

2004-2005-2006-2007

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CORPORATIONS AMENDMENT (TAKEOVERS) BILL 2007

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Parliamentary Secretary to the Treasurer,
The Hon Chris Pearce, MP)

Table of Contents

OUTLINE	1
FINANCIAL IMPACT STATEMENT	2
ABBREVIATIONS	3
NOTES ON INDIVIDUAL CLAUSES	4

1

Outline

1.1 This Bill implements legislative amendments to the provisions of the *Corporations Act 2001* (the Act) that relate to the Takeovers Panel (the Panel). It is designed to allow the Panel to continue to act in an effective, efficient and expeditious manner, as the primary forum for resolving disputes during takeover bid periods, relying on the specialist expertise of its members, so that the outcome of any takeover bid can be resolved by the target shareholders on the basis of its commercial merits.

1.2 The fundamental objective underlying the takeovers law is to ensure that the purposes set out in section 602 of the Act are achieved, and in particular that the acquisition of control over the voting shares or voting interests in companies ('companies' here includes listed bodies and listed managed investment schemes) takes place in an efficient, competitive and informed market.

1.3 The Panel requires broad and flexible powers to perform the role envisaged for it, which includes being 'the main forum for resolving disputes about a takeover bid until the bid period has ended' in accordance with those principles.

1.4 Two decisions relating to the Panel, *Glencore International AG v Takeovers Panel* [2005] FCA 1290 and *Glencore International AG v Takeovers Panel* [2006] FCA 274 (the Glencore cases), have interpreted the limits of the jurisdiction of the Panel, as set out in the current legislation. As a result of those cases, concerns were raised that it may be open to read the Panel's powers and jurisdiction in the current legislation in a way that is too narrowly formulated to enable the Panel to perform effectively the role envisaged for it by Parliament.

1.5 In particular there were concerns that:

- the interpretation of the term 'substantial interest' in the decisions, based on existing defined provisions, may prevent the Panel from being able to

deal with new and developing interests and tactics in relation to takeovers;

- the Panel may not be able to act to prevent the effects of unacceptable circumstances (even if clearly apprehended), but rather, may need to wait until those effects, and the consequent harm, have actually occurred;
- the Panel may not be able to address all the circumstances which impair or affect the efficient, competitive and informed market for control of voting securities in companies; and
- under the interpretation set out in the Glencore cases, the Panel's power to make orders to protect the rights or interests of persons affected by unacceptable circumstances may be too confined, with the result that the Panel may not be able to properly address the effects that the circumstances have on the interests of those persons.

1.6 The Corporations Amendment (Takeovers) Bill 2007 responds to those concerns and also addresses concerns about the limits of the orders the Panel can make and the time-limit for concluding a review of a Panel decision.

Financial impact statement

1.7 This Bill should not have a financial impact for the Commonwealth because it will not involve any Government expenditure. The Bill should not impose any additional compliance costs, paperwork burden or tasks on anyone.

2

Abbreviations

2.1 The following abbreviations are used in this explanatory memorandum.

Act	<i>Corporations Act 2001</i>
Glencore cases	<i>Glencore International AG v Takeovers Panel</i> [2005] FCA 1290 and <i>Glencore International AG v Takeovers Panel</i> [2006] FCA 274
Panel	Takeovers Panel

3

Notes on individual clauses

Part 1 — Preliminary

Clause 1 — Short title

3.1 Upon enactment, the Bill will be known as the *Corporations Amendment (Takeovers) Act 2007*.

Clause 2 — Commencement

3.2 Clauses 1 to 3 of the Bill will commence on the day on which the Bill receives Royal Assent. The amendments to the takeovers provisions listed in Schedule 1 of the Bill will commence on the 28th day after that Royal Assent.

Clause 3 — Schedule

3.3 The Act is amended as set out in the applicable items in Schedule 1.

Schedule 1 — Amendments of the takeovers provisions in the *Corporations Act 2001*

Item 1 — Definition

3.4 An inclusive definition of ‘substantial interest’ is inserted as section 602A of the Act. The definition does not define all the interests that will be considered ‘substantial interests’ but provides that a ‘substantial interest’ is not confined to the three specified forms of interest. These are a ‘relevant interest’ as defined; legal or equitable interests in securities; and powers or rights in

relation to a company, body or scheme or securities in it. The definition is intended to ensure that the term ‘substantial interest’ is broad enough to encompass new and evolving instruments and developments in takeovers and to deter avoidance of the purposes of the takeovers law.

3.5 It is not intended that every involvement with a company, listed body or listed managed investment scheme will be a substantial interest. By way of example, people will not have a substantial interest in a company merely because they are employees of the company, or supply goods or services to the company, or are someone to whom the company supplies goods or services.

3.6 The definition also provides for regulations to specify that particular interests may constitute or do not in themselves constitute substantial interests. This provision should allow any future uncertainty about the application of the term to particular situations to be addressed.

Item 2 — Effect of circumstances

3.7 Paragraph 657A(2)(a) of the Act currently provides that the Panel may declare circumstances to be unacceptable if it appears to the Panel that they are unacceptable having regard to their effect on the matters specified in sub-paragraphs (i) and (ii). The amendment allows the Panel to make a declaration having regard to what the Panel is satisfied is the past, present, future or likely effect of the circumstances. This makes it clear that it is for the Panel to satisfy itself as to what the effect or likely effect is, and that the Panel can make a declaration before any effect has actually occurred.

Item 3 — Jurisdiction to make declaration

3.8 A new paragraph 657A(2)(b) is inserted in the Act to give the Panel jurisdiction to declare circumstances unacceptable having regard to the purposes of Chapter 6 of the Act set out in section 602. This is a significant change, designed to ensure the Panel can address circumstances which impair those purposes, without having to also establish either a contravention of the Act or an effect on control or potential control of a company or on the acquisition or proposed acquisition of a substantial interest in a company. The intention is to give the Panel a wider power to give effect to the spirit of the Act. The purpose of the words in brackets in the new paragraph is to ensure that the Panel can make a declaration of unacceptable circumstances in relation to the affairs of one company, being the company referred to in subsection 657A(1), where the effect of the unacceptable circumstances relates to or is primarily manifest on another company or the securities of either company.

3.9 Paragraph 657A(2)(c) is a replacement for the current paragraph 657A(2)(b), expanded so it covers past, present, future and likely

contraventions, for consistency with the amended paragraph 657A(2)(a) and the new paragraph 657A(2)(b). Each of paragraphs 657A(2)(a), (b) and (c) are worded to cover past, present, future and likely effects and contraventions.

Item 4 — People to be given opportunity to make submissions

3.10 Paragraph 657D(1)(a) of the Act currently requires the Panel, before making an order, to give an opportunity to make submissions to each person to whom the proposed order relates. If this is interpreted to include more than just persons on whom the order imposes obligations, there could be tens of thousands of such people in some cases, including each current and potential shareholder in the relevant companies. The amendment means that the opportunity required by paragraph 657D(1)(a) need only be given to each person to whom the order is directed. Paragraphs 657D(1)(b) and (c) will continue to require the Panel to provide each party to the proceedings and ASIC an opportunity to make submissions about the orders which it proposes to make.

Item 5 — Protecting the people affected

3.11 Paragraph 657D(2)(a) of the Act currently allows the Panel to make orders it thinks appropriate to protect the rights or interests of any person affected by the circumstances. The amendment means that this is not confined to rights and interests directly affected by the circumstances. The amendment ensures that the Panel can make any order it thinks appropriate to protect any rights or interests of a person or group of persons, where the Panel is satisfied that their rights or interests have been, are being, will be or are likely to be affected by the unacceptable circumstances. This will allow the Panel to protect the interests of those persons more effectively. The amendment will also ensure that the Panel may make orders which protect the interests of a group of persons whose interests have been affected, rather than requiring it to address the effects person by person.

Item 6 — When Panel may make declaration on a review

3.12 Section 657EA is amended so that the time limit for the Panel to make a declaration on a review runs from the time the application for review is filed, not from the time when the original application is filed. Currently the legislation does not specifically address the time limit for review proceedings, and the time limit in section 657B could already have expired before the application for review is even made.

Item 7 — Transitional provisions

3.13 A transitional part is inserted in the Act. The amendments will apply in relation to applications made on or after the date the Schedule commences, and to those not finally disposed of before then.