

# **Takeovers Panel**

**Annual Report**

**2009-2010**

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26 August 2010

The Honourable Wayne Swan MP  
Deputy Prime Minister  
Parliament House  
Canberra ACT 2600

Dear Deputy Prime Minister

**ANNUAL REPORT 2009-10**

In accordance with section 183 of the *Australian Securities and Investments Commission Act 2001*, I submit the 2009-10 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 blue ink that reads 'Simon McKeon'.

Simon McKeon  
President



# CONTENTS

<b>INDEX OF COMPLIANCE .....</b>	<b>vii</b>
<b>SECTION 1 — INTRODUCTORY.....</b>	<b>1</b>
Introduction .....	1
Sources of information .....	1
Contact.....	2
Review by the President .....	3
<b>SECTION 2 — THE PANEL.....</b>	<b>7</b>
Introduction .....	7
Role.....	7
Executive.....	9
Office.....	10
Members .....	11
Legislation.....	17
Litigation.....	17
Matters .....	18
Issues covered by decisions.....	18
Guidance.....	19
<b>SECTION 3 — PERFORMANCE REPORTING.....</b>	<b>21</b>
Objective .....	21
Operations.....	21
Organisational structure.....	23
Corporate governance .....	23
Outcome and output information .....	24
Performance information.....	26
Financial information.....	27
<b>SECTION 4 — MANAGEMENT AND ACCOUNTABILITY.....</b>	<b>29</b>
External scrutiny .....	29
Management of human resources .....	30
Consultants and competitive tendering and contracting.....	31
Discretionary grants .....	32
Advertising and market research .....	32
Environmental performance.....	32
Freedom of information.....	33
Regulatory Impact Statements .....	35
<b>INDEX .....</b>	<b>42</b>

**LIST OF TABLES**

Table 1: Resources for outcomes corporate governance and accounting .....	25
Table 2: Agency Resource Statement .....	25
Table 3: Schedule of Revenues and Expenditures (unaudited) for the year ended 30 June 2010 .....	27
Table 4: Operative staff by classification and gender .....	30
Table 5: Sub-committees .....	38
Table 6: Applications received by the Panel in 2009-10 .....	39

**LIST OF CHARTS**

Chart 1: The Panel's organisation structure .....	23
Chart 2: Outcome and output flowchart .....	25

## INDEX OF COMPLIANCE

REQUIREMENT	PAGE
<b>Letter of Transmission</b>	iii
<b>Aids to Access</b>	
Contents	v
Contact	2
Abbreviations and acronyms	41
Alphabetical index	42
<b>Review by the President</b>	3
<b>Performance Reporting</b>	
Corporate governance	23
Performance information	26
Financial information	27
<b>Management and Accountability</b>	
External scrutiny	29
Management of human resources	30
Staffing	30
Workplace diversity	31
Industrial democracy	31
Occupational health and safety	31
Consultants	31
Competitive tendering and contracting	32
Discretionary grants	32
Advertising and market research	32
Environmental performance	32
Freedom of information	33





## 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;
- consultation papers; and
- Procedural Rules.

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

13 March 2010 marked the 10 year anniversary of the Panel's role as the main forum for resolving takeover disputes in Australia. On 3 August 2010 we celebrated this anniversary with a special dinner at the Museum of Sydney. At the dinner, the then Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP, announced that Kathleen Farrell will take over the role of President from 1 September 2010.

Kathy was a valued member of the Panel from 2001 to March 2010, has very considerable experience in mergers and acquisitions and commercial law and is also highly regarded as a result of activities such as chairing the Business Law Section of the Law Council of Australia. I am delighted that the Panel will be in such capable hands.

It is appropriate to consider how far we have come in 10 years. Since the Panel was revitalised in 2000 – we have resolved more than 320 disputes, improved compliance in mergers and acquisitions and dealt with many novel takeover issues quickly and effectively. In doing so, we have freed up considerable court time and substantially reduced the cost to both market participants and the public purse. The Panel's work has also ensured that takeovers regulation in Australia is at the forefront of international best practice.

The revitalisation of the Panel in 2000 completed an evolutionary shift away from black letter law to a principles based regime. The acceptance of such a regime and the Panel's role as a peer review body is significant because back in 2000 acceptance was far from guaranteed. The professional advisory market servicing takeovers is inherently competitive, indeed often combative. It comprises many different individuals and firms, each conscious of where he, she or they lie on various league tables. Given that environment, it is a testimony to the professionalism of our market participants that so many gather to assist the Panel in its operation. Competitiveness and individual egos are put to one side and the focus is on making a fundamentally sound system work as best it can.

It was always likely that this new regime would be susceptible to judicial review and constitutional challenge. There have been 3 major challenges to the Panel since 2000. In 2005, two of the Panel's decisions regarding Austral Coal Limited<sup>1</sup> were

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1 [2005] ATP 16 and 20.

challenged in the Federal Court<sup>2</sup> and resulted in legislative amendments in 2007 to 'give the Panel a wider power to give effect to the spirit of the Act'.<sup>3</sup> In 2008, the High Court in *Alinta* held that the Panel had not exercised judicial power by finding unacceptable circumstances arising out of a contravention of the Act.<sup>4</sup> More recently, the Panel's decision to make a declaration of unacceptable circumstances and orders was challenged by CEMEX in 2008 and again on appeal in 2009.<sup>5</sup> The challenge and the appeal were dismissed.

The High Court in *Alinta* noted the importance of the substantial commercial experience and judgment of Panel members in resolving takeovers disputes promptly. We are now, on average, completing the process from receipt of an application to making a decision and providing reasons in a little over 2 weeks. I am grateful to the many individuals who have served as Panel members or as legal secondees to the Panel executive, and their firms for having made available their best and brightest. I also acknowledge the Federal Government for its consistent (and bipartisan) support and to the Department of Treasury which has been a most supportive parent to the Panel.

The Panel in 2009-2010 had a relatively quiet year, dealing with 25 applications (the average is around 30). However the Panel considered some significant issues regarding association (Mesa Minerals), rights issues (Multiplex Prime Property Fund), target statement disclosure (Tully Sugar) and 'bear hug' announcements (Macarthur Coal and Transurban). The Panel also updated four of its guidance notes, issued a updated version of its procedural rules and released a consultation paper seeking comments on a rewrite of Guidance Note 1 (Unacceptable Circumstances – including a new paragraph relating to reverse takeovers) and a new Guidance Note on Recommendations and Undervalue Statements.

The Panel continues to be very ably supported by Allan, Alan and their small, highly competent, executive team. They have continued their focus on ensuring that the Panel is understood by the market, with Allan and Alan conducting a national 'roadshow' during March 2010 to explain the Panel's objectives and processes and to provide a personal liaison opportunity with the executive. The executive continues to make itself available by phone and in person to participants. It has a standing invitation with applicants and other parties to a 'post matter review' to discuss their perspectives on how the matter was conducted.

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2 [2005] FCA 1290 / [2006] FCA 274.

3 Corporations Amendment (Takeovers) Bill 2007, Explanatory Memorandum, para 3.8.

4 *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2.

5 [2008] FCA 1572 and [2009] FCAFC 78 .

At 30 June 2010, the Panel was made up of 54 members, having continued to recruit members of an extremely high quality. I thank members for their work throughout the year and in particular those whose terms ended in this reporting period.



**The Hon Chris Bowen MP** speaking at the 10 year anniversary dinner.

In closing, I wish the Panel all the very best for its next decade and beyond and express my deep gratitude to everyone who has been associated with it for having made my term as President an exceptional experience and a terrific privilege.



## SECTION 2 — THE PANEL

### Introduction

During a takeover bid, the Panel is the main forum for dealing with issues that arise.<sup>6</sup> Only ASIC and other public bodies can commence court proceedings during the bid period.<sup>7</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 Notes'), and publishes its reasons (available on its website under 'Reasons for Decisions'). The Panel also has a rule making power.<sup>8</sup>

### *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 19 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.

On an application for review by a party, the Panel reviews decisions of the Panel made at first instance (in relation to declarations of unacceptable circumstances).<sup>9</sup>

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

7 Section 659B.

8 Section 658C.

The review is a merits review. A review Panel comprises three different members to the 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.<sup>10</sup> In the current period there were two reviews of ASIC decisions brought to the Panel.

### *Other reviews*

The Panel has an additional review function if a matter is referred from the Court.<sup>11</sup> There were none in the current period.

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9 Section 657EA.

10 Section 655A.

11 Section 657EB.





**Mr Allan Bulman, Director**



**Mr Alan Shaw, Counsel**

## 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).

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 Ms Marissa Bendyk

(Piper Alderman, Adelaide) and Mr Riccardo Troiano (Baker & McKenzie, Melbourne); and

- three administrative staff: Ms Karolina Danger as Office Manager, Ms Rebecca Banhelyi as Executive Assistant and Ms Rebecca Whitehead as Project Officer. During the current period, Ms Whitehead resigned.



**The President and Executive Director of Markets Group with the Executive:** (L to R) Alan Shaw, Nirangjan Nagarajah, Simon McKeon, Riccardo Troiano, Jim Murphy, (L to R), Rebecca Banhelyi, Allan Bulman and Karolina Danger.

## Office

The Panel maintains an office in Melbourne at Level 10, 63 Exhibition Street. The Panel's current lease in Exhibition Street expires in January 2013.

During 2009-10, the Panel provided the use of its office to Treasury when it required facilities in Melbourne.

## Members

### *Appointment of members*

At 30 June 2010 the Panel had 54 members. Members are appointed by the Governor-General on the nomination of the Minister.<sup>12</sup> State Ministers may submit nominations to the Minister.

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, 11 members were re-appointed:

Mr Guy Alexander;  
Mr Tom Bathurst QC;  
Mr Garry Besson;  
Mr Graham Bradley AM;  
Ms Catherine Brenner;  
Mr Geoff Brunsdon;  
Mr Byron Koster;  
Mr Rodd Levy;  
Mr Norman O'Bryan AM SC;  
Mr Robert Sultan; and  
Mr Anthony Sweetman.

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12 Section 172 of the ASIC Act.

In the current period, ten new members were appointed:

Mr Ewen Crouch, Chairman of Partners and Co-Head of M&A, Allens Arthur Robinson – Sydney;  
Mr Peter Day, Company Director – Melbourne;  
Mr James Dickson, Partner, Piper Alderman – Adelaide;  
Ms Sarah Dulhunty, Partner, Blake Dawson – Sydney;  
Mr David Friedlander, Partner, Mallesons Stephen Jaques – Sydney;  
Mr Rod Halstead, Partner, Clayton Utz – Sydney;  
Dr Nora Scheinkestel, Company Director and Associate Professor – Melbourne;  
Ms Jane Sheridan, Partner, Arnold Bloch Leibler – Melbourne;  
Mr Laurie Shervington, Special Counsel, Minter Ellison – Perth; and  
Ms Alison Watkins, Chief Executive Officer, Bennelong Group – Melbourne.

In the current period, eight members completed their terms:

Ms Kathleen Farrell (reappointed a member effective 18 August 2010, appointed President effective 1 September 2010);  
Ms Teresa Handicott;  
Mr Braddon Jolley;  
Ms Alison Lansley;  
Ms Irene Lee;  
Mr Kevin McCann AM;  
Ms Marie McDonald; and  
Mrs Nerolie Withnall (retired).

### *Members' Biographies*

**Simon McKeon (President)** – Executive Chairman, Macquarie Group's Melbourne office (President since 1999), Chairman or Board member of a number of non profit and Government entities including Chairman of CSIRO.

**Martin Alciaturi** – General Manager, Finance & Corporate, Aquila Resources Limited (Member since 2006), a Chartered Accountant and a Senior Fellow of FINSIA, previously Division Director, Macquarie Capital.

**Guy Alexander** – Co-Head of M&A, Allens Arthur Robinson (Member since 2004), member of the Corporations Committee of the Business Law Section of the Law Council of Australia.

**Michael Ashforth** – Executive Director, Macquarie Group (Member since 2002), previously a Managing Director of Gresham Advisory Partners and a partner of Freehill Hollingdale & Page.

**Tom Bathurst QC** – Barrister (Member since 2007), 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), non executive director of AMP Ltd, AMP Life Ltd, Coca Cola Amatil Ltd and Centennial Coal Company Ltd. 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** – General Counsel & Company Secretary, Newcrest Mining Limited (Member since 2005), previously with Rio Tinto, independent chair of the National Employment Services Association.

**Ewen Crouch** – Chairman of Partners at Allens Arthur Robinson (Member since 2010) and a Fellow of AICD.

**Peter Day** – Non Executive Director of Ansell and SAI Global, Chairman of Centro Retail Trust and Orbital Corporation (Member since 2010), previously Chief Financial Officer for Amcor and Deputy Chairman of ASIC.

**James Dickson** – Partner and Head of Corporate Division, Piper Alderman (Member since 2010).

**Hamish Douglass** – Chief Executive Officer, Magellan Financial Group (Member since 2005) and a member of FIRB and the Financial Literacy Board, 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.

**Sarah Dulhunty** – Partner, Blake Dawson (Member since 2010). Member of the Corporations Committee of the Law Council of Australia and AICD.

**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.

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

**David Friedlander** – Partner, Mallesons Stephen Jaques (Member since 2010), member of the ASX Capital Markets Advisory Panel.

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

**Rod Halstead** – Partner and National Chair of Mergers and Acquisitions Group, Clayton Utz (Member since 2010), previously non executive director of Boral Limited and Amcor Limited, a Fellow of 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.

**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), member of the Corporations Committee of the Law Council of Australia.

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

**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), Chairman of Australian Stem Cell Healthcare, Chairman of the Burnet Institute, board member of Fauna & Flora Australia and deputy chair of the Market Policy Group of 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), director of David Jones Limited, company director, Senior Advisor to UBS Investment Bank.

**Alice McCleary** – Independent Company Director (Member since 1999), previously a corporate tax partner at Coopers & Lybrand.

**Vicki McFadden** – Company Director (Member since 2008), previously an investment banker and a Managing Director of Merrill Lynch Australia.

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

**Simon Mordant (Acting President)** – Co Chief Executive, Greenhill Caliburn Pty Limited (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 the Council of HBF Health Ltd.

**Ian Ramsay (Acting President)** – Professor, Faculty of Law, University of Melbourne (Member since 2000), a member of CAMAC and CALDB, the National Law Committee of AICD, the Corporations Committee of the Law Council of Australia and ASIC's External Advisory Panel.

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

**Nora Scheinkestel** – Company Director and Associate Professor (Member since 2010). Non-executive director of AMP Limited, Orica Limited and Pacific Brands Limited.

**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.

**Jane Sheridan** – Partner, Arnold Bloch Leibler (Member since 2010).

**Laurie Shervington** – Special Counsel, Minter Ellison and company director (Member since 2010). Member of CAMAC, the Corporations Committee of the Law Council of Australia and the Securities Institute of Australia.

**Andrew Sisson** – Managing Director, Balanced Equity Management (Member since 2008), member of the board of Save the Children Australia and a trustee of the National Gallery of Victoria.

**Robert Sultan** – Partner, Norton Rose, 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 Corporate Advisory, UBS AG (Member since 2007).

**Alison Watkins** – Chief Executive Officer, Bennelong Group (Member since 2010), non-executive director of Australia and New Zealand Banking Group and Woolworths.



**Simon Withers** – Company Director (Member since 2003), previously a director of London merchant bank Kleinwort Benson and a partner of Anvil Partners (London).

**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 (this year was quieter, with 25 applications). 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 Panel members 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 period.

### **Litigation**

There was no litigation involving the Panel in the current period.

## 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;<sup>13</sup>
- 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; or
- proceedings being withdrawn. The Procedural Rules require the Panel to consent before a proceeding may be withdrawn. Relevant factors include whether the resolution of the matter has also resolved the unacceptable circumstances.

## Issues covered by decisions

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

- Bowen Energy 02 & 02R: The Panel examined in detail the analysis and basis of an independent expert's opinion and report in relation to a takeover offer.
- Multiplex Prime Property Fund 01-04: The Panel considered various issues in relation to a bid for, and a rights issue in, a distressed property fund with a complex structure. The Panel stopped a market bid for the entity that was coercive on the entity's retail security holders. See also Multiplex Prime Property Fund 03 and 03R.
- Tully Sugar Limited: The Panel obtained further disclosure in a target's statement to ensure that shareholders were provided with sufficient

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13 Section 201A of the ASIC Act.

information to assess a proposal where the target board had not commissioned an independent expert to assess value.

- Macarthur Coal Limited: The Panel considered, on a very tight time frame, whether a shareholder meeting to approve a control transaction should be postponed because of the announcement of a rival conditional proposal for a merger by scheme of arrangement.
- A number of applications regarding rights issues: Redflex Holdings Limited, Multiplex Prime Property Fund (above) and Transurban Group 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

On 1 October 2009, the Panel released a consultation draft of the Procedural Rules and sought comments from interested persons. The Panel received five submissions in response. Following this consultation process, the Panel adopted new Procedural Rules, which came into effect on 1 June 2010.

The new Rules set out the procedure and related guidance for applications made to the Panel. The objectives of the new Rules are to promote:

- procedural fairness;
- timely and cost-effective completion of proceedings;
- obtaining the best available information; and
- not unnecessarily delaying commercial transactions.

The new Rules apply to each application and proceeding of the Panel, except to the extent that the Panel directs otherwise. The new Rules have been registered under the *Legislative Instruments Act 2003* (Cth).

## 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 four Guidance Notes following consultation:

- GN 7 Lock-up Devices – Rewritten to provide simpler guidance in relation to different types and combinations of restrictions and safeguards and additional guidance in relation to break fees;
- GN 12 Frustrating Action – Rewritten to clarify parts of the guidance and provide more examples;
- GN 14 Funding Arrangements – Rewritten to reduce the amount of internal cross-referencing and to bring related subjects together. After consultation, more substantive changes to the guidance note were not made; and
- GN 17 Rights Issues – Rewritten to update references and clarify guidance, including that the Panel looks at the effect of the rights issue beyond what is reasonably necessary for fundraising.

### *Consultation Paper*

The Panel also released a consultation paper seeking comments on proposed:

- updated GN 1 Unacceptable Circumstances; and
- draft Guidance Note on Recommendations and Undervalue Statements, to assist the market with guidance following a couple of recent Panel matters involving target board recommendations.

The consultation paper was released on 20 April 2010.

The period for comments closed on 21 May 2010. In all, eight 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 2009-10, the Panel received 25 applications. See Appendix 3.

### *Development*

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

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 19.

## *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.

## *Referrals to ASIC*

There are two bases on which matters might be referred to ASIC. The first, where ASIC is a party to every application, involves recommending that ASIC look into aspects of the application that might give rise to concerns under the Corporations Act generally. During the period the Panel made one such formal referral. The second is where the Panel refers a matter to ASIC for it to consider whether to make an application to the Panel.<sup>14</sup> During the period there were no such referrals.

## *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 available through the Panel's mailing list or RSS feed. If the entity involved is listed, the media release is also published on ASX.

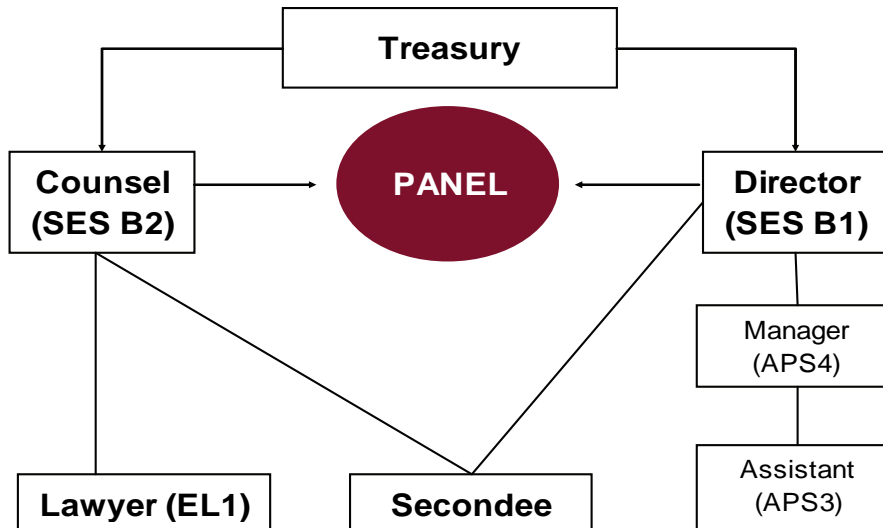
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14 ASIC regulation 18.

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

- Mr Simon Mordant;
- Mr Graham Bradley; and
- Professor Ian Ramsay.

Mrs Nerolie Withnall was also an Acting President, which ended with her resignation as a member.

### *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.

## Outcome and output information

### *Outcome and output structure*

In the current period, the Panel's functions contributed to Treasury's Outcome: *'Informed decisions on the development and implementation of policies to improve the wellbeing of the Australian people, including by achieving strong, sustainable economic growth, through the provision of advice to Government and the efficient administration of federal financial relations'*.

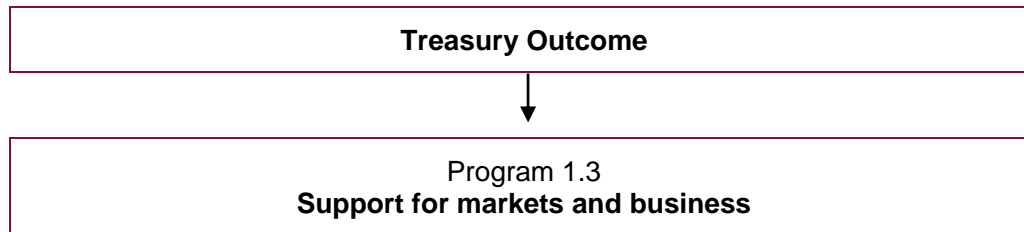
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15 Section 182(1)(a)&(b) of the ASIC Act.



The Panel's outputs contribute to Treasury Program 1.3: 'Support for markets and business'.

**Chart 2: Outcome and output flowchart**



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

	Budget Estimate 2009-10 (\$'000)	Actual 2009-10 (\$'000)	Variation	Budget Estimate 2010-11 (\$'000)
<b>Revenue for agency outputs</b>				
Revenue from Government (appropriations) contributing to price of agency outputs	1,990	1,990	0	1,950
s.31 relevant agency receipts	0	0	0	0
<b>Total revenue for agency outputs</b>	<b>1,990</b>	<b>1,990</b>	<b>0</b>	<b>1,950</b>
<b>Price of agency outputs</b>				
Resourcing for agency outputs	1,990	1,799	191	1,950
<b>Total price of agency outputs</b>	<b>1,990</b>	<b>1,799</b>	<b>191</b>	<b>1,950</b>
			<b>2009-10</b>	<b>2010-11</b>
Average staffing levels (number)			6	6

**Table 2: Agency Resource Statement**

	Actual 2009-10 (\$'000)	Payments 2009-10 (\$'000)	Balance Remaining 2009-10 (\$'000)
<b>Departmental appropriation</b>			
Revenue from Government (appropriations)	1,990	1,799	191
s.31 relevant agency receipts	0	0	0
<b>Total Resourcing and Payments</b>	<b>1,990</b>	<b>1,799</b>	<b>191</b>

## Performance information

### *Treasury outcome*

The Panel contributed to Treasury's outcome 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*

The Panel contributed to 'support for markets and business' 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 2010**

	\$
<b>Revenues</b>	
Revenues from Government (appropriations)	1,990,000
Other	20
<b>Total revenues</b>	<b>1,990,020</b>
<b>Employee expenses</b>	
Salaries	837,778
Employer superannuation	129,607
Members' annual retainer and sitting fees	483,310
<b>Total employee expenses</b>	<b>1,450,695</b>
<b>Operating expenses</b>	
Printing	4,900
Travel	127,223
Official entertainment	25,827
Advertising	3,839
Legal	5,028
Telephone charges	11,011
Rent	115,495
Other expenses	55,113
<b>Total operating expenses</b>	<b>348,436</b>
<b>Total expenses incurred to 30 June 2009</b>	<b>1,799,131</b>
<b>Balance of allocation after operating expenditure</b>	<b>190,889</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 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 2010. 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 \$1,990,000 classified as revenue.

#### **c) Expenses**

Expenses are recognised as they accrue. The Panel's expenses for 2009-2010 are also recorded in Treasury's audited financial statements for the period 1 July 2009 to 30 June 2010.

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

The balance of allocation after operating expenditure for the period 1 July 2009 to 30 June 2010 was a surplus of \$190,889.

#### **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. Purchases for Leasehold Improvements totalling \$15,085 and for Other Office Equipment totalling \$1,362 were made during the year ended 30 June 2010.

#### **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; and
- judicial review.<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

None of the Panel's decisions were subject to judicial review in 2009-2010.

### Government scrutiny

The Panel was not subject to any reports by the ANAO or the Parliamentary Committees in 2009-10.

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 2009-10.

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16 Section 657EA.

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

18 Section 1317B(1).

19 Section 659A.

## Management of human resources

### *Staffing*

At 30 June 2010, the executive consisted of five permanent full time staff 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.

### *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, government procurement, financial management 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 Workplace Agreement 2009-11 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).

### *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, Management of Human Resources).

### *Industrial democracy*

The Panel has adopted Treasury's Workplace 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 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 2009-10.

### *Competitive tendering and contracting*

The Panel follows Treasury's procurement framework to ensure that it undertakes competitive and non-discriminatory tendering and quoting processes which are designed to result in value for money.

All proposed procurements valued at \$10,000 or more were reviewed by Treasury's Procurement and Contracts Team.

During 2009-10 the Panel entered into contracts related to providing conference facilities for the Panel days and one secondment agreement that exceeded \$10,000.

### **Discretionary grants**

During 2009-10, 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 2009-10.

### **Environmental performance**

As a small office, the Panel executive's operations have a relatively small impact on the environment. The Panel seeks to minimise:

- 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*.<sup>20</sup>

### *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 (for consultation) 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.

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<sup>20</sup> Repealed and replaced by the *Australian Securities and Investments Commission Act 2001*.

## *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;
- procedural rules;
- 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, Procedural Rules, 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 and available by search.

### *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  
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 2009-10.

### **Regulatory Impact Statements**

The Panel did not submit any Regulatory Impact Statements in 2009-10.

## APPENDIX 1 — PANEL MEMBERS

### MEMBERS OF THE PANEL AT 30 JUNE 2010:

Mr Simon McKeon (President)	Mr Byron Koster
Mr Martin Alciaturi	Ms Francesca Lee
Mr Guy Alexander	Mr Rodd Levy
Mr Michael Ashforth	Mr Alastair Lucas
Mr Tom Bathurst QC	Mr Andrew Lumsden
Mr David Bennett AC QC	Mr Peter Mason AM
Mr Garry Besson	Ms Alice McCleary
Mr Graham Bradley	Ms Vickki McFadden
Ms Catherine Brenner	Ms Sophie Mitchell
Mr Geoff Brunson	Mr Simon Mordant
Ms Diana Chang	Mr Norman O'Bryan AM SC
Mr Stephen Creese	Mr John O'Sullivan
Mr Ewen Crouch	Mr Mark Paganin
Mr Peter Day	Professor Ian Ramsay
Mr James Dickson	Mr Mike Roche
Mr Hamish Douglass	Dr Nora Scheinkestel
Ms Susan Doyle	Mr Peter Scott
Ms Sarah Dulhunty	Ms Jennifer Seabrook
Ms Paula Dwyer	Ms Jane Sheridan
Mr John Fast	Mr Laurie Shervington
Mr David Friedlander	Mr Andrew Sisson
Mr John M Green	Mr Robert Sultan
Mr Rod Halstead	Mr Anthony Sweetman
Mr Peter Hay	Ms Alison Watkins
Mr Robert Johanson	Mr Simon Withers
Mr David Jones (New Zealand)	Ms Karen Wood
Mr John Keeves	Ms Heather Zampatti

**NEW MEMBERS APPOINTED TO THE PANEL IN 2009-10:**

Mr Ewen Crouch

Mr Peter Day

Mr James Dickson

Ms Sarah Dulhunty

Mr David Friedlander

Mr Rod Halstead

Dr Nora Scheinkestel

Ms Jane Sheridan

Mr Laurie Shervington

Ms Alison Watkins

**MEMBERS WHO CEASED THEIR MEMBERSHIP OF THE PANEL IN 2009-10:**

Ms Kathleen Farrell<sup>21</sup>

Ms Teresa Handicott

Mr Braddon Jolley

Ms Alison Lansley

Ms Irene Lee

Mr Kevin McCann AM

Ms Marie McDonald

Mrs Nerolie Withnall (retired)

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21 Reappointed as a member effective 18 August 2010, appointed President effective 1 September 2010.

## APPENDIX 2 — SUB-COMMITTEE MEMBERS

**Table 5: Sub-committees**

Topic	Sub-committee members	
	Panel member	External member
Procedural Rules	Diana Chang John Fast Andrew Lumsden Peter Scott Robert Sultan	David Friedlander (now a Panel member)
Guidance Notes 7,12,14 & 17	Guy Alexander John Fast Byron Koster Andrew Lumsden Marie McDonald Jennifer Seabrook Peter Scott	
Reverse Takeovers	Michael Ashforth Garry Besson Paula Dwyer Rodd Levy Alastair Lucas Andrew Lumsden Simon Mordant	Bruce Dyer

## APPENDIX 3 — PANEL APPLICATIONS

**Table 6: Applications received by the Panel in 2009-10**

Matter No.	Section	Matter name	Decision	Application Date	Decision date
1	2009/17	657A,D&E Blue Energy Limited	Decline to commence proceedings	06/08/2009	14/08/2009
2	2009/18	657A,D&E Bowen Energy Limited 02	Commenced proceedings, no declaration	18/08/2009	01/09/2009
3	2009/19	657EA Bowen Energy Limited 02R	Declaration and Orders	03/09/2009	30/09/2009
4	2009/20	657A,D&E Multiplex Prime Property Limited	Declaration and Orders	06/09/2009	23/09/2009
5	2009/21	657A&D Multiplex Prime Property Limited 02	Declaration and Orders	10/09/2009	23/09/2009
6	2009/22	657A,D&E Redflex Holdings Limited	Decline to commence proceedings	11/09/2009	23/09/2009
7	2009/23	657A,D&E NewSat Ltd	Decline to commence proceedings	18/09/2009	02/10/2009
8	2009/24	657A&D Multiplex Prime Property Fund 03	Refuse application due to undertakings	09/10/2009	27/10/2009
9	2009/25	657A,D&E Multiplex Prime Property Fund 04	Decline to commence proceedings	15/10/2009	21/10/2009
10	2009/26	657EA Multiplex Prime Property Fund 03R	Affirm Panel decision	29/10/2009	04/11/2009
11	2009/27	656A Confidential Matter <sup>22</sup>	Decline to commence proceedings	12/11/2009	13/11/2009
12	2009/28	656A Lion-Asia Resources Pte Ltd	Affirm ASIC decision	23/11/2009	03/12/2009
13	2009/29	657A&D Tully Sugar Limited	Commenced proceedings, no declaration	25/11/2009	22/12/2009
14	2009/30	657A,D&E Vesture Limited	Withdrawn	08/12/2009	16/12/2009
15	2009/31	657EA Tully Sugar limited 01R	Affirm Panel decision	23/12/2009	07/01/2010
16	2010/01	657A,D&E Powerlan Limited	Undertaking	19/01/2010	29/01/2010
17	2010/02	657A&D Midwinter Resources NL	Withdrawn	05/02/2010	08/02/2010
18	2010/03	657A,D&E Macarthur Coal Limited	Decline to commence proceedings	07/04/2010	09/04/2010
19	2010/04	657A,D&E Macarthur Coal Limited 02	Withdrawn	09/04/2010	09/04/2010

22 Review of an ASIC decision, which refused relief from s638(5). The issue concerned confidential information in a target's statement about the bidder that had been included without consent of the bidder. No media release or reasons were published because of the confidential nature of the information involved.

**Table 6: Applications received by the Panel in 2009-10 (continued)**

<b>Matter No.</b>	<b>Section</b>	<b>Matter name</b>	<b>Decision</b>	<b>Decision date</b>
20	657A,D&E	Mesa Minerals Limited	Declaration and Orders	13/04/2010
21	657EA	Mesa Minerals Limited 01R	Declaration and Orders	24/05/2010
22	657A,D&E	Transurban Group	Decline to commence proceedings	24/05/2010
23	657A,D&E	Wallace Absolute Return limited	Withdrawn	07/06/2010
24	657A,D&E	North Queensland Metals Limited	Withdrawn	23/06/2010
25	657A,D&E	Coote Industrial Limited	Withdrawn	25/06/2010



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

ACCC	Australian Competition and Consumer 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
CAMAC	Corporations and Markets Advisory Committee
CLERP	Corporate Law Economic Reform Program
EEO	Equal Employment Opportunity
EL	Executive Level
FINSIA	Financial Services Institute of Australasia
FIRB	Foreign Investment Review Board
MOU	Memorandum of Understanding
OH&S	Occupational Health and Safety
SEB	Senior Executive Band
SES	Senior Executive Service

## INDEX

---

### A

Applications · 7, 21, 39  
Australian Securities and Investments  
Commission Act 2001 (Cth) · 1, 17

---

### C

Consultants and competitive tendering and  
contracting · 31  
Corporate governance · 23  
Corporations Act 2001 (Cth) · 1, 17  
Courts · 29

---

### D

Discretionary grants · 32

---

### E

Enquiries · 2  
Environmental performance · 32  
Executive · 9, 30

---

### F

Financial information · 27  
Freedom of information · 33

---

### G

Guidance · 7, 17, 19, 20

---

### I

Industrial democracy · 31

---

### L

Legislation · 1, 17  
Litigation · 17

---

### M

Management and accountability · 29  
Management of human resources · 30  
Matters · 18

---

### O

OH&S · 31  
Organisational structure · 23  
Outcome and output information · 24

---

### P

Panel members · 11, 36  
Performance information · 26  
President · 23  
**Price of agency outputs** · 25

---

### R

Review of a Panel decision · 7  
Review of ASIC decisions · 8

---

### S

Secondments · 30  
Section 602 · 7  
Section 656A · 7  
Section 657A · 7  
Section 657D · 7  
Section 673 · 7

Staff development · 30  
Staffing · 30  
Sub-committee members · 38

---

*T*

Treasury · 23, 24, 26, 27, 31, 33

---

*W*

Website · 22  
Workplace diversity · 31

