

# Quick answers

## New-look Takeovers Panel puts runs on the board

*A more powerful Takeovers Panel has put an end to the delaying tactics once common in mergers and acquisitions activity. RON FORSTER reviews a significant change.*

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Australia's revamped Corporations and Securities Panel — commonly referred to as the Takeovers Panel — seems to be working. Not only is it demonstrating a willingness to formulate policy, but it is also proving its ability to resolve takeover disputes quickly.

The changes to the panel's powers and composition, which were made early last year as part of the federal government's Corporate Law Economic Reform Program (CLERP), have already had one profound effect: parties trying to block or frustrate takeover attempts can no longer use "tactical litigation" as a means of creating delays.

The new panel is performing better than its predecessor for three reasons. The first is that it has new and wider powers. Second, the panel now has a larger membership with broader experience, with commercial as well as purely legal training. And third, the panel is hearing applications made by a much wider range of parties. Previously, it heard only those matters referred to it by the Australian Securities and Investments Commission (ASIC). Now, any party that believes its interests need protecting can apply to have its case heard. Further, such a party is not required to pay the other party's costs if its case is not successful.

Before the CLERP-inspired changes in March last year, mergers and acquisitions were too often delayed in court. A target

company, having received a hostile takeover bid (or a rival bidder who feared being pipped at the post) would often allege inadequacies in the predator's bid documents. Until those arguments were heard and resolved — often by courts which had little time to assess the issues in dispute — the predator would be unable to dispatch the offer documents.

With the new Takeovers Panel, such disputes can be resolved more efficiently, rather than by detailed judicial examination of legal arguments, in weeks rather than months.

The approach adopted by the Takeovers Panel when dealing with applications from rival bidders who want to create delays is perhaps best illustrated by the action taken late last year in a bidding war between De Beers and Rio Tinto for Ashton Mining Limited. De Beers applied for various interim orders to prevent Rio Tinto dispatching its offer documents. It also sought declarations from the panel that unacceptable circumstances existed in relation to the bid.

In its decision, the panel said that its "general policy is not to hold up dispatch of a bidder's statement, unless it contains misleading matter, and its dispatch may spread erroneous ideas which later supplementary statements may not succeed in removing. Formal defects and omissions which are not misleading can generally be remedied by a supplementary bidder's

statement and an extension of the relevant bid if necessary.”

The decision went on: “We should not restrain dispatch of Rio Tinto’s bidder’s statement, unless we have reason to believe that its dispatch would lead to unacceptable circumstances in relation to the affairs of Ashton. Relevantly, those would be constituted by an insufficiency of information for shareholders to decide on one or other bid, or by an uninformed market in Ashton shares. Misinformation is as bad as insufficient information.”

It is clear from this that the days of target companies and rival bidders substantially delaying the dispatch of takeover documents to target shareholders are now behind us — and that is unquestionably a favourable development.

However, one important question that has not yet been tested is that of the jurisdictional line drawn between the panel and the traditional court system. To enable the panel to be the main forum for resolving disputes until the bid period has ended, section 659B of the Corporations Law prevents anyone other than ASIC and other public authorities from mounting court actions in relation to bids or proposed bids.

This jurisdictional question gains some importance if, for example, a target anticipates a hostile takeover bid and takes appropriate defensive measures such as allotting 14.9% of its shares (in line with the ASX listing rules) without shareholder approval. Given that no takeover has actually been announced, it is unclear whether the panel or the court has jurisdiction.

One can imagine that a hostile bidder may want the issue decided by the panel because of the speed with which the matter could be resolved. The target, on the other hand, might not regard the panel as the most appropriate forum, as the issue of whether the allotment of shares can be set aside would involve questions of directors’ duties and the protection of the directors’ action by the business judgment rule. The target may prefer to have such matters heard by the Supreme Court. It is inevitable that this issue will be resolved, but the sooner it is, the better. **J**



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