

***University of New South Wales Law Research Series***

**SPEED IN DECISION-MAKING: AN  
ASSESSMENT OF THE AUSTRALIAN  
TAKEOVERS PANEL**

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(2017) 35 *Company and Securities Law Journal* 352  
[2018] *UNSWLRS* 28

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# *Speed in Decision-Making: An Assessment of the Australian Takeovers Panel*

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## *Abstract*

Timely decision-making is an important element of an effective system of dispute resolution. The ability of tribunals to make relatively speedy decisions is accordingly a key advantage of using administrative tribunals in place of courts. This article examines the speed with which the Australian Takeovers Panel has made its decisions since it became the primary forum for resolving takeover disputes on 13 March 2000 up to 30 June 2016. The assessment is conducted based on an empirical analysis of the timing of Panel decision-making. It focusses particularly on the time taken by the Panel to make its decisions and publish the reasons for its decisions over that period.

## I INTRODUCTION

On 13 March 2000, the role of the Australian Takeovers Panel ('the Panel') was transformed by reforms in the *Corporate Law Economic Reform Program Act 1999* (Cth) ('CLERP reforms').<sup>1</sup> This resulted in the Panel replacing the previous role of the courts in becoming the primary forum for resolving takeover disputes in the context of corporate law. These reforms were designed to inject legal and commercial specialist expertise into takeover dispute resolution, provide 'speed, informality and uniformity' in decision-making, minimise 'tactical litigation' and free up court resources.<sup>2</sup> The Panel on Takeovers and Mergers in the United Kingdom was the key overseas body cited in support of the CLERP reforms based on its 'reputation of resolving takeover disputes promptly and effectively'.<sup>3</sup> Notwithstanding the differences in the way in which the two Panels operate, it has been concluded that the criteria of speed, flexibility and certainty can be applied to the Australian Panel in determining whether the CLERP reform aims have been achieved.<sup>4</sup>

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<sup>1</sup> These reforms were implemented in light of the policy aims set out in the proposals paper entitled *Corporate Law Economic Reform Program, 'Takeovers — Corporate Control: A Better Environment for Productive Investment'* (Paper No 4, 1997) ('CLERP 4') 7–8. See also *Corporations Act 2001* (Cth) s 659AA.

<sup>2</sup> CLERP 4, above n 1, 32. See also Explanatory Memorandum, *Corporate Law Economic Reform Program Bill 1998* (Cth), 38.

<sup>3</sup> CLERP 4, above n 1, 36.

<sup>4</sup> See Emma Armson, 'Lessons for the Australian Takeovers Panel from the United Kingdom' (2014) 29 *Australian Journal of Corporate Law* 295, 310–4, 318–9, 321.

As a result of the CLERP reforms, parties are required to apply to the Panel instead of the courts in relation to takeover disputes during the bid period.<sup>5</sup> The Panel cannot act on its own motion and only decides applications by persons whose interests are affected by the relevant circumstances or decision.<sup>6</sup> First, applications can be made for the Panel to exercise its key role of making declarations of unacceptable circumstances under subsection 657A(2) of the *Corporations Act 2001* (Cth) (*'Corporations Act'*). Such a declaration can be made where it appears to the Panel that the circumstances are unacceptable either (a) having regard to their effect on the control of, or an acquisition of a substantial interest in, a company, (b) in relation to a company in light of the purposes of the takeover provisions, or (c) because they are likely to give rise to a contravention of the provisions on takeovers, compulsory acquisitions, takeover rights and liabilities, substantial shareholdings or tracing beneficial ownership.<sup>7</sup> The Panel's power must be exercised having regard to the underlying purposes or 'spirit' of the takeover provisions.<sup>8</sup> These purposes are to ensure that acquisitions take place in an 'efficient, competitive and informed market', target shareholders have enough information, reasonable time to make a decision and are afforded a 'reasonable and equal opportunity to participate in any benefits' under a takeover bid, and an appropriate procedure is followed prior to the use of the compulsory acquisition provisions.<sup>9</sup>

Secondly, parties can apply for interim or final orders relating to circumstances alleged or found to be unacceptable respectively.<sup>10</sup> With the exception of orders directing a person to comply with the legislation,<sup>11</sup> the Panel can make the same broad range of orders as a court including restraining the exercise of voting rights, directing the disposal of shares, and vesting shares in the corporate regulator, the Australian Securities and Investments Commission (ASIC).<sup>12</sup> Thirdly, an application can be made for an internal Panel (known as the 'Review Panel') to review a Panel decision relating to its powers to make a declaration of unacceptable circumstances and orders.<sup>13</sup> Finally, an application can be made to the Panel to review ASIC decisions concerning its exemption and modification powers in relation to the

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<sup>5</sup> See *Corporations Act 2001* (Cth) ss 657C, s 659AA, 659B.

<sup>6</sup> *Corporations Act 2001* (Cth) ss 657C(2); 656A(2).

<sup>7</sup> See *Corporations Act 2001* (Cth) ss 602A, 657A(1)–(3).

<sup>8</sup> *Corporations Act 2001* (Cth) s 657A(3)(a)(i).

<sup>9</sup> *Corporations Act 2001* (Cth) s 602.

<sup>10</sup> *Corporations Act 2001* (Cth) ss 657C, 657D, 657E. In contrast to final orders, interim orders can be made irrespective of whether a declaration or application for a declaration has been made and consequently only apply for up to two months: see ss 657D(1), 657E(1).

<sup>11</sup> *Ibid* s 657D(2). This limitation is designed to avoid the Panel exercising judicial power contrary to Chapter III of the Constitution: see, for example, *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83. The High Court has upheld the constitutionality of the Panel following the CLERP reforms: see *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542.

<sup>12</sup> See *Corporations Act 2001* (Cth) ss 9 ('remedial order'), 657D(2) (cf s 1325A(1)). The Panel's orders must not 'unfairly prejudice any person': see *Corporations Act 2001* (Cth) s 657D(1). It also has the power to make interim orders under s 657E.

<sup>13</sup> *Corporations Act* s 657EA(1). The Panel President must consent to the application for review if the Panel's decision is not to make a declaration of unacceptable circumstances, or an interim or final order: s 657EA(2).

*Corporations Act* provisions on takeovers, substantial shareholdings and beneficial ownership.<sup>14</sup>

Timely decision-making is an important element of an effective system of dispute resolution, with time delays leading to concerns about access to justice.<sup>15</sup> In light of the delays generally experienced in the court system, the ability of tribunals to make relatively speedy decisions is a key advantage of using administrative tribunals in place of courts.<sup>16</sup> However, this article does not compare the Panel's operations to the litigation conducted in the courts prior to the CLERP reforms. It instead assesses the speed of Panel decision-making against different standards based on the timing expectations of the Panel, other administrative bodies and courts making decisions relating to takeover and corporate law matters. There is sparse empirical research in relation to the timely resolution of disputes in the Australian system of civil dispute resolution.<sup>17</sup> One of the key difficulties in comparing the timeliness of the decisions of different bodies is the lack of consistency in the periods used to measure timeliness, and the fact that many bodies report the percentage of matters resolved over a certain period (often 12 months) without providing further detail.<sup>18</sup>

Speed in decision-making was a particular aim of the CLERP reforms due to the effect that delay can have on a takeover bid and the ability of the target shareholders to decide upon the merits of the bid.<sup>19</sup> A takeover bid is one of the key exceptions to a prohibition preventing certain acquisitions that would result in any person's voting power increasing above a 20% threshold.<sup>20</sup> There are high financial stakes for the bidder in making a general offer to purchase the remaining shares in the target company, in light of the risks and timing pressures involved. This is particularly the case where the bidder needs to obtain finance for cash consideration for the takeover offers.

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<sup>14</sup> *Corporations Act 2001* (Cth) ss 655A, 656A, 673.

<sup>15</sup> See, for example, Productivity Commission, *Access to Justice Arrangements Inquiry Report*, Vol 1 (No 72, 5 September 2014), iv ('Productivity Commission Report (Vol 1)').

<sup>16</sup> See, for example, Robin Creyke, 'Administrative Justice: Beyond the Courtroom Door' (2006) *Acta Juridica* 257, 266; Hazel Genn, 'Tribunals and Informal Justice' (1993) 56 *Modern Law Review* 393, 395; Productivity Commission Report (Vol 1), above n 15, 36.

<sup>17</sup> See Robyn Sheen and Penny Gregory, *Building an Evidence-Base for the Civil Justice System: Civil Justice System Framework and Literature Review Report* (3 September 2012), ix, 67; Productivity Commission, *Access to Justice Arrangements Inquiry Report*, Vol 2 (No 72, 5 September 2014), 881–2 ('Productivity Commission Report (Vol 2)').

<sup>18</sup> Productivity Commission Report (Vol 2), above n 17, 883. For example, empirical research based on a survey relating to the Victorian Small Claims Tribunal concluded that it appeared that the Tribunal was speedier than the Magistrates Courts based on an average estimated waiting time of 11 weeks between filling in the claim form and the hearing, and high levels of satisfaction with the amount of time before the hearing: David de Vaus, 'Small Claims Tribunals: An Effective Alternative to the Court System?' (1987) 22 *Australian Journal of Social Issues* 597, 607, 608. See also E Eugene Clark, 'Small Claims Courts and Tribunals in Australia: Development and Emerging Issues' (1991) 10 *University of Tasmania Law Review* 201, 212, 231.

<sup>19</sup> CLERP 4, above n 1, 36.

<sup>20</sup> *Corporations Act 2001* (Cth) ss 606(1), 611 it 1.

Litigation was used frequently in the context of takeovers prior to the CLERP reforms,<sup>21</sup> often as a defence tactic to either give the target company more time to respond to the takeover or prevent the bid being considered by target shareholders.<sup>22</sup> Consequently, the CLERP reforms were proposed partly in response to concerns that tactical litigation could delay or prevent the takeover as a result of the delays involved in the court process.<sup>23</sup> This would also undermine the disciplinary effect of takeovers on company management, as the threat of takeover provides a strong incentive for directors to ensure that their company is operating efficiently.<sup>24</sup> Accordingly, the overall aim of the CLERP reforms was for the inevitable disputes in hostile bids ‘to be resolved as quickly and efficiently as possible’ to allow the outcome of the bid to be decided by target shareholders ‘on the basis of its commercial merits’.<sup>25</sup> Indeed, it was contemplated that the Panel would ‘be well placed to act with speed in every case’.<sup>26</sup>

This article assesses the extent to which the Panel has achieved speed in its decision-making consistent with the CLERP reforms over the period from 13 March 2000 to 30 June 2016. The article is divided into five parts. Part II examines how to measure speed in relation to Panel decision-making. It develops different standards of speed based on an examination of the timing expectations of the Panel and other administrative bodies and courts making decisions relating to takeover and corporate law matters. These standards are used in the assessment in Part IV, which analyses the time between the dates of the applications to the Panel, the Panel’s decisions and the publication of its reasons. Part III analyses the elements of the Panel’s processes affecting its ability to make speedy decisions. Part IV assesses the Panel’s decision-making against the criterion of speed, with concluding comments in Part V.

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<sup>21</sup> See, for example, RP Austin, ‘Takeovers – The Australian Experience’ in John H Farrar (ed), *Takeovers: Institutional Investors, and the Modernization of Corporate Laws* (Oxford University Press, 1993) 144, 179 (n 51); Bruce Dyer and Marie McDonald, ‘Why Was the Takeovers Panel Established?’ in Ian Ramsay (ed), *The Takeovers Panel and Takeovers Regulation in Australia* (Melbourne University Press, 2010) 80, 85–7; GFK Santow and George Williams, ‘Taking the Legalism Out of Takeovers’ (1997) 71 *Australian Law Journal* 749, 749–50, Appendix A; Roman Tomasic and Brendan Pentony, ‘Resisting to the Last Shareholders’ Dollar: Takeover Litigation – A Tactical Device’ (1992) 1 *Australian Journal of Corporate Law* 154, 155–6; AE Vrisakis, ‘Litigation in Contested Takeovers’ (1987) 61 *Australian Law Journal* 645, 647–51.

<sup>22</sup> See, for example, *Cultus Petroleum NL v OMV Australia Pty Ltd* (1999) 32 ACSR 1, 21 (Santow J); Ian Ramsay, ‘The Takeovers Panel – A Review’ in Ian Ramsay (ed), *The Takeovers Panel and Takeovers Regulation in Australia* (Melbourne University Press, 2010) 1, 23.

<sup>23</sup> See CLERP 4, above n 1, 37–8; Roman Tomasic and Brendan Pentony, above n 21, 155; Roman Tomasic and Brendan Pentony, ‘Fast-Tracking Takeover Litigation and Alternatives to the Courts in Company Takeover Disputes’ (1989) 17 *Australian Business Law Review* 336, 336, 354, 355.

<sup>24</sup> See, for example, Jonathan Farrer, ‘Reforming Australia’s Takeover Defence Laws: What Role for Target Directors?’ (1997) 8 *Australian Journal of Corporate Law* 1, 2–6, 9–10; James Mayanja, ‘Reforming Australia’s Takeover Defence Laws: What Role for Target Directors? A Reply and Extension’ (1999) 10 *Australian Journal of Corporate Law* 162, 162–4; CLERP 4, above n 1, 7–8.

<sup>25</sup> CLERP 4, above n 1, 36.

<sup>26</sup> *Ibid* 37.

## II HOW TO MEASURE SPEED

This Part examines how to measure speed in decision-making by the Panel. As discussed in Part I above, Panel decisions are only made in response to certain types of applications. The outcome of Panel decisions in relation to those applications are communicated to the public through media releases available on its website.<sup>27</sup> Reasons for the Panel's decisions are also published sequentially on the website on separate pages for each year.<sup>28</sup> There are only exceptional circumstances in which this does not occur due to the matter being confidential.<sup>29</sup> Consequently, the speed of the Panel's decision-making can be assessed through an empirical analysis of the time period between the dates of each application to the Panel and its decision on the application. The Panel's reasons also provide an important accountability mechanism in providing the basis upon which the Panel has made its decision. Given this, it is appropriate to also assess the timing of the publication of the Panel's reasons for its decisions. This can be measured based on the time between the date of the Panel's decisions and the publication of its reasons.

The methodology adopted to assess speed includes an analysis of the elements of the regulatory framework affecting the Panel's ability to meet the speed criterion. It is also important to examine how the timing of Panel decision-making has been affected by judicial review. Different levels of speed that could be achieved are quantified and placed on a spectrum taking into account varying levels of conformance with these standards. The assessment is consequently conducted in light of what are considered to be strong, medium and weak forms of speed in decision-making.<sup>30</sup> This reflects the timing goals for courts and other tribunals making decisions relating to corporate and takeover matters, which are used as benchmarks for the speed of the Panel's decisions.

Court proceedings relating to *Corporations Act* matters are generally brought in the Supreme and Federal Courts.<sup>31</sup> Apart from the Panel, the other key administrative decision-maker in the context of the *Corporations Act* is the Australian Administrative Appeals Tribunal ('AAT'). The AAT reviews certain ASIC decisions under the Act, including the exercise of its exemption and modification powers apart from those reviewed by the Panel.<sup>32</sup> It was responsible for reviewing all ASIC takeover and exemption modification decisions prior to

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<sup>27</sup> See Takeovers Panel, *Media Releases*,

<<http://www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=MR>>.

<sup>28</sup> Each application is assigned an ATP number for that year: see Takeovers Panel, *Reasons for Decisions*,

<[www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=RD](http://www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=RD)>.

<sup>29</sup> This has only occurred once to date: see Takeovers Panel, 2009 Reasons for Decisions, *Confidential* [2009] ATP 24 <[www.takeovers.gov.au/content/ListDocuments.aspx?pageid=&doctype=RD&year=2009](http://www.takeovers.gov.au/content/ListDocuments.aspx?pageid=&doctype=RD&year=2009)>.

<sup>30</sup> This is similar to the approach adopted in relation to the efficient capital market hypothesis, in which different forms of efficiency reflect the extent to which information is reflected in market prices: see, for example, Eugene Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25 *Journal of Finance* 383, 383.

<sup>31</sup> See *Corporations Act 2001* (Cth) s 58AA.

<sup>32</sup> In relation to takeovers, see *ibid* ss 669, 673, 1317B(1)(b), 1317C(ga), (gb); above n 14 and accompanying text.

the CLERP reforms.<sup>33</sup> Another administrative body that is relevant to takeovers is the Australian Competition Tribunal ('Competition Tribunal'). The Competition Tribunal decides applications for authorisation of takeovers and mergers that would result in a substantial lessening of competition in a market under the *Competition and Consumer Act 2010* (Cth).<sup>34</sup> It also reviews certain decisions of the Australian Competition and Consumer Commission, Australian Energy Regulator ('AER'), Economic Regulation Authority and relevant Minister.<sup>35</sup>

In its *Report on Government Services 2017*, the Australian Productivity Commission noted the national benchmarks applying in relation to its 2015-16 review of the court system.<sup>36</sup> This involved Supreme and Federal Courts completing at least 90 per cent of matters within a year, and all matters within two years.<sup>37</sup> The Federal Court has set its own time goal of completing 85 per cent of cases within eighteen months of commencement.<sup>38</sup> Similarly, the AAT seeks to finalise 75 per cent of matters within 12 months of lodgment,<sup>39</sup> with its New South Wales counterpart focusing on reducing outstanding matters that are older than 12 months.<sup>40</sup>

A shorter time frame is applied by the Productivity Commission in relation to the Federal Circuit Court and the magistrates' and children's courts. This involves these courts completing at least 90 per cent of matters within six months of lodgment and all within a year.<sup>41</sup> In addition, nearly half of the matters before the Federal Court in 2015-16 related to its Corporations jurisdiction and just under 90 per cent of these matters were aged under six months.<sup>42</sup> Similarly, the median time taken by the AAT in 2015-16 to finalise commercial matters that did not involve taxation was 24 weeks.<sup>43</sup> The Productivity Commission has previously found that most tribunals reporting data on timeliness over 2011-12 had resolved a majority of its disputes within six months.<sup>44</sup>

The Competition Tribunal and the Panel strive for the shortest time periods.<sup>45</sup> Both bodies are not bound by the rules of evidence, and conduct proceedings with as much expedition and

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<sup>33</sup> See Explanatory Memorandum, *Corporate Law Economic Reform Program Bill 1998* (Cth), 38.

<sup>34</sup> See *Competition and Consumer Act 2010* (Cth) ss 50, Pt VII Div 3 Subdiv C; Federal Court of Australia, *Annual Report 2015-2016*, 156.

<sup>35</sup> For example, see *Competition and Consumer Act 2010* (Cth) s 44K, Pt IX; National Electricity Law s 71B; National Gas Law s 245. See also Federal Court of Australia, *Annual Report 2015-2016*, 156.

<sup>36</sup> Productivity Commission, *Report on Government Services 2017*, Volume C, Chapter 7, 7.20.

<sup>37</sup> *Ibid.*

<sup>38</sup> Federal Court of Australia, *Annual Report 2015-2016*, 15.

<sup>39</sup> Administrative Appeals Tribunal, *Annual Report 2015-16*, 21.

<sup>40</sup> NSW Civil and Administrative Tribunal, *Annual Report 2015-2016*, 28.

<sup>41</sup> Productivity Commission, *Report on Government Services 2017*, Volume C, Chapter 7, 7.20.

<sup>42</sup> Federal Court of Australia, *Annual Report 2015-2016*, 29 (Table 3.1).

<sup>43</sup> Administrative Appeals Tribunal, *Annual Report 2015-16*, 26 (Table 3.4).

<sup>44</sup> Productivity Commission Report (Vol 1), above n 15, 360.

<sup>45</sup> The Superannuation Complaints Tribunal ('SCT') is the other key dispute resolution body in the Australian Treasury portfolio, which provides an alternative to the court system in relation to superannuation complaints. It operates differently to the Competition Tribunal and the Panel, in seeking to resolve a significant volume of

little formality as permitted by a proper consideration of the matter.<sup>46</sup> However, unlike the Panel, the Competition Tribunal generally conducts its hearings in public.<sup>47</sup> The Competition Tribunal is deemed to have refused to grant a merger authorisation if it has not done so within three months of the application (or within a further three month period if the Tribunal determines that there are special circumstances).<sup>48</sup> In relation to certain AER decisions, the Competition Tribunal is also required to ‘use its best endeavours’ to determine applications for review within a three month period after it grants leave for the application.<sup>49</sup> The Tribunal granted leave following one to two months after the application in the majority of the seven AER review decisions in 2016.<sup>50</sup>

There are also provisions in the *Corporations Act* concerning the timing of Panel decisions. Consistent with the CLERP aim of speed in decision-making, the Panel only has the power to decide unacceptable circumstances matters where the application is made ‘within ... 2 months after the circumstances have occurred’.<sup>51</sup> Significantly, the Panel can only make a declaration of unacceptable circumstances within the later of ‘3 months after the circumstances occur’ or 1 month following the application.<sup>52</sup> This time period is able to be extended, with the courts having done this in relation to two of the matters affected by judicial review.<sup>53</sup> A similar time restriction and power of extension by the court apply to

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complaints over the reporting period through a process designed to minimise the number of matters determined by the SCT. This involves matters being resolved where possible by officers at the first instance and otherwise being subject to a conciliation process. Accordingly, only 8% of the 2252 complaints closed in 2015-16 were determined by the SCT: see Superannuation Complaints Tribunal, *Annual Report 2015/16*, 8, 23–4, 40.

<sup>46</sup> See *Australian Securities and Investments Commission Regulations 2001* (Cth) rr 13, 16(2); *Competition and Consumer Act 2010* (Cth) s 103(1); Federal Court of Australia, *Annual Report 2015-2016*, 156.

<sup>47</sup> Federal Court of Australia, *Annual Report 2015-2016*, 156. Cf below n 81 and accompanying text.

<sup>48</sup> See *Competition and Consumer Act 2010* (Cth) s 95AZI; above text accompanying n 34. Similar time limits apply in relation to applications for variations and revocations (or substitutions) of authorisations under sections 95AZL and 95AZM respectively.

<sup>49</sup> See, for example, National Electricity (NSW) Law s 71Q; National Gas (NSW) Law s 260. The provisions allow this ‘standard period’ to be extended.

<sup>50</sup> See Australian Competition Tribunal, Decisions <<http://www.competitiontribunal.gov.au/decisions/>>, especially *Applications by Public Interest Advocacy Centre Ltd and Endeavour Energy* [2016] ACompT 2; *Applications by Public Interest Advocacy Centre Ltd and Essential Energy* [2016] ACompT 3; *Application by ActewAGL Distribution* [2016] ACompT 4; *Application by Jemena Gas Networks (NSW) Ltd* [2016] ACompT 5.

<sup>51</sup> See above text accompanying n 2; *Corporations Act 2001* (Cth) s 657C(3)(a). However, the Panel can extend the time for applications provided it first allows procedural fairness to affected persons by allowing them an opportunity to make submissions: see *Corporations Act 2001* (Cth) s 657C(3)(b); *Queensland North Australia Pty Ltd v Takeovers Panel* (2014) 100 ACSR 358, 376; *Queensland North Australia Pty Ltd v Takeovers Panel* (2015) 320 ALR 726, 741.

<sup>52</sup> *Corporations Act 2001* (Cth) s 657B.

<sup>53</sup> See *Corporations Act 2001* (Cth) s 657B; *Takeovers Panel v Glencore International AG* (2005) 55 ACSR 453, 458 (Finkelstein J); *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* (2015) 328 ALR 664, 694–5 (Greenwood J). An extension was refused in *Chaudhri v Takeovers Panel* (2011) 218 FCR 574, with related judicial review proceedings subsequently withdrawn: see Takeovers Panel, ‘Bentley Capital Limited 01R – Withdrawal of Judicial Review Applications’ (Media Release TP12/027, 23 April 2012). Extensions of time were also granted in *Re Takeovers Panel* [2002] FCA 1120, *McCann v Pendant Software Pty Ltd* (2006) 235 ALR 566 and *Takeovers Panel v Keybridge Capital Ltd* [2017] FCA 469.

declarations following an application for review of an initial Panel decision by a Review Panel.<sup>54</sup>

Consistent with these legislative requirements, the Panel's website indicates that it will usually decide whether to conduct proceedings between a few days and a week following an application.<sup>55</sup> If proceedings are not conducted, the Panel expects that it will usually conclude the matter in around one to two weeks after the application.<sup>56</sup> On the other hand, matters are expected to conclude around two to three weeks after the application if the Panel decides to conduct proceedings.<sup>57</sup> The Panel is required to notify ASIC and persons to whom the application relates of its decision on whether to conduct proceedings 'as soon as practicable after making the decision'.<sup>58</sup> Where proceedings are conducted, the Panel usually provides its reasons at a later time.<sup>59</sup>

In light of the above analysis, there would be a strong form of speed if the Panel consistently makes its decision within one month of receiving the application and publishes its reasons within three months of the application. This reflects the timing requirements for Panel decisions to make declarations of unacceptable circumstances, as well as the three month periods applicable to Competition Tribunal determinations (which include its reasoning). A medium form of speed would be reflected in the Panel consistently making its decisions and publishing its reasons from three to six months of receiving the application. This would be comparable to what is generally being achieved in relation to similar matters in the AAT and Federal Court.<sup>60</sup> Finally, there would be a weak form of speed if the decisions were made and reasons available consistently from six to 12 months following the application. This reflects the highest standard generally applied to courts and tribunals in relation to all matters.

### III PANEL PROCESSES

The Panel's processes are analysed in this Part to determine the extent to which they promote speed in decision-making. These processes are determined by the regulatory framework applying to the Panel<sup>61</sup> and procedural rules adopted by the Panel to discharge its

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<sup>54</sup> *Corporations Act 2001* (Cth) s 657EA(5).

<sup>55</sup> See Takeovers Panel, *The Panel and Process*,

<[http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=panel\\_process/the\\_panel\\_process.htm](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=panel_process/the_panel_process.htm)> (under the heading 'How long the Panel process takes').

<sup>56</sup> *Ibid.*

<sup>57</sup> Takeovers Panel, *The Panel and Process*,

<[http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=panel\\_process/the\\_panel\\_process.htm](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=panel_process/the_panel_process.htm)> (under the heading 'How long the Panel process takes').

<sup>58</sup> *Australian Securities and Investments Commission Regulations 2001* (Cth) rr 21(1)–(2).

<sup>59</sup> Cf *Online Advantage Limited* [2002] ATP 14.

<sup>60</sup> See above nn 42-43 and accompanying text.

<sup>61</sup> See *Corporations Act 2001* (Cth) Pt 6.10 Div 2; *Corporations Regulations 2001* (Cth) Pt 6.10; *Australian Securities and Investments Commission Act 2001* (Cth) Pt 10; *Australian Securities and Investments Commission Regulations 2001* (Cth) Pt 3.

responsibilities ('Procedural Rules').<sup>62</sup> There are competing objectives reflected in the procedures applying in both the *Australian Securities and Investments Commission Regulations 2001* (Cth) and the Procedural Rules. These involve balancing the aims of providing informality,<sup>63</sup> fairness<sup>64</sup> and timeliness in decision-making.<sup>65</sup>

After an application is made to the Panel,<sup>66</sup> the Panel President directs three Panel members to constitute the Sitting Panel that decides the outcome of the application.<sup>67</sup> This direction is made in light of any conflicts of interest identified in the application and/or disclosed by Panel members.<sup>68</sup> To assist with this process, the Panel President has recently been given the power to make the direction while outside Australia.<sup>69</sup> Other Panel members are also appointed as Acting Presidents so that they can progress matters when the Panel President is unable to discharge their duties.<sup>70</sup>

The Sitting Panel decides at the outset whether to conduct proceedings and, if there is an application for an interim order, whether to make the order.<sup>71</sup> Interim orders can be made by the Sitting Panel or Panel President without consulting other parties, although submissions and rebuttal submissions may be sought if the order is not urgent.<sup>72</sup> It is expected that parties will give the Panel or President at least one business day to deal with an application for an interim order.<sup>73</sup> In relation to the decision whether to conduct proceedings, parties other than the applicant can make preliminary submissions but not rebuttal submissions in relation to

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<sup>62</sup> Takeovers Panel, *Procedural Rules* (1 June 2010)

<[http://www.takeovers.gov.au/content/rules\\_for\\_proceedings/current\\_June\\_2010.aspx](http://www.takeovers.gov.au/content/rules_for_proceedings/current_June_2010.aspx)> ('Procedural Rules').

<sup>63</sup> See *Australian Securities and Investments Commission Regulations 2001* (Cth) rr 13(b), 16(2)(c)(ii).

<sup>64</sup> See *Australian Securities and Investments Commission Regulations 2001* (Cth) rr 13(a), 16(2)(c)(i); Procedural Rules, above n 62, r 1.1.1(a), (c).

<sup>65</sup> See *Australian Securities and Investments Commission Regulations 2001* (Cth) rr 13(c), 16(2)(c)(iii); Procedural Rules, above n 62, r 1.1.1(b), (d).

<sup>66</sup> See above text accompanying n 6 and following.

<sup>67</sup> *Australian Securities and Investments Commission Act 2001* (Cth) ss 184(1), (2). There are currently 43 part-time members including solicitors, investment bankers and advisors, company directors and barristers: see Takeovers Panel, About, *Panel Members*, <[http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=about/panel\\_members.htm](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=about/panel_members.htm)>.

<sup>68</sup> See Takeovers Panel, *Guidance Note 11: Conflicts of Interest*, 24 August 2009 ('GN11') < [\(Cth\) s 185\(1\), \(1A\). The Guidance Note indicates that a reconstituted Sitting Panel may need to rehear a matter where a conflict is identified following the commencement of Panel proceedings \(see \[21\]\).](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance_notes/current/011.htm&pageID=&Year)

<sup>69</sup> See *Australian Securities and Investments Commission Act 2001* (Cth) s 184(3A); See *Corporations Legislation Amendment (Deregulatory and Other Measures) Act 2015* (Cth), Sch 2, Pt 1, it 1–2; Explanatory Memorandum, *Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014* (Cth) at [5.4]–[5.5].

<sup>70</sup> See, for example, Takeovers Panel, *Annual Report 2015-2016*, 10; GN11, above n 68, [5].

<sup>71</sup> See *Australian Securities and Investments Commission Regulations 2001* (Cth) r 20; *Corporations Act 2001* (Cth) ss 657C(1), 657E(1); Takeovers Panel, *The Panel and Process*, <[http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=panel\\_process/the\\_panel\\_process.htm](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=panel_process/the_panel_process.htm)>.

<sup>72</sup> See *Corporations Act 2001* (Cth) s 657E(1); Procedural Rules, above n 62, r 8.1.1, Notes 3-4.

<sup>73</sup> Procedural Rules, above n 62, r 8.1.1, Note 2.

other preliminary submissions.<sup>74</sup> Typically, the Panel declines to conduct proceedings in situations where there is ‘no reasonable prospect that it would declare the circumstances unacceptable’.<sup>75</sup> This similarly occurs where the Panel considers the material is insufficient to warrant further investigation.<sup>76</sup> A Review Panel may also decide not to conduct proceedings where it agrees with the initial Panel’s decision and reasons, and concludes that it would not decide the matter differently.<sup>77</sup>

If the Sitting Panel conducts proceedings, it sends a brief to the parties inviting submissions on the key issues or questions identified and setting out the timetable for making submissions and rebuttal submissions.<sup>78</sup> Although copies of documents must be provided to interested persons,<sup>79</sup> it is possible that further submissions may not be given to each party and documents may be withheld ‘for confidentiality or other reasons’.<sup>80</sup> The Panel prefers to conduct its proceedings in private.<sup>81</sup> It relies predominantly on written submissions and uses email as its primary means of communicating.<sup>82</sup> Panel members can also now participate in proceedings while overseas.<sup>83</sup> However, a conference can be convened to allow oral evidence.<sup>84</sup> The Panel has indicated that it may conduct a conference if it considers that it would ‘expedite proceedings or if it requires a better understanding of evidence, issues or arguments’.<sup>85</sup>

The Panel does not need to comply with the rules of evidence,<sup>86</sup> and may instead act based on ‘any logically probative material from any source’.<sup>87</sup> Before making a declaration or orders, the Panel is required to give ASIC, parties and any persons affected by the proposed declaration or orders an opportunity to make submissions.<sup>88</sup> Parties are encouraged to resolve issues before making the application and the Panel will generally give consent to withdraw an application where the dispute is resolved (unless unacceptable circumstances are suspected to occur or continue).<sup>89</sup> The Panel also urges parties to propose undertakings to remedy

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<sup>74</sup> Procedural Rules, above n 62, r 6.1.1.

<sup>75</sup> See, for example, *Innate Immunotherapeutics Limited* [2017] ATP 2, 1. Other factors that the Panel considers include the strength of the evidence and timing of the application: see *ibid* r 6.1.1, Note 2.

<sup>76</sup> See, for example, *Kasbah Resources Limited OIR* [2017] ATP 1, 1.

<sup>77</sup> Procedural Rules, above n 62, r 3.3.1 Note 3.

<sup>78</sup> Procedural Rules, above n 62, r 6.2.1, Note 2.

<sup>79</sup> See *Corporations Act 2001* (Cth) ss 657A(6), 657D(4); *Australian Securities and Investments Commission Regulations 2001* (Cth) r 28(2); Procedural Rules, above n 62, rr 2.2.2, 2.2.3, 7.1.1, 8.1.1.

<sup>80</sup> See *Australian Securities and Investments Commission Regulations 2001* (Cth) r 30(2)–(3) and Procedural Rules, above n 62, r 2.3.1 respectively.

<sup>81</sup> Procedural Rules, above n 62, r 1.1.1 Note 1.

<sup>82</sup> See above n 65 and accompanying text; Procedural Rules, above n 62, rr 1.1.1 Note 1; 2.1.1, Note 1.

<sup>83</sup> See *Australian Securities and Investments Commission Act 2001* (Cth) s 188(3); above n 69.

<sup>84</sup> *Australian Securities and Investments Commission Regulations 2001* (Cth) rr 35, 37(1).

<sup>85</sup> Procedural Rules, above n 62, r 6.4.1 Note 1.

<sup>86</sup> *Australian Securities and Investments Commission Regulations 2001* (Cth) r 16(2)(a).

<sup>87</sup> Procedural Rules, above n 62, r 6.3.1 (see also Note 1).

<sup>88</sup> *Corporations Act 2001* (Cth) ss 657A(4), 657D(1).

<sup>89</sup> See Procedural Rules, above n 62, rr 3.1.1 Note 6, 3.4.1 Note 1.

concerns raised, particularly in the context of preliminary submissions, and the making of declarations and/or orders.<sup>90</sup>

There are a number of ways in which the Panel's decisions can be reviewed. In addition to the Panel's power to review ASIC decisions,<sup>91</sup> parties can seek review of a Panel decision relating to unacceptable circumstances.<sup>92</sup> This latter application for review of a Panel decision must be made within two business days of the decision of the initial Panel.<sup>93</sup> The Review Panel comprises another three members of the Panel and has similar powers to the initial Panel.<sup>94</sup> When exercising the power to review decisions of ASIC or an initial Panel, the Panel or Review Panel respectively decide the matter 'de novo'.<sup>95</sup> This means that the circumstances are reconsidered 'afresh' in light of the relevant policy considerations and taking into account any new circumstances since the original decision.<sup>96</sup>

Panel decisions are also subject to judicial review.<sup>97</sup> Judicial review applications to date have focused on procedural fairness<sup>98</sup> and whether the Panel has complied with the legislative requirements giving it jurisdiction.<sup>99</sup> In relation to procedural fairness, parties must be given a reasonable opportunity to make submissions before the Panel exercises its powers to review ASIC decisions and make a declaration of unacceptable circumstances and orders.<sup>100</sup> However, in the case of an ASIC decision subject to Panel review, the Panel can decline to give a reasonable opportunity for submissions if it is 'not practicable' due to 'the urgency of the case or otherwise'.<sup>101</sup> On the other hand, the courts have applied procedural fairness rules to the Panel in circumstances where the legislation did not specifically require this. Consequently, the Panel has been found to have exercised improperly its power to extend the

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<sup>90</sup> See Procedural Rules, above n 62, rr 6.1.1 Note 3, rr 7.1.1 Note 2, 8.1.1 Note 5. The Panel has also recently indicated that it is more receptive to proposals offered earlier in the process: see Takeovers Panel, 'Amendment of GN 4 Remedies General – Public Consultation Response Statement' (30 January 2017), 2.

<sup>91</sup> See above n 14 and accompanying text.

<sup>92</sup> *Corporations Act 2001* (Cth) ss 656A, 657EA(1).

<sup>93</sup> *Corporations Regulations 2001* (Cth) r 6.10.01.

<sup>94</sup> *Corporations Act 2001* (Cth) s 657EA(4); *Australian Securities and Investments Commission Act 2001* (Cth) s 184(1).

<sup>95</sup> Procedural Rules, above n 62, rr 3.2.1, 3.3.1.

<sup>96</sup> See Procedural Rules, above n 62, rr 3.2.1 Note 1, 3.3.1 Note 2; *Corporations Act 2001* (Cth) ss 655A(2), 656A(3), 657A(3), 673(2).

<sup>97</sup> See *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 3, 5; *Judiciary Act 1903* (Cth) s 39B; *Australian Constitution* s 75.

<sup>98</sup> See *Tinkerbelle Enterprises Pty Ltd as Trustee for The Leanne Catelan Trust v Takeovers Panel* (2012) 208 FCR 266; *Queensland North Australia Pty Ltd v Takeovers Panel* (2014) 100 ACSR 358; *Queensland North Australia Pty Ltd v Takeovers Panel* (2015) 320 ALR 726.

<sup>99</sup> See especially *Glencore International AG v Takeovers Panel* (2005) 220 ALR 495; *Glencore International AG v Takeovers Panel* (2006) 151 FCR 77; *Queensland North Australia Pty Ltd v Takeovers Panel* (2014) 100 ACSR 358; *Queensland North Australia Pty Ltd v Takeovers Panel* (2015) 320 ALR 726; *Queensland North Australia Pty Ltd v Takeovers Panel (No 2)* (2015) 236 FCR 370.

<sup>100</sup> See *Corporations Act 2001* (Cth) ss 656B(3), 657A(4), 657D(1); Procedural Rules, above n 62, r 8.1.1 Note 7. There may also be submissions on interim orders if the matter is not urgent: see Procedural Rules, above n 62, r 8.1.1 Note 4.

<sup>101</sup> *Corporations Act 2001* (Cth) s 656B(4).

time for an application for a declaration of unacceptable circumstances where it had not given affected parties an opportunity to make submissions beforehand.<sup>102</sup> Courts have also quashed a number of Panel decisions based on breaches of the legislative requirements concerning its jurisdiction.<sup>103</sup> Following the first two judicial review decisions, the legislation was amended in light of concerns that it had been interpreted too narrowly.<sup>104</sup>

#### IV ASSESSMENT OF SPEED

This Part assesses the speed of decision-making of the Panel over the period from 13 March 2000 to 30 June 2016. The first section contains an empirical analysis of the timing of Panel decisions.<sup>105</sup> It focuses particularly on the average times that the Panel took to make its decisions and publish the reasons for its decisions in each year, as well as the average times taken to make interim orders. This section also evaluates the effect of the Panel deciding not to conduct proceedings and the use of conferences on the timing of decision-making. The second section analyses the impact of judicial review on the time that it took to resolve the affected matters. It compares the relative times taken by the Panel and the courts in relation to these matters and the time taken by the courts in relation to the different judicial review matters over time. The final section assesses the speed of Panel decision-making using the methodology set out in Part II.

##### A *Timing of Panel Decision-Making*

The most important indicator of the speed of the Panel's decision-making is the time that it takes to make its decisions and publish the reasons for its decisions. As discussed above, the Panel usually announces its decision prior to the publication of the reasons.<sup>106</sup> Accordingly, Table 1 below provides an empirical analysis of the average number of days taken from the application to the decision, from the decision to the publication of reasons and from the application to the reasons for Panel applications occurring between 13 March 2000 and 30 June 2016.<sup>107</sup> This data set is also depicted in Graph 1 below. In addition, Table 1 sets out the average number of applications per month for each year. This latter information allows the Panel's workload for each year to be compared on an equivalent basis, given the shorter time periods in the first and last calendar year over the relevant period.

As set out at the bottom of Table 1, the Panel's decisions were on average made within 16.6 days of the application, with reasons being provided an average of 29.5 days later. This resulted in a total average of 46.1 days between the date of the application and the availability

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<sup>102</sup> See *Corporations Act 2001* (Cth) s 657C(3)(b); *Queensland North Australia Pty Ltd v Takeovers Panel* (2014) 100 ACSR 358, 376; *Queensland North Australia Pty Ltd v Takeovers Panel* (2015) 320 ALR 726, 741.

<sup>103</sup> See *Glencore International AG v Takeovers Panel* (2005) 220 ALR 495; *Glencore International AG v Takeovers Panel* (2006) 151 FCR 77; *Queensland North Australia Pty Ltd v Takeovers Panel* (2015) 320 ALR 726; *Queensland North Australia Pty Ltd v Takeovers Panel (No 2)* (2015) 236 FCR 370.

<sup>104</sup> See Explanatory Memorandum, *Corporations Amendment (Takeovers) Bill 2007* (Cth) 1–2.

<sup>105</sup> This analysis is based on statistical information made available by the Panel.

<sup>106</sup> See above n 59 and accompanying text.

<sup>107</sup> This includes applications up to and including that relating to the decision in *Sovereign Gold Company Limited* [2016] ATP 12.

of reasons for the decision. The average time taken for the Panel to make its decisions over this period ranged from 9.8 days in 2008 to 23.1 days in 2002. This highest average is still around a week less than the one month time limit applicable to the Panel making a declaration of unacceptable circumstances.<sup>108</sup> Although there were only seven matters in which the Panel conducted an oral conference,<sup>109</sup> it is interesting to note that the average time for the Panel to make its decision in these matters was 30 days, which is nearly double the overall average.<sup>110</sup>

**Table 1 – Timing of Panel decisions and reasons from 13 March 2000 to 30 June 2016**

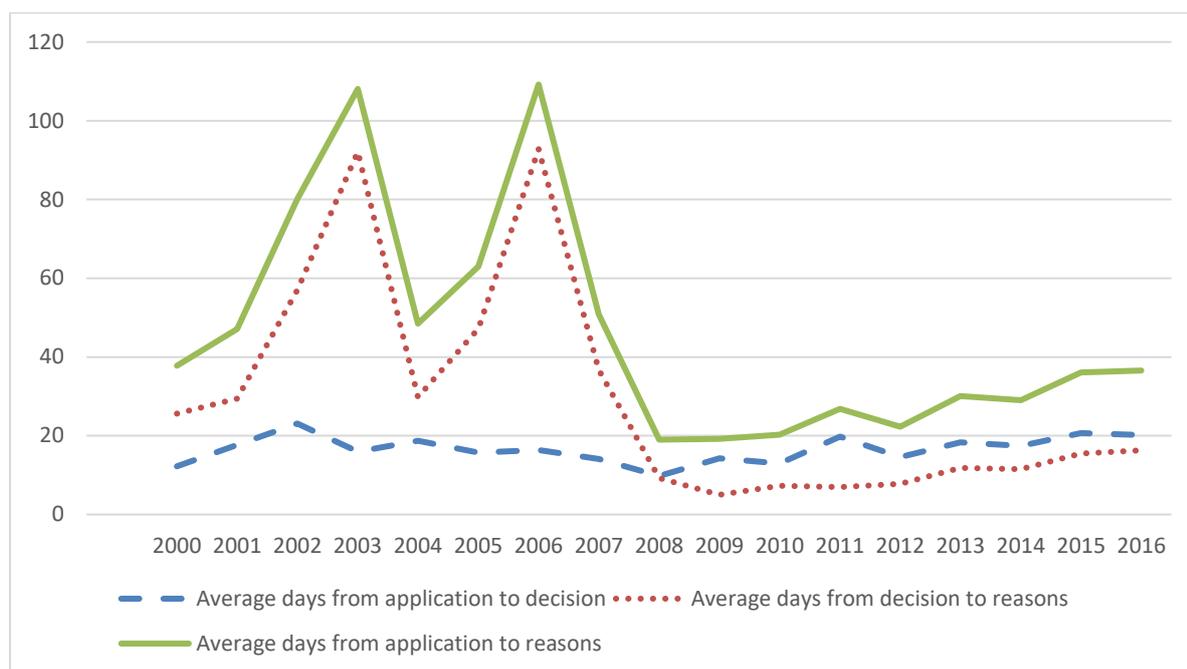
	Average number of applications each month	Average days from application to decision	Average days from decision to reasons	Average days from application to reasons
2000	2.1	12.2	25.6	37.8
2001	2.6	17.7	29.4	47.1
2002	1.9	23.1	57.0	80.1
2003	4.1	16.0	92.1	108.1
2004	2.8	18.7	29.8	48.5
2005	2.2	15.7	47.2	63.0
2006	3.0	16.4	92.8	109.2
2007	2.8	14.1	36.7	50.8
2008	3.1	9.8	9.2	19.0
2009	2.7	14.3	5.0	19.2
2010	2.2	13.0	7.3	20.3
2011	1.3	19.8	7.0	26.8
2012	2.1	14.6	7.8	22.3
2013	1.7	18.3	11.8	30.1
2014	2.1	17.4	11.5	29.0
2015	1.3	20.7	15.5	36.1
2016	2.2	20.2	16.3	36.6
<b>Average</b>	<b>2.4</b>	<b>16.6</b>	<b>29.5</b>	<b>46.1</b>

<sup>108</sup> See *Corporations Act 2001* (Cth) s 657B(b).

<sup>109</sup> *Infratil Australia Ltd 02* [2000] ATP 1; *Email Limited 03* (2000) 18 ACLC 708; *Vincorp Wineries Ltd* (2001) 38 ACSR 584; *Pinnacle 5* (2001) 39 ACSR 43; *Pinnacle VRB Limited* (No 8) (2001) 39 ACSR 55; *Online Advantage Limited* [2002] ATP 14; Takeovers Panel, ‘Panel Decision in Online Advantage Limited’ (Media Release TP02/052, 10 September 2002); *Yancoal Australia Limited* [2014] ATP 24.

<sup>110</sup> However, the average time to provide reasons in these matters was 30.6 days, which was only just above the overall average figure.

**Graph 1** – Timing of Panel decisions and reasons from 13 March 2000 to 30 June 2016



Graph 1 highlights the greater variability in the average times taken for the Panel to publish its reasons. These ranged from an average of five days in 2009 to 92.8 days in 2006. The second highest average in 2003 also exceeded three months (92.1 days). An obvious factor in relation to the timing is the average number of applications received each month over the relevant time periods. There is some correlation between the average number of applications and timing of the reasons. In particular, the highest average number of applications occurred in 2003 (4.1 per month), which was the year in which average time for the reasons was the second longest. Significantly, the Panel received 19 applications in relation to Anaconda Nickel Ltd (the highest number in relation to any matter) in just under 3 months at the beginning of 2003.<sup>111</sup> Similarly, the longest time for the reasons occurred in 2006, which had the third highest average number of applications (three per month). The number of applications is clearly not the only relevant factor given that the average times for the decision and reasons are significantly lower in 2008, which had the second largest number of applications (3.1 per month). It is also important to note that there was significant delay in 2006 in relation to the Panel’s reasons for their decisions concerning Alinta Ltd,<sup>112</sup> with this timing affected by three sets of court decisions that ultimately led to the High Court upholding the constitutionality of the Panel in *Alinta*.<sup>113</sup>

There was no discernible correlation between the number and timing of interim orders. Table 2 below sets out the average number of days between the dates of the application and interim

<sup>111</sup> See Takeovers Panel, ‘Anaconda Nickel Limited 01-19 – Panel Publishes Reasons in Anaconda 01 to 19’ (Media Release TP03/067, 15 July 2003).

<sup>112</sup> The reasons for these decisions were each published more than 500 days after the decision: see *Re Alinta Ltd (No 1)* [2006] ATP 15; *Re Alinta Ltd (No 1R)* [2006] ATP 19; *Re Alinta Ltd (No 2)* (2007) 25 ACLC 1746.

<sup>113</sup> See *Australian Pipeline Ltd v Alinta Ltd* (2006) 237 ALR 158; *Australian Pipeline Ltd v Alinta Ltd* (2007) 159 FCR 301; *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542.

order for each year from 13 March 2000 to 30 June 2016. It also contains the average monthly number of applications for an interim order for each year, together with the number of interim orders granted in each year. The overall average time for the making of interim orders was 5.7 days, with the minimum average time of 1.5 days in 2006.

**Table 2** – Timing of interim orders from 13 March 2000 to 30 June 2016

	Average number of applications each month	Average days from application to interim order	Number of interim orders
2000	1.1	5.0	1
2001	1.1	5.6	5
2002	1.1	8.0	2
2003	1.8	2.6	5
2004	1.2	5.9	8
2005	1.3	8.0	4
2006	1.8	1.5	2
2007	1.3	3.0	1
2008	2.3	3.4	7
2009	1.6	6.2	6
2010	1.5	7.8	8
2011	0.9	6.7	3
2012	1.5	6.0	2
2013	1.4	7.6	6
2014	1.9	8.4	5
2015	0.8	7.4	4
2016	1.8	3.6	3
<b>Average</b>	<b>1.4</b>	<b>5.7</b>	4.2

It is notable from Table 1 that the total average time periods from the date of application to the publication of reasons in the years starting from 2008 were lower than the overall average. This can be explained partly by the Panel generally declining to conduct proceedings in a higher percentage of matters over that time. Table 3 below sets out the percentage of matters in which the Panel conducted proceedings, declined to conduct proceedings and consented to the withdrawal of the application in the matters from 13 March 2000 to 30 June 2016. This data set is also depicted in Graph 2.

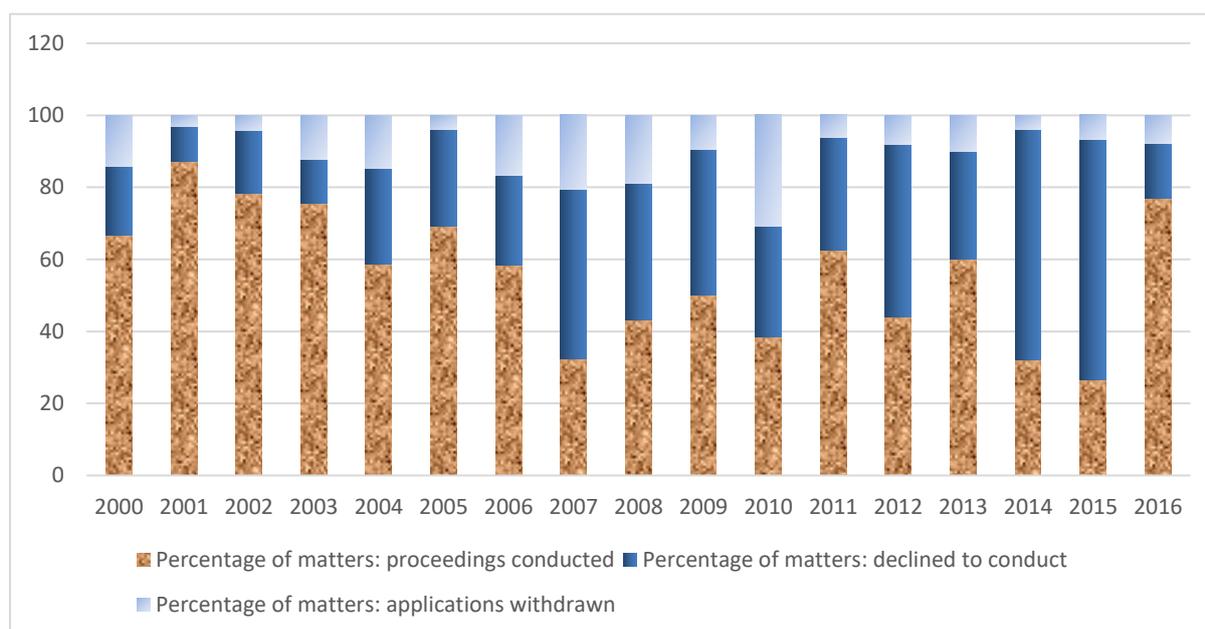
**Table 3** – Process outcomes from 13 March 2000 to 30 June 2016

	Percentage of matters: proceedings conducted	Percentage of matters: declined to conduct	Percentage of matters: applications withdrawn
2000	66.7	19.0	14.3
2001	87.1	9.7	3.2
2002	78.3	17.4	4.3
2003	75.5	12.2	12.2
2004	58.8	26.5	14.7
2005	69.2	26.9	3.8
2006	58.3	25.0	16.7
2007	32.4	47.1	20.6
2008	43.2	37.8	18.9
2009	50.0	40.6	9.4
2010	38.5	30.8	30.8
2011	62.5	31.3	6.3
2012	44.0	48.0	8.0
2013	60.0	30.0	10.0
2014	32.0	64.0	4.0
2015	26.7	66.7	6.7
2016	76.9	15.4	7.7
<b>Average</b>	<b>56.5</b>	<b>32.3</b>	<b>11.3</b>

**Table 4** – Average process outcomes from 13 March 2000 to 30 June 2016

	Percentage of matters: proceedings conducted	Percentage of matters: declined to conduct	Percentage of matters: applications withdrawn
2000-2005	72.6	18.6	8.8
2006-2010	44.5	36.3	19.3
2011-2016	50.4	42.6	7.1

**Graph 2** – Process outcomes from 13 March 2000 to 30 June 2016



As set out in Table 3 above, the Panel either declined to conduct proceedings or consented to withdrawal of the application in at least half of the matters in seven out of the 10 years starting in 2007. This trend is also demonstrated in Graph 2. In addition, Table 4 highlights that the number of matters in which the Panel declined to conduct proceedings increased over time based on the averages for the time periods 2000-2005, 2006-2010 and 2011-2016. Interestingly, Table 1 above shows that the average times for providing reasons in the years from 2008 was lower compared to the average times taken to make the decision. Table 1 also reveals that there has been a significant reduction in the time taken to provide reasons for decisions overall in those years. The combination of these factors suggest that the Panel has become more efficient in its decision-making over time.

## **B** *Impact of Judicial Review*

Judicial review affected Panel decisions in relation to four different sets of circumstances over the period from 13 March 2000 to 30 June 2016. This involved a total of nine Panel decisions and nine court decisions.<sup>114</sup> Table 5 below sets out the times between the application and when the reasons were provided in relation to each of these decisions.<sup>115</sup> It demonstrates clearly the adverse impact that judicial review has on the overall timing of decision-making by the Panel.

<sup>114</sup> This excludes the circumstances relating to the *Alinta* cases, which were ultimately concerned with whether the Panel had exercised its powers in accordance with the *Australian Constitution*: see *Australian Pipeline Ltd v Alinta Ltd* (2006) 237 ALR 158; *Australian Pipeline Ltd v Alinta Ltd* (2007) 159 FCR 301; *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542.

<sup>115</sup> The dates for the application and reasons are typically set out in the relevant Panel or Court decisions, or have otherwise been obtained from searches of the Panel's media releases (<<http://www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=MR>>) or the Commonwealth Courts Portal (<<http://www.fedcourt.gov.au/online-services/commonwealth-courts-portal>>).

**Table 5 – Timing of judicial review applications from 13 March 2000 to 30 June 2016**

<b>Timing (from date of application to that body to date of reasons)</b>	<b><i>Glencore</i> (2005-2006)</b>	<b><i>CEMEX</i> (2007-2009)</b>	<b><i>Tinkerbell</i> (2011-2012)</b>	<b><i>QNA</i> (2012-2016)</b>
Initial Panel	74 days <sup>116</sup>	35 days <sup>117</sup>	61 days <sup>118</sup>	59 days <sup>119</sup>
Review Panel	47 days <sup>120</sup>	66 days <sup>121</sup>	19 days <sup>122</sup>	N/A
First Court	49 days <sup>123</sup>	393 days <sup>124</sup> (>1 year)	591 days <sup>125</sup> (>1 year, 7 months)	622 days <sup>126</sup> (>1 year, 8 months)
Second Review Panel	56 days <sup>127</sup>	N/A	N/A	N/A
Second Court	120 days <sup>128</sup>	231 days <sup>129</sup> (>7 months)	N/A	436 days <sup>130</sup> (>1 year, 2 months)
Second Panel	N/A	N/A	N/A	144 days <sup>131</sup>
Third Court	N/A	N/A	N/A	29 days <sup>132</sup>

<sup>116</sup> See *Re Austral Coal Ltd (No 2)* (2005) 55 ACSR 60.

<sup>117</sup> See *Re Rinker Group Ltd (No 2)* [2007] ATP 17.

<sup>118</sup> See *Re CMI Ltd* [2011] ATP 4.

<sup>119</sup> See *Re The President's Club Ltd* [2012] ATP 10.

<sup>120</sup> See *Re Austral Coal Ltd (No 2R)* (2005) 55 ACSR 60.

<sup>121</sup> See *Re Rinker Group Ltd (No 2R)* (2007) 64 ACSR 472.

<sup>122</sup> See *Re CMI Ltd (No 1R)* [2011] ATP 5.

<sup>123</sup> See *Glencore International AG v O'Bryan* [2005] HCATrans 458; *Glencore International AG v Takeovers Panel* (2005) 220 ALR 495.

<sup>124</sup> See Takeovers Panel, 'Rinker Group Limited 02R – Application for Judicial Review' (Media Release, No 72/2007, 27 September 2007); *Cemex Australia Pty Ltd v Takeovers Panel* (2008) 106 ALD 5.

<sup>125</sup> See Takeovers Panel, 'CMI Limited – Application for Judicial Review and Request for Stay' (Media Release, No 26/2011, 7 April 2011); *Tinkerbell Enterprises Pty Ltd as Trustee for The Leanne Catelan Trust v Takeovers Panel* (2012) 208 FCR 266.

<sup>126</sup> See Takeovers Panel, 'The President's Club Limited – Application for Judicial Review' (Media Release, No TP12/72, 24 September 2012); *Queensland North Australia Pty Ltd v Takeovers Panel* (2014) 100 ACSR 358.

<sup>127</sup> This comprised 29 days before second Court proceedings and 27 days following the orders to extend the time for the Panel's decision: see *Re Austral Coal Ltd (No 2RR)* (2005) 23 ACLC 1797; *Takeovers Panel v Glencore International AG* (2005) 55 ACSR 453.

<sup>128</sup> *Glencore International AG v Takeovers Panel* (2006) 151 FCR 77.

<sup>129</sup> See Takeovers Panel, 'Rinker Group Limited 02R – Appeal to Full Federal Court' (Media Release, No 08/104, 14 November 2008); *Cemex Australia Pty Ltd v Takeovers Panel* (2009) 177 FCR 98.

<sup>130</sup> This figure combines the timing of the first and second decisions of the Full Federal Court, comparing the date of the application to that of the second judgment setting out the Court's orders: see Takeovers Panel, 'The President's Club Limited – Full Federal Court Decision' (Media Release, No TP15/45, 4 September 2015); *Queensland North Australia Pty Ltd v Takeovers Panel* (2015) 320 ALR 726 (reasons); *Queensland North Australia Pty Ltd v Takeovers Panel (No 2)* (2015) 236 FCR 370 (orders).

<sup>131</sup> This involved 82 days before the third Court proceedings and 62 days following the date of the judgment of the third Court: see *Re The President's Club Ltd (No 2)* [2016] ATP 1; *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* (2015) 328 ALR 664.

<sup>132</sup> See *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* (2015) 328 ALR 664.

Total for Panel decisions	177 days (3 decisions)	101 days (2 decisions)	80 days (2 decisions)	203 days (2 decisions)
Total for Court decisions	169 days (2 decisions)	624 days (2 decisions)	591 days (1 decision)	1087 days (4 decisions)
Court time taken compared to Panel	95%	618%	739%	535%
Total time for decisions	346 days (11.4 months <sup>133</sup> )	725 days (1 year, 11.8 months)	671 days (1 year, 10.1 months)	1290 days (3 years, 6.4 months)

For the Panel decisions affected by judicial review, the average time between the dates of the applications and the publication of reasons was 62.3 days.<sup>134</sup> This is longer than the equivalent average time of 46.1 days for all Panel matters over the same time period.<sup>135</sup> In contrast, the average time taken for the Court decisions in relation to judicial review was 274.6 days.<sup>136</sup> This is over four times the average time taken by the Panel to provide its reasons in relation to the matters subject to judicial review.

As highlighted in the final rows of Table 5, the first judicial review proceedings (*Glencore* cases<sup>137</sup>) took marginally less time than the Panel decisions under review.<sup>138</sup> They also took significantly less time than the court proceedings in relation to the subsequent Panel decisions.<sup>139</sup> The *Glencore* cases related to decisions by an initial and Review Panel that required Glencore to sell shares to each person who had sold the same shares on the Australian Securities Exchange over a certain time period.<sup>140</sup> One possible factor that could help explain the relative speediness of the *Glencore* judicial review cases is that the proceedings were initially commenced during the takeover bid period.<sup>141</sup> This is likely to have led to increased time pressures in relation to the finalisation of the proceedings.

In contrast, the court decisions in the *CEMEX* and *Tinkerbelle* matters took around 3.5 times the amount of time as the *Glencore* cases, and 618% and 739% respectively of the time taken by the Panel in relation to each of those matters. This resulted from the fact that the court decisions in each of the *CEMEX* and *Tinkerbelle* matters took a total of over a year and seven months. There was also a significant discrepancy in relation to the most recent judicial review

<sup>133</sup> The number of months calculated for the total times taken are approximated based on an average of 30.4 days per month.

<sup>134</sup> Average calculated using data in 'Total for Panel decisions' row in Table 5 above.

<sup>135</sup> See 'Average' row in Table 1 above.

<sup>136</sup> Average calculated using data in 'Total for Court decisions' row in Table 5 above.

<sup>137</sup> *Glencore International AG v Takeovers Panel* (2005) 220 ALR 495; *Glencore International AG v Takeovers Panel* (2006) 151 FCR 77.

<sup>138</sup> See 'Court time taken compared to Panel' row in Table 5 above.

<sup>139</sup> See 'Total for Court decisions' row in Table 5 above.

<sup>140</sup> See *Re Austral Coal Ltd (No 2R)* (2005) 55 ACSR 60, 132–5 ('*Austral Coal 02R*'); *Austral Coal 02RR* (2005) 23 ACLC 1797, 1842–5, 1849–50.

<sup>141</sup> The first application was accordingly brought in the High Court to avoid the operation of the privative clause in the legislation: see *Glencore International AG v O'Bryan* [2005] HCATrans 458.

decisions in *QNA*. These decisions took over six times the time taken in the *Glencore* cases, and 535% of the time taken in the Panel decisions subject to review.<sup>142</sup>

The longest delay in the judicial review matters resulted from the first instance judgment in *QNA*, which was delivered after over a year and eight months.<sup>143</sup> It then took just over a year and two months for the Full Federal Court to provide its reasons and orders, which were delivered in separate judgements.<sup>144</sup> However, the Federal Court judgment subsequently only took 29 days to dismiss a judicial review application in relation to the Panel extending time for the application and to extend time for the Panel to make its declaration.<sup>145</sup> This was the second fastest time taken for any Panel or court decision in relation to the judicial review matters, only being longer than the 19 days taken by the Review Panel in *Tinkerbelle* to decide and provide reasons for its decision not to conduct proceedings.<sup>146</sup>

### C Overall Assessment

Speed in Panel decision-making is assessed based on the methodology discussed in Part II above. Consequently, there would be a strong form of speed where the Panel consistently makes its decisions within one month of the application, and publishes its reasons consistently within three months. A medium form of speed would be reflected in the Panel consistently making its decisions and publishing its reasons from three to six months of receiving the application. The weak form is considered to result where both of these occur from six to 12 months following the application.

There are many elements of the Panel's processes that are designed to produce speed in decision-making. Two of the most important are the Panel using written submissions and email communication to conduct its proceedings.<sup>147</sup> Similarly, it is significant that the Panel conducts its proceedings in private and is not subject to the rules of evidence.<sup>148</sup> Although the Panel can decide to allow oral argument by convening a conference, this has only been done in seven matters (with only one of these occurring since 2002).<sup>149</sup> The Panel has also used its power to decline to conduct proceedings increasingly over time.<sup>150</sup>

In light of these processes, the Panel took an average of 16.6 days to make its decisions and a further average of 29.5 days to make its decisions in the period from 13 March 2000 to 30 June 2016. This resulted in an overall total average of 46.1 days for the decisions and

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<sup>142</sup> See 'Court time taken compared to Panel' row in Table 5 above.

<sup>143</sup> An amended originating application was filed just over 10 months following the initial application: see Takeovers Panel, 'The President's Club Limited – Application for Judicial Review', Media Release No TP12/72 (24 September 2012); *Queensland North Australia Pty Ltd v Takeovers Panel* (2014) 100 ACSR 358, 361.

<sup>144</sup> See *Queensland North Australia Pty Ltd v Takeovers Panel* (2015) 320 ALR 726 (reasons); *Queensland North Australia Pty Ltd v Takeovers Panel (No 2)* (2015) 236 FCR 370 (orders).

<sup>145</sup> *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* (2015) 328 ALR 664.

<sup>146</sup> *CMI Limited 01R* [2011] ATP 5.

<sup>147</sup> See above n 82.

<sup>148</sup> See above nn 81, 86.

<sup>149</sup> See above n 109.

<sup>150</sup> See above text following Table 2.

reasons. Over this period, there were only two years in which the average time to publish the Panel's reasons exceeded three months. These average times were 108.1 days and 109.2 days in 2003 and 2006 respectively. It is notable that the highest number of applications in relation to any matter was received in 2003.<sup>151</sup> There was also a significant delay in the reasons for the Panel's decisions in 2006 concerning Alinta Ltd, in light of court proceedings that ultimately led to the High Court upholding the constitutionality of the Panel in *Alinta*.<sup>152</sup> Notwithstanding this, the Panel's decisions were announced on average around 16 days after the application in both of these years.

As highlighted in the preceding section, judicial review had a significant impact on the timing of the final decision in relation to the four sets of affected matters. This resulted in the total time taken by the Panel and the courts to make their decisions in those proceedings ranging from around 11 months in *Glencore* to 3.5 years in *QNA*. Notwithstanding this delay in the final outcome, the Panel provided its reasons on average 62.3 days following the application in the four sets of proceedings, which is slower than the overall average of 46.1 days. In light of this and the overall average taken by the Panel to make its decisions and publish its reasons, the Panel achieved a strong form of speed overall in relation to its decision-making over this period.

## V CONCLUSION

Speed in decision-making is an important element of an effective dispute resolution system and was one of the main aims of the CLERP reforms. This reflects one of the key advantages of using administrative bodies in place of the courts. It is particularly important in the context of takeovers due to the impact that delay can have on the viability of the takeover, especially where the bidder needs financing for to pay cash consideration. This article assesses the speed of the Panel's decision-making from 13 March 2000 to 30 June 2016. It achieves this by measuring the timing of Panel decisions against different standards based on the legislative requirements for Panel decision-making and benchmarks applied to courts and other tribunals making similar types of decisions. Accordingly, a strong form of speed reflects the Panel consistently making its decisions in one month, and providing its reasons within three months, of the application.

The assessment of speed is conducted primarily based on an empirical analysis of the timing of the announcement of Panel decisions and publication of the reasons for its decisions. Overall, the Panel took an average of 16.6 days to make its decisions and an overall total average of 46.1 days from the application to the publication of its reasons. This can be contrasted with the total time taken by the Panel and the courts in the matters affected by judicial review (ranging from around 11 months to 3.5 years). However, the Panel provided its reasons on average 62.3 days after the application in the matters affected by judicial

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<sup>151</sup> See Takeovers Panel, 'Anaconda Nickel Limited 01-19 – Panel Publishes Reasons in Anaconda 01 to 19' (Media Release, TP03/067, 15 July 2003).

<sup>152</sup> See *Australian Pipeline Ltd v Alinta Ltd* (2006) 237 ALR 158; *Australian Pipeline Ltd v Alinta Ltd* (2007) 159 FCR 301; *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542.

review. This demonstrates that the aim of speed is best achieved where the Panel is the sole decision-maker in relation to takeover disputes. In light of the above analysis, it is concluded that the Panel has achieved, to date, a strong form of speed overall since the CLERP reforms in 2000.