SYDNEY LAW SCHOOL

TAKEOVERS PANEL CONFERENCE
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CLOSING REMARKS

R I Barrett[1]

I begin with two difficulties or disadvantages.

First, I was not able to be here during the day; so I have only the outline in the programme to know what has been covered.

Second, and I confess it immediately, I have never had any first hand contact with the Panel and its work.

The renewed and reconstituted Takeovers Panel commenced operations only a few months before I was appointed a judge. During that short interval, I managed to keep my clients away from the Panel – just as I had, very largely, kept them away from the earlier panel, the ASC and the NCSC during the preceding decades.

I must admit that, in those past years, I had something of an aversion to involvement in the aspects of those bodies' activities which are, by and large, the province of today's Panel.

When the *Companies (Acquisition of Shares) Act* and codes came into operation on 1 July 1981, the National Companies and Securities Commission was given the power to make declarations of unacceptable conduct and to declare acquisitions of shares unacceptable. The concept

was new and unfamiliar. We had reached a point at which the black letter was starting to turn to a shade of grey – when, for the first time, the Eggleston principles[2] were given statutory expression in abstract and overriding terms and formed the basis for discretionary intervention, as distinct from being merely the inspiration for definitive operative provisions.

Those same Eggleston principles, which continue today at the very centre of the Panel's work, have now been the cornerstone of our various schemes of takeover regulation for forty years.

In the early days of the regime that began on 1 July 1981 it is, I think, fair to say that some opprobrium – disgrace is putting it too high – befell those judged to have made an unacceptable acquisition or engaged in unacceptable conduct. That may have been in part because the effect of such a declaration was to deem the unacceptable acquisition to be in breach of the 20% threshold rule, although admittedly only for the purpose of providing access to the sections about remedial court orders.

The more powerful cause of the opprobrium was, I think, the simple attitude in those past times that one did not want to be seen to be in dispute with authority. The eighties were an era in which there were firm perceptions about good guys and bad guys in the market for corporate control; when everyone spoke quite candidly about "corporate raiders" and "asset strippers" and some people looked askance at them. There was a view that they – and they alone; the quick money break-up operators on the edge – were the people for whom the unacceptable acquisition and unacceptable conduct provisions were designed.

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[1] A Judge of the Supreme Court of New South Wales.

[2] The principles now stated in s 602 of the *Corporations Act* 2001 (Cth) and originally recommended by the Company Law Advisory Committee to the Standing Committee of Attorneys-General in its Second Interim Report (February 1969).

The 1980 legislation entrusted the Eggleston principles to the care of the Commission. It was directed to have regard to those principles when exercising its powers of granting exemptions and modifications and making declarations of unacceptability[3].

A perceived need for custodianship of the Eggleston principles to move elsewhere came up in the early years. The Commission was, in a sense, the prosecutor and the court. It was an uneasy combination of roles. There was also a strain on resources. I recall being at one of the early hearings – I think it was in fact the first - when three Commissioners sat for several days in an atmosphere reminiscent of that in the High Court. The chairman, after noting that proceedings were to be conducted with as little formality as practicable[4], said that counsel might remain seated while addressing. Of course, they all stood. That was the Bruck-Bradmill case[5].

When the BHP matter came up in, I think, 1986, the three full-time Commissioners all sat again for several days. The Commission, meanwhile, presumably ran itself.

Writing in the Company and Securities Law Journal in November 1984, Quentin Digby[6] expressed an opinion that the Commission had been "unable to live up to expectations in its role as the regulator of takeovers". He said that expectations of it had been too high but also that the discretions vested in it were insufficient.

[3] The powers conferred by ss 57 to 60 of the *Companies (Acquisition of Shares) Act* 1980 (Cth) and corresponding State codes.
[4] *National Companies and Securities Commission Act* 1979 (Cth), s 38(1)(a).
[5] Which resulted in a declaration by the National Companies and Securities Commission on 5 April 1982 that an acquisition of shares in Bradmill Industries Ltd by a subsidiary of Bruck (Australia) Ltd was unacceptable.
[6] Quentin Digby, "The Principal Discretionary Powers of the National Companies and Securities Commission under the Takeovers Code" (1984) 2 CSLJ 216.

So why were the discretionary powers not given to the courts? Why were the courts not made the custodians of the Eggleston legacy?

I dug out this little book from my shelf earlier in the week. It is entitled "Takeovers and Corporate Control"[7]. It contains the proceedings of conferences on that subject in both Australia and New Zealand in June 1986. Let me read from one of the papers:

> "When the NCSC legislation was first introduced we saw the judges who were responsible for interpreting it run far away from giving that legislation a spirit of intention approach … I don't need to remind you of the famous comment made by a judge in the Queensland Supreme Court who had a case brought to him under the securities and takeover legislation and said it was the first time and he hoped the last time he would have to interpret legislation of this kind. Mr Justice Needham in one of the very first cases refused to be a bold spirit or even a timid soul in interpreting the legislation; he simply would not look at policy. Contrast that to the recent judgment in the *Broken Hill North* case involving Industrial Equity. That judgment is full of references to the spirit and the philosophy of the legislation.
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> I don't believe though that the present courts are the appropriate body to interpret this legislation. Maureen Brunt and I argued in relation to trade practices, and we would make the same argument in relation to this area, that because the courts are not the appropriate body to handle the basic issues of the philosophy and interpretation of a piece of legislation."

That was said by the Sir John Latham Professor of Law at Monash University, Robert Baxt. On his analysis, the judges did not rise to the occasion and were not equipped to administer the Eggleston principles.

Although I have not been able to locate the case, I do recall the Queensland judge who, in some context of urgency, was called upon to come to grips cold with the relevant interest, association and entitlement concepts on which the then new legislation was based in much the same

[7] "Takeovers and Corporate Control: Towards a New Regulatory Environment", Centre for Independent Studies, 1987.

style as its modern counterpart. He did not enjoy the task. Nor would anyone who came to it unexpectedly and under pressure and had to make a decision virtually on the spot. As Dr Austin reminded the undergraduates in his address to them here at the Law School the week before last, "judges are human beings".

I say no more about the particular Queensland judge criticised by Professor Baxt. But I will say this: that other Queensland judges dealt gracefully and skilfully with the new order. If one looks at decisions on Queensland's own advance version of the 1980 takeovers legislation (the *Company (Takeovers) Act* 1979) and later on the uniform legislation itself, one finds prompt, efficient and erudite attention to a range of matters by, for example, Justice Connolly, Justice McPherson and Justice Thomas in the first half of the 1980s.

Professor Baxt's 1986 criticism of Justice Needham in New South Wales was that he "refused to be a bold spirit or even a timid soul in interpreting the legislation; he simply would not look at policy".

What did Justice Needham actually say? We find it in his judgment in *National Companies and Securities Commission v Industrial Equity Ltd*[8] – a judgment of 30 December 1981, which was six months less one day after the legislation started. Justice Needham referred to a submission that, in the light of the legislation and the political compact that had given rise to it, the court should give a liberal interpretation so as to ensure that the general purposes of the scheme were promoted. He then said:

> "I was invited to be a brave spirit rather than a timorous soul – *Candler v Crane Christmas & Co* [1951] 2 KB 164 at 178. I would prefer not to enter either category but to apply to the provisions of the scheme relevant to this case the ordinary principles of interpretation of legislation, taking into account, of course, that

[8] (1981) 6 ACLR 1.

> those provisions are part of a larger whole brought into operation in the commendable hope that company law throughout the Commonwealth will be and remain uniform and effective. However, as the defendant submitted, no beneficial construction of the legislation can create a power or a remedy where none exists expressly or by necessary implication."

An unexceptionable and orthodox approach to statutory interpretation, one might think; but one that apparently did not satisfy the thirst for spirit.

The idea that the law could not adequately regulate takeovers without some super-added value system administered outside the traditional arenas was, in the early 1980's, by no means a new idea. The first move to give effect to the Eggleston principles was by means of the very substantial 1971 amendments[9] to the uniform *Companies Acts* of 1961. The 1971 legislation was of the traditional black letter kind. It was not universally acclaimed. Kim Santow, in an article in the Australian Law Journal of June 1972[10], referred to what he saw as shortcomings, including a complexity bearing a striking resemblance to some of our most complicated tax legislation.

At the end of that article, Kim Santow floated a number of ideas of the kind that, both then and later, we were accustomed to expect from his brilliant and agile brain. One of them was that we should have an equivalent of the London Panel – but with a recognition that there might have to be penal sanctions "in a Ned Kelly country still lacking a developed 'City'".

That was a theme to which he and others were to return as the years passed and which was very influential in bringing us to the situation we have today.

[9] See, in New South Wales, *Companies (Amendment) Act* 1971 (assented to 15 December 1971).

My perception of that present day situation is that the opprobrium once associated with being branded the perpetrator of something "unacceptable" has gone; that it is today simply part and parcel of normal process and normal procedure to invoke the jurisdiction of the Panel and to have that jurisdiction invoked against oneself. The ordinary course of life has changed. Sensitivities are different.

The program for today's conference included a session in which Dr Austin and Tony Damien dealt with the subject of the Panel and the courts. They no doubt spoke about ss 659A to 659C of the *Corporations Act* and the way they have worked over the last ten years. My own perception as something of an outsider looking in is that they have worked fairly well. It is noteworthy that, if my research is right, there has been only one instance of the Panel referring a question of law to the court under s 650A; that was the Mirvac case in 2002[11]. One can speculate about why this is so. One might suspect that the Panel has some unease about the nature of any *res judicata* the court's answer creates, that being a matter the Panel itself identified in its *AMP Shopping Centre Trust 01* decision[12]. Perhaps there is some spectre of the mere advisory opinion being inconsistent with the exercise of judicial power.

A much more substantial explanation is, I think, to be found in the Panel's simple and creditable resolve to do its job as it was intended to do it. I quote from one of the earliest Panel decisions (*Email Limited 01*)[13]:

> "The Panel is mindful of its mandate to be 'the main forum for resolving disputes about a takeover bid until the bid period has ended' (Corporations Law section 659AA) and of the policy that disputes be decided 'as quickly and efficiently as possible by a

[10] G F K Santow, "Some Aspects of Regulating Takeovers and Mergers in Australia" (1972) 46 ALJ 269.
[11] *Re Seabrook* [2002] FCA 1219; (2002) 21 ACLC 82.
[12] [2003] ATP 21.
[13] [2000] ATP 3.

> specialist body largely comprised of takeover experts' (paragraph 7.16 of the Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998). For the Panel to refer any and all legal issues arising in a matter to the Court would defeat this mandate and policy.
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> Our preliminary view is that the Panel should consider the questions of law itself, and should do so in relation to the determination of the substantive issues. . .".

That preliminary view expressed in the early part of the Panel's existence has, I think, become a settled and continuing view; and one that has played a part in seeing the Panel develop as a significant practical force in the field it was created to oversee.

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