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ASSESSMENT OF THE AUSTRALIAN  
TAKEOVERS PANEL**

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## FLEXIBILITY IN DECISION-MAKING: AN ASSESSMENT OF THE AUSTRALIAN TAKEOVERS PANEL

EMMA ARMSON\*

### I INTRODUCTION

The Australian Takeovers Panel ('the Panel') became the primary forum for resolving takeover disputes in the context of corporate law on 13 March 2000. This resulted from the implementation of the reforms in the *Corporate Law Economic Reform Program Act 1999* (Cth) ('CLERP reforms').<sup>1</sup> In replacing the previous role of the courts with the Panel, the CLERP reforms sought 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 ('UK Panel') 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>

As a result of the CLERP reforms, parties are required to apply to the Australian Panel instead of the courts in relation to takeover disputes during the bid period.<sup>5</sup> The Panel can then exercise its power to make a declaration of unacceptable circumstances under section 657A(2) of the *Corporations Act 2001* (Cth) ('*Corporations Act*') on three alternative grounds. These grounds are where

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1 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 Report 4') 7–8. See also *Corporations Act* s 659AA.

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

3 CLERP Report 4, above n 1, 36.

4 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.

5 See *Corporations Act* ss 657C, 659AA–659B.

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>6</sup> The Panel's power must be exercised having regard to the underlying purposes or 'spirit' of the takeover provisions.<sup>7</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>8</sup> With the exception of orders directing a person to comply with the legislation,<sup>9</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>10</sup> The Panel also has the power to review certain ASIC decisions, namely those relating to the exercise of ASIC's exemption and modification powers concerning the *Corporations Act* provisions on takeovers, substantial shareholdings and beneficial ownership.<sup>11</sup>

Flexibility in decision-making is one of the key advantages of using administrative tribunals in place of courts.<sup>12</sup> This is important particularly in the context of takeovers in light of the need to respond to changes in the market.<sup>13</sup> Indeed, the *Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on Takeover Bids* emphasised that '[i]n order to be effective, takeover regulation should be flexible and capable of dealing with new circumstances as they arise'.<sup>14</sup> Consistent with this, it has been observed that one of the significant features of the UK Panel has been its ability to respond to developments that would otherwise have led to legislative intervention.<sup>15</sup> This flexibility results from the fact that the UK Panel can apply its takeover rules

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6 See *Corporations Act* ss 602A, 657A(1)–(3).

7 *Corporations Act* s 657A(3)(a)(i).

8 *Corporations Act* s 602.

9 See below nn 70–1 and accompanying text.

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

11 *Corporations Act* ss 655A, 656A, 673.

12 See, eg, Robin Creyke, 'Tribunals: Divergence and Loss' (2001) 29 *Federal Law Review* 403, 404.

13 See, eg, Barbara Muston, 'Coping with Change: A View from the UK Takeover Panel' in John Munch and Rolf Skog (eds), *The Securities Council 25 Years – An Anthology* (Capital Markets Board, Stockholm, 2011) 69, 72 <[http://www.aktiemarknadsnamnden.se/UserFiles/AMN25ar\\_kap06\\_utan\\_KOM\\_kap06-165x242%20\(2\).pdf](http://www.aktiemarknadsnamnden.se/UserFiles/AMN25ar_kap06_utan_KOM_kap06-165x242%20(2).pdf)>.

14 *Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on Takeover Bids* [2004] OJ L 142/12, recital 6. See also Muston, above n 13, 79.

15 John Armour, Jack B Jacobs and Curtis J Milhaupt, 'The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework' (2011) 52 *Harvard International Law Journal* 219, 238, 259. See also Muston, above n 13, 77.

according to their ‘spirit’, in addition to having informal procedures and staffing by market participants.<sup>16</sup> It has also been observed that pragmatism is an important feature of UK Panel decision-making.<sup>17</sup>

There are a number of factors that impact upon a Panel’s ability to provide flexibility in its decision-making. A key factor is the Panel’s ability to make decisions taking into account broad-based principles and policy considerations, rather than being limited to applying prescribed legislative provisions. This is reflected in the takeover bodies’ role to ensure that the ‘spirit’ of the takeover rules is upheld as well as their substance.<sup>18</sup> Another significant factor affecting the way in which takeover panels and like bodies approach their decision-making is the qualifications of their members. In contrast to judges who are chosen according to their legal expertise, members of the Australian Panel are appointed in light of their experience in a range of different fields (including law, business, financial markets, economics and accounting).<sup>19</sup> These factors combine to produce a different approach to decision-making compared to court decisions enforcing legislative provisions. Consequently, it was pointed out in Australian Parliamentary debate in the 1980s that one of the key benefits of adopting a panel-based model is to adopt a ‘commercial approach’ in contrast to the technical and legalistic techniques adopted historically by the courts.<sup>20</sup>

This article addresses the question whether there has been flexibility in relation to Australian Panel decision-making since the CLERP reforms. Flexibility can be divided into two elements, namely procedural and substantive flexibility. These both reflect the CLERP reform aim of ‘informality’ in decision-making.<sup>21</sup> Procedural flexibility is shaped by the design features of the Panel system. In particular, it is determined by the powers of the Panel, its processes and the expertise of its members. These are set out in the regulatory framework<sup>22</sup> and the procedural rules adopted by the Panel in order to discharge its responsibilities (‘*Procedural Rules*’).<sup>23</sup> Procedural flexibility reflects the CLERP reforms’ aims to allow the Panel to ‘bring greater understanding and expertise to takeover disputes’,<sup>24</sup> with its proceedings to be conducted ‘as informally as is consistent with providing parties with a fair hearing and the expeditious

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16 See John Armour and David A Skeel Jr, ‘Who Writes the Rules for Hostile Takeovers, and Why?: The Peculiar Divergence of US and UK Takeover Regulation’ (2007) 95 *Georgetown Law Journal* 1727, 1729, 1745; Muston, above n 13, 72.

17 See, eg, Robert Falkner, ‘Non-Statutory Takeover Panel: Advantage or Anachronism?’ (1990) 9 *International Financial Law Review* 15, 16; Muston, above n 13, 71, 80.

18 See above text accompanying n 7 and following.

19 *Australian Securities and Investments Commission Act 2001* (Cth) s 172(4).

20 See Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 1983, 3041 (Lionel Bowen, Minister for Trade); Emma Armson, ‘Evolution of Australian Takeover Legislation’ (2013) 39 *Monash University Law Review* 654, 672–3.

21 CLERP Report 4, above n 1, 32.

22 See *Corporations Act* 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.

23 Takeovers Panel, *Procedural Rules* (at 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)>.

24 CLERP Report 4, above n 1, 37.

resolution of the matter'.<sup>25</sup> Substantive flexibility is more difficult to assess, as it involves an analysis of the extent to which the Panel has demonstrated flexibility in exercising its decision-making powers. There are a number of factors that are relevant to substantive flexibility. These relate to the extent to which the Panel adopts policies that are based on discretions rather than narrow rules, whether it uses a commercial or pragmatic approach to decision-making rather than a legalistic one, and the extent to which decision outcomes are based on negotiation rather than orders. This reflects the CLERP reforms' aim of avoiding 'excessive legalism' in Panel proceedings.<sup>26</sup>

The article is divided into five parts. Part II examines how to measure both procedural and substantive flexibility in relation to decision-making by the Australian Panel. Part III assesses the first element of procedural flexibility. This assessment is conducted by analysing the powers given to the Panel, its procedures and the expertise of its members. Part IV focuses on the second element relating to substantive flexibility in Panel decision-making. This element is assessed based on a case study examining the Panel's development of its frustrating action policy up to 30 June 2016. In particular, it analyses the nature of the policy as it was established, the extent to which it developed, the approach adopted by the Panel in applying the policy and the outcomes in response to matters raising the policy. Part V concludes with an assessment of the extent to which decision-making by the Australian Panel satisfies the criterion of flexibility.

## II HOW TO MEASURE FLEXIBILITY

This Part examines how to measure the extent to which the Australian Panel's decision-making meets the criterion of flexibility. As discussed in Part I above, flexibility in this context can be evaluated using two elements, namely procedural and substantive flexibility. This necessarily involves value judgments in relation to both elements. The methodology adopted to assess these is discussed below. It includes an analysis of the factors relevant to determining whether Panel decision-making meets the flexibility criterion. The different levels of flexibility that could be achieved in relation to the two elements are then considered 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 achievement of both procedural and substantive flexibility.<sup>27</sup>

Procedural flexibility is determined by the powers given to the Panel, its procedures and the expertise of its members. Accordingly, in relation to each of

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25 Ibid 39–40.

26 Ibid 40.

27 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, eg, Eugene F Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25 *Journal of Finance* 383, 383.

these factors, a strong form of procedural flexibility would result where the Panel has substantial discretion in relation to the exercise of its powers, its processes are highly adaptable and Panel members have an extensive range of knowledge and experience. The expertise of members is an important factor in this context as it facilitates Panels taking into account a wide range of commercial and other considerations, in addition to any legal issues involved. On the other hand, there would be a medium form of procedural flexibility for these factors where there was a moderate level of discretion in relation to Panel powers, some adaptability in its processes and a sufficient range of knowledge and experience represented in its membership. In contrast, a weak form of procedural flexibility would involve low levels of discretion in the Panel's powers, rigidity in its processes and/or a restricted range of knowledge and experience in the Panel membership.

Substantive flexibility involves the extent to which the Panel demonstrates flexibility in exercising its decision-making powers. This is assessed in Part IV below using a case study examining the Panel's establishment and development of its frustrating action policy. The relevant factors relating to substantive flexibility are the extent to which the policy involves discretionary powers (rather than narrow rules), the Panel adopts a commercial or pragmatic approach (instead of a legalistic one), and the outcome of the decisions are based on negotiation (including the use of undertakings rather than the Panel making declarations of unacceptable circumstances and/or orders). A strong form of substantive flexibility would result where the policy is based largely on the exercise of discretionary powers, the Panel consistently adopts a commercial or pragmatic approach and the decision outcomes frequently involve undertakings. The medium form of these would involve the policy being based on discretions to a limited extent, the Panel adopting a commercial or pragmatic approach in some cases and undertakings being used on a restricted basis. Finally, a weak form of substantive flexibility would be indicated by a low level of discretion in the application of the policy, the Panel adopting a legalistic approach and/or there being little use of negotiated outcomes such as undertakings.

### III PROCEDURAL FLEXIBILITY

Procedural flexibility is assessed in this Part through an analysis of the regulatory requirements applying to the Panel and its *Procedural Rules*.<sup>28</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>29</sup> fairness<sup>30</sup> and timeliness in decision-making.<sup>31</sup> In this context, the

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28 See above nn 22–3.

29 See *Australian Securities and Investments Commission Regulations 2001* (Cth) regs 13(b), 16(2)(c)(ii).

30 See *Australian Securities and Investments Commission Regulations 2001* (Cth) regs 13(a), 16(2)(c)(i); *Procedural Rules*, above n 23, rr 1.1.1(a), (c).

31 See *Australian Securities and Investments Commission Regulations 2001* (Cth) regs 13(c), 16(2)(c)(iii); *Procedural Rules*, above n 23, rr 1.1.1(b), (d).

first section below focusses on the design features of the Panel system affecting flexibility, particularly the expertise of Panel members and the legislative and procedural rules concerning its decision-making. It also examines other considerations that are relevant to the Panel's operations. These relate to constitutional limitations, the statutory framework, the rules of procedural fairness and the need to ensure matters are conducted efficiently. The factors examined in the first section are analysed in the second section to provide an assessment of the extent to which there is procedural flexibility in relation to Panel decision-making.

## A Regulatory Framework

### 1 Expertise

Members are appointed to the Panel on a part-time basis based on their professional experience and/or knowledge in accounting, business, company administration, economics, law and financial markets, products and services.<sup>32</sup> In the period between 13 March 2000 and 30 June 2016, there was a total of 134 current and past Panel members.<sup>33</sup> At the time of their appointment, the largest numbers of members were lawyers (47 per cent), investment advisers and bankers (22 per cent), company directors (19 per cent) and accountants (4 per cent). There was a smaller proportion of members from the funds management industry (2 per cent), company administration (1 per cent), academia (1 per cent), the stockbroking industry (less than 1 per cent) and the Australian Securities Exchange ('ASX') (less than 1 per cent).

Of the total Panel members, the largest group were commercial solicitors (34 per cent). There was a smaller number of barristers (6 per cent), legal and general counsel (5 per cent) and judges (1 per cent). The concentration of commercial lawyers on the Panel reflects its preference for parties to be represented by the commercial lawyers working on the transaction.<sup>34</sup> This is consistent with a desire to focus on the commercial nature of the transactions rather than legal issues. As a result, the Panel has only consented to legal representation by senior counsel on one occasion, in an early decision.<sup>35</sup> Similarly, the two judges were only appointed to the Panel during the first six years of the Panel's operation following the CLERP reforms.

The knowledge and experience held by Panel members has allowed it to draw upon a wide range of commercial expertise, notwithstanding that a significant proportion of Panel members have had legal qualifications.<sup>36</sup> The President of the

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32 *Australian Securities and Investments Commission Act 2001* (Cth) s 172(4).

33 The statistics in this article relating to the background of Panel members are based on an analysis of information from the Panel's website and media releases: see Takeovers Panel, *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)>; Takeovers Panel, *Media Releases* <<http://www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=MR>>.

34 See *Procedural Rules*, above n 23, r 4.3.1 note 2.

35 See *Australian Securities and Investments Commission Act 2001* (Cth) s 194; *Re Email Ltd [No 3]* (2000) 18 ACLC 708.

36 For example, in a study of the Panel's composition from March 2000 until November 2004, it was found that at least 71 per cent of all members had legal qualifications: see Emma Armson, 'The Australian

Australian Panel ('Panel President') directs three members to decide a particular application ('Sitting Panel'), and designates one of them to be the President of the Sitting Panel ('Sitting President').<sup>37</sup> They aim for the Sitting Panel to include 'a lawyer, an investment banker or other corporate adviser and, if possible, a member with particular skills directly relevant to the issues raised'.<sup>38</sup> Each of the above factors facilitates the Panel focusing on the commercial aspects of the transactions under consideration.

## 2 Powers and Process

One of the key features of the Panel system promoting flexibility is the legislative basis upon which the Panel makes its decisions. That is, the Panel applies the purposes underlying the takeover provisions in relation to both its powers to review ASIC decisions and to make declarations of unacceptable circumstances.<sup>39</sup> This can involve the Panel exercising broad discretionary powers based on competing policy objectives, particularly those to ensure both a 'competitive, efficient and informed market' and a 'reasonable and equal opportunity' for target shareholders to participate in the benefits arising from a proposed acquisition.<sup>40</sup> Although guidance notes are issued to assist market participants in the context of the Panel's exercise of its discretionary powers, the Panel decides matters on the individual circumstances before it.<sup>41</sup> The Panel also has a power to make a broad range of orders, both following a declaration of unacceptable circumstances and on an interim basis without such a declaration.<sup>42</sup> Its orders may be different to those sought in the application,<sup>43</sup> and interim orders can be made without seeking submissions from or consulting other persons.<sup>44</sup> Orders are also frequently varied in light of different circumstances arising since the original orders were made.<sup>45</sup>

In addition, there are two legislative powers that the Panel has not yet used. The first is the power to dismiss an application and/or direct a person not to make a subsequent application of a similar kind where it is satisfied that the application is 'frivolous or vexatious'.<sup>46</sup> It would appear that the Panel has not needed to exercise this power in light of its ability to decline to conduct proceedings.<sup>47</sup>

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37 See *Australian Securities and Investments Commission Act 2001* (Cth) s 184.

38 *Procedural Rules*, above n 23, r 5.1.2 note 4. See also Armson, 'Commercial Body or Quasi-Court?', above n 36, 575 (Table 1).

39 See *Corporations Act* ss 655A(2), 656A(3), 657A(3), 673(2).

40 *Corporations Act* ss 602(a), (c). See, eg, Armson, 'Evolution of Australian Takeover Legislation', above n 20, 692–3.

41 See, eg, below n 172 and accompanying text.

42 See *Corporations Act* ss 657D, 657E; above n 10 and accompanying text.

43 *Procedural Rules*, above n 23, r 8.1.1 note 6.

44 *Procedural Rules*, above n 23, r 8.1.1 note 3.

45 See *Procedural Rules*, above n 23, r 8.1.1.

46 *Corporations Act* s 658A.

47 *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 20. These Regulations also allow the Panel to disregard matters that are frivolous or vexatious (reg 26(1)(b)) or are irrelevant to the proceedings (regs 25–6).

Secondly, in addition to its power to make procedural rules,<sup>48</sup> there is a legislative provision empowering the Panel to make substantive rules regulating the conduct of takeovers.<sup>49</sup> However, this provision does not on its face give the Panel an explicit power to waive compliance with the Panel's substantive rules, which undermines the flexibility that the substantive rules could otherwise provide.<sup>50</sup>

There is significant flexibility in the processes relating to the Panel's proceedings. For example, the Sitting President nominated by the Panel President has the power to determine the time and place at which proceedings are conducted.<sup>51</sup> Recent legislative amendments also allow the Panel President and members of the Sitting Panel to be outside Australia when constituting the Sitting Panel and conducting its proceedings respectively.<sup>52</sup> Although three members are appointed to the Sitting Panel, they can act with a quorum of two members.<sup>53</sup> Related applications can be heard together.<sup>54</sup> In addition, the *Procedural Rules* emphasise that they should be interpreted according to their 'spirit', by focusing on substance rather than form to promote their objectives.<sup>55</sup> The Panel can also excuse non-compliance with or override the application of its *Procedural Rules* in a particular matter,<sup>56</sup> with the Rules noting specifically the possibility of waiving the submission requirements relating to word limits and timing.<sup>57</sup>

The way in which the Panel makes its decisions is also more flexible than a court-based process. For example, the Panel does not need to comply with the rules of evidence,<sup>58</sup> and may instead act based on 'any logically probative material from any source'.<sup>59</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>60</sup> This means that the circumstances are reconsidered 'afresh' in light of the relevant policy considerations and taking into account any new

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48 See *Australian Securities and Investments Commission Act 2001* (Cth) s 195(1); *Procedural Rules*, above n 23.

49 *Corporations Act* s 658C. Such rules would prevail over any inconsistent ASIC exemptions and modifications: s 658D.

50 It has also been argued that the power should be amended to make it clear that such rules would override any inconsistent takeover provisions in the legislation: see Rodd Levy and Neil Pathak, 'The Takeovers Panel of the Future: Proposals to Enhance the Effectiveness and the Role of the Panel' in Ian Ramsay (ed), *The Takeovers Panel and Takeovers Regulation in Australia* (Melbourne University Press, 2010) 211, 230–1.

51 See *Australian Securities and Investments Commission Act 2001* (Cth) ss 184(3), 188(2); above text accompanying n 37.

52 See *Australian Securities and Investments Commission Act 2001* (Cth) ss 184(3A), 188(3); *Corporations Legislation Amendment (Deregulatory and Other Measures) Act 2015* (Cth) sch 2 pt 1 items 1–2; Explanatory Memorandum, *Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014* (Cth) 21 [5.4]–[5.5].

53 *Australian Securities and Investments Commission Act 2001* (Cth) ss 184(2), 193.

54 *Procedural Rules*, above n 23, r 3.1.1.

55 See *ibid*, rr 10.2.1, 1.1.1; above nn 30–1 and accompanying text.

56 *Procedural Rules*, above n 23, rr 1.2.1–1.2.3.

57 See *ibid*, above n 23, rr 2.2.4 note 2, 3.1.1 note 3.

58 *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 16(2)(a).

59 *Procedural Rules*, above n 23, r 6.3.1. See also at r 6.3.1 note 1.

60 *Ibid*, above n 23, rr 3.2.1, 3.3.1.

circumstances since the original decision.<sup>61</sup> The Review Panel can also decline to conduct proceedings where it agrees with the decision, reasons and any declaration and/or orders of the initial Panel.<sup>62</sup> There is a considerable focus on negotiation in the Panel's processes. For example, the Panel encourages parties to resolve issues before making the application and will generally give consent to withdraw an application where the dispute is resolved (unless unacceptable circumstances are suspected to occur or continue).<sup>63</sup> Most importantly, the Panel urges parties to propose undertakings to remedy concerns raised, particularly in the context of preliminary submissions, and the making of declarations and/or orders.<sup>64</sup> This has had a significant impact on the way in which the Panel conducts its proceedings.

Consistent with its goal of timely decision-making, the Panel predominantly relies on written submissions and uses email as its primary means of communication.<sup>65</sup> However, a conference can be convened to allow oral evidence for the purposes of clarification, resolving inconsistent statements or the Panel informing itself.<sup>66</sup> Persons can be permitted to attend the conference using telephone, video conferencing and any other form of communication approved by the Sitting President.<sup>67</sup> Witnesses can also be summonsed to attend proceedings to answer questions.<sup>68</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>69</sup>

### 3 Other Considerations

There are a number of other considerations relevant to the Panel's decision-making. First, the most significant of these are the statutory limitations resulting from Chapter III of the *Australian Constitution*, which prevent administrative bodies such as the Panel exercising judicial power.<sup>70</sup> Consequently, the Panel cannot order a person to comply with a requirement in the legislation, or enforce its own orders or rules.<sup>71</sup> However, the Panel can refer questions of law to the courts,<sup>72</sup> and the legislation provides for court enforcement of Panel orders and

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61 See *ibid*, above n 23, rr 3.2.1 note 1, 3.3.1 note 2; *Corporations Act* ss 655A(2), 656A(3), 657A(3), 673(2).

62 *Procedural Rules*, above n 23, r 3.3.1 note 3. See also *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 20.

63 See *Procedural Rules*, above n 23, rr 3.1.1 note 6, 3.4.1 note 1.

64 See *Procedural Rules*, above n 23, rr 6.1.1 note 3, 7.1.1 note 2, 8.1.1 note 5.

65 See above n 31 and accompanying text; *Procedural Rules*, above n 23, rr 1.1.1 note 1, 2.1.1, note 1.

66 *Australian Securities and Investments Commission Regulations 2001* (Cth) regs 35, 37(1).

67 *Australian Securities and Investments Commission Regulations 2001* (Cth) regs 37(3)–(4).

68 See *Australian Securities and Investments Commission Act 2001* (Cth) ss 192(1)–(4), 198(1), 201.

69 *Procedural Rules*, above n 23, r 6.4.1 note 1.

70 See *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542; Emma Armson, 'Judicial Power and Administrative Tribunals: The Constitutional Challenge to the Takeovers Panel' (2008) 19 *Public Law Review* 91.

71 *Corporations Act* s 657D(2).

72 See *Corporations Act* s 659A; *Re Colonial First State Property Trust Group 03* [2002] ATP 17, 2; *Seabrook, Re Takeovers Panel and the Corporations Act* (2003) 21 ACLC 82 (Conti J).

rules.<sup>73</sup> Secondly, there are limitations on the Panel's power to make costs orders, which can only be exercised where the Panel has made a declaration of unacceptable circumstances.<sup>74</sup> Although the Panel indicated that it would 'discuss this limitation with the Government' in its first decision on the frustrating action policy in 2001,<sup>75</sup> there has not been any subsequent legislative change in relation to this.<sup>76</sup> However, the Panel has indicated that costs orders will be only used in exceptional cases, as it considers that 'a party is entitled to make, or resist, an application once without exposure to a costs order, provided it presents a case of reasonable merit in a businesslike way'.<sup>77</sup>

Thirdly, the regulatory framework gives the Australian Panel a more limited role than its UK counterpart. It has been argued that the Australian Panel's role and powers should be expanded to include those held by the UK Panel.<sup>78</sup> In particular, the UK Panel has the power to act on its own motion and its Executive can provide advanced rulings that are binding on the parties.<sup>79</sup> On the other hand, the Australian Panel only makes decisions in response to applications made to it,<sup>80</sup> and its Executive cannot make binding decisions (although it can provide guidance as to the Panel's likely response to particular circumstances).<sup>81</sup> However, this should not be considered to be a limitation on the ability of the Australian Panel to operate flexibly. Rather, the Australian Panel is undertaking a different role to the UK Panel, which sets, administers, monitors compliance with and enforces the detailed takeover rules.<sup>82</sup> The CLERP reforms instead established the Australian Panel as the primary body responsible for resolving takeover disputes and maintained ASIC's responsibility for monitoring and enforcing compliance with the legislative provisions on takeovers.<sup>83</sup>

Fourthly, the Panel's processes are affected by the need to provide procedural fairness, which applies to the extent that it is not inconsistent with other

73 *Corporations Act* ss 657F–657G, 658C(5)–(6).

74 *Corporations Act* ss 657D(1)–(2).

75 *Re Pinnacle VRB Limited [No 5]* (2001) 39 ACSR 43, 54 n 13 ('Pinnacle 5'). See also Levy and Pathak, above n 50, 237.

76 This is notwithstanding amendments made to the Panel's powers to make orders under *Corporations Act* s 657D(2) in 2007: see *Corporations Amendment (Takeovers) Act 2007* (Cth).

77 Takeovers Panel, *Guidance Note No 4 – Remedies General* (27 May 2015) 7 [28] <[http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance\\_notes/current/004.htm&pageID=&Year=>](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance_notes/current/004.htm&pageID=&Year=>) ('Guidance Note 4').

78 See Levy and Pathak, above n 50, especially 231–6.

79 See, eg, The Panel on Takeovers and Mergers, *The Takeover Code* (RR Donnelley, 11<sup>th</sup> ed, 2013) A1, A10–A11 ('UK Takeover Code').

80 See *Corporations Act* ss 656A(2), 657C(1). Applications may be only made by persons whose interests are affected (including ASIC in the case of a declaration of unacceptable circumstances): *Corporations Act* ss 656A(2), 657C(2). However, the Panel can refer matters to ASIC so that it can consider making an application and accept submissions from non-parties: see *Australian Securities and Investments Commission Regulations 2001* (Cth) regs 18, 23; *Procedural Rules*, above n 23, rr 4.1.1 note 7, 6.1.1 note 1.

81 See *Procedural Rules*, above n 23, 3 (introduction), r 10.1.1. The Executive is not mentioned in the legislative regime and regulations set out in n 22 above, with its role instead set out in the *Procedural Rules*, above n 23, 3 (Introduction), rr 2.2.1, 2.2.3, 2.3.2, 2.4.1, 3.1.1, 10.1.1.

82 See *UK Takeover Code*, above n 79.

83 See *Corporations Act* s 659AA; *Australian Securities and Investments Commission Act 2001* (Cth) s 1(2).

regulatory provisions.<sup>84</sup> Before proceedings are conducted, any conflicts of interest are disclosed by Panel members in order to avoid fairness concerns with members appointed to a Sitting Panel.<sup>85</sup> Parties must also 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>86</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>87</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 was found to have exercised improperly its power to extend the time for an application for a declaration of unacceptable circumstances on the basis that it had not given affected parties an opportunity to make submissions beforehand.<sup>88</sup>

Furthermore, Panel orders cannot ‘unfairly prejudice any person’.<sup>89</sup> Given this, it is usual for the Panel to provide parties with its proposed decision and any declaration and/or orders to obtain comments on unfair prejudice and factual matters.<sup>90</sup> The Panel also takes into account time zone differences affecting the lodgment of documents to avoid any ‘unfair tactical advantage’.<sup>91</sup> In addition, there are a number of requirements designed to ensure both fairness and transparency in relation to the Panel’s operations. For example, parties must be notified as soon as practicable after the Panel decides not to conduct proceedings,<sup>92</sup> and copies of documents must be provided to interested persons.<sup>93</sup> However, it is possible that further submissions may not be given to each party and that documents can be withheld ‘for confidentiality or other reasons’.<sup>94</sup>

Finally, there are a number of timing limitations affecting the Panel’s exercise of its powers. These apply to restrict the time period in which the Panel can make decisions, in light of the CLERP aim to provide efficiency through speedy decision-making.<sup>95</sup> For example, the Panel has the power to decide applications that are made ‘within ... 2 months after the circumstances have

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84 *Australian Securities and Investments Commission Act 2001* (Cth) s 195(4).

85 See generally *Australian Securities and Investments Commission Act 2001* (Cth) s 185; *Procedural Rules*, above n 23, r 5.1.1.

86 See *Corporations Act* ss 656B(3), 657A(4), 657D(1); *Procedural Rules*, above n 23, 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 23, r 8.1.1 note 4.

87 *Corporations Act* s 656B(4).

88 See *Corporations Act* s 657C(3)(b); *Queensland North Australia Pty Ltd v Takeovers Panel* (2014) 100 ACSR 358, 376 (Collier J); *Queensland North Australia Pty Ltd v Takeovers Panel* (2015) 320 ALR 726, 741 (The Court).

89 *Corporations Act* s 657D(1). See, eg, *Glencore International AG v Takeovers Panel* (2005) 220 ALR 495, 510 (Emmett J).

90 See *Procedural Rules*, above n 23, r 7.1.1 notes 1, 3.

91 *Procedural Rules*, above n 23, r 2.2.3 note 1.

92 *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 21.

93 See *Corporations Act* ss 657A(6), 657D(4); *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 28(2); *Procedural Rules*, above n 23, rr 2.2.2, 2.2.3, 7.1.1, 8.1.1.

94 See *Australian Securities and Investments Commission Regulations 2001* (Cth) regs 30(2)–(3) and *Procedural Rules*, above n 23, r 2.3.1 respectively.

95 See above text accompanying n 2.

occurred'.<sup>96</sup> However, the Panel can extend the time for applications provided that it first allows procedural fairness to affected persons by allowing them an opportunity to make submissions.<sup>97</sup> The Panel can also only make a declaration of unacceptable circumstances within the later of '3 months after the circumstances occur' or 1 month following the application.<sup>98</sup> This time limitation can be extended, with the courts having exercised this power in relation to two of the matters affected by judicial review.<sup>99</sup> A similar time restriction and power of extension by the court applies in relation to declarations following an application for review by a Review Panel.<sup>100</sup>

### B Assessment of Procedural Flexibility

As discussed in Part II above, procedural flexibility is determined by the Panel's powers, procedures and member expertise. Under the strong form of procedural flexibility, the Panel would have substantial discretionary powers, highly adaptable processes and members with an extensive range of knowledge and experience. The medium form would exist in the case of a moderate level of discretion in relation to Panel powers, some adaptability in its processes and where its members have a sufficient range of knowledge and experience. On the other hand, the weak form would involve low levels of discretion, rigid processes and/or a restricted range of knowledge and experience held by Panel members.

In relation to the Panel's expertise, there is a broad range of both knowledge and experience possessed by its current and past members. A significant proportion of these members has emanated from the legal profession (47 per cent), with many other members legally trained.<sup>101</sup> However, a comparable number of members (43 per cent) has been drawn from the ranks of company directors and management, corporate advisors and investment bankers. The relatively small percentage of remaining members has been appointed from the accounting profession, funds management and stockbroking industries, academia and the ASX. In deciding which members will constitute the Sitting Panel to decide a particular matter, one of the key factors taken into account is whether the members bring a range of different perspectives.<sup>102</sup>

The Panel has significant discretionary powers in its decision-making. When reviewing ASIC decisions, it has the same wide-ranging discretions as ASIC to exempt persons from, and modify the operation of, the takeover and beneficial ownership provisions of the *Corporations Act*.<sup>103</sup> Similarly, both initial and

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96 *Corporations Act* s 657C(3)(a). The Full Federal Court has found that it is insufficient that the effects of the circumstances are continuing: *Queensland North Australia Pty Ltd v Takeovers Panel* (2015) 320 ALR 726, 740 (The Court).

97 See above n 88 and accompanying text.

98 *Corporations Act* s 657B. See also above n 96.

99 See *Corporations Act* s 657B; *Takeovers Panel v Glencore International AG* (2005) 55 ACSR 453, 458 (Finkelstein J); *Palmer Leisure Coolool Pty Ltd v Takeovers Panel* (2015) 328 ALR 664, 694–5 (Greenwood J).

100 *Corporations Act* s 657EA(5).

101 See above nn 33 and 36.

102 See above n 38 and accompanying text.

103 See above nn 11, 60, 61 and accompanying text.

Review Panels have a broad discretion to make a declaration of unacceptable circumstances.<sup>104</sup> Each of these powers is exercised in light of the policy purposes underlying the takeover provisions in section 602 of the *Corporations Act*. This can involve the balancing of broad and sometimes competing policy objectives, particularly providing an ‘efficient, competitive and informed market’ and a ‘reasonable and equal opportunity’ for target shareholders to participate in the benefits arising from a takeover bid.<sup>105</sup> The Panel also has the power to make a wide range of orders, including interim orders that do not require it to make a declaration of unacceptable circumstances beforehand.<sup>106</sup>

Given the extensive reliance on discretion in the Panel’s powers, the constitutional and statutory limitations discussed in the previous section do not have a significant impact on the flexibility of its powers. In particular, the constitutional limitations that prevent the Panel from enforcing its own orders do not affect the outcome of its decision-making. This is also the case in relation to the Panel’s power to award costs being confined to where it has made a declaration of unacceptable circumstances. In addition, the Panel is disinclined to use the power to award costs apart from in exceptional circumstances, instead seeking to encourage parties to present cases ‘of reasonable merit in a businesslike way’.<sup>107</sup> This reflects a commercial approach to applications to the Panel, rather than the more legalistic one adopted in a court context. Accordingly, costs have been awarded in a small proportion (less than three per cent)<sup>108</sup> of the Panel’s decisions from 13 March 2000 to 30 June 2016.

The Panel’s powers are also affected by the rules of procedural fairness and statutory timing requirements. Although the procedural fairness requirements can affect the outcome of the Panel’s decision, they predominantly have an impact upon the speed with which the Panel can fulfil its functions. This is because they require typically that persons affected by Panel decisions have an opportunity to make submissions beforehand. The need to avoid orders that would ‘unfairly prejudice any person’ also involves the inclusion of additional processes before the Panel can exercise its powers.<sup>109</sup> Similarly, the deadlines for making Panel applications and decisions can be extended through an application to the Panel and courts respectively in appropriate circumstances. Failure to comply with the procedural fairness and timing requirements have led to successful judicial review applications, particularly in relation to the first (*Glencore International AG v Takeovers Panel*)<sup>110</sup> and most recent (*Queensland North Australia Pty Ltd v*

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104 See above text following n 5.

105 *Corporations Act* ss 602(a), (c).

106 *Corporations Act* s 657E.

107 See Takeovers Panel, *Guidance Note 4*, above n 77, 7 [28].

108 See *Re Pinnacle VRB Ltd [No 6]* (2001) 38 ACSR 564; *Re Taipan Resources NL [No 11]* [2001] ATP 16; *Re Pinnacle VRB Ltd [No 11]* [2001] ATP 23; *Re AMP Shopping Centre Trust [No 1]* (2003) 45 ACSR 496; *Re Skywest Ltd [No 3]* (2004) 51 ACSR 57; *Re Skywest Ltd [No 3R]* (2004) 51 ACSR 57; *Re Skywest Ltd [No 4]* (2004) 53 ACSR 87; *Re Minemakers Ltd* [2012] ATP 8; *Re IFS Construction Services Ltd* [2012] ATP 15; *Re Northern Iron Ltd* [2014] ATP 11; *Re Condor Blanco Mines Ltd* [2016] ATP 8.

109 *Corporations Act* ss 657D(1)–(2).

110 See *Glencore International AG v Takeovers Panel* (2005) 220 ALR 495, 511–12 (Emmett J); *Glencore International AG v Takeovers Panel* (2006) 151 FCR 77, 108 (Emmett J).

*Takeovers Panel*)<sup>111</sup> judicial review proceedings. This was not able to be remedied by the Panel in the first matters, with the *Glencore International AG v Takeovers Panel* decisions resulting in legislative changes giving the Panel broader powers.<sup>112</sup> On the other hand, the deficiencies identified in the *Queensland North Australia Pty Ltd v Takeovers Panel* matter were subsequently rectified by the Panel after further delay.<sup>113</sup>

Finally, the Panel's processes involve a high level of adaptability. Unlike courts, the Panel is not subject to the rules of evidence and decides all of its matters afresh in light of the circumstances before it. The Panel President can constitute a Sitting Panel, with Panel members also able to participate in proceedings, while overseas. Panels can hear related proceedings together and waive compliance with the *Procedural Rules*. Although it usually conducts proceedings based on written submissions, the Panel has the power to conduct oral conferences. Consistent with the aim of speed in decision-making, conferences have been used sparingly. Indeed, there have been conferences in less than two per cent of the Panel's decisions from 13 March 2000 to 30 June 2016, with all but one of them occurring within the first two and a half years of the Panel's operations following the CLERP reforms.<sup>114</sup>

Another significant example of procedural flexibility is the Panel's ability to use undertakings in preference to making declarations of unacceptable circumstances and/or orders.<sup>115</sup> The Panel considers that accepting undertakings promotes the public interest, as it 'can be more flexible and quicker than orders'.<sup>116</sup> As a result, just over a third of Panel matters from 13 March 2000 to 30 June 2016 have involved an undertaking, compared to the less than a quarter of the decisions involving a declaration of unacceptable circumstances (either with or without orders).<sup>117</sup> This provides a clear demonstration of the adaptability of the Panel's processes. In light of this and the Panel's expertise, discretionary powers and other adaptive processes, the Panel is assessed as having a strong form of procedural flexibility.

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111 See *Queensland North Australia Pty Ltd v Takeovers Panel* (2015) 320 ALR 726, 741 (The Court); *Queensland North Australia Pty Ltd v Takeovers Panel* (No 2) (2015) 109 ACSR 232, 233–4, 240–1 (The Court).

112 See *Corporations Amendment (Takeovers) Act 2007* (Cth) sch 1 items 3–4.

113 See *Re The President's Club Ltd [No 2]* [2016] ATP 1.

114 See *Re Infratil Australia Ltd [No 2]* [2000] ATP 1; *Re Email Ltd [No 3]* (2000) 18 ACLC 708; *Re Vincorp Wineries Ltd* (2001) 38 ACSR 584; *Pinnacle 5* (2001) 39 ACSR 43; *Re Pinnacle VRB Limited [No 8]* (2001) 39 ACSR 55 ('Pinnacle 8'); *Re Online Advantage Ltd* [2002] ATP 14; Takeovers Panel, 'Panel Decision in Online Advantage Limited' (Media Release TP02/052, 10 September 2002); *Yancoal Australia Ltd* [2014] ATP 24.

115 See *Australian Securities and Investments Commission Act 2001* (Cth) s 201A.

116 Takeovers Panel, *Guidance Note 4*, above n 77, 8 [39], see also at 9 [40].

117 A handful of decisions have also involved both a declaration and an undertaking (instead of orders): see *Namakwa Diamond Co NL [No 2]* [2001] ATP 9; *Rivkin Financial Services Ltd [No 2]* (2005) 54 ACSR 59; *Gondwana Resources Ltd* [2014] ATP 9.

## IV SUBSTANTIVE FLEXIBILITY

As discussed in Part I above, substantive flexibility involves an analysis of the extent to which the Panel has demonstrated flexibility in exercising its decision-making powers. There are three key factors relevant to substantive flexibility. These involve the extent to which the Panel adopts policies that are based on discretions rather than narrow rules, it uses a commercial or pragmatic approach to decision-making rather than a legalistic one, and its decision outcomes are based on negotiation rather than orders.

### A Application of Frustrating Action Policy

This section comprises a case study analysis relating to the application of the frustrating action policy ('FAP') from when it was first introduced by the Takeovers Panel in a decision on 25 May 2001 to 30 June 2016.<sup>118</sup> The FAP prevents a target company from taking action without its shareholders' approval in certain circumstances. It typically applies to action that would trigger a condition of either a formal takeover bid or potential bid communicated to target directors, where it could lead to the bid being withdrawn, lapsing or not being proceeded with.<sup>119</sup> The introduction of the FAP was significant because it resulted in a substantial change in the regulation of the conduct of target companies and their directors in the context of a takeover.<sup>120</sup> Importantly, it resulted in a change from the courts' focus on the purpose of the target directors' actions in complying with their duties to the company.<sup>121</sup> Instead, the Panel examines the effect of the action on the target shareholders' ability to make a decision on

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- 118 The decisions used in the case study are predominantly listed under the 'Frustrating action' headings in the Takeovers Panel, *Index of Reasons: By Topic 2000–2014* (8 April 2015) 6, 20, 24, 27 <[http://www.takeovers.gov.au/content/index\\_of\\_reasons/default.aspx](http://www.takeovers.gov.au/content/index_of_reasons/default.aspx)> ('Panel Index of Reasons'). This list was supplemented by decisions obtained from searches of the LexisNexis database and Takeovers Panel website using the search term of 'frustrating action'. It does not include decisions that do not refer explicitly to frustrating action: see *Re Taipan Resources NL [No 4]* (2001) 19 ACLC 791 (decided prior to the first FAP decision; cf 'Placement as frustrating action' heading in *Panel Index of Reasons*, above n 118, 20); *Re Normandy Mining Ltd [No 6]* [2001] ATP 32 (cf Takeovers Panel, *Guidance Note 1 – Unacceptable Circumstances* (21 September 2010) 12 n 57 <[www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance\\_notes/current/001.htm&pageID=&Year=>](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance_notes/current/001.htm&pageID=&Year=>)); *Re Anaconda Nickel Ltd [No 19]* [2003] ATP 20 (Review Panel decision in relation to *Anaconda Nickel Ltd [No 15]* [2003] ATP 17 ('*Anaconda 15*') not referring to frustrating action).
- 119 See Takeovers Panel, *Guidance Note 12 – Frustrating Action* (18 July 2014) <[http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance\\_notes/superseded/012c.htm&pageID=&Year=>](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance_notes/superseded/012c.htm&pageID=&Year=>)> ('fourth GN12'), especially 1 [1], 2 [5]. This is the most recent version of the Guidance Note for the purposes of the case study. However, a new version was released by the Panel on 1 December 2016 (see Takeovers Panel, *Guidance Note 12 – Frustrating Action* (1 December 2016) <[www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance\\_notes/current/012.htm&pageID=&Year=>](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance_notes/current/012.htm&pageID=&Year=>)> ('fifth GN12')).
- 120 See generally Emma Armson, 'The Frustrating Action Policy: Shifting Power in the Takeover Context' (2003) 21 *Company and Securities Law Journal* 487; Jennifer Hill, 'Back to the Future? Bigshop 2 and Defensive Tactics in Takeovers' (2002) 20 *Company and Securities Law Journal* 126; Jennifer Hill and Jeremy Kriewaldt, 'Theory and Practice in Takeover Law – Further Reflections on Pinnacle No 8' (2001) 19 *Company and Securities Law Journal* 391; Rodd Levy, 'Pinnacle 8 New Duties for Target Directors' (2001) 19 *Company and Securities Law Journal* 329.
- 121 See, eg, Armson, 'The Frustrating Action Policy', above n 120, 502.

whether to accept the takeover bid.<sup>122</sup> This altered the balance between the interests of the bidder and target companies by imposing further restrictions on what actions target company directors can take when faced with a takeover.<sup>123</sup>

The FAP has been chosen for the purposes of the case study for a number of reasons. First, it is significant in demonstrating the Panel's ability to develop its own policy to apply in addition to the legislative requirements. This allows the nature of the policy implemented by the Panel to be analysed, in order to determine whether the Panel has exercised its powers flexibly in introducing the policy. Secondly, the FAP similarly provides an opportunity to examine the extent to which the policy has been applied flexibly, including whether it has been amended to respond to issues arising from its application. This can be determined through an analysis of the Panel's decisions and guidance issued in relation to the policy. Finally, there is a significant body of Panel decisions relating to the FAP.<sup>124</sup> This provides a case study of 35 decisions, which represent just fewer than nine per cent of the Panel decisions from 13 March 2000 to 30 June 2016. There is a larger body of Panel decisions in relation to other key topic areas, particularly those matters involving association, bidder's statement disclosure and rights issues.<sup>125</sup> However, the FAP has been chosen for the case study instead of these topics as it provides an opportunity to analyse the flexibility of the Panel's decision-making in the context of both the introduction and development of a policy that has had a substantial impact on the operation of the relevant law.

There are four parts to the case study analysis in this section. The first part focuses on the initial decisions establishing the FAP ('*Pinnacle* decisions').<sup>126</sup> These decisions are examined to allow an assessment of the extent to which the

122 Ibid.

123 Ibid 502–3.

124 The decisions in the case study in order of the date of the decision are: *Pinnacle 5* (2001) 39 ACSR 43; *Pinnacle 8* (2001) 39 ACSR 55; *Re Bigshop.com.au Ltd* (2001) 39 ACSR 525 ('*Bigshop 1*'); *Re Bigshop.com.au Limited [No 2]* [2001] ATP 24 ('*Bigshop 2*'); *Re Equity-1 Resources NL [2002] ATP 20* ('*Equity-1*'); *Re Anaconda Nickel Ltd [No 1]* [2003] ATP 2 ('*Anaconda 1*'); *Anaconda 15* [2003] ATP 17; *Re Anaconda Nickel Ltd [Nos 2–5]* [2003] ATP 4 ('*Anaconda 2–5*'); *Re BreakFree Ltd [No 1]* [2003] ATP 29 ('*BreakFree 1*'); *Re Selwyn Mines Ltd [2003] ATP 33* ('*Selwyn*'); *Re Rivkin Financial Services Ltd* (2004) 50 ACSR 147 ('*Rivkin*'); *Re Goodman Fielder Ltd [No 2]* [2003] ATP 5 ('*Goodman Fielder 2*'); *Re Coopers Brewery Ltd [No 3]* (2005) 57 ACSR 1 ('*Coopers 3*'); *Re Coopers Brewery Ltd (Nos 3R and 4R)* (2005) 57 ACSR 348 ('*Coopers 3R*'); *Re Volante Group Ltd [2006] ATP 2* ('*Volante*'); *Re Sydney Gas Ltd [No 1]* [2006] ATP 9 ('*Sydney Gas 1*'); *Re Watty Ltd* (2006) 57 ACSR 362 ('*Watty*'); *Re Sydney Gas Ltd [No 2]* [2006] ATP 18 ('*Sydney Gas 2*'); *Re GoldLink Growthplus Ltd [2007] ATP 23* ('*GoldLink*'); *Re Resource Pacific Holdings Ltd [2007] ATP 26* ('*Resource Pacific*'); *Re Lion Selection Ltd [2008] ATP 14* ('*Lion 1*'); *Re Lion Selection Ltd [No 2]* [2008] ATP 16 ('*Lion 2*'); *Re MacarthurCook Ltd* (2008) 67 ACSR 345 ('*MacarthurCook*'); *Re Babcock & Brown Communities Group [2008] ATP 25* ('*Babcock*'); *Re Perilya Ltd [No 2]* [2009] ATP 1 ('*Perilya 2*'); *Re International All Sports Ltd [No 1]* [2009] ATP 4 ('*IASL 1*'); *Re Rey Resources Ltd [2009] ATP 14* ('*Rey Resources*'); *Re Powerlan Ltd [2010] ATP 2* ('*Powerlan*'); *Re Transurban Group [2010] ATP 5* ('*Transurban*'); *Re Austock Group Ltd [2012] ATP 12* ('*Austock*'); *Re World Oil Resources Ltd [2013] ATP 1* ('*World Oil*'); *Re Hastings Rare Metals Ltd [2013] ATP 13* ('*Hastings*'); *Re Gondwana Resources Ltd [2014] ATP 9* ('*Gondwana 1*'); *Re Gondwana Resources Ltd [No 2]* [2014] ATP 15 ('*Gondwana 2*'); *Re Gondwana Resources Ltd [No 2R]* [2014] ATP 18 ('*Gondwana 2R*').

125 See Panel Index of Reasons, above n 118, 2–5, 7–9, 26–9 respectively.

126 *Pinnacle 5* (2001) 39 ACSR 43; *Pinnacle 8* (2001) 39 ACSR 55.

policy established by these decisions is narrow or rule-based, involves the use of discretions and reflects a commercial or pragmatic approach to decision-making. The second part analyses the development of the FAP through the guidance notes issued by the Panel, with the third part focusing on the application of the policy in the Panel's decisions. These parts allow an examination of the extent to which the FAP has been developed and applied based on discretions rather than narrow rules, as well as whether the Panel is adopting a commercial or pragmatic approach rather than a legalistic one. The final part focuses on the remedies applied by the Panel in its decisions on the FAP to establish the extent to which decision outcomes are based on negotiation rather than orders. Each of these issues are analysed in detail in the second section below to provide an assessment of the Panel's decision-making in relation to substantive flexibility.

### **1 Introduction of Policy**

The FAP was first introduced in Australia in the Panel's decision in *Pinnacle 5*.<sup>127</sup> In doing this, the *Pinnacle 5* Panel relied on a number of matters. First, the Panel noted that it was required to have regard to the purposes of the takeover provisions in determining whether there were unacceptable circumstances.<sup>128</sup> In this context, the Panel emphasised the purpose in section 602(c) of ensuring that target shareholders 'all have a reasonable and equal opportunity to participate in any benefits' under a takeover bid ('equal opportunity principle').<sup>129</sup> Secondly, it also pointed out that the legislation required it to take into account actions causing or contributing to a takeover bid not proceeding.<sup>130</sup> Thirdly, the Panel noted that ASIC's policy on share buy-backs at that time indicated that frustrating a takeover bid could lead to unacceptable circumstances.<sup>131</sup> Finally, it observed that the UK Takeover Code required target directors to seek shareholder approval for material sales or contracts that were not in the ordinary course of business.<sup>132</sup> Accordingly, the Panel concluded that section 602(c) provided 'a solid basis for a similar rule or policy in Australia'.<sup>133</sup>

In *Pinnacle 5*, the Panel summarised the FAP as requiring that 'a transaction entered into after a bid has been announced and before it closes should be conditional on approval by [target] shareholders, if it may cause the bid to fail by causing a defeating condition not to be fulfilled.'<sup>134</sup> However, the application of this policy was made subject to the Panel's discretion, as the *Pinnacle 5* Panel considered that the target's shareholders 'should decide if the transactions should proceed, unless there were compelling reasons why shareholder approval should

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127 (2001) 39 ACSR 43, 51. At the time of this decision, the relevant legislation was the Corporations Law. However, as the key provisions are the same, reference will be made to the equivalent provisions in the *Corporations Act*.

128 See *Pinnacle 5* (2001) 39 ACSR 43, 46; *Corporations Act* s 657A(3)(a).

129 See *Pinnacle 5* (2001) 39 ACSR 43, 46; *Corporations Act* ss 602(c), 657A(3)(a).

130 See *Pinnacle 5* (2001) 39 ACSR 43, 46; *Corporations Act* s 657A(3).

131 *Pinnacle 5* (2001) 39 ACSR 43, 47.

132 See *ibid*; *UK Takeover Code*, above n 79, r 21.1.

133 *Pinnacle 5* (2001) 39 ACSR 43, 47.

134 *Ibid*.

not be required in this particular case.<sup>135</sup> In its decision, the *Pinnacle 5* Panel focussed on the commercial imperatives driving the proposed transactions, which involved the utilisation of intellectual property owned by the target company.<sup>136</sup> The Panel concluded that, in deciding whether the approval of target shareholders should have been sought either prior to or as a condition of the transactions, ‘the test is an objective one, based on commercial considerations rather than a subjective test based on proper purposes’.<sup>137</sup> This involved a weighing up process, balancing the concern that target shareholders decide whether the transactions proceed (and consequently the outcome of the takeover bid) with the potential harm to the target company from delaying the transactions.<sup>138</sup> While the Panel accepted the target’s evidence in relation to the commercial reasons for the transactions,<sup>139</sup> it found that there were no ‘compelling reasons’ why shareholder approval could not be obtained in this case given that the transactions were material and would trigger a defeating condition in the bid.<sup>140</sup> Accordingly, the Panel concluded that shareholder ratification would not be ‘so harmful to [the target company] and the transactions as to outweigh the need for ratification’.<sup>141</sup> However, the *Pinnacle 5* Panel acknowledged that the parameters of the newly introduced FAP needed to be developed further:

The policy needs to be refined to make its application clear in instances where, for instance, the facts involve breaches of conditions which may be unreasonable for a bidder to rely on, transactions which have been entered into or announced before a bid is made, or compelling reasons why shareholder approval should be dispensed with in a particular case.<sup>142</sup>

The uncertainty surrounding the operation of the FAP at the time it was introduced was also highlighted by the Review Panel in this matter in *Pinnacle 8* (2001) 39 ACSR 55. The *Pinnacle 8* Panel acknowledged that the principles applied in the *Pinnacle* decisions would ‘need to be fleshed out by a process of policy formulation’ and that any guidance obtained from the Panel Executive in relation to ‘gaps in the policy’ would not be binding on future Panels.<sup>143</sup> There were two qualifications made to the FAP in the *Pinnacle 8* decision. The first was that the Panel could make a declaration of unacceptable circumstances if the target directors were clearly acting to ‘defeat or delay’ takeover offers by putting a transaction of ‘dubious benefit’ to its members.<sup>144</sup> Secondly, the *Pinnacle 8*

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135 Ibid 48.

136 Ibid 48–9. Two staff members from the Panel Executive inspected documentation at the target company’s office in relation to this: see *ibid* 52.

137 Ibid 50. Both *Pinnacle* Panels emphasised that the FAP is a separate issue to the question whether there is a breach of the duties of the target company directors: see *ibid* 51; *Pinnacle 8* (2001) 39 ACSR 55, 66–7. However, the *Pinnacle 8* Panel noted that if there was clear evidence of an improper purpose with the target board acting to defeat a bid, this would be relevant to the exercise of its discretion to make a declaration of unacceptable circumstances: *Pinnacle 8* (2001) 39 ACSR 55, 68.

138 *Pinnacle 5* (2001) 39 ACSR 43, 51.

139 *Ibid*.

140 *Ibid* 48.

141 *Ibid* 51.

142 *Ibid* 48.

143 *Pinnacle 8* (2001) 39 ACSR 55, 57.

144 *Ibid* 58.

Panel noted that there may be ‘exceptional circumstances’ in which target shareholder approval may not need to be obtained notwithstanding that the action would trigger a defeating condition in a takeover bid.<sup>145</sup> Examples cited were transactions that were ‘far advanced’ before the bid announcement and ‘clearly for the commercial advantage of the company and so motivated’, or where the bid conditions exceeded what was ‘commercially reasonable in the circumstances’.<sup>146</sup> Noting that some transactions may be in a ‘grey area’, the *Pinnacle 8* Panel emphasised that a balance needed to be struck between preventing ‘unfair defensive’ action by target directors and ‘not interfering unreasonably with the ordinary and proper conduct of the target’s business’.<sup>147</sup>

## 2 Development of Policy

### (a) First Guidance Note

In June 2003, the Panel released the first version of *Guidance Note 12: Frustrating Action* (‘first GN12’).<sup>148</sup> The Overview highlighted the Panel’s discretion in applying the FAP, noting that ‘the Panel *may* prevent the target from proceeding with the frustrating action’.<sup>149</sup> Rather than providing ‘bright line’ rules, the first GN12 set out a series of matters that the Panel may take into account in applying the FAP. Consistent with this, the first GN12 made it clear that the existence of unacceptable circumstances depends on the individual facts in the case.<sup>150</sup> The first GN12 accordingly gave a list of the type of actions that ‘*might* give rise to unacceptable circumstances’, which included significant issues of shares, sales of major assets and declaring ‘special or abnormally large’ dividends.<sup>151</sup>

There were also a series of exceptions set out in the first GN12 that might allow the target action to proceed without shareholder approval. The exceptions were stated to apply generally, while allowing the Panel to decide that they did not apply in a particular case. They related to actions forming part of the target’s ordinary business or implementing agreements already announced or entered into,<sup>152</sup> where the action did not have a material effect on the target’s business or financial position or the bid condition was ‘overly extensive or restrictive’,<sup>153</sup> where there was a ‘commercial or legal imperative’ for the action,<sup>154</sup> or if it

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145 Ibid.

146 Ibid.

147 Ibid.

148 Takeovers Panel, *Guidance Note 12: Frustrating Action* (16 June 2003) <[http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance\\_notes/superseded/012.htm&pageID=&Year=>](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance_notes/superseded/012.htm&pageID=&Year=>). The Guidance Note was issued following the release of a Draft Guidance Note on 31 May 2002: Takeovers Panel, *Frustrating Action Guidance Note: Draft for Public Comment – May 2002* (31 May 2002) <<http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=consultation/002.htm&pageID=&Year=>>.

149 First GN12, above n 148, 1 [Overview] (emphasis added).

150 Ibid.

151 Ibid 7 [12.27] (emphasis added).

152 Ibid 7 [12.28].

153 Ibid 8 [12.33].

154 Ibid 8 [12.32]. See also at 9–10 [12.41].

resulted from compliance with a ‘court order, legislative requirement or Government directive’.<sup>155</sup>

The first GN12 emphasised the focus of the Panel on commercial factors in its decision-making in relation to the FAP.<sup>156</sup> It also required that the Panel take the commercial aspects of the transactions into account in different ways. First, it stressed that ‘the Panel will not regard the breach of a defeating condition which cannot commercially be considered critical to the bid as giving rise to unacceptable circumstances’.<sup>157</sup> Secondly, the first GN12 indicated that the Panel would be ‘less likely’ to find that there were unacceptable circumstances where the breach of the condition resulted from soliciting a competing proposal that would allow target shareholders to choose between them, especially where the conditions were ‘anti-competitive, overly restrictive or lack commercial justification’.<sup>158</sup> Finally, as noted above, one of the key exceptions to the FAP applied in relation to a ‘commercial or legal imperative’.<sup>159</sup>

There was also a reference to the balancing process undertaken by the Panel in exercising its discretion to make a declaration of unacceptable circumstances. In particular, where the target’s action had a material effect on and formed part of its ordinary course of business, the first GN12 concluded that the Panel would ‘balance the nature of the triggering action against its potential effect on the bidder’s stated objectives in relation to the target’.<sup>160</sup> The first GN12 also discussed the need to balance the policy or ‘spirit’ underlying the takeover provisions with the directors’ duties to the company, and set out a number of ways that this might be achieved.<sup>161</sup> These involved seeking prior approval from target shareholders or making the target’s action conditional on such approval,<sup>162</sup> making the transaction conditional on the failure of the bid or have a ‘cooling-off clause’ exercisable by any new management if it succeeds,<sup>163</sup> or target management making an announcement ‘that they will enter into an agreement after a specified, reasonable time, unless control has by then passed to the bidder’.<sup>164</sup> This last option introduced a new alternative to target shareholder approval (known as the ‘passage of time’ exception), which has since been amended by the Panel.<sup>165</sup>

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155 Ibid 8 [12.31].

156 In relation to its general approach, see *ibid* 6 [12.21].

157 *Ibid* 4 [12.13].

158 *Ibid* 5 [12.20].

159 See above text accompanying n 154.

160 First GN12, above n 148, 7 [12.29].

161 See *ibid* 8–9 [12.36], 9 [12.38].

162 See *ibid* 9 [12.38(b)–[12.38(c)]. These options were referred to in the *Pinnacle 5* decision: see above n 134 and accompanying text.

163 First GN12, above n 148, 9 [12.38(d)].

164 *Ibid* 9 [12.38(a)].

165 See below text accompanying n 184 and following.

*(b) Second Guidance Note*

The second version of Guidance Note 12 ('second GN12') was released in February 2010.<sup>166</sup> Less than two thirds of the length of the first GN12, the second GN12 no longer contained references to the balancing processes,<sup>167</sup> and some of the commercial factors,<sup>168</sup> which were included in the first GN12. However, the second GN12 continued the focus on the commercial importance of both the defeating conditions of the bid,<sup>169</sup> and the possibility of a 'commercial imperative' allowing the frustrating action to proceed without shareholder approval.<sup>170</sup> The overall focus on the Panel's discretion is also maintained in the subsequent versions of Guidance Note 12. For example, the second GN12 emphasises that, although an action triggering a condition will be a frustrating action, whether it leads to unacceptable circumstances will depend on the effect on target shareholders and the market, in light of the policy purposes in sections 602(a) and (c) and the Panel's jurisdiction under section 657A of the legislation.<sup>171</sup> The second GN12 also introduced an explicit warning that the examples of frustrating action provided 'are illustrative only and nothing in the note binds the Panel in a particular case'.<sup>172</sup>

Another key development in the FAP reflected in the second GN12 arose from the decision in *MacarthurCook* (2008) 67 ACSR 345. This decision involved the Panel's first application of the FAP in the context of a 'potential offer'.<sup>173</sup> A proposal to make offers for the target's shares had been communicated to the target subject to the qualification that it was 'non-binding, indicative and incomplete and expresses current intentions only'.<sup>174</sup> The *MacarthurCook* Panel concluded that this was a 'genuine potential offer',<sup>175</sup> because it was made by a 'genuine potential bidder',<sup>176</sup> the terms were set out in enough detail,<sup>177</sup> and the qualification was designed to avoid the continuous disclosure requirements and the requirement to make a takeover bid under

166 Takeovers Panel, *Guidance Note 12 – Frustrating Action* (11 February 2010) <[http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance\\_notes/superseded/012a.htm&pageID=&Year=>](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance_notes/superseded/012a.htm&pageID=&Year=>). The Guidance Note was issued following the release of a Consultation Paper on 13 May 2009: Takeovers Panel, *Consultation Paper: Rewrite of GN7, GN12, GN14 and GN17* (13 May 2009) <<http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=consultation/030.htm&pageID=&Year=>>, and at the same time as a Public Consultation Response Statement: Takeovers Panel, *Public Consultation Response Statement: Rewrite of GN7, GN12, GN14 and GN17* (11 February 2010) <<http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=consultation/032.htm&pageID=&Year=>>.

167 See above text following n 159.

168 See, eg, text accompanying n 158.

169 See second GN12, above n 166, 3 [7] example 1, 4 [11(b)], 4 [11(c)], 30 n 12.

170 *Ibid* 4 [11(h)].

171 *Ibid* 2–3 [7].

172 *Ibid* 1 [2].

173 A 'potential offer' was defined in the first GN12 as 'an offer the terms of which have been communicated to target directors publicly or privately by a *genuine bidder*, but is not yet a formal offer under Chapter 6 of the Corporations Act': first GN12, above n 148, 2 [12.2].

174 *MacarthurCook* (2008) 67 ACSR 345, 347, 350.

175 *Ibid* 350.

176 This was because it could comply with its financial obligations, had conducted discussions with the target and had entered into a pre-bid agreement to purchase its shares: *ibid*.

177 Although not 'finally settled', the terms included the conditions and price: *ibid*.

section 631 of the *Corporations Act*.<sup>178</sup> Following *MacarthurCook*, the definition of ‘potential offer’ in the first GN12 was replaced by the term ‘potential bid’ in the second GN12.<sup>179</sup> The *MacarthurCook* decision was noted by including a footnote to this definition indicating that it includes ‘announcements to which s 631 applies but [is] not limited to these’.<sup>180</sup>

(c) *Third Guidance Note*

There was only just over a year between the second and third versions of the Guidance Note, with the latter (‘third GN12’) released in May 2011.<sup>181</sup> Significantly, the key substantive revisions in the third GN12 were designed to give the target company greater freedom to take action in certain circumstances. The first amendment reflected the Panel’s decision in *Transurban* [2010] ATP 5. In *Transurban*, the Panel concluded that the FAP did not apply in circumstances where the bidding parties were not prepared to make a hostile takeover bid, and the target board had rejected a number of proposed schemes of arrangement that required the target’s support.<sup>182</sup> As a result, the third GN12 made it clear that proposed schemes of arrangement cannot be frustrated if they are not supported by the target board.<sup>183</sup>

The other key revisions in the third GN12 related to target directors making announcements that would allow frustrating action to occur after a certain time period. First, the ‘passage of time’ exception, under which target directors could announce that they would proceed with an agreement following a ‘specified, reasonable time’, was amended to allow it to apply in a wider range of circumstances.<sup>184</sup> The following new paragraph was also added:

One of the factors that the Panel will take into account in deciding whether unacceptable circumstances exist is whether, before undertaking a corporate action, the target notified the potential bidder that it intends to take the action if

178 Ibid. The continuous disclosure rules require listed entities to disclose to the market information that ‘a reasonable person would expect to have a material effect on the price or value’ of its securities: see Australian Securities Exchange, *Listing Rules* (at 14 April 2014) r 3.1; *Corporations Act* s 674. This is subject to exceptions, which include ‘an incomplete proposal or negotiation’ that is confidential and would not be expected to be disclosed by a reasonable person: Australian Securities Exchange, *Listing Rules* (at 14 April 2014) r 3.1A. Section 631 of the *Corporations Act* requires a person to make a takeover bid with comparable terms and conditions within two months of proposing publicly to make a bid.

179 This new definition removed the reference to a ‘genuine bidder’ and instead referred to ‘a genuine potential bid communicated to target directors publicly or privately which is not yet a formal bid under Chapter 6’: second GN12, above n 166, 2 [5].

180 See *ibid* 2 [5] n 4; above n 178.

181 Takeovers Panel, *Guidance Note 12 – Frustrating Action* (6 May 2011) <[http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance\\_notes/superseded/012b.htm&pageID=&Year=>](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance_notes/superseded/012b.htm&pageID=&Year=>)>. The third GN12 was issued following the release of a Consultation Paper on 10 December 2010: Takeovers Panel, *Consultation Paper: GN12 Frustrating Action* (10 December 2010) <<http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=consultation/036.htm&pageID=&Year=>>> (‘third GN12 Consultation Paper’), and at the same time as a Public Consultation Response Statement: Takeovers Panel, *Public Consultation Response Statement: Amendment of GN12* (6 May 2011) <<http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=consultation/038.htm&pageID=&Year=>>> (‘third GN12 Response Statement’).

182 *Transurban* [2010] ATP 5, 1, 4.

183 Third GN12, above n 181, 3 [7] example 3.

184 See third GN12 Consultation Paper, above n 181, 2 [5.2]; above text accompanying n 164.

the potential bidder does not make its bid or formally announce its proposed bid [under section 631] within a *reasonable time*.<sup>185</sup>

In relation to this new paragraph, the third GN12 indicated that two weeks would usually constitute a ‘reasonable time’, but that this would be determined in light of the particular facts of the case.<sup>186</sup> While it indicated that such a notification may have assisted in the circumstances of *MacarthurCook*, the third GN12 warned that this would not provide a ‘safe harbour’ and that a declaration of unacceptable circumstances may be made nevertheless due to other considerations.<sup>187</sup>

(d) *Fourth Guidance Note*

The fourth version of Guidance Note 12 (‘fourth GN12’) was released in July 2014.<sup>188</sup> This resulted from changes proposed in response to concerns raised both with the Panel and generally that the FAP ‘unduly restricts targets’ activities.<sup>189</sup> There was a particular concern that a hostile bidder could use the policy to force a target to negotiate in circumstances where it was unclear whether the bidder would rely on a condition that had already been triggered.<sup>190</sup> As a result, the fourth GN12 Consultation Paper proposed three revisions to the paragraph in GN12 setting out the considerations the Panel considers in exercising its discretion to declare circumstances to be unacceptable.<sup>191</sup> The first proposed change was implemented and required the Panel to consider ‘whether a condition has been triggered previously and the bidder has not disclosed whether it will rely on it or waive it within a reasonable time’.<sup>192</sup> In light of comments received on the Consultation Paper, the Panel also included additional guidance on the factors it would take into account in determining what is a ‘reasonable time’ in this context.<sup>193</sup> However, the Panel decided not to make the further amendments proposed in relation to this issue given submissions that these changes were not needed in light of the first change.<sup>194</sup> In addition, the Consultation Paper had also sought comment on whether a fixed timeframe such as 90 or 120 days should be

185 Third GN12, above n 181, 7 [17] (emphasis added).

186 Ibid 7 [17] n 25.

187 Ibid 7 [17] n 24.

188 Fourth GN12, above n 119. The Guidance Note was issued following the release of a Consultation Paper on 6 January 2014: Takeovers Panel, *Consultation Paper: GN12 Frustrating Action* (6 January 2014) <<http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=consultation/041.htm&pageID=&Year=>> (‘fourth GN12 Consultation Paper’), and at the same time as a Public Consultation Response Statement: Takeovers Panel, *Public Consultation Response Statement: Amendment of GN12* (18 July 2014) <<http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=consultation/044.htm&pageID=&Year=>> (‘fourth GN12 Response Statement’).

189 Fourth GN12 Consultation Paper, above n 188, 2 [5].

190 Ibid.

191 Ibid 2 [6.1].

192 Fourth GN12, above n 119, 4 [11(f)].

193 Noting that this will depend on the ‘prevailing circumstances’, the Guidance Note indicates that such factors will include the nature of the condition triggered, whether there has been a subsequent variation to the bid terms, and ‘whether it is still acceptable to wait until the time for giving notice of the status of conditions’: see *ibid* 4 [11(f)] n 15; *Re Novus Petroleum Ltd [No 1]* (2004) 22 ACLC 436.

194 See fourth GN12 Consultation Paper, above n 188, 2 [6.1.2], 2 [6.2]; fourth GN12 Response Statement, above n 188, 1–2.

introduced after which the FAP would no longer apply.<sup>195</sup> Such a fixed timeframe was not pursued given that the submissions concluded that this was unnecessary.<sup>196</sup>

### 3 Application of Policy

The Panel has focussed on the commercial aspects of the transactions under consideration in its decisions relating to the FAP.<sup>197</sup> This has occurred both in the context of the conditions put forward by the bidder and the circumstances that may justify the target acting without shareholder approval. In relation to the former, declarations of unacceptable circumstances and orders have been made in cases where the Panel has concluded that the proposed or actual bid conditions affected by the frustrating action were ‘commercially critical’.<sup>198</sup> On the other hand, the Panel has determined that it will be less likely to find circumstances to be unacceptable if the event activating the relevant condition is ‘not material to the bid’, particularly where it is based on conditions that are easily triggered or are otherwise inappropriate.<sup>199</sup> The Panel has also declined to find frustrating action where it considered that the condition placed an unreasonable burden on the target company as it required the bidder to have access to information held by the target.<sup>200</sup> Although most of the FAP decisions have focussed on the triggering of conditions that would result in defeating the takeover bid, the Panel has also considered whether the target’s action had a material effect on the bid’s objectives in a handful of decisions.<sup>201</sup>

In relation to the exceptions to the FAP, the *Pinnacle 5* Panel emphasised at the outset that there would need to be ‘compelling reasons’ why shareholder approval should not be sought for the frustrating action.<sup>202</sup> In particular, it focussed on the need for a ‘commercial imperative’, which it did not find in relation to the proposed transactions in that case.<sup>203</sup> The *Pinnacle 8* Panel also concluded that the target should seek shareholder approval after considering the ‘commercial interests’ of the target and its shareholders.<sup>204</sup> Similarly, the Guidance Notes referred to a ‘commercial imperative’ as a relevant factor for the Panel in deciding whether frustrating action results in unacceptable

195 See fourth GN12 Consultation Paper, above n 188, 3 [8].

196 See fourth GN12 Response Statement, above n 188, 2.

197 There were a few decisions in which the FAP was not discussed in detail: see *Anaconda 15* [2003] ATP 17, 5 (only in submissions); *IASL 1* [2009] ATP 4, 4 (only in submissions); *Powerlan* [2010] ATP 2, 3–5, 10 (interim order granted to allow submissions but not pursued by applicant).

198 See *World Oil* [2013] ATP 1, 6, 29, 33–4, 38–9; *Gondwana 2* [2014] ATP 15, 8, 11–12, 16–20 (with the Review Panel not coming to a different decision in *Gondwana 2R* [2014] ATP 18, 4).

199 *Austock* [2012] ATP 12, 8.

200 See *Anaconda 2–5* [2003] ATP 4, 16; *Goodman Fielder 2* [2003] ATP 5, [94]; *Volante* [2006] ATP 2, 8; *Watytl* (2006) 57 ACSR 362, 376.

201 See *Bigshop 1* (2001) 39 ACSR 525, 529 (no); *Bigshop 2* [2001] ATP 24, 8 (yes); *BreakFree 1* [2003] ATP 29, 6–7 (yes); *Rey Resources* [2009] ATP 14, 3–4 (not decided in light of undertaking).

202 *Pinnacle 5* (2001) 39 ACSR 43, 48, 51. See also *Bigshop 1* (2001) 39 ACSR 525, 534.

203 See *Pinnacle 5* (2001) 39 ACSR 43, 48–50, 52–3 (especially at 53).

204 *Pinnacle 8* (2001) 39 ACSR 55, 68, 71.

circumstances.<sup>205</sup> Subsequent Panel decisions considering the existence of a commercial imperative have related to arguments that the target needed to raise funds.<sup>206</sup> In most of these decisions, the question whether there was a commercial imperative did not need to be decided in light of action taken remedying the Panel's concerns.<sup>207</sup> It was found in another decision that there appeared to be a commercial imperative, based on the need for the target to have funds to continue its ordinary activities and financial information indicating that it would be in financial difficulties in two months.<sup>208</sup> This decision also considered how the commercial objectives of the bid would be frustrated.<sup>209</sup> However, the Panel did not make any final conclusions on whether there was frustrating action in light of undertakings accepted by the Panel.<sup>210</sup>

The only decision to state clearly that there was a commercial imperative for the action taken by a target company provides a strong example of the flexible approach adopted by the Panel in its decision-making.<sup>211</sup> In *Perilya 2* [2009] ATP 1, the target had announced that it had received a \$10 million refundable deposit in relation to a \$45 million placement, and given a call option to sell a major asset for \$15 million in the event that the deposit was not repaid if the placement did not proceed.<sup>212</sup> Although the call option was not subject to prior approval by target shareholders, a meeting was subsequently convened for them to approve the terms of the call option and placement.<sup>213</sup> Notwithstanding the risk that the aggregation of the refundable deposit and call option could constitute frustrating action, the *Perilya 2* Panel concluded that there was a commercial imperative for the target to be paid the deposit before the target shareholder meeting.<sup>214</sup> In making its decision, the Panel took into account the 'unusual' nature of both the deposit and the prevailing market conditions in the aftermath of the global financial crisis.<sup>215</sup> In light of these extraordinary circumstances, the *Perilya 2* Panel indicated that another target company in a similar situation may not receive the same result.<sup>216</sup>

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205 See above nn 154, 170 and accompanying text. These references to a 'commercial imperative' have since been replaced by a statement that there is unlikely to be unacceptable circumstances where 'the frustrating action is required to avoid a materially adverse financial consequence, such as insolvency': see fifth GN12, above n 119, 7 [21(c)]. The decision in *Perilya 2* [2009] ATP 1 is cited as an example of this in the footnote to the new paragraph 21(c). Although it removes the explicit reference to 'commercial' in this context, the new wording requires the Panel to consider the commercial implications of requiring target shareholders to approve the frustrating action.

206 See *Resource Pacific* [2007] ATP 26, 4 (entitlement offer); *Babcock* [2008] ATP 25, 8 (issue of convertible and loan notes); *Perilya 2* [2009] ATP 1, 7 (placement); *Rey Resources* [2009] ATP 14, 4–5 (rights issue).

207 See *Resource Pacific* [2007] ATP 26, 4 (disclosure); *Babcock* [2008] ATP 25, 8–11 (undertaking); *Rey Resources* [2009] ATP 14, 4–5 (undertaking).

208 *Rey Resources* [2009] ATP 14, 4–5.

209 *Ibid* 4.

210 *Ibid*.

211 *Perilya 2* [2009] ATP 1, 7.

212 *Ibid* 1–2.

213 *Ibid* 2–3.

214 *Ibid* 5, 7.

215 *Ibid* 5–6.

216 *Ibid* 6.

One of the important features of the Panel's decision-making in relation to the FAP has been its approach of balancing the different interests of the parties. This approach was introduced at the outset, with the *Pinnacle 5* Panel seeking submissions from all parties on whether the advantages of the proposed transactions to shareholders outweighed their potential effect on the takeover bid.<sup>217</sup> Consistent with this, the *Pinnacle 8* Panel emphasised that whether the 'transactions led to unacceptable circumstances depends on their effects on the outcome of the bid but also on the other commercial interests of Pinnacle and its shareholders'.<sup>218</sup> It also noted that a balance needed to be struck between preventing 'unfair defensive' action by target directors and 'not interfering unreasonably with the ordinary and proper conduct of the target's business'.<sup>219</sup> Similarly, the *Perilya 2* Panel concluded that it 'must balance the impact of its decision on the company and other interested parties, including whether its decision may place the company in a precarious financial position'.<sup>220</sup> This is reflected in the competing factors that the Guidance Note indicates the Panel will take into account in considering whether the frustrating action leads to unacceptable circumstances.<sup>221</sup> On the one hand, the Panel considers the effect of the action on the takeover bid, including its likely success and whether the action triggers a condition that is 'commercially critical'.<sup>222</sup> However, it also focusses on the impact of the FAP on the target's business. This includes whether it would be 'unreasonable' to rely on the condition for the purpose of the policy, such as where it requires co-operation from the target or is 'overly restrictive'.<sup>223</sup> The Guidance Note also stresses that the bidder 'must accept that the target's normal business will continue normally'.<sup>224</sup>

The application of this balancing process led to different outcomes in the decisions of the initial and Review Panels in the *Bigshop* decisions. The decisions involved a proposed placement, commitment fee and board appointments announced by the target company in the context of a proposed proportional takeover bid.<sup>225</sup> The *Bigshop 1* Panel weighed up the elements of the proposed placement to determine whether they were 'significant enough' or 'sufficiently material' to frustrate the intention of the proposed bid.<sup>226</sup> In *Bigshop 1*, the initial Panel concluded that, although the target's actions 'came very close to being frustrating action', they did not 'on balance' frustrate the bidder's intentions.<sup>227</sup> The *Bigshop 1* Panel considered this decision was made easier by developments during the proceedings.<sup>228</sup> These included a reduction in the

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217 *Pinnacle 5* (2001) 39 ACSR 43, 49.

218 *Pinnacle 8* (2001) 39 ACSR 55, 68.

219 *Ibid* 58.

220 *Perilya 2* [2009] ATP 1, 6.

221 See fourth GN12, above n 119, 4–5 [11].

222 *Ibid* 4 [11(a)], 4 [11(b)].

223 See *ibid* 4 [11(c)], especially Examples 1–2.

224 *Ibid* 5 [11(h)].

225 *Bigshop 1* (2001) 39 ACSR 525, 526–7, 539.

226 *Ibid* 530, 532.

227 *Ibid* 539.

228 *Ibid* 529–30.

proposed placement size, and undertakings concerning the resolution to approve the proportional bid that prevented the new directors from making recommendations and the party receiving the placement shares from voting.<sup>229</sup> Although *Bigshop 2* also applied a materiality test, it found ‘[o]n balance’ that the placement would be likely to defeat the proposed bid if it was not approved by target shareholders due to its effect on the bidder’s aim to achieve ‘effective control’.<sup>230</sup> Unusually, it made interim orders instead of a declaration of unacceptable circumstances and final orders in order to facilitate this approval.<sup>231</sup> Apart from minor differences in the undertakings accepted by the *Pinnacle* Panels,<sup>232</sup> the other Review Panels in the case study confirmed the decision of the initial Panel in relation to the FAP.<sup>233</sup>

#### 4 Decision Outcomes

The outcomes resulting from the decisions on the FAP in the case study can be divided into three categories.<sup>234</sup> The first category comprises the 13 (or 41 per cent of) decisions in which the Panel either did not conduct proceedings or make a declaration in relation to the FAP.<sup>235</sup> In many of these decisions, the Panel concluded that there was no frustrating action as there was no takeover bid at the time of the relevant action. This was either because no takeover bid was contemplated at that time,<sup>236</sup> or the takeover bid had not yet been communicated.<sup>237</sup> There were also a significant number of decisions in which the Panel did not apply the FAP where the relevant bid condition involved the bidder accessing information held by the target.<sup>238</sup> In addition, the FAP was not enlivened by the target repaying convertible notes as they fell due.<sup>239</sup> On the other hand, notwithstanding the risk of frustrating action, the *Perilya 2* Panel declined to make a declaration of unacceptable circumstances in relation to a significant placement and related call option given the target company’s precarious financial situation.<sup>240</sup>

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229 Ibid.

230 *Bigshop 2* [2001] ATP 24, 8, 16.

231 Ibid 1, 17–8.

232 The Review Panel in *Pinnacle 8* accepted more detailed undertakings than the initial Panel: see *Pinnacle 5* (2001) 39 ACSR 43, 54; *Pinnacle 8* (2001) 39 ACSR 55, 71–3.

233 See *Coopers 3* (2005) 57 ACSR 1, 20–1; *Coopers 3R* (2005) 57 ACSR 348, 357, 361; *Gondwana 2* [2014] ATP 15, 8, 11–12; *Gondwana 2R* [2014] ATP 18, 4.

234 This analysis does not include the decisions in which the FAP is not discussed in detail: see above n 197.

235 See *Equity-1* [2002] ATP 20, 1, 3; *Anaconda 2–5* [2003] ATP 4, 12, 16, 31; *Goodman Fielder 2* [2003] ATP 5, [94], [101]; *Selwyn* [2003] ATP 33, [4], [34], [38]; *Volante* [2006] ATP 2, 8–9; *Sydney Gas 1* [2006] ATP 9, 17; *Wattyl* (2006) 57 ACSR 362, 376–8; *GoldLink* [2007] ATP 23, 4–5; *Perilya 2* [2009] ATP 1, 5–7; *Transurban* [2010] ATP 5, 1, 4; *Rivkin* (2004) 50 ACSR 147, 151; *Hastings* [2013] ATP 13, 1, 3–4; *Gondwana 1* [2014] ATP 9, 7.

236 See *Equity-1* [2002] ATP 20, 1, 3; *Rivkin* (2004) 50 ACSR 147, 151; *GoldLink* [2007] ATP 23, 4–5; *Transurban* [2010] ATP 5, 1, 4; *Hastings* [2013] ATP 13, 1, 3–4.

237 See *Selwyn* [2003] ATP 33, [4], [34], [38]; *Gondwana 1* [2014] ATP 9, 7.

238 See *Anaconda 2–5* [2003] ATP 4, 12, 16, 31; *Goodman Fielder 2* [2003] ATP 5, [94], [101]; *Volante* [2006] ATP 2, 8–9; *Wattyl* (2006) 57 ACSR 362, 376–8.

239 *Sydney Gas 1* [2006] ATP 9, 17.

240 See above text following n 210.

A similar number of decisions (13, or 41 per cent) involved the Panel accepting undertakings or some other form of action instead of deciding whether to make a declaration of unacceptable circumstances.<sup>241</sup> In the first decisions on the FAP, the *Pinnacle* Panels accepted undertakings that target shareholder approval would be sought for the proposed transactions before they were implemented.<sup>242</sup> On the other hand, the *Bigshop 1* Panel considered that an offer to reduce the size of the placement and undertakings concerning a resolution to approve a proposed proportional takeover bid made it easier for the Panel to conclude that there was no frustrating action.<sup>243</sup> The Panel also accepted undertakings from the proposed bidder and underwriter to the rights issue in *Anaconda 1* to allow the application to be withdrawn,<sup>244</sup> and was able to conclude proceedings in *BreakFree 1* given that the target had volunteered to make undertakings to terminate the asset sale agreements in that matter.<sup>245</sup> In later decisions relating to approval of the frustrating action, the Panel either declined to conduct or concluded proceedings as the target had provided additional disclosure to remedy deficiencies in the information provided to target shareholders for the approval process.<sup>246</sup> There were also a handful of decisions in which the target's undertaking or provision of further information avoided the need for the Panel to decide whether there was frustrating action.<sup>247</sup>

In the third and smallest category of decisions (six, or 19 per cent), the outcome of the FAP proceedings was determined by the Panel making orders.<sup>248</sup> Four of these decisions involved the Panel making both a declaration of unacceptable circumstances and final orders requiring shareholder approval for the frustrating action.<sup>249</sup> The outcome in the other two decisions was unusual. In *Bigshop 2*, the Panel used interim rather than final orders to regulate the conduct of meetings so that the target shareholders could choose between approving a proportionate bid and the proposed placement.<sup>250</sup> The *Bigshop 2* decision demonstrates the flexibility of the Panel's powers in allowing it to make interim

241 See *Pinnacle 5* (2001) 39 ACSR 43, 54; *Pinnacle 8* (2001) 39 ACSR 55, 71; *Bigshop 1* (2001) 39 ACSR 525, 529–30; *Anaconda 1* [2003] ATP 2, 2, 8; *BreakFree 1* [2003] ATP 29, 8, 11–12; *Coopers 3* (2005) 57 ACSR 1, 20–1; *Coopers 3R* (2005) 57 ACSR 348, 361; *Sydney Gas 2* [2006] ATP 18, 11; *Resource Pacific* [2007] ATP 26, 4; *Lion 1* [2008] ATP 14, 3–4, 6; *Lion 2* [2008] ATP 16, 5–6; *Babcock* [2008] ATP 25, 8–11; *Rey Resources* [2009] ATP 14, 5.

242 See *Pinnacle 5* (2001) 39 ACSR 43, 54; *Pinnacle 8* (2001) 39 ACSR 55, 71.

243 See *Bigshop 1* (2001) 39 ACSR 525, 529–30, 539. However, the *Bigshop 2* Panel came to the opposite conclusion: see above text following n 229.

244 *Anaconda 1* [2003] ATP 2, 2, 8.

245 *BreakFree 1* [2003] ATP 29, 1, 8, 11–12.

246 See *Coopers 3* (2005) 57 ACSR 1, 20–1; *Coopers 3R* (2005) 57 ACSR 348, 361; *Resource Pacific* [2007] ATP 26, 4; *Lion 1* [2008] ATP 14, 3–4, 6; *Lion 2* [2008] ATP 16, 5–6. See also below n 248.

247 See *Sydney Gas 2* [2006] ATP 18, 11; *Babcock* [2008] ATP 25, 8–11; *Rey Resources* [2009] ATP 14, 5.

248 Interim orders were also made in relation to the following decisions: *Powerlan* [2010] ATP 2, 3–5, 10 (see above n 197); *Coopers 3* (2005) 57 ACSR 1, 9, 24; *Coopers 3R* (2005) 57 ACSR 348, 354–5; *Gondwana 2* [2014] ATP 15, 4.

249 See *MacarthurCook* (2008) 67 ACSR 345, 352–5; *World Oil* [2013] ATP 1, 29, 33–4, 38–9; *Gondwana 2* [2014] ATP 15, 11–12, 16–20; *Gondwana 2R* [2014] ATP 18, 4. See also above n 248.

250 See *Bigshop 2* [2001] ATP 24, 1, 17–18. The *Bigshop 2* Panel also accepted undertakings from the bidder: at 1, 5–7, 12, 14.

orders for 2 months that remedied the Panel's concerns.<sup>251</sup> In *Austock* [2012] ATP 12, the Panel took the rare step of making a costs order in light of the bidder's conduct in that matter. This was because the Panel had found that the bidder had brought an application solely based on frustrating action when it had not arranged finance and was consequently incapable of implementing the bid.<sup>252</sup>

### B Assessment of Substantive Flexibility

Substantive flexibility is assessed based on the case study on the FAP using the methodology discussed in Part II above. Consequently, there would be a strong form of substantive flexibility where the policy applied by the Panel is largely based on the exercise of discretionary powers, the Panel consistently adopts a commercial or pragmatic approach and the decision outcomes frequently involve undertakings. On the other hand, the medium form of each of these would be demonstrated by the existence of discretionary powers to a limited extent, a commercial or pragmatic approach adopted in some cases or undertakings being used on a restricted basis. In contrast, a weak form of substantive flexibility would involve a low level of discretion in the application of the policy, the adoption of a legalistic approach and/or little use of negotiated outcomes such as undertakings.

The case study shows clearly that the Panel's decision-making is based on the exercise of discretionary powers to a significant extent. First, and perhaps most importantly, the introduction of the FAP in the *Pinnacle 5* decision demonstrates the Panel's ability to adapt the regulatory framework through the use of its discretionary powers. This was achieved through the Panel's power to declare circumstances to be unacceptable under section 657A of the *Corporations Act*, which is based on the broad purposes or 'spirit' of the takeover regulation set out in section 602. As a result, the Panel was able to introduce a policy that required target shareholders to approve target company actions that may frustrate a takeover bid in order to uphold the purpose of ensuring that the shareholders have a 'reasonable and equal opportunity to participate in any benefits' arising from the proposed bid.<sup>253</sup> Secondly, the nature of the FAP as introduced by the Panel involves a high degree of discretion in relation to the operation of the policy. This follows from the policy being established as a general rule, with flexibility provided through the use of exceptions where appropriate. These exceptions were only formulated at a high level at the time that the FAP was established, with the *Pinnacle 5* Panel concluding that target shareholders should approve the frustrating action 'unless there were compelling reasons why shareholder approval should not be required in this particular case.'<sup>254</sup> However, the FAP has been subsequently 'refined' and 'fleshed out' as predicted by the *Pinnacle 5* and *Pinnacle 8* Panels respectively.<sup>255</sup>

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251 See *Corporations Act* s 657E.

252 See *Austock* [2012] ATP 12, 8–9, 12–13.

253 See *Corporations Act* s 602(c).

254 *Pinnacle 5* (2001) 39 ACSR 43, 48.

255 See above nn 142–3 and accompanying text.

Thirdly, the development of the FAP over the four versions of Guidance Note 12 in the case study has reinforced its reliance on the Panel's discretionary powers. In particular, the Guidance Notes make it clear that the Panel decides whether to exercise its power to make a declaration of unacceptable circumstances and/or orders based on the policy in light of the particular facts in each case.<sup>256</sup> The Guidance Notes also demonstrate that the Panel has responded to emerging issues in relation to the policy. This is shown in amendments reflecting the Panel's application of the policy to potential offers in *MacarthurCook*, as well as its decision in *Transurban* not to apply the policy in the context of schemes of arrangement.<sup>257</sup> More recently, the Panel has made changes to the Guidance Note in light of concerns about the burden that the FAP places on target companies.<sup>258</sup> It has also modified its position in light of submissions received regarding its proposals.<sup>259</sup> Finally, the Panel has used its discretionary powers in applying the FAP. One of the key ways in which this has been established is through the Panel's process of weighing up the different interests affected. This has involved balancing the effect on the target of delaying the proposed action on the one hand, with the impact on the proposed or actual bid and the opportunity for the target shareholders to choose between the alternative options on the other.<sup>260</sup>

The Panel has also consistently adopted a commercial or pragmatic approach in applying the FAP. This has resulted from its focus on the commercial aspects of the transactions under consideration.<sup>261</sup> In deciding whether the policy applies, the Panel takes into account the extent to which it is reasonable for the bidder to rely on the conditions triggered by the proposed frustrating action, including whether the conditions are 'commercially critical'.<sup>262</sup> The Panel also considers the 'commercial interests' of the target and its shareholders.<sup>263</sup> Similarly, the Panel has taken into account whether there is a 'commercial imperative' in deciding whether to allow the target to act without shareholder approval.<sup>264</sup> In a key decision demonstrating the Panel's commercial approach, the *Perilya 2* Panel used the existence of a 'commercial imperative' to allow a potentially frustrating action to proceed in light of the target's need for funding in the aftermath of the global financial crisis.<sup>265</sup>

It is arguable that the Review Panels in the first two FAP matters adopted a more legalistic approach than in the other decisions. The initial Panel decision in *Pinnacle 5* focussed primarily on the commercial imperatives for the transactions, in order to determine whether there was a justification for

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256 See above n 150 and accompanying text.

257 See above text following n 172 and accompanying nn 182–3.

258 See above text following n 188.

259 See above text following n 192.

260 See above text following nn 159 and 216.

261 See above text following n 156.

262 See above n 198 and accompanying text.

263 See *Pinnacle 8* (2001) 39 ACSR 55, 68, 71.

264 See above text accompanying n 203 and following text; above n 205.

265 See above text following n 210.

not requiring shareholder approval in that case.<sup>266</sup> Although the Review Panel decision in *Pinnacle 8* also weighed up the commercial interests of the parties,<sup>267</sup> it included a significant emphasis on the legal implications of the actions of the parties involved (including a detailed examination of issues arising from the purpose of the target directors' actions).<sup>268</sup> Similarly, both the initial and Review Panels in the *Bigshop* matter weighed up the different factors to decide whether the intention of the proposed bid would be frustrated.<sup>269</sup> However, the *Bigshop 2* decision also contained a lengthy discussion of the Panel's interim orders, in light of the impact of the resolution for approving the frustrating action on resolutions already proposed to approve the proportionate bid.<sup>270</sup> It is explicable though that the initial Panel did not focus on this issue, as only the Review Panel concluded that there was frustrating action in this matter.<sup>271</sup>

The greater emphasis in the Review Panel decisions in *Pinnacle 8* and *Bigshop 2* on the legal issues arising from the introduction of the FAP could be attributed in part to the composition of the Panels. Unlike in the other Panel decisions on the FAP, the Sitting President was at that time a sitting judge in both *Pinnacle 8* (Santow J) and *Bigshop 2* (Austin J).<sup>272</sup> This may explain the focus in these decisions on the impact of the new requirement for target shareholders to approve frustrating action on existing shareholder approval processes, particularly those relating to breaches of directors' duties. However, given that the *Pinnacle* and *Bigshop* matters involved the first decisions in relation to the FAP, these differences could also be attributed to a desire by the Review Panels to flesh out the FAP to the greatest extent possible in light of uncertainty surrounding the operation of the policy following its introduction.<sup>273</sup> Both Review Panels were concerned to ensure that the relevant processes were compatible so that shareholders would have a real choice between a takeover bid and the alternative proposal by the target board.<sup>274</sup> It is also important to note that both Austin and Santow JJ had extensive commercial experience in corporate law prior to becoming judges, with the *Pinnacle 8* decision emphasising the need for the Panel to operate as a 'first-rate commercial panel' rather than a 'second-rate court'.<sup>275</sup>

In addition, the outcomes in the Panel's decisions on the FAP have involved negotiation to a significant extent, with undertakings accepted frequently by the Panel. The Panel decided not to conduct proceedings in a significant number of the decisions (41 per cent), with this figure including a decision in which the Panel allowed the action to proceed without prior shareholder approval due to a

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266 *Pinnacle 5* (2001) 39 ACSR 43, 49–50, 52–3.

267 See *Pinnacle 8* (2001) 39 ACSR 55, 68, 71.

268 *Ibid* 68–9.

269 See above text following n 224.

270 See *Bigshop 1* (2001) 39 ACSR 525, 11–16.

271 Compare *Bigshop 1* (2001) 39 ACSR 525, 539; *Bigshop 2* [2001] ATP 24, 8–10.

272 See *Pinnacle 8* (2001) 39 ACSR 55, 56; *Bigshop 2* [2001] ATP 24, 1.

273 See above text accompanying n 142 and following.

274 See *Pinnacle 8* (2001) 39 ACSR 55, 57, 65; *Bigshop 2* [2001] ATP 24, 12.

275 *Pinnacle 8* (2001) 39 ACSR 55, 67.

‘commercial imperative’.<sup>276</sup> Undertakings or other action taken by the parties were used to conclude the proceedings in the same number of FAP decisions (41 per cent). This is more than double the amount of decisions that were resolved using declarations of unacceptable circumstances and/orders (19 per cent). Undertakings were also used instead of interim orders in 16 per cent of the decisions.<sup>277</sup> In light of this and the above analysis, it is concluded that a strong form of substantive flexibility applies in relation to Panel decision-making.

## V CONCLUSION

Flexibility is an important aim of takeover regulation given the need to respond to new developments in the market. It is also one of the key reasons why Panel-based systems are used to decide takeover matters instead of the courts. The Takeovers Panel has been the primary body responsible for resolving takeover disputes during the bid period since the CLERP reforms were implemented on 13 March 2000. Consequently, it is important that there is flexibility in relation to its decisions, consistent with the CLERP aim of ‘informality’ in decision-making. The question whether the Panel has achieved flexibility in decision-making from 13 March 2000 to 30 June 2016 is examined in this article by focusing on two key elements. The first element of procedural flexibility is determined by three key features in the design of the Panel system, namely the powers of the Panel, its processes and the expertise of its members. Substantive flexibility is the second element, which examines the extent to which the Panel has demonstrated flexibility in exercising its decision-making powers.

The analysis in this article commences with a focus on how to measure these two elements of flexibility. Procedural flexibility is examined using a qualitative analysis of the regulatory framework and the Panel’s *Procedural Rules*. This results in an assessment of a strong form of procedural flexibility. In particular, the Panel’s powers are based on discretions to a significant extent and its processes involve a high level of adaptability. Panel members also have a broad range of knowledge and experience in relation to providing commercial advice on corporate and takeover transactions. Although there are limitations on the Panel’s powers, these do not impact significantly on the Panel’s ability to provide flexibility in its decision-making.

A case study approach was adopted in relation to substantive flexibility to enable a qualitative analysis of the extent to which the Panel has demonstrated flexibility in the exercise of its decision-making powers. The case study analyses the Panel’s development of the frustrating action policy. This policy was adopted as the basis for the case study as it provides an opportunity to examine the nature of a policy that has been introduced by the Panel. It also enables an analysis of whether the FAP has been flexibly applied and amended in light of emerging

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<sup>276</sup> See *Perilya 2* [2009] ATP 1, 1, 8.

<sup>277</sup> See *Bigshop 1* (2001) 39 ACSR 525, 529; *Goodman Fielder 2* [2003] ATP 5, [12]–[14]; *Volante* [2006] ATP 2, 9; *Lion 2* [2008] ATP 16, 4; *Gondwana 1* [2014] ATP 9, 3. Cf above n 248.

issues. In light of the sample size of the case study, this provides a sufficient basis upon which to make conclusions in relation to the Panel's decision-making generally.

The case study establishes a strong form of substantive flexibility in Panel decision-making. This was demonstrated at the outset by the *Pinnacle 5* Panel in introducing the FAP based on the broad policy purposes underlying the takeover provisions, particularly the equal opportunity principle in section 602(c) of the *Corporations Act*. At the time of its introduction, the FAP involved the Panel exercising a high level of discretion and it was foreshadowed that the policy would need to be developed further over time. This has occurred through subsequent decisions and successive issues of Guidance Note 12. The Guidance Notes have expanded upon the issues to be taken into account by the Panel in exercising its discretion whether to make a declaration of unacceptable circumstances and responded to emerging issues in relation to the policy. In particular, there have been amendments made to the Guidance Note in response to concerns that the policy had swung the balance too much in favour of bidders over target companies.

In the Panel's decisions applying the FAP, there has been a consistent focus on the commercial aspects of the transactions. This has resulted in the Panel applying a commercial or pragmatic approach rather than a legalistic one. A significant number of decisions have also involved the use of negotiated outcomes instead of declarations and/or orders. Given this and the assessment on procedural flexibility, it is concluded that the Australian Panel has achieved, to date, a strong form of flexibility overall since the CLERP reforms in 2000.