

# Finsia proposes takeover law reforms

Australia's takeover laws are far from straightforward. The fact the government has had to put a panel in place to adjudicate on takeover issues is testimony to that. Finsia believes it is time to reform the takeover laws.

Autumn's JASSA featured an article by Martin Bugeja and Raymond da Silva Rosa titled "Raising the takeovers threshold in Australia: issues and evidence". Their paper concluded that: "Increasing the takeover threshold to 30% (from the current 20%) promises to deliver more certainty to potential acquirers and higher returns to target firm shareholders, as they benefit from a higher incidence of takeover bids. Concurrent elimination of the provisions allowing a creeping takeover will directly address the remaining concerns that the increase in the threshold will allow an acquirer to achieve control without paying a premium. Both changes are recommended in the interest of enhancing the competitiveness of Australia's capital markets."

Utilising this research, Finsia's Markets Policy Group (MPG) has developed a package of takeover law reforms designed to improve the market for corporate control, remove existing anomalies and protect the rights of minority shareholders.

## FINSIA'S TAKEOVERS PACKAGE

The Finsia Takeovers Package contains three key proposals for reform:

1. As recommended by Bugeja and da Silva Rosa, the package proposes increasing the takeover threshold from 20% to 30%, in conjunction with abolishing the "3% creep in 6 months" rule.
2. Similar to an earlier government

proposal known as the Mandatory Bid Rule, Finsia has proposed a Pre-bid Commitment Rule (PCR) that will facilitate pre-bid acceptances from a substantial shareholder. Currently, where a substantial shareholder owns more than 20% of a company, they cannot negotiate to sell their holding to a bidder. The PCR would allow a substantial shareholder to negotiate a sale, provided that all other shareholders are invited to participate in a takeover on the same terms and conditions.

3. The increased use of the "schemes of arrangement" provisions of the Corporations Law have allowed some bidders to circumvent key protections in the takeover laws, for example, permitting a compulsory acquisition to

occur with less than a 90% holding. Finsia proposes removing the significant inconsistencies between the regulation of schemes of arrangements and takeovers.

As well as improving the protections for minority shareholder, the academic research indicates that these proposals will increase the number of takeover bids and make Australia's takeover regime more comparable to its OECD counterparts.

Other initiatives included in the package are:

4. Removing the inconsistencies in the treatment of collateral benefits.
5. Abolishing the prohibition on escalator clauses.
6. Ensuring that the underwriting exemption is not being exploited to circumvent the takeovers restriction.

### Finsia acknowledges and warmly appreciates the contribution of members of its Markets Policy Group for this groundbreaking industry-driven package of reforms. The Finsia Markets Policy Group comprises:

Alison Lansley SF Fin (Chair)	Mallesons Stephen Jaques
Alastair Lucas SF Fin (Deputy Chair)	Goldman Sachs JB Were
Trevor Allen F Fin	KPMG
Chris Baohm SA Fin	Gresham Advisory Partners
Atagun Bensan	Grant Samuel Group
Bruce Dyer SA Fin	Blake Dawson Waldron
John Fast F Fin	BHP Billiton
Alex Fabbri SF Fin	Shaw Stockbroking
Brett Heading F Fin	McCullough Robertson
John Keeves SF Fin	Johnson Winter & Slattery
Trevor Loewensohn SF Fin	UBS Investment Bank
John O'Sullivan	Commonwealth Bank
Dave Poddar SA Fin	Mallesons Stephen Jaques
Jennifer Seabrook F Fin	Gresham Partners Securities
Will Taylor SF Fin	Finlaysons

## THE IMPORTANCE OF EFFICIENT TAKEOVER LAWS

Brian Salter, Chief Executive Officer Finsia, said, "The Takeovers Package is the culmination of three years of engaging industry experts, consultation, debate and academic research designed to ensure that Australian laws produce an efficient regulatory framework combined with the highest standards of market integrity."

The Federal Treasury CLERP 4 Paper on Takeovers recognised its economic importance, stating:

"Takeovers are an integral part of the operation of equity markets and in turn the Australian economy. The benefits of takeovers, or the prospect of takeovers, to shareholders, the corporate sector and the economy include improved corporate efficiency and enhanced management discipline, leading ultimately to greater wealth creation.

The basic objective of takeover regulation is to improve market efficiency. Specifically, regulation is directed at achieving an appropriate balance between encouraging efficient management and ensuring a sound investor protection regime, particularly for minority investors."

The Finsia Takeovers Package proposals will remove unnecessary constraints on takeover transactions while at the same time improving protections for minority shareholders. Calculations indicate that, despite the apparent

recent flurry of takeover activity, Australian M&A activity is still substantially less, when compared on a relative market capitalisation basis, than in the United States and United Kingdom. With these reforms, companies that don't deliver appropriate value to their shareholders run a greater risk of becoming takeover targets.

## FUTURE CONSULTATION

Finsia's MPG representatives Alastair Lucas (Goldman Sachs JB Were) and Alison Lansley (Mallesons Stephen Jaques) have presented the Finsia Takeovers Package to a range of interested stakeholders including the Hon. Chris Pearce MP, Treasury, the Takeovers Panel, ASIC, the ASX, Law Council and the Australian Shareholders Association.

Finsia will continue its consultation with key stakeholders on the Takeovers Package and will be providing further feedback to the government as part of the Corporations and Financial Services Regulation Review process.

The detailed Finsia Takeovers Package and accompanying academic research are available in the 'Policy and Advocacy' section of the Finsia website. [\[1\]](#)

*The Finsia Policy Team team welcomes all contributions from members to various policy projects, committees and technical submissions. If you would like further information on this process, or wish to comment on an industry issue, please email: [policyteam@finsia.edu.au](mailto:policyteam@finsia.edu.au)*

## THE TAKEOVERS PANEL

The Parliamentary Secretary to the Treasurer, the Hon. Chris Pearce, recently announced the appointment of Martin Alciaturi *SF Fin* and John Keeves *SF Fin* to the Takeovers Panel.

The Panel is a statutory body established under the auspices of Federal Treasury and the ASIC Act. Its membership comprises around 40 industry experts of the highest professional standing. New members and reappointment of a proportion of the Panel's membership are announced periodically.

Including John and Martin, there are now 18 Finsia members on the Panel: Alison Lansley *SF Fin*, Alastair

Lucas *SF Fin*, Brett Heading *F Fin*, John Fast *F Fin* and Jennifer Seabrook *F Fin* (all members of our Markets Policy Group), Mark Paganin *SF Fin* (Chair of our WA Regional Council), Teresa Handicott *F Fin* (member of our Queensland Regional Council), and other Finsia members Andrew Lumsden *SA Fin*, Simon McKeon *SA Fin*, Michael Ashforth *SA Fin*, Kathleen Farrell *SA Fin*, David Gonski *SA Fin*, Peter Mason *SA Fin*, Marian Micalizzi *F Fin* and Peter Scott *F Fin*.

Bruce Dyer *SA Fin*, a member of the Markets Policy Group, is currently the legal counsel for the Takeovers Panel.

Further information is available at [www.takeovers.gov.au](http://www.takeovers.gov.au).

# APEC financial regulators course

The APEC Financial Regulators Training Initiative is now entering its eighth year of operation and Finsia is continuing to facilitate the delivery of the training programs on behalf of the Asian Development Bank. This year three training programs for securities regulators and four training programs for bank supervisors will be delivered to participants from the APEC and ADB member nations under the Training Initiative. In May 2006, a new regional seminar on the Regulation of New Products was delivered in Kuala Lumpur hosted by the Securities Commission Malaysia and facilitated by Finsia. Thirty-five participants from 10 economies attended the five-day program. Securities regulators from United States Securities and Exchange Commission (US SEC), United States Commodity Futures Trading Commission (US CFTC), Securities and Futures Commission Hong Kong (SFC), Securities Commission Malaysia (SC) and Australian Securities and Investment Commission (ASIC) presented the issues associated with regulating new products being listed in the financial markets. The program was also relevant to bank supervisors as the supervision and regulation of these products in the market are of interest to both regulatory agencies.

The course attracted much regional interest and it is intended to offer the program again. For further details about the program, please contact Sue Jeffery as Assistant to the Secretariat – Asian Development Bank (ADB) for the APEC Financial Regulators Training Initiative at [s.jeffery@finsia.edu.au](mailto:s.jeffery@finsia.edu.au). [\[1\]](#)