knowledge management;
- completion of the rewrites of guidance notes and policy development based on the novel policy areas addressed by the Panel in the current period;
- seeking to establish the effectiveness of our work in simplifying procedures; and
- deliver decisions that are timely, commercial and consistent.

Next year we will celebrate the 10th anniversary of the Panel in its current form. In that time we have decided over 300 applications, improved compliance in mergers and acquisitions, dealt with novel issues and, in doing so, have freed up substantial court time. As a result takeovers regulation in Australia is at the forefront of international best practice. I would like to thank our past and present Panel members and executive for all their hard work in achieving these outcomes.

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.⁵ Only ASIC and other public bodies can commence court proceedings during the bid period.⁶

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 Notes'), and publishes its reasons (available on its website under 'Reasons for Decisions').

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 25 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.

5 Section 659AA. References are to the *Corporations Act 2001* (Cth) unless otherwise indicated.

6 Section 659B.

The Panel reviews decisions of the Panel made at first instance (in relation to declarations of unacceptable circumstances).⁷ 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 four applications for review.

Review of ASIC decisions

The Panel may review ASIC decisions.⁸ 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.⁹ There were none in the current period.

7 Section 657EA.

8 Section 655A.

9 Section 657EB.

Executive

The role of the executive is to assist the Panel in making consistent, timely and commercial decisions. It includes:

- administrative and legal support for Panel members;
- liaison with market practitioners, ASIC's takeovers staff and ASX; 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).



Mr Allan Bulman, Director



Mr Alan Shaw, Counsel

The Panel's executive comprises:

- Director, Mr Allan Bulman;
- Counsel, Mr Alan Shaw;
- Lawyer, Mr Nirangjan Nagarajah;
- legal secondees. The Panel's normal process is to staff its office, in part, with secondees from major law firms or other professional 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 secondees included Mr Andrew Hensher (Chang, Pistilli & Simmons, Sydney), Mr Sean Huber (Corrs Chambers Westgarth, Sydney) and Mr Emin Altiparmak (Allens Arthur Robinson, Melbourne). At 30 June 2009, the secondee was Ms Marissa Bendyk (Piper Alderman, Adelaide).

- two administrative staff: Ms Karolina Danger as Office Manager and Ms Rebecca Banhelyi as Executive Assistant.



Simon McKeon with the Executive: (L to R) Allan Bulman, Alan Shaw, Simon McKeon, Nirangjan Nagarajah, Emin Altiparmak, (L to R), Marissa Bendyk, Karolina Danger and Rebecca Banhelyi.

Office

The Panel maintains an office in Melbourne. On 16 March 2009, the Panel moved premises from Level 47, 80 Collins Street to Level 10, 63 Exhibition Street, Melbourne. The Panel's current lease in Exhibition Street expires in January 2013.

During 2008-09, the Panel provided the use of its offices and conference room to Treasury when they required facilities in Melbourne.

Members

Appointment of members

At 30 June 2009 the Panel had 53 members. Members are appointed by the Governor-General on the nomination of the Minister.¹⁰ 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.

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, nine members were re-appointed:

Mr Martin Alciaturi;
Mr Robert Johanson;
Mr John Keeves;
Mr Mark Paganin;
Professor Ian Ramsay;
Ms Jennifer Seabrook;
Mr Simon Withers;
Ms Karen Wood; and
Ms Heather Zampatti.

10 Section 172 of the ASIC Act.

In the current period, five new members were appointed:

Mr David Bennett AC QC – Barrister, Sydney;

Mr John M Green – Company Director, Sydney;

Mr Peter Hay – Chairman of the Advisory Board at Lazard Carnegie Wylie, Melbourne;

Ms Francesca Lee – General Counsel and Company Secretary of OZ Minerals Ltd, Melbourne; and

Ms Sophie Mitchell – Director of Special Projects for ABN AMRO Morgans, Brisbane.

In the current period, four members completed their terms:

Ms Robyn Ahern;

Ms Elizabeth Alexander AM;

Mr Brett Heading; and

Ms Marian Micalizzi.

Members' biographies

Simon McKeon (President) – Executive Chairman, Macquarie Group's Melbourne office (President since 1999), Chairman of a number of charities and organisations and a member of the Strategic Advisory Board of the University of Melbourne's Graduate Law Program.

Martin Alciaturi – Head of Corporate Finance WA, Macquarie Group (Member since 2006), a Chartered Accountant and a Senior Fellow of FINSIA.

Guy Alexander – Partner, Allens Arthur Robinson (Member since 2004), member of the Corporations Committee of the Business Law Section of the Law Council of Australia.

Michael Ashforth – Managing Director, Gresham Advisory Partners (Member since 2002), previously a partner at Freehill Hollingdale & Page.

Tom Bathurst QC – Barrister (Member since 2007), vice-President of the NSW Bar Association and President of the Australian Bar Association.

David Bennett AC QC – Barrister (Member since 2009), former Solicitor-General of Australia (1998-2008) and a former president of the NSW Bar Association and the Australian Bar Association.

Garry Besson – Partner, Gilbert & Tobin (Member since 2007), formerly a partner at Clayton Utz (1983-1989) and a partner at Freehills (1989-1996).

Graham Bradley (Acting President) – Chairman, HSBC Bank Australia Limited (Member since 2004), company director, formerly national managing partner of Blake Dawson and partner of McKinsey & Company.

Catherine Brenner – Company Director (Member since 2007), previously a Managing Director in the Investment Banking Group at ABN AMRO.

Geoff Brunsdon – Company Director (Member since 2007), previously Managing Director, Merrill Lynch (Australia) Limited, a Chartered Accountant, a Fellow of FINSIA and a Fellow of AICD.

Diana Chang – Partner, Chang, Pistilli & Simmons (Member since 2008), previously a partner at Atanaskovic Hartnell.

Stephen Creese – Managing Director, Rio Tinto Australia (Member since 2005).

Hamish Douglass – Chief Executive Officer, Magellan Financial Group (Member since 2005), previously Co-Head of Global Banking for Deutsche Bank AG in Australia and New Zealand.

Susan Doyle – Company Director (Member since 2005), member of the Future Fund Board of Guardians.

Paula Dwyer – Company Director (Member since 2008), a Chartered Accountant, a Fellow of the Institute of Chartered Accountants, a Fellow of AICD and a Fellow of FINSIA.

Kathleen Farrell – Consultant to Freehills (Member since 2001), company director, previously a partner with Freehill Hollingdale & Page

John Fast – Lawyer and Company Director (Member since 2005), previously Chief Legal Counsel and Head of External Affairs at BHP Billiton Limited and partner at Arnold Bloch Leibler.

John M Green – Company Director (Member since 2009), previously a Macquarie Bank Executive Director and Freehills partner, Senior Fellow of FINSIA and a Fellow of AICD.

Teresa Handicott – Partner, Corrs Chambers Westgarth (Member since 2001), a Senior Fellow of FINSIA, a member of the Law Council of Australia and AICD.

Peter Hay – Chairman of the Advisory Board, Lazard (Member since 2009), company director, previously Chief Executive Officer of Freehills.

Robert Johanson – Director, Grant Samuel (Member since 2006), Chairman Bendigo and Adelaide Bank and member of Council of University of Melbourne.

Braddon Jolley – Partner, Corrs Chambers Westgarth (Member since 2001), previously a partner at Freehills.

David Jones – Chairman, New Zealand Takeovers Panel (Member since 2007), a founding partner of Auckland law firm, Jones Young.

John Keeves – Partner, Head of Corporate, Johnson Winter & Slattery (Member since 2006), past National Chairman of the Corporations Committee of the Law Council of Australia, Senior Fellow and former Board member of FINSIA, member of CALDB.

Byron Koster – Partner, Corrs Chambers Westgarth (Member since 2004), previously a partner at the law firm Blake Dawson.

Alison Lansley – Partner, Mallesons Stephen Jaques (Member since 2001), Chairman of the Markets Policy Group of FINSIA.

Francesca Lee – General Counsel & Company Secretary, OZ Minerals Ltd (Member since 2009), previously senior roles at BHP Billiton, Rio Tinto Limited and Citibank Limited.

Irene Lee – Company Director (Member since 2001), previously Executive Director of Citicorp Investment Bank and Head of Corporate Finance at the Commonwealth Bank of Australia.

Rodd Levy – Partner, Freehills, Melbourne (Member since 2007), author of Takeovers Law and Strategy (3rd Edition, 2009) and a Senior Fellow of the Faculty of Law of the University of Melbourne.

Alastair Lucas – Vice-Chairman, Goldman Sachs JBWere (Member since 2005), deputy chair of the Market Policy Group of the FINSIA.

Andrew Lumsden – Partner, Corrs Chambers Westgarth (Member since 2002), previously Chief of Staff to the Minister for Financial Services & Regulation, the Hon Joe Hockey, MP.

Peter Mason AM – Chairman of AMP Limited (Member since 2005), company director, Senior Advisor to UBS Investment Bank.

Kevin McCann AM – Chairman, Origin Energy Limited (Member since 2001), company director, previously Chairman of Partners at Allens Arthur Robinson.

Alice McCleary – Independent Company Director (Member since 1999), Deputy Chancellor at the University of South Australia, previously a corporate tax partner at Coopers & Lybrand.

Marie McDonald – Partner, Blake Dawson (Member since 2001), joint practice head – M&A, of Blake Dawson Lawyers.

Vicki McFadden – Company Director (Member since 2008), a Member of the Advisory Board & Executive Committee, Australian School of Business, UNSW.

Sophie Mitchell – Director of Corporate & Special Projects, ABN AMRO Morgans (Member since 2009), company director.

Simon Mordant (Acting President) – Joint Chief Executive, Caliburn Partnership (Member since 1999), previously Joint Head of Corporate Finance, ABN AMRO in Australia and New Zealand.

Norman O’Bryan AM SC – Barrister (Member since 2004), a member of the Law Council of Australia, the Australian Bar Association and the International Bar Association.

John O’Sullivan – Chairman, Investment Banking Department, Credit Suisse (Australia) Limited (Member since 2005), member of the Business Council of Australia, previously General Counsel of the Commonwealth Bank of Australia and partner of Freehills.

Mark Paganin – Partner, Clayton Utz (Member since 2003), a member of the Boards of FINSIA and of the University Club of UWA.

Chris Photakis – Managing Director, Pitt Capital Partners Limited (Member since 2001), previously a Partner/Executive Director of KPMG Corporate Finance.

Ian Ramsay (Acting President) – Professor, Faculty of Law, University of Melbourne (Member since 2000), a member of CAMAC, the National Law Committee of AICD, the Corporations Committee of the Law Council of Australia.

Mike Roche – Managing Director and Head of Mergers & Acquisitions at Deutsche Bank AG, Sydney (Member since 2008).

Peter Scott – Vice Chairman, Investment Banking, UBS AG (Australia) (Member since 2002). Australia's representative on the New Zealand Takeovers Panel.

Jenny Seabrook – Special Advisor, Gresham Partners (Member since 2000), company director, a member of FINSIA's Corporate Finance Advisory Group and ASIC's External Advisory Group.

Andrew Sisson – Managing Director, Balanced Equity Management (Member since 2008).

Robert Sultan – Partner, Deacons, Melbourne (Member since 2007), a member of the Corporations Committee of the Business Law Section of the Law Council of Australia and a director of the Gourlay Charitable Trust.

Anthony Sweetman – Managing Director, Head of Mergers & Acquisitions, Australia, UBS AG (Member since 2007).

Simon Withers – Company Director (Member since 2003), previously a barrister and solicitor with Parker & Parker and a director of London merchant bank Kleinwort Benson.

Nerolie Withnall (Acting President) – Company Director (Member since 1999), a member of CAMAC and the Senate of the University of Queensland, a Fellow of AICD and previously a partner of Minter Ellison.

Karen Wood – Group Executive and Chief People Officer, BHP Billiton (Member since 2000), previously Chief Governance Officer and Company Secretary BHP Billiton, a Fellow of the Institute of Chartered Secretaries and a member of the Law Council of Australia.

Heather Zampatti – National Head of Wealth Management, Bell Potter Securities (Member since 2006), company director and member of the University of WA, Senate Committee-Strategic Resources.

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.

Litigation

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

- *Cemex Australia Pty Limited v Takeovers Panel* [2009] FCAFC 78; and
- *Noble Group Limited Anor v Takeovers Panel & Ors*.

CEMEX

This case arose out of CEMEX's takeover of Rinker in 2007. It was heard by the Full Court of the Federal Court of Australia (on appeal from a single judge of the same Court) on 21 May 2009. The decision of the Court at first instance, which upheld the Panel's decision, was upheld.

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 purporting to confer the judicial power of the Commonwealth on the Panel. This last claim was abandoned following the decision in *Alinta*.¹¹

On 23 October 2008 Stone J dismissed CEMEX's application on all bases.¹² CEMEX appealed to the Full Court.

On 30 June 2009 the Full Court (Ryan, Jacobson and Foster JJ) dismissed CEMEX's appeal.¹³

Noble Group

This case arose out of the Panel's proceedings in Gloucester Coal Limited 01R [2009] ATP 9.

Gloucester Coal Limited and Whitehaven Coal Limited agreed to a merger which was structured as a recommended scrip takeover by Gloucester of the larger Whitehaven. Noble Group Limited made a \$4.85 cash bid for

11 *Attorney General of the Commonwealth of Australia v Alinta Limited and Others* [2008] HCA 2.

12 *See Cemex Australia Pty Ltd v Takeovers Panel and Another* [2008] FCA 1572.

13 *See Cemex Australia Pty Ltd v Takeovers Panel* [2009] FCAFC 78.

Gloucester which was conditional on the merger with Whitehaven not proceeding. Noble applied to the Panel for a declaration of unacceptable circumstances because Gloucester shareholders would not, under the structure of the merger, be given a say in relation to the transaction.

The initial Panel made a declaration of unacceptable circumstances and ordered, among other things, that the merger be subject to Gloucester shareholder approval. A review was sought by both Gloucester and Whitehaven. The review Panel also made a declaration of unacceptable circumstances, but set aside the orders of the initial Panel, instead ordering that the merger be subject to no superior proposal for Gloucester emerging.

Noble initiated proceedings in the High Court¹⁴ contending that the review Panel had fallen into 'jurisdictional error'.

Noble withdrew after it increased its bid to \$7 and Gloucester announced that it considered the increased Noble bid to be a superior proposal to the merger.

Matters

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;¹⁵ 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 of unacceptable circumstances if established, the strength of the evidence, and the remedies that might be available. The Panel does not conduct proceedings merely because an application has been made.

14 Section 659B prohibits parties from bringing proceedings in the Federal Court before the end of the bid period. The parties consented to the matter being remitted to the Federal Court.

15 Section 201A of the ASIC Act.

Issues covered by decisions

The Panel considered applications relating to an array of issues in the current period. These included:

- Babcock & Brown Communities Group: the Panel examined the impact that the sale of management rights to a managed investment scheme in a complex stapled structure can have on the auction process for an entity.
- Goldlink IncomePlus Limited 04 & 04R: the Panel considered the issue of 'share splitting' to take advantage of a provision that forces a bidder that has made a proportional bid for a company to purchase all the shares of a shareholder holding an unmarketable parcel of shares after accepting the takeover.
- International All Sports Limited 01 & 02: the Panel addressed the issue of standstill agreements and their commercial impact on the market for control of a company.
- Gloucester Coal Limited 01 & 01R: the Panel considered reverse takeovers in the context of the policy of the takeovers provisions of the Corporations Act.
- A number of applications regarding rights issues: Bisalloy Steel Group Limited, DataDot Technology Limited, Emerald Capital Limited and Rey Resources Limited.

Guidance

The Panel publishes Guidance Notes to assist the market in relation to takeovers matters and to assist Panel members make consistent decisions. In the current period the Panel continued to review its Guidance Notes.

Rules

The Panel is also reviewing its 'Rules for Proceedings'. These were last updated in 2005.

Updated Guidance Notes

In the current period, the Panel continued its practice of updating its guidance notes employing the principles of simplified drafting. The Panel updated three Guidance Notes:

- GN 2 Reviewing Decisions – updated to reflect the Panel’s decision that it will not publicise receipt of an application for review of an ASIC decision until an appropriate time;
- GN 4 Remedies General – now incorporates the Panel’s old Guidance Note 9 on Costs Orders; and
- GN 5 Specific Remedies – Information Deficiencies – now incorporates the Panel’s old Guidance Note 16 on correction of takeovers documents.

Consultation paper

The Panel also proposed to update the following guidance notes:

- GN 7 Lock up Devices;
- GN 12 Frustrating Action;
- GN 14 Funding Arrangements; and
- GN 17 Rights Issues.

A consultation paper was released on 13 May 2009. It invited comments on these four guidance notes both generally and on the following specific issues:

- Update of market practices – the Panel invited comments on whether the guidance notes accommodate current market practice, given that it has been some years since the last issue.
- Funding arrangements – the Panel invited comments on whether a requirement of payment of bid consideration in an off market bid no later than transfer of shares was desirable, and whether it was necessary for bid conditions to precisely match funding conditions.

The period for comments closed on 30 June 2009. Five submissions have been received. The Panel is reviewing the submissions.

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.

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 2008-09, the Panel received 30 applications. See Appendix 3.

Development

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

The Panel executive conducted a 'roadshow' in Sydney, Melbourne, Brisbane, Perth and Adelaide to discuss Panel processes. Over 200 market participants attended.

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

Refer to Guidance on page 20.



Panel members at one of the 2009 July Panel days.

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 AICD and FINSIA.

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.

The Panel released a new look website in the current period, with improved navigation and search functions.

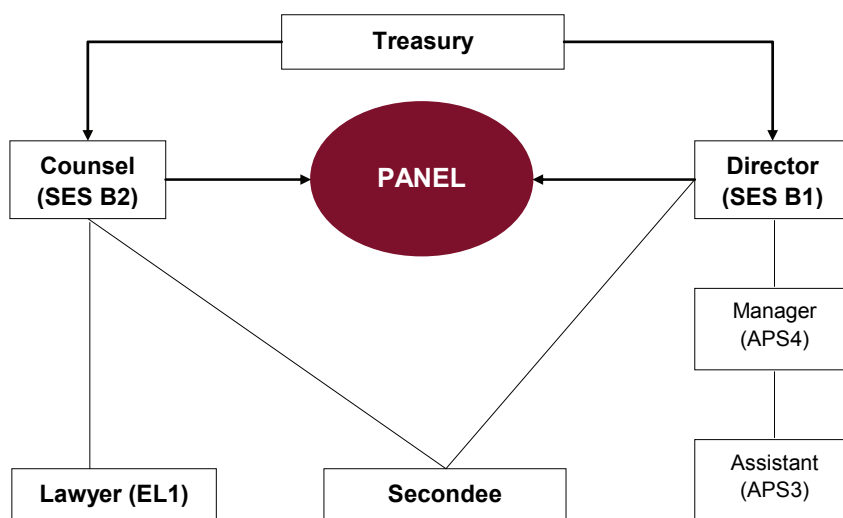
Announcements and media releases

Panel decisions are available through the Panel’s mailing list or RSS feed. If the entity involved is listed, the media release is also published on ASX.

Organisational structure

The Panel’s funding is included in Treasury’s budget. The Panel relies on 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.

He is also a member of the Panel and regularly sits on matters.

The Minister has appointed¹⁶ the following members to act as President when the President is absent from office or unable to act:

- Mrs Nerolie Withnall;
- Mr Simon Mordant;
- 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 Guidelines.

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

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

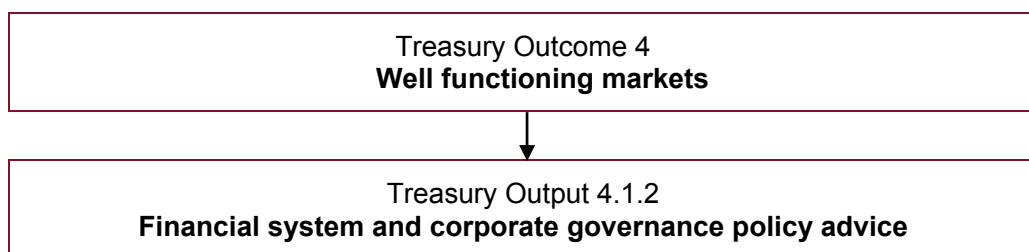


Table 1: Resources for outcomes corporate governance and accounting

	Budget Estimate 2008-09 (\$'000)	Actual 2008-09 (\$'000)	Variation	Budget Estimate 2009-10 (\$'000)
Revenue for agency outputs				
Revenue from Government (appropriations) contributing to price of agency outputs	1,964	1,964	0	\$2,000
s.31 relevant agency receipts	0	1	1	0
Total revenue for agency outputs	1,964	1,965	1	2,000
Price of agency outputs				
Resourcing for agency outputs	1,964	1,956	8	2,000
Total price of agency outputs	1,964	1,956	8	2,000
			2008-09	2009-10
Average staffing levels (number)			6	6.4

Table 2: Agency Resource Statement

	Actual 2008-09 (\$'000)	Payments 2008-09 (\$'000)	Balance Remaining 2008-09 (\$'000)
Departmental appropriation			
Revenue from Government (appropriations)	1,964	1,956	8
s.31 relevant agency receipts	1	0	1
Total Resourcing and Payments	1,965	1,956	9

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 3: Schedule of Revenues and Expenditures (unaudited) for the year ended 30 June 2009

	\$
Revenues	
Revenues from Government (appropriations)	1,964,000
Other	664
Total revenues	1,964,664
Employee expenses	
Salaries	954,440
Employer superannuation	115,136
Members' annual retainer and sitting fees	453,886
Total employee expenses	1,523,462
Operating expenses	
Printing	5,406
Travel	145,421
Official entertainment	9,928
Advertising	230
Legal	47,392
Telephone charges	15,252
Rent	160,614
Other expenses	47,862
Total operating expenses	432,105
Total expenses incurred to 30 June 2009	1,955,567
Balance of allocation after operating expenditure	9,097

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, that 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 2009. 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 \$1,964,000 classified as revenue.

c) Expenses

Expenses are recognised as they accrue. The Panel's expenses for 2008-2009 are also recorded in Treasury's audited financial statements for the period 01.07.2008 – 30.06.2009.

d) Balance of allocation after operating expenditure

The balance of allocation after operating expenditure for the period 01.07.2008 – 30.06.2009 was a surplus of \$9,097.

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 purchased during the year ended 30 June 2009.

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 Panel¹⁷ 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; and
- judicial review.¹⁸

Panel decisions are not reviewable by the Administrative Appeals Tribunal.¹⁹ 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.²⁰

Courts

The Panel's decision in Rinker 02R was upheld by the Full Court of the Federal Court of Australia in *Cemex Australia Limited v Takeovers Panel [2009] FCAFC 78*.

Government scrutiny

The Panel was not subject to any reports by the ANAO or the Parliamentary Committees in 2008-09.

The Panel attends hearings of the Senate Standing Committee on Economics Estimates as required.

Ombudsman

The Panel was not subject to any reports by the Commonwealth Ombudsman in 2008-09.

17 Section 657EA.

18 Section 75(v) of the Constitution and *Administrative Decisions (Judicial Review) Act 1977*.

19 Section 1317B(1).

20 Section 659A.

Management of human resources

Staffing

At 30 June 2009, the executive comprised five permanent full time staff, one of whom was on maternity leave, one non-ongoing staff member and one legal secondee. Permanent staff are employed under the *Public Service Act 1999*.

Table 4: Operative staff by classification and gender

Classification	Permanent full time		Total
	Male	Female	
APS3		1	1
APS4		1	1
EL1	1		1
SEB1	1		1
SEB2	1		1
Total	3	2	5

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

Two staff on the executive are 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 and information technology.

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 payments 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).

During 2008-09, one staff member moved substantive levels from APS2 to APS3, through the Performance Management System.

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

The Panel did not engage any consultants in 2008-09.

Competitive tendering and contracting

The Panel did not enter into any tenders or contracts during 2008-09.

Discretionary grants

During 2008-09, the Panel made a discretionary grant to the Australasian Legal Information Institute (AustLii) of \$2,500.

Advertising and market research

The Panel did not enter into any advertising or market research during 2008-09.

Environmental performance

As a small agency, the Panel's operations have a relatively small impact on the environment through:

- the use of electricity, water, paper and other materials consumed;
- the use of air travel by Panel members and the executive; and
- the generation of waste.

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 paper, toner cartridges 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 notes and other policy 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, consultation papers, takeover resources, annual reports and document pro-formas.

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 10, 63 Exhibition Street

Melbourne VIC 3000

Telephone: 03 9655 3500

Facsimile: 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 2008-09.

Regulatory Impact Statements

The Panel did not submit any Regulatory Impact Statements in 2008-09.

APPENDIX 1 — PANEL MEMBERS

MEMBERS OF THE PANEL AT 30 JUNE 2009:

Mr Simon McKeon (President)	Ms Irene Lee
Mr Martin Alciaturi	Mr Rodd Levy
Mr Guy Alexander	Mr Alastair Lucas
Mr Michael Ashforth	Mr Andrew Lumsden
Mr Tom Bathurst QC	Mr Peter Mason AM
Mr David Bennett AC QC	Mr Kevin McCann AM
Mr Garry Besson	Ms Alice McCleary
Mr Graham Bradley	Ms Marie McDonald
Ms Catherine Brenner	Ms Vicki McFadden
Mr Geoff Brunson	Ms Sophie Mitchell
Ms Diana Chang	Mr Simon Mordant
Mr Stephen Creese	Mr Norman O'Bryan AM SC
Mr Hamish Douglass	Mr John O'Sullivan
Ms Susan Doyle	Mr Mark Paganin
Ms Paula Dwyer	Mr Chris Photakis
Ms Kathleen Farrell	Professor Ian Ramsay
Mr John Fast	Mr Mike Roche
Mr John M Green	Mr Peter Scott
Ms Teresa Handicott	Ms Jennifer Seabrook
Mr Peter Hay	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
Ms Francesca Lee	

NEW MEMBERS APPOINTED TO THE PANEL IN 2008-09:

Mr David Bennett AC QC

Mr John M Green

Mr Peter Hay

Ms Francesca Lee

Ms Sophie Mitchell

MEMBERS WHO CEASED THEIR MEMBERSHIP OF THE PANEL IN 2008-09:

Ms Robyn Ahern

Mr Brett Heading

Ms Elizabeth Alexander AM

Ms Marian Micalizzi

APPENDIX 2 — SUB-COMMITTEE MEMBERS

Table 5: Sub-committees

Topic	Sub-committee members	
	Panel member	External member
Rules	John Fast Andrew Lumsden Robert Sultan Peter Scott Diana Chang	David Friedlander

APPENDIX 3 — PANEL APPLICATIONS

Table 6: Applications received by the Panel in 2008-09

Matter No.	Section	Matter name	Decision	Decision date
1	657A, D&E	GoldLink IncomePlus Limited 02	Decline to conduct proceedings	15/07/08
2	657A, D&E	GoldLink IncomePlus Limited 03	Decline to conduct proceedings	22/07/08
3	657A, D&E	Just Group Limited	Decline to conduct proceedings with undertakings	01/08/08
4	657A, D&E	Origin Energy Limited	Withdrawn	31/07/08
5	657A, D&E	Challenger Infrastructure Fund	Withdrawn	08/08/08
6	657A&D	Origin Energy Limited 02	Proceedings conducted, no declaration	10/09/08
7	657A, D&E	Incremental Petroleum Limited	Withdrawn	26/09/08
8	657A, D&E	Boulder Steel Limited	Decline to conduct proceedings	03/10/08
9	657A&D	Babcock & Brown Communities Group	Proceedings conducted, no declaration	31/10/08
10	657A, D&E	MYOB Limited	Declaration and orders	21/11/08
11	657A, D&E	Babcock & Brown Communities Group 02	Decline to conduct proceedings	19/11/08
12	657EA	MYOB Limited 01R	Withdrawn	25/11/08
13	657A, D&E	Perilya Limited	Refuse application due to undertakings	18/12/08
14	657A, D&E	Bisalloy Steel Group Limited	Declaration and orders	23/12/08
15	657A, D&E	GoldLink IncomePlus Limited 04	Declaration and orders	21/01/09
16	657A, D&E	Perilya Limited 02	Decline to conduct proceedings	20/01/09
17	657EA	GoldLink IncomePlus Limited 04R	Decline to conduct proceedings	02/02/09
18	657A&D	International All Sports Limited	Proceedings conducted, no declaration	13/02/09
19	657EA	International All Sports Limited 01R	Affirm panel decision	03/03/09
20	657A, D&E	Gloucester Coal Ltd	Declaration and orders	17/03/09
21	657EA	Gloucester Coal Ltd 01R ²¹	Declaration and orders	29/04/09

21 Gloucester Coal Limited 01R consisted of two related matters treated as one application.

Table 6: Applications received by the Panel in 2008-09 (continued)

Matter No.	Section	Matter name	Decision	Decision date
22	657A, D&E	Regis Resources Limited	Decline to conduct proceedings	21/04/09
23	657A&D	Queensland Ores Limited	Decline to conduct proceedings	28/04/09
24	657A, D&E	3D Oil Limited	Withdrawn	27/05/09
25	657A, D&E	DataDot Technology Limited	Declaration and orders	17/06/09
26	656A	Cape Lambert MinSec Pty Ltd	Affirm ASIC decision	15/06/09
27	657A&D	Drillsearch Energy Limited 01	Decline to conduct proceedings	09/06/09
28	657A, D&E	Drillsearch Energy Limited 02	Decline to conduct proceedings	09/06/09
29	657A, D&E	Emerald Capital Limited	Withdrawn	25/06/09
30	657A, D&E	Rey Resources Limited	Undertaking	07/07/09

APPENDIX 4 — ABBREVIATIONS AND ACRONYMS

ACCC	Australian Consumer and Competition Commission
AICD	Australian Institute of Company Directors
ANAO	Australian National Audit Office
APS	Australian Public Service
ASIC	Australian Securities and Investments Commission
ASX	Australian Securities Exchange
CALDB	Companies Auditors and Liquidators Disciplinary Board
CLERP	Corporate Law Economic Reform Program
EEO	Equal Employment Opportunity
FINSIA	Financial Services Institute of Australasia
MOU	Memorandum of Understanding
OH&S	Occupational Health and Safety
SEB	Senior Executive Band
SES	Senior Executive Service

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