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The Resolution of Australian Takeovers Disputes

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SUMMARY

The reconstituted Australian Takeovers Panel has now been in operation for almost 18 months. It has received broad support from the corporate and professional community in relation to its processes, its decisions and its policy formulation.

This paper begins by explaining the Panel's functions and constitution. It explains who comprises its members, the importance of the concept "unacceptable circumstances" and the very broad range of remedies open to the Panel.

In considering the Panel as a forum, the paper emphasises that proceedings are required to be conducted on a fair and reasonable basis, with little formality and in a timely manner. Once an application is made, the Panel itself drives the proceedings as opposed to the applicant. There is an emphasis on written documents although the Panel has used conferences from time to time to elicit further evidence. Proceedings are conducted privately and submissions and evidence are received in confidence.

Most importantly, the Panel sees its function as remedial, not punitive. Accordingly, the focus is more on rectifying circumstances that have been found to be unacceptable rather than necessarily making an example of the party responsible, although there are circumstances where this is considered appropriate.

The paper concludes by discussing a number of issues which are of particular interest to resource companies in the context of takeover disputes. These include the position of the Australasian Code for Reporting of Mineral Resources and Ore Reserves (the JORC) Code in relation to disclosure, revenue and production forecasts, disclosure of change of control clauses in joint ventures and poison pills.

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INTRODUCTION

The resolution of takeover disputes in Australia entered a new era on 13 March 2000. The Corporations and Securities Panel (which has also become known as the Australian Takeovers Panel) was reconstituted such that it became the main forum for resolving such disputes during the bid period.

The initiative was greeted with a mixture of optimism and scepticism. There were those who believed that there had to be a better method of resolving disputes than by exclusive reference to the courts. The need for timely (and often very rapid) determination in circumstances involving numerous complex commercial and technical issues presented a challenge to our conventional court regime. Indeed, an environment had developed where tactical litigation became the accepted norm, and for example, it became commonplace for targets to "buy time" (or at least more time than envisaged by the *Corporations Law*) especially where the bid involved an element of scrip.

But there were also the sceptics. Some were driven by noble motives. They expressed genuine concern about the constitutional underpinning of the new Panel as well as the ability of part time business and professional persons to fulfil adequately the heavy onus placed upon them. There were also those, however, who had no difficulty in principle with tactical litigation, notwithstanding that it frequently resulted in the undoing of the legislature's intention.

As we look back over the last 18 months, we are able to conclude that "The Panel has worked", or at least "The Panel has worked thus far." In large part, this is due to a small executive team, comprising both full time and seconded personnel, which has worked tirelessly to ensure that the Panel has done everything required of it from what was, in effect, a standing start. Evidence of the Panel's effectiveness includes:

- Around 40 matters have been resolved in a timely and practical manner without significant fuss.
- The decisions have been, on the whole, well received.
- The cost of resolving disputes to applicants, their shareholders and the taxpayer generally has been modest.
- Anecdotal evidence suggests that certain disputes have been resolved between the parties without an application being made which in the previous era would have been likely to have been the subject of court proceedings.

- The Panel is now producing policies designed to assist the market place in relation to areas requiring some guidance such as lock-up devices (which include break fees). Again, its initial foray into the policy arena has been generally well received.

The Panel remains very much in development mode. Indeed, both Panel members and the executive team feel, at times, like pioneers or perhaps students who have embarked only a small way along a steep learning curve. In this regard, the Panel regards it as critical to obtain feedback as to how it is performing. In particular, the Panel has a practice of conducting "post mortems" with the parties to a dispute once the decision has been made, the reasons published and the dust has settled. This feedback has been invaluable and has had a direct impact on the Panel's continuing operation.

This paper deals with the Panel's functions and constitution, how it functions as a forum and concludes with some comments on issues which are pertinent in relation to takeovers in the resources sector.

THE PANEL'S FUNCTIONS AND CONSTITUTION

The Panel's principal function[1] is to give or refuse declarations and orders[2] in relation to takeover bids, takeover documents and control transactions other than bids. During a bid, this function is largely exclusive of that of the court. In other situations, the Panel's jurisdiction is concurrent with that of the court.[3] As at August 2001, the Panel has received and dealt with 31 applications of this nature. It has also considered a further four applications for internal review of decisions on these applications.[4]

The Panel also has a function of reviewing the Australian Securities and Investments Commission (ASIC) decisions whether to modify or exempt from Ch 6 under s 655A.[5] It can uphold, quash or vary a decision or remit the matter with directions as to the policy to be applied.[6] This function was previously carried out by the Administrative Appeals Tribunal. The Panel has dealt with four

[1] This paper concerns the Panel's powers and functions, as revised by the *Corporate Law Economic Reform Program Act* 1999. Statutory references are generally to the *Corporations Act* 2001.

[2] In most respects equivalent to court injunctions.

[3] Schemes of arrangement, however, are dealt with entirely by the courts.

[4] A power to conduct an internal review is conferred by s 657EA. Like review of ASIC decisions mentioned below, this is a merits review.

[5] And decisions under s 673 whether to grant exemptions from and modifications of Ch 6C, but only in relation to bids.

[6] Section 656A. Because the Panel can substitute its own decision on the merits, it is implicit that this is a review on the merits, ie de novo review, and that the review Panel's obligation is to decide what is the preferable decision on the facts as it finds them.

applications of this nature. One was upheld: the other three were refused.

There is a further function, of making procedural rules to govern Panel proceedings[7] and substantive rules to supplement and clarify Ch 6.[8] A set of draft procedural rules are on the Panel's website. They have worked reasonably well, although some refinements have been drafted which will be incorporated into the final rules which will be adopted shortly. No substantive rules have yet been made, with the Panel's focus having been on resolving disputes, and producing both reasons and policy statements so as to provide guidance to the market.

Membership

The Panel has 43 members, all of them part-time.[9] The members all have day jobs. They comprise:

Two judges; one barrister; one legal academic; one corporate finance academic; one Australian Stock Exchange (ASX) officer; 11 investment bankers; 13 solicitors, five accountants; eight company directors and secretaries (who all have either legal or accounting backgrounds).

Three of those members make up a sitting Panel.[10] They are chosen with a view to assembling a team with a suitable combination of skills and who are free of conflicts. The most usual cause of conflict is that a member is associated with a firm, or is an officer of a company, which has a business relationship with a party to the matter.[11]

The Panel is supported by a small executive, who co-ordinates proceedings, provides advice and support to the Panel and liaises with the parties on behalf of the Panel. The Panel executive produces drafts of all documents issued by the Panel in connection with a

[7] Section 195 of the *Australian Securities and Investments Commission Act* 2001 (ASIC Act).

[8] Section 658C. Rules under s 658C must be consistent with the *Corporations Act* and the regulations, and may supplement or clarify Ch 6. The rules override ASIC relief under s 655A, if they are inconsistent. Neither the Panel nor ASIC has any power to exempt from a rule.

[9] The legislation makes no provision for a separate class of senior members, like the presidential members of the AAT.

[10] Section 184 of the ASIC Act.

[11] Section 185(1) of the ASIC Act provides that where a Panel has been constituted, a member of that Panel must disclose "*any interest, pecuniary or otherwise*" that could conflict with the proper performance of the member's functions. Under s 185(1), the member must disclose the interest to the substantive President and the parties involved in the matter and thereafter must not take any further part in the matter, except with the consent of the President. Under s 185(1A), the President may only give that consent if the President believes on reasonable grounds that the member's interest is immaterial or indirect and will not prevent the member from acting impartially in relation to the matter. In practice, we apply the same rules to all conflicts, whether they arise from interests or from other causes such as professional connections.

matter including press releases, the brief and the reasons for decision, all of which are settled by the members of the sitting Panel. The executive are not delegates of the Panel: they cannot perform any of its discretionary or adjudicative roles. Obviously staff can carry out administrative functions at the Panel's or the President's direction, and in their names.

Unacceptable Circumstances

The only basis for making a declaration or order is that *unacceptable circumstances exist* in relation to the affairs of a company.[12] Whether circumstances are unacceptable depends on whether the principles set out in s 602[13] are satisfied: these are an enlarged version of the Eggleston principles,[14] which were originally set out in an expert report on which Australia's first takeovers legislation was based.[15]

Unacceptable circumstances are not defined. The Panel is directed to consider whether circumstances are unacceptable and whether to make a declaration to that effect, having regard to:

(a) a substratum of facts:

  (i) the effect of the circumstances on control or potential control of a company;

  (ii) their effect on an acquisition or proposed acquisition of a substantial interest in a company; or

[12] A listed company, a listed non-company with a share capital or a listed managed investment scheme, or an unlisted company with 50 or more members.

[13] The purposes of this Chapter are to ensure that:

(a) the acquisition of control over:
  (i) the voting shares in a listed company, or an unlisted company with more than 50 members; or
  (ii) the voting shares in a listed body; or
  (iii) the voting interests in a listed managed investment scheme;
  takes place in an efficient, competitive and informed market; and

(b) the holders of the shares or interests, and the directors of the company or body or the responsible entity for the scheme:
  (i) know the identity of any person who proposes to acquire a substantial interest in the company, body or scheme; and
  (ii) have a reasonable time to consider the proposal; and
  (iii) are given enough information to enable them to assess the merits of the proposal; and

(c) as far as practicable, the holders of the relevant class of voting shares or interests all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the company, body or scheme; and

(d) an appropriate procedure is followed as a preliminary to compulsory acquisition of voting shares or interests or any other kind of securities under Pt 6A.1.

[14] Section 657A.

[15] Company Law Advisory Committee to the Standing Committee of Attorneys-General, *Second Interim Report on Disclosure of Substantial Shareholdings and Takeover Offers*, 1969, para 16.

(iii) whether they constitute or give rise to a contravention of Chs 6, 6A, 6B or 6C; and

(b) various sources of policy:
   (i) the purposes of Ch 6 set out in s 602 (the enlarged Eggleston principles);
   (ii) the provisions of Ch 6 (but not of Chs 6A, 6B and 6C);
   (iii) any relevant Panel rules under s 658C (there are none at present); and
   (iv) any matters declared to be relevant by the regulations (again, at present there are none); and

(c) any other matters the Panel considers relevant; and

(d) whether making a declaration (or not making one) would be against the public interest, after taking into account any policy considerations the Panel considers relevant.

The simplest formulation is probably that unacceptable circumstances are the mischief the takeovers code was designed to overcome.

The old function of declaring certain *conduct* and *acquisitions* to be unacceptable has been replaced by this new function. A Panel can declare that unacceptable circumstances exist without finding that anyone is at fault, or has attempted to avoid compliance with Ch 6. That means that the previous specialised anti-avoidance function has been replaced by a general dispute-resolution function.

Most applications to the Panel are made by one party concerned with a takeover bid and concern disclosures or conduct by another party to the bid. To date, they have all concerned takeover bids, or transactions connected with takeover bids. In each case, the applicant has been the target, the bidder or a rival bidder. The Panel has received only one application, and relatively few submissions, from other target shareholders.

Remedies

If it has declared that unacceptable circumstances exist, the Panel may make orders under s 657D. This power is very wide in content (it includes any of the remedial orders as defined in s 9), and is limited by the purpose of the orders, which must be:

(a) to protect the rights or interest of any person affected by the unacceptable circumstances; or

(b) to ensure that a bid proceeds as far as possible in a way that it would have proceeded, had the circumstances not occurred.

The Panel may also make interim, ancillary and costs orders.

The power to make costs orders is limited, because it can only be exercised where a declaration has been made. This means that no costs order can be made where no declaration is made, whether that is because the Panel largely agreed with the applicant, but accepted an undertaking, or because the application was rejected as unmeritorious.

The power to make interim orders is very important in dealing with ongoing situations, where a situation may need to be dealt with before there is sufficient evidence to base a final decision. They may be made by the sitting Panel, without any declaration or application having been made, but they may not operate for more than two months.[16] There are no specific grounds or pre-requisites for an interim order. Comparing s 657E with s 657D, it is implicit that interim orders may be used to prevent unacceptable circumstances from arising or to prevent harm resulting from actual, suspected or impending unacceptable circumstances. They have been used to hold up:

- dispatch of a bidder's statement, while its adequacy was considered,[17]
- processing acceptances while a bidder showed that it had funds to pay,[18] and
- payment of consideration for some shareholders while the bidder applied to the court for orders against those shareholders.[19]

Under s 201A of the *Australian Securities and Investments Commission Act* 2001 (ASIC Act), the Panel may accept an undertaking from a person affected by Panel proceedings. The undertaking can be about anything relevant to the proceedings, and the court can order the person to comply with it. The Panel has used this power to deal with situations where it might otherwise have made declarations of unacceptable circumstances and orders. This has been done in several matters, concerning the contents of bidders' statements and a change in the consideration for a bid.

The Panel is subject to stringent time limits. An application for a declaration must be made within two months after the unacceptable circumstances have occurred.[20] The Panel can extend this period, but must make a declaration within three months after the circumstances

[16] Section 657E4, which also provides that the President may make interim orders: in our view, this refers to the substantive President until a Panel has been appointed, and then to the sitting President.
[17] *Email Ltd (No 2)* (2000) 18 ACLC 708.
[18] *Pinnacle VRB Ltd (No 4)* (2001) 19 ACLC 1,142 and *Pinnacle VRB Ltd (No 6)* (2001) 19 ACLC 1,249.
[19] *Australian Liquor Group Ltd* (unreported, 14 August 2001).
[20] Section 657C(3).

occurred, or one month after the application was made.[21] Only the court can extend this limit.

The resources available to the Panel and the parties are different from those available in court proceedings. While a Panel member can issue a summons to give oral testimony or produce documents and the Panel can examine witnesses under oath,[22] the Panel has no power to order discovery. The Panel cannot enforce its own orders or punish for contempt. In Panel proceedings, the law of evidence does not apply and there are no pleadings.

Generally, a private party cannot bring court proceedings for civil relief in relation to a bid (including judicial review of ASIC or the Panel)[23] until the end of the bid.[24] This was done to prevent tactical litigation. A public authority (and specifically ASIC) has standing to apply to a court for civil relief during a bid. Private parties can bring civil proceedings in relation to a bid after the bid closes. If the Panel has declined to make a declaration in relation to the bid, the only civil remedies available under the *Corporations Act* are money orders.[25]

Representation

Parties may be accompanied and advised at a Panel conference by anyone. They may be represented by their commercial solicitors and financial advisers who have been involved in the transaction. In fact, r 11 of the Panel Rules specifies that oral and written submissions to the Panel can only be made by persons who have taken direct part in the relevant transactions.

A party may not be represented in Panel proceedings by a lawyer or other advocate without the leave of the Panel. Leave will typically be given only for specific purposes or where special skills are required, such as arguing a point of law or examining a witness. While draft r 11 expressly includes the solicitors advising the parties it would not include barristers unless they have been advising the parties throughout the transaction and have taken direct part in the relevant transactions.

[21] Section 657B.
[22] Section 199 of the ASIC Act.
[23] This is one reason why the Panel has an internal review function.
[24] Section 659B.
[25] Section 659C.

Applications

An application needs to deal with the circumstances to which it relates and any proposed declarations and orders in sufficient detail to make it clear that:

(a) the Panel has jurisdiction to conduct the proceedings and make the declarations and orders,
(b) there is a prospect of the Panel being satisfied on credible evidence of the existence of the facts alleged,
(c) those facts are sensibly related to control of a company, an acquisition of a substantial interest in a company or a contravention of Chs 6, 6A, 6B or 6C, and
(d) they are unacceptable within the meaning of s 657A, that is, in the light of policy considerations mentioned in that section or otherwise relevant to the policy of Ch 6.

In our experience, the most effective applications bring these elements together, that is, argue that relevant facts exist, that they constitute circumstances falling within one of the paragraphs of s 602 and that they relate to control of a company, or to the acquisition of a substantial interest in a company.

It is not sufficient to set out pleadings, on the basis that the evidence can be given at the hearing. The decision whether to proceed may be taken on the application alone and there may be no hearing, even if the Panel decides to conduct proceedings.

Submissions need to deal with factual and policy issues. In our experience thus far, legal issues tend to receive too much attention. Under s 657A(2)(b), unacceptable circumstances may result from a contravention of Chs 6, 6A, 6B or 6C. There are two elements here: the contravention and the unacceptable circumstances. It does not follow automatically from a finding that a section has been contravened that unacceptable circumstances resulted.

The most effective way to support an application is to argue that relevant facts exist, constitute circumstances falling within one of the paragraphs of s 602 (or otherwise relevant to the policy of Chs 6, 6A, 6B or 6C) and relate to control of a company, or to the acquisition of a substantial interest in a company or a contravention of Chs 6, 6A, 6B or 6C. To rebut an application, a party needs to argue that one of those elements is missing, or that the Panel does not have jurisdiction.

Again, if a party has evidence for its contentions, it is best to mention it in submissions, not to "save it for the hearing".

THE PANEL AS A FORUM

After nearly a year and a half, it is possible to make a few generalisations about the Panel as a forum. In general, its character reflects the specific purpose for which it was set up.

Expeditious Proceedings

Panel proceedings are quick and informal. Regulation 13 requires the Panel to ensure that any proceedings it conducts are:

> "(a) as fair and reasonable; and
> (b) conducted with as little formality; and
> (c) conducted in as timely a manner;
> as the requirements of … [the legislation pertaining to the Panel] and a proper consideration of the matters before the Panel, permit…"

Wherever practicable, and certainly at the outset, proceedings are based on written submissions. Several decisions have been made in less than a week from receipt of the application. In 39 applications, only six conferences have been held.

In general, parties are given two business days to respond to a brief which concerns an initial application for a declaration or order, and one day to respond to a submission other than an initial application. Less time may be allowed to respond to an application for an interim order, if it is urgent. The Panel may allow more or less time, however, depending upon how much time parties reasonably need to deal with the legal, factual and commercial issues involved, the time at the Panel's disposal, difficulties in obtaining the necessary information and other relevant matters.

Panel Drives Proceedings

If the Panel decides to conduct proceedings on an application,[26] it issues a document called a brief, which it is required to issue to all interested parties and ASIC.[27] In the brief, the Panel sets out the issues as it sees them at that stage, and calls for responses on the facts, the evidence, and the proposed remedies. The brief defines the issues and the process. In litigation, the pleadings would define the issues.

[26] The first decision a Panel has to make is whether to conduct proceedings on an application ie that it is not frivolous or vexatious, the relief sought is within power, the relevant matter is not being dealt with by a court and the application discloses some ground for intervention: ASIC, reg 20.

[27] ASIC, reg 21.

If the issues change as the matter develops, a supplementary brief may be needed.

One result of the Panel taking charge of the form of the proceedings is that they usually have more the character of a natural justice hearing than of either an inquiry or a court case.[28] In particular, it is exceptional for a witness to be sworn and examined, so a party usually cannot rely on being able to cross-examine the other side's witnesses. Another effect is that most of the information the Panel requires is provided voluntarily by parties, in their applications or defences.[29]

Applications and Submissions

Proceedings in the Panel are to a very large extent conducted on the papers: written applications, submissions and responses are the rule, and oral submissions are the exception. Even when a Panel takes oral submissions, this is as often done by telephone as face to face.[30] This is dictated by the fact that parties and members of a sitting Panel are usually based in different cities: we have never yet had all of the parties and all of the members based in the same city.[31]

A Panel proceeding does not consist of a hearing, and the Panel is not obliged to conduct a hearing in relation to a matter. The Panel may conduct a conference to clarify matters arising from documents, to resolve inconsistencies and otherwise to inform itself.[32]

Sub-regulation 16(2) provides that the rules of evidence do not apply to Panel proceedings. The rules of procedural fairness do apply to the extent that they are not inconsistent with the legislation applicable to the Panel.[33]

Proceedings in Private

Connected with this is the fact that proceedings are conducted privately. Submissions and evidence are received in confidence, by the Panel and the parties. The Panel has broad powers to control the dissemination of information amongst parties to a Panel proceeding.[34] It is required to take all reasonable measures to

[28] Section 195 of the ASIC Act requires the Panel to give natural justice before exercising any of its powers to make declarations and orders, and is backed up by ss 657A(4) and 657D(1).
[29] Under s 192 of the ASIC Act, the Panel can summons a person to give oral testimony or to produce documents, and has done so on several occasions.
[30] We have also used video-conferencing, with mixed success.
[31] Although we did once have an all-Sydney Panel to consider an all-Melbourne matter.
[32] ASIC, reg 35.
[33] Section 195 of the ASIC Act.
[34] Section 190 of the ASIC Act.

preserve the confidentiality of information it obtains in the course of performing its functions.[35]

For natural justice reasons, in general all parties have access to all submissions and other papers submitted to the Panel and may be present throughout any conference. Because of its confidentiality obligations, and to support maximum candour in disclosures and submissions, the Panel requires parties to undertake to respect the confidentiality of information disclosed in Panel proceedings.[36]

The Panel may restrict or prevent access to submissions or evidence given to it by, for example, not allowing some parties to view certain documents or submissions, or only allowing their advisers to do so. This type of information is generally information provided by a party who would otherwise be under no obligation to disclose it and may include financial projections, minutes of board meetings, board presentations, or trade secrets or processes. To date, very few documents have been submitted to the Panel which were not also provided to other parties, and even fewer of those documents have been relied on in Panel decisions.

Remedial Function

Panels see their function as remedial, not punitive. Accordingly, they are usually more concerned that any unacceptable circumstances be put right and that any prejudice flowing from them be overcome than to make a declaration for the sake of publishing their view of those circumstances or of the parties' conduct. Even more than the courts, they have made declarations as a part of remedial action, and not as a reflex whenever certain facts are established.

In several matters, a party has seen where the Panel's questions were leading and voluntarily offered an undertaking to deal with the issue which concerned the Panel, one effect of which is to forestall any risk of a declaration. In each case, the Panel was willing to accept the offer, once it was adapted to meet their concerns. In several other matters, a sitting Panel has asked a party to provide an undertaking to a certain effect. In each case, a suitable undertaking was obtained, and no declaration was made. It will work out differently, in cases where the sitting Panel feels that a declaration should be made pour encourager les autres.

[35] Section 127 of the ASIC Act, applied by s 186. Section 127 also confers discretionary powers to disclose confidential information.

[36] This does not apply to ASIC, whose confidentiality obligations are codified in s 127.

This attitude came under challenge in *Taipan Resources NL (No 11)*,[37] which was a wide-ranging review of decisions in a previous matter, *Taipan Resources NL (No 10)*.[38] The challenge was as much to the way in which the issues had been dealt with as to the outcomes: where the *Taipan (No 10)* Panel felt that unacceptable circumstances had (or may have) occurred, it had been willing to accept undertakings and voluntary rectification, and had not made declarations of unacceptable circumstances which seemed to it unnecessary and unproductive. The *Taipan (No 11)* Panel supported this approach. In another case, it might be necessary to make a declaration, to preserve remedies under s 659C.

Light Touch

The Panel will seek to interfere as little as it can, consistently with preventing or rectifying unacceptable circumstances wherever practicable. A bid takes six weeks at least, from service to close, and a Panel can frequently decide a well-prepared case in less than a week. Unless harm will result from an act or the circulation of a document and cannot be set right later, the Panel will generally prefer not to make a party wait until it can be shown that unacceptable circumstances will not result from that party's conduct.

This means that applicants need to move quickly, particularly if they seek to restrain dispatch of offers. The policy under discussion on restraining dispatch of offer documents seeks to strike a balance between allowing sufficient time to resolve any issues which can be resolved without Panel intervention and retaining sufficient time to give proper consideration to an application and make a decision early enough for it to be effective. In *Alpha Healthcare Ltd*,[39] the Panel invited the parties to settle disclosure issues between themselves, which they did.

Pragmatic Outcomes

Panels will adopt sensible outcomes, rather than dogmatic ones. In *Realestate.com*,[40] *Taipan (No 9)*[41] *to (No 11)*,[42] *Namakwa (No 1)*[43] and *Alpha Healthcare*,[44] the sitting Panels asked themselves what needed to be remedied, not who had done wrong. When it decided that

[37] *Re Taipan Ltd (No 11)* (unreported, 26 June 2001).
[38] *Re Taipan Ltd (No 10)* (unreported, 23 May 2001).
[39] *Re Alpha Healthcare Ltd* (unreported, 27 July 2001).
[40] *Re Realestate.com.au Ltd* (2001) 19 ACLC 618.
[41] *Re Taipan Ltd (No 9)* (unreported, 12 April 2001).
[42] Op cit nn 37, 38.
[43] *Re Namakwa Ltd (No 1)* (unreported, 30 May 2001).

nothing more needed to be remedied, the Panel stopped. Some of the parties felt that those Panels should have been more impressed with the sheer wrongness of other people's conduct. The Panel's function has nothing to do with guilt (moral or legal): it is to deal with unacceptable circumstances, with the means at its disposal. That the Panel did not go into issues of guilt is inherent in the quite specific function it has been given, and does not indicate a lack of principle.

Innovative

Panels will be inventive and may innovate boldly, as in *Pinnacle (No 5)*[45] and *Pinnacle (No 8)*.[46] In the teeth of submissions from both parties that the issue should be decided as one of directors' duties, that is, of *purposes*, the Panel treated the issue from a different perspective, that of the *effect* of the transactions on the bid. Had the Panel acceded to the parties' submissions, it would have had to inquire into the directors' purposes to decide if their decisions were valid. This might have required a sitting continuing for weeks. Instead, those Panels followed a much faster process, reached a more certain decision and did it with less prejudice to the process of the bid than if they had treated the matter as one of validity.

Concentrate on Effect

Panels will not delve deeper into motive and understandings than is necessary to reach a sensible resolution. Those inquiries take time, which is something Panels are short of, and tend to lead to uncertain conclusions, which are a poor basis for decisive action. We saw this in *Advance Property Trust*,[47] *Pinnacle (No 5)*,[48] *Pinnacle (No 8)*,[49] *Namakwa (No 1)*,[50] *Taipan (No 9)*[51] and *Alpha Healthcare*,[52] in each of which a Panel declined to enter into extensive inquiries, because they would not have contributed proportionately to its decision.

This attitude may be supported by the presence on nearly every Panel of an investment banker. Although there is always a lawyer on a Panel and although submissions and staff advice are generally

[44] Op cit n 39.
[45] *Re Pinnacle VRB Ltd (No 5)* (2001) 19 ACLC 1,154.
[46] *Re Pinnacle VRB Ltd (No 8)* (2001) 19 ACLC 1,252.
[47] *Re Advance Property Fund* (2000) 18 ACLC 777.
[48] Op cit n 45.
[49] Op cit n 46.
[50] Op cit n 43.
[51] Op cit n 41.
[52] Op cit n 39.

drafted by lawyers, Panels are generally not very interested in dealing with legal issues for their own sake.

If another fact situation arose like that in *Wesfi*,[53] where in order to identify and deal with unacceptable circumstances it was necessary to conduct an extended inquiry to find out whether certain people were associated, or what a person's intentions had been, a Panel would conduct that inquiry. Given the limited time available to the Panel and its members, however, it will often be preferable for extended investigations to be conducted by ASIC or to take the form of litigation.

Generally Resolves Legal Issues

The Panel generally resolves issues of law which arise in proceedings, although it often side-steps them. A decision of this kind is only an opinion as to the law and does not settle the legal point in the way that a court decision would. While the Panel may refer a legal issue to a court under s 659A, and while it would often be useful to obtain a ruling, it has not yet done so: that would take time which might not be available.

Strong on Disclosure

Panels are generally keen to see important information made available to offerees under a bid. That doesn't mean that they want to see large documents for their own sake, but members frequently ask themselves whether they could make a decision on the documents on offer, as well as what it would cost in time, money, or risk to provide additional information, and what the value of that information would be. This is another attitude which appears to be supported by the presence of investment bankers.

RECURRING THEMES RELEVANT TO THE RESOURCES SECTOR

In this last section, we touch on a few themes which have already emerged, choosing some which are most relevant to mining companies, although the examples are not always mining companies.

[53] *Re ASIC and Westfi Ltd* (1999) 17 ACLC 1,690.

The JORC Code

The Panel is frequently obliged to consider whether a bid is proceeding in a competitive, efficient and informed market, and whether directors and shareholders in a target company have all of the information they would reasonably need to make an informed decision on the bid. For those purposes, it has looked to existing benchmarks of adequate disclosure. Among those, the JORC Code[54] has been considered on two occasions.

The JORC Code is the latest version of an industry response to the boom in mining stocks of late 1969 and early 1970, memorably recorded in the *Rae Report*[55] and *The Money Miners*.[56] A recurring feature of that boom was rumours exaggerating the size and the value of mineral resources, sometimes on a slight foundation of fact, and sometimes on no factual basis at all. For instance, the Windarra nickel deposit was once freely touted as the new Broken Hill: there was nickel at Windarra, but it was some time before the deposit was proved economic to mine.

The Code, compliance with which is required by ASX,[57] but which is otherwise voluntary, requires a statement about mineral or ore to be expressed in standard terms, supported with detail, and made by someone with the relevant professional competence. It has been used as a benchmark by Panels in two recent matters. The ways in which it has been used indicate that the Panel will build on industry standards for disclosure where they are available, but critically, without requiring slavish adherence where those standards are inapplicable to a particular set of facts.

In *Namakwa Diamond Company Ltd (No 2)*,[58] the Panel considered a bidder's statement issued by Majestic Resources NL. Majestic was offering its own shares in exchange for shares in Namakwa. Both companies are principally interested in mining diamonds from secondary, alluvial deposits. In the course of describing its own prospects, Majestic referred to "mineable resources". The Panel noted that this expression ran together two categories, which the JORC Code required to be kept separate, and asked Majestic to justify the blurring.

[54] *Australian Code for Reporting of Mineral Resources and Ore Reserves* prepared by the Joint Ore Reserves Committee of the Australian Institute of Mining and Metallurgy, Australian Institute of Geoscientists and Minerals Council of Australia, 1999 Edition.
[55] *Report of the Senate Committee on Securities and Exchange*, 1974.
[56] Trevor Sykes, *The Money Miners*.
[57] Listing Rule 5.6.
[58] *Re Namakwa Diamond Company Ltd (No 2)* (unreported, 15 May 2001).

Majestic submitted that the categories in the Code do not appropriately cover the particular problems of alluvial diamond prospects. The Panel noted that the Code contemplates the particular difficulties of disclosure about alluvial diamonds, and sets out specific disclosure requirements.[59] It did not accept Majestic's submission that it was appropriate to depart from the Code requirements, and directed Majestic to restate its reserves in terms consistent with the Code, and to add the specific information required by the Code.

This was an occasion on which the Panel may have benefited from access to specialised advice about compliance with the Code, particularly concerning alluvial diamonds.

In *Taipan Resources NL (No 10)*[60] and *(No 11)*,[61] two Panels (first instance and review) had to consider whether St Barbara Mines Ltd had made adequate disclosure in a bidder's statement of its prospective revenue from its gold mining operations at Meekatharra. As a standalone document, the bidder's statement did not comply with the Code. The description of the resources and reserves did not contain the detail required by the Code, and the bidder's statement had not been prepared by a competent person, within the meaning of the Code.

The material set out in the bidder's statement, however, was drawn from St Barbara's most recent annual report, which described those operations and was incorporated by reference into the bidder's statement. The relevant part of the annual report appeared to comply with the JORC Code. In particular, it had been prepared by a competent person. Accordingly, the Panels accepted that the Code had been complied with in substance.

The Code may not, however, have been complied with to the letter. It requires full compliance in any public document discussing ore reserves, and seems to make no allowance for incorporation by reference or for reliance on lodged documents, which now play a large part in the preparation of prospectuses and scrip bidder's statements.[62]

Forecasts of Revenue Production

Several Panel matters have concerned revenue and production forecasts. The legislation and court decisions on takeovers walk a

[59] Estimation and Reporting of Diamond Mineralisation in Table 1: "information concerning secondary sources [including alluvial sources] should include details of the nature of the geological environment together with its form, age and size."
[60] Op cit n 38.
[61] Op cit n 37.
[62] Sections 712 and 713.

fine line between encouraging the presentation of information which is useful to offerees and discouraging speculation. On the one hand, a bidder and a target must provide all the information available to them which would assist an offeree to make a decision. On the other, s 670A(2) requires a person to have reasonable grounds for a statement in a bidder's or target's statement about a future matter.

In *Namakwa Diamond Co Ltd (No 2)*,[63] Majestic Resources NL in its bidder's statement forecast its production from several diamond resources in South Africa. Noting that most of the production was to come from several ore bodies which had yet to be properly explored and defined, the Panel required Majestic to revise its forecast, using the JORC Code classification and terminology.

A more difficult case concerned a target's disclosure. In *Realestate.com.au Ltd*[64] the target company was developing a web site and software for advertising real estate on the internet. It had issued a forecast that it would become profitable before it exhausted the cash it had raised under a prospectus. Its expenses ran higher and longer than it had anticipated, its revenue was slower to increase, and it was slow to disclose the setback to ASX. One result was that a proposed bid by RP Data Ltd fell through. We do not know whether Realestate.com would have run into solvency problems, as News Corporation made a large investment in it.

Making a forecast, however, brings with it the responsibility to update or withdraw the forecast in the light of events. For instance, in *Vincorp Wineries Ltd*,[65] the bidder, Simon Gilbert Wines Ltd (SGW), had 18 months before issued a prospectus containing a detailed forecast of vineyard and winery development. When it issued a bidder's statement for a scrip bid, an examination of its annual reports and announcements to ASX showed that SGW had provided little information to update that forecast. Evidence provided to the Panel disclosed that the development had proceeded according to plan. The market, however, had been told neither of that progress, nor of the effect of those investments on the company's cash position. At the request of the Panel, SGW undertook to provide a supplementary bidder's statement to bring its disclosures up to date.[66]

Disclosure of Joint Ventures

Change of control clauses in joint ventures and other agreements have come up several times, mainly concerning mining companies.

[63] Op cit n 58.
[64] Op cit n 40.
[65] *Re Vincorp Wineries Ltd* (unreported, 26 June 2001).
[66] The undertaking was withdrawn by consent of the Panel when the bid fell through.

Several of these clauses appeared not to have been adequately disclosed, although the joint ventures themselves were well known. This didn't attract much concern until there was a bid for one of the parties, when the change of control clauses became critical.

The clearest example of the problem arose in *Ashton Mining Ltd*.[67] The value of Ashton was largely in the Argyle Joint Venture with Rio Tinto, which was one of the rival bidders for Ashton. Confidentiality clauses in the joint venture agreement impeded Ashton in disclosing enough information for the market in general and de Beers in particular (the other bidder) to assess whether a successful takeover by de Beers might lead to Rio Tinto acquiring Ashton's share of the joint venture, and on what terms. Ashton provided a summary of the relevant clauses in its target's statement. We do not know whether one of the factors behind de Beers' decision not to overbid Rio Tinto was uncertainty on this issue.

Another example of a change of control clause which needed to be disclosed concerned the bid by Smorgon Distribution Pty Ltd for Email Ltd. Email then produced some lines of electrical appliances under licence from Electrolux. It was believed that the licence contained a change of control condition, but its terms had not been disclosed. Again, Email provided details of the clauses in its target's statement. The bid for Email eventually included the sale by Email of the appliances operations to Electrolux.

Companies, particularly listed companies, need to consider the implications of withholding information on clauses such as these. Listing Rule 3.1 does not allow a company to withhold information merely because it has agreed to keep it confidential: there must also be something inherently sensitive about the information. Section 713 expressly requires price-sensitive information to be released in a scrip bidder's statement, even if it could be withheld under Listing Rule 3.1, because it is confidential. The standard for a full scrip bidder's statement under s 710, or for a target's statement, which is the converse of a prospectus or a scrip bidder's statement, can be no lower. If a company withholds this sort of information, it may have to release it in the middle of a bid, when it may have its greatest effect on the company's share price.

Defeating Transactions and Poison Pills

A joint venture may seriously affect the value of a company which is party to it, particularly if it contains a change of control clause, even if it appears to have been entered into without any view to

[67] *Re Ashton Mining Ltd* (unreported, 10 October 2000).

deterring takeovers. The Panel may find circumstances unacceptable, if a transaction such as a joint venture agreement is entered into when it may have the effect of defeating a bid.[68]

This recently came up in relation to Pinnacle VRB Ltd. Briefly, after a bid had been announced for Pinnacle and offers had been dispatched, Pinnacle agreed to grant exclusive licences, covering most of the world, over the technology which is its principal asset. The bidder sought to have the agreements set aside: the Panel instead required Pinnacle to obtain shareholder approval before proceeding with them.[69] This decision was confirmed on review.[70]

Importantly, both Panels based their decisions on the effects on the bid of the relevant agreements, without deciding that the directors had acted for improper motives. Both Panels alluded to the impracticality of the Panel conducting a trial on the directors' intentions in entering into the relevant agreements.

Pinnacle was a strong case, and how far it sets a precedent for future bids remains to be seen. A subcommittee of the Panel is attempting to formulate policy to make future decisions in this area predictable. In some overseas jurisdictions, there are quite general rules that material transactions and transactions outside the ordinary course of business must be made subject to shareholder approval.[71]

Each decision contains a brief but clear recognition that there are often good commercial reasons for entry into joint ventures and other agreements, although they may incidentally deter some bidders. A change of control clause in such an agreement should generally be safe from attack under the *Pinnacle* precedent, unless it is entered into when a bid is pending, it provides for shareholder approval or (perhaps) it is clearly uncommercial and appears to be designed as a poison pill.

The Panel has just issued a draft policy for comment dealing with break fees and other lock-up devices. In that policy, it indicates how it will deal with change of control clauses in joint venture agreements relating to a company's key asset. Generally, the Panel will not regard a change of control clause as unacceptable if it has been disclosed to shareholders and accepted by them (by a meeting, or because it has been disclosed long enough that shareholders can be assumed to have held or bought in the knowledge that it existed). If the clause has not been so accepted (it is either new, or has not previously been

[68] Even more so, if the transaction has been entered into for that purpose, although the purpose is usually harder to demonstrate than the effect.
[69] *Pinnacle VRB Ltd (No 5)* (2001) 19 ACLC 1,154.
[70] *Pinnacle VRB Ltd (No 8)* (2001) 19 ACLC 1,252.
[71] Extracts of the UK and New Zealand rules to this effect are appended to the reasons in *Pinnacle (No 8)*.

adequately disclosed) and if the Panel thinks the terms are uncommercial, it may hold that the clause gives rise to unacceptable circumstances. While the Panel has not explained when it will consider the terms of a clause to be uncommercial, it can be expected to have regard to provisions requiring a current valuation or allowing price competition.

CONCLUSION

All of those involved as either members of the Panel or serving with its executive team are pleased that so much has been achieved in a relatively short period. It is also satisfying to have received strong encouragement from the broader Australian takeovers community.

As the Panel leaves its establishment or "pilot plant" stage, there are now a different set of challenges with which to grapple. With more than 40 Panel members, it is recognised as critical to its ongoing success that this complement regards itself as "one team" and, in particular, that there is consistency of decision making. The Panel now also has an objective of releasing policy or guidance notes in areas where it is considered that the market should be guided, in advance of an application, as to what the general position of the Panel is.

Finally, it is appropriate to thank the Federal Government for having implemented the necessary legislation which has reconstituted the Panel and provided its funding. It will come as no surprise that over the last two years, various refinements to the legislation have been suggested by various interested persons, both inside and outside of the Panel. The Panel looks forward to discussing these initiatives with the incoming Federal Government.

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