



FINANCIAL
SERVICES
INSTITUTE
of Australasia

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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
CANBERRA ACT 2600

To whom it may concern,

The Operation of the Takeovers Panel

The Financial Services Institute of Australasia (Finsia) appreciates the opportunity to respond to the Parliamentary Joint Committee on Corporations and Financial Services (the committee) on the operation of the Takeovers Panel as provided under section 243 of the *Australian Securities and Investments Commission Act 2001*.

Finsia is Australasia's premier membership organisation for professionals working in the industry. We advance members' careers by building their capability and professional standing and connect them to leading content, insights and influential networks. We play a vital role in strengthening the industry through policy initiatives and respected credentials and drive professional excellence. We are the only professional association representing the entire spectrum of the Australasian financial services industry – including wealth management, banking and finance, and capital markets sectors connecting with more than 12,000 members.

Finsia has a strong research and policy focus in this area, recently launching a discussion paper titled *Regulating Foreign Direct Investment in Australia*. This paper was initiated by Finsia's Corporate Finance Advisory Group and examined the regulatory environment, stakeholder influences and the role of the foreign investment review board in handling cross-border transactions in Australia. The paper identified that both investors and vendors of assets are best supported by a process that is transparent, consistent and predictable.

In preparing a response to the committee, Finsia brought together a number of senior members and industry leaders in the corporate finance and legal sectors to identify any issues of concern or areas for reform of the Takeovers Panel. It should be noted that many senior Finsia members are also members of the Takeovers Panel and abstained from the discussion owing to the conflict of interest.

Finsia broadly believes that the current arrangements for the Takeovers Panel provide a mechanism for the efficient and effective resolution of takeover disputes. It believes the Takeovers Panel is well staffed, resourced and appropriately funded at current levels. It is supportive of a peer review body that is comprised of leading decision-makers with vast commercial experience who can comprehend the many factors that are required to be assessed in all transaction disputes. We also note that the appeal mechanism functions and operates well.

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Despite our broad support for the current operation of the Takeovers Panel, Finsia's members have identified some issues of concern and possible reform. Finsia believes that the Takeovers Panel should provide a Guidance Note for market participants that sets the boundaries for "truth in takeovers". This would serve to hold companies and executives to account for what is publically stated during a takeover process. There have been multiple occasions when inconsistencies have occurred, such that bids and offers have been adjusted contrary to public statements not to do so (examples can be provided upon request). A Guidance Note could be completed by the Takeovers Panel jointly with ASIC with an update of ASIC's current *Regulatory Guide 25 - Takeovers: False and misleading statements*.

The length of time taken for an application to reach a conclusion depends on a number of factors, including: the complexity of the matter, the urgency of the application, and whether the Panel decides to commence proceedings. For a number of small to medium sized transactions it has been identified that certain parties, discontent with particular transactions, have used the application process for the purposes of causing significant delays and increasing costs for parties involved. The fact that the Takeovers Panel cannot award costs unless a determination is made can create a substantial burden, particularly for smaller companies. The possible "manipulation" of the Takeovers Panel process by parties seeking to employ delay tactics for vexatious reasons can have significant ramifications on the success or otherwise of a transaction. This issue may also be exacerbated in situations where a party to a transaction refuses to assist with the resolution of the dispute. This issue threatens to undermine the integrity of the application process and ability of the Panel to provide for the 'efficient, effective and speedy resolution of takeover disputes'.

In light of this issue, a potential reform may be to broaden the powers of the Takeovers Panel to award costs through the implementation of penalties for those who are found to have filed applications for the purposes of increasing delays and costs to a transaction. This functions as a deterrent to discontented parties from exploiting the application process. The Takeovers Panel should refine the vetting process of transactions – smartly identifying those who file applications in a vexatious manner - to quickly expedite and expel patently obstructive applications. Finsia recognises that the "vetting" of applications is highly subjective and any legislative change may attract unintended consequences, but a more efficient framework is required to preserve the integrity of the overall process.

Finsia's consultation and research supports a Takeovers Panel that operates in a transparent, consistent and predictable manner to maintain the efficient and effective resolution of disputes. We strongly believe that it currently operates well and only propose reform to provide a "truth in takeovers" Guidance Note and for the panel's powers to award costs being broadened to improve the process for vetting obstructive applications.

Finsia is grateful for this opportunity to respond and is willing to be involved in any further consultations on these matters. If you have any further questions please contact Samuel Bell, Manager, Policy on (02) 9275 7953 or email s.bell@finsia.com.

Yours sincerely,



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