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Assessing the Performance of Takeover Panels: A Comparative Study

Emma Armson*

A Introduction

Takeover regulatory regimes around the world seek to balance the conflicting interests of the parties involved in takeovers. The clearest conflict arises from the opposing aims of the shareholders of the company being taken over (target) and the acquirer (bidder) in regard to the price paid for the target shares and the amount of information provided. Another involves the target company's directors, who are in the best position to advise target shareholders on the merits of the takeover bid and yet are likely to be concerned not to lose their position as a result of the takeover.¹ Different takeover regimes adopt varying approaches to deal with these conflicts. This chapter focuses on regulatory systems that use a Panel or like body to make decisions in relation to takeover matters.

Of all of the Panel bodies, the Panel on Takeovers and Mergers in the United Kingdom (UK Panel) is the most well-known. This is principally because it was the first of its kind,² and has subsequently provided a model for a number of other like bodies around the world.³ In Asia, these bodies are the Takeovers and Mergers Panel in Hong Kong (HK Panel)⁴ and Securities Industry Council in Singapore (Singapore Council).⁵ Both of these jurisdictions have adopted a Takeover Code that is modelled to varying extents on The City Code on Take-overs and Mergers (UK Code).⁶ In contrast, the Takeovers Panel in Australia (Australian Panel) operates on a different basis from the takeover bodies in Hong Kong (HK), Singapore and the UK (Code jurisdictions). That is, rather than having a proactive role in enforcing a Takeover Code, the Australian Panel only decides applications made before it based on the Australian

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¹ See, for example, Daniel R. Fischel, 'Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers' (1978) 57 *Texas Law Review*, 1-46 at 5; Henry G. Manne, 'Mergers and the Market for Corporate Control' (1965) 73 *Journal of Political Economy* 110-120 at 112-13.

² See, generally, John Armour, Jack B. Jacobs and Curtis Milhaupt, 'The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework' (2011) 52 *Harvard International Law Journal*, 219-285; 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* 1727-1794; Alexander Johnston, *The City Takeover Code* (Oxford: Oxford University Press, 1980), Alexander Johnston, 'Takeover Regulation: Historical and Theoretical Perspectives on the City Code' (2007) 66 *Cambridge Law Journal* 422-460.

³ See, for example, the Irish Takeover Panel (see irishtakeoverpanel.ie, last accessed 16 December 2016), The Takeovers Panel in New Zealand (see www.takeovers.govt.nz, last accessed 16 December 2016) and The Takeover Regulation Panel in South Africa (<http://trpanel.co.za/>, last accessed 16 December 2016).

⁴ See www.sfc.hk/web/EN/about-the-sfc/organisational-chart/external-committees/takeovers-and-mergers-panel.html, last accessed 16 December 2016.

⁵ See www.mas.gov.sg/sic, last accessed 16 December 2016.

⁶ See *The Codes on Takeovers and Mergers and Share Buy-backs* (Hong Kong Takeover Code); *The Singapore Code on Take-overs and Mergers* (Singapore Code); *The City Code on Takeovers and Mergers* (UK Code).

takeover legislation.⁷ As a result, the Australian Panel's role focuses on resolving disputes between the parties involved in a takeover.⁸

Notwithstanding the differences in their names and functions, each of the above takeover bodies is responsible for ensuring that parties to a takeover act appropriately. Importantly, the bodies make their decisions based on similar aims and regulatory principles underpinning the respective regimes. First, each of the four jurisdictions is concerned to ensure that the target shareholders are given equal treatment.⁹ The Code jurisdictions achieve this by requiring a mandatory offer once an acquirer and associated persons have obtained control or reached a threshold of 30 percent of voting rights.¹⁰ In Australia, a general offer to shareholders is one of the key exceptions to a prohibition on acquisitions above a 20 percent threshold.¹¹ Secondly, each jurisdiction requires shareholders to be given sufficient time and information to reach a properly informed decision.¹² Thirdly, the systems operate on the basis that a target board requires shareholder approval for action that would frustrate a bona fide offer.¹³ This is consistent with general principles setting out that the target board must act in the interests of the company as a whole.¹⁴ Fourthly, the jurisdictions are concerned to ensure that there is not a false market in the securities of a company in relation to a takeover bid.¹⁵ As a result, they require that a takeover bid only be announced if the bidder can fulfil their obligations.¹⁶ Finally, each system operates on the basis that parties must observe the 'spirit' or underlying purposes of the takeover regime.¹⁷

⁷ Corporations Act 2001 (Cth) (Australian Act).

⁸ See Australian Act, ss. 659AA–659C.

⁹ See Singapore Code, General Principle 3; UK Code, General Principle 1. In Hong Kong, the principle refers to shareholders being treated 'similarly': Hong Kong Takeover Code, General Principle 2(1). The Australian provision focuses on the shareholders having a 'reasonable and equal opportunity to participate' in benefits arising from the takeover bid: Australian Act, s. 602(c).

¹⁰ The UK Code applies a 30 percent threshold: UK Code, r. 9.1. In Hong Kong and Singapore, control is defined to be achieved at the 30 percent threshold: see Hong Kong Takeover Code, Definitions (Note 1 'Control'), General Principle 2(2) and r. 26; Singapore Code, Definitions (11 'Effective Control'), General Principle 5 and r. 14.1.

¹¹ Australian Act, ss. 606 and 611 item 1.

¹² See Australian Act, s. 602(b); Hong Kong Takeover Code, General Principle 2(5); Singapore Code, General Principle 10; UK Code, General Principle 2.

¹³ The Code jurisdictions have specific principles and rules dealing with this: Hong Kong Takeover Code, General Principle 2(9) and r. 4; Singapore Code, General Principle 7 and r. 5; UK Code, General Principle 6 and r. 21.1. In Australia, the frustrating action policy was developed by the Panel in light of the Australian and UK provisions: see, generally, Emma Armson, 'The Frustrating Action Policy: Shifting Power in the Takeover Context' (2003) 21 *Company and Securities Law Journal* 487-506.

¹⁴ See Hong Kong Takeover Code, General Principle 2(8); Singapore Code, General Principles 2 and 13; UK Code, General Principle 3. Although not referred to explicitly in the takeover provisions, the Australian law imposes similar requirements on target directors: see, for example, Australian Act, s. 181; *Mills v. Mills* (1938) 60 CLR 150.

¹⁵ See Hong Kong Takeover Code, General Principle 2(6); Singapore Code, General Principle 12; UK Code, General Principle 4. This principle is encompassed in the broader policy purpose in the Australian legislation of ensuring that acquisitions of control take place in an 'efficient, competitive and informed market': Australian Act, s. 602(a).

¹⁶ See Australian Act, s. 631; Hong Kong Takeover Code, General Principle 2(4); Singapore Code, General Principle 6; UK Code, General Principle 5.

¹⁷ See Hong Kong Takeover Code, General Principle 1; Singapore Code, General Principle 1; UK Code, Introduction, A2. The Australian Panel's jurisdiction is based upon ensuring that the policy underlying the takeover provisions is complied with: see Australian Act, ss. 602 and 657A.

This chapter examines how to assess the performance of Takeover Panels and like bodies. It examines three key questions. The first question is whether the UK Panel objectives of speed, flexibility and certainty can be applied to other Panels. This involves an examination of how the criteria are relevant to takeover bodies, in terms of their historical development and rationale. The second question is whether there are other considerations that create difficulties in applying these criteria. Finally, this chapter addresses how each of the relevant criteria can be applied in order to assess the performance of takeover bodies.

There are five remaining sections to this chapter. Section B provides an overview of the way in which the UK and the Australian Panels operate.¹⁸ It commences with a discussion of the UK Panel, as the takeover bodies in HK and Singapore are modelled to varying extents on that Panel.¹⁹ This section also examines the Australian Panel given that its role is significantly different to the other takeover bodies. Section C analyses the criteria of speed, flexibility and certainty. It commences with a discussion of the historical development of the criteria, and then focuses on their application to takeover bodies. Section D examines some of the other key considerations relevant to the operation of Takeover Panels and like bodies. Section E considers how to assess the performance of these bodies by applying the relevant criteria. While the discussion focusses on the UK and Australian Panels, reference is also made to the HK and Singapore systems where appropriate.²⁰ To conclude, Section F answers the three key questions identified above.

B How the UK and Australian Panels operate

1 UK Panel

The UK Panel's key roles involve setting, administering, monitoring compliance with and enforcing the detailed rules contained in the UK Code, as well as its 'spirit' and General Principles.²¹ They also include the Panel's ability to grant dispensations from the Code's operation.²² In relation to breaches of the Code, the Panel may choose to respond by private reprimand, public censure, reporting conduct to another person (such as a regulator or certain professional bodies) or taking action to trigger the 'cold shouldering' arrangements that would require the members of professional bodies not to act for the person in breach.²³ The Code Committee was established in 2001 to review and amend the Code in order to separate

¹⁸ Both Sections B and C have been developed from Emma Armson, 'Lessons for the Australian Takeovers Panel from the United Kingdom' (2014) 29 *Australian Journal of Corporate Law* 295-321.

¹⁹ The operation of the HK Panel and Singapore Council are discussed in David Donald, chapter 12, pp. ___ and Wan Wai Yee, chapter 13, pp. ___ respectively.

²⁰ For a discussion of the takeover regulatory regimes in HK and Singapore, see Donald, chapters 12, pp. ___ and Wan, chapter 13, pp. ___ respectively.

²¹ UK Code, Introduction, A1 and A10–A11. The UK Panel currently has 31 members: The Takeover Panel, About, *Panel Membership*, www.thetakeoverpanel.org.uk/structure/Panel-membership, last accessed 16 December 2016.

²² This includes the power to allow different conditions to be attached to takeover offers and an adjusted price to be used as the minimum consideration instead of the highest price paid by the bidder and associated persons in the last 12 months: UK Code, rr. 9.3 and 11.3.

²³ *Ibid.*, Introduction, A16–A17.

the adjudicative and rule-making functions of the Panel in light of the Human Rights Act 1998 (UK).²⁴

Most decisions are made by the Takeover Panel Executive, which currently comprises 26 staff.²⁵ In addition to its roles of administering and monitoring compliance with the Code and supporting the Code Committee, the Panel Executive provides advice on the Code's operation and has the power to make binding rulings in relation to the conduct of market participants (subject to the appeal process discussed below).²⁶ The Panel Executive can also act on its own motion.²⁷ Parties may appeal from Executive decisions to the Hearings Committee of the Panel, which comprises the Panel Chairman and members appointed by the Panel and its constituent bodies.²⁸ The quorum for Panel hearings conducted by the Hearings Committee is five members.²⁹ Disciplinary matters may also be referred to the Panel by the Executive.³⁰ There is a right to appeal to the Takeover Appeal Board in relation to Hearings Committee rulings.³¹

In making its decisions, the Panel relies upon informal proceedings that do not involve the rules of evidence.³² The Panel conducts oral hearings as a matter of course. Although parties can be represented by legal advisers,³³ this is not usually the case. In relation to communication to the public, the Panel usually publishes its decisions and reasons in the form of a Panel Statement.³⁴ Traditionally, the Panel has released guidance in the form of Notes to the Rules in the Code and interpretation contained within its Annual Reports. However, in order to avoid difficulties in accessing the latter, the Panel started releasing Practice Notes in 2004.³⁵

²⁴ See The Takeover Panel, *Panel Membership, Code Committee, Introduction to the Takeover Code*, Panel Statement 2001/03, 15 February 2001; The Takeover Panel, *About the Panel, Committees, Code Committee*, www.thetakeoverpanel.org.uk/structure/committees/code-committee, last accessed 16 December 2016.

²⁵ See The Takeover Panel, *About the Panel, Executive*, www.thetakeoverpanel.org.uk/structure/executive, last accessed 16 December 2016.

²⁶ UK Code, Introduction, A11.

²⁷ *Ibid.*, Introduction, A10.

²⁸ See *ibid.*, Introduction, A8–A9, A11; The Takeover Panel, *About, Committees, Hearings Committee, Membership*, www.thetakeoverpanel.org.uk/structure/committees/hearings-committee, last accessed 16 December 2016. The following constituent bodies appoint members to the Panel: The Association for Financial Markets in Europe (with separate representation also for its Corporate Finance Committee and Securities Trading Committee), The Association of British Insurers, The Association of Investment Companies, The British Bankers' Association, The Confederation of British Industry, The Institute of Chartered Accountants in England and Wales, The Investment Association, The Pensions and Lifetime Savings Association, The Quoted Companies Alliance and The Wealth Management Association: The Takeover Panel, *About, Panel Membership*, www.thetakeoverpanel.org.uk/structure/Panel-membership, last accessed 16 December 2016.

²⁹ UK Code, Appendix 9, r.5.1.

³⁰ *Ibid.*, Introduction, A9.

³¹ *Ibid.*, Introduction, A12–A13.

³² *Ibid.*, Appendix 9, r.5.4.

³³ *Ibid.*, Appendix 9, r.5.6.

³⁴ *Ibid.*, Introduction, A11.

³⁵ See The Takeover Panel, *Statements, Practice Statements*, www.thetakeoverpanel.org.uk/statements/practice-statements, last accessed 16 December 2016.

2 Australian Panel

Unlike the UK Panel, the Australian Panel does not act of its own volition, but instead decides applications brought before it.³⁶ Its key role is to make a declaration of unacceptable circumstances and orders where appropriate.³⁷ The Panel may make a declaration where it appears that circumstances are unacceptable having regard to (i) their effect on control or an acquisition of a substantial interest in a company, (ii) their effect on a company in light of the purposes of the takeover provisions set out below, or (iii) if 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.³⁸ Although the Panel cannot order a person to comply with a requirement in the legislation for constitutional reasons,³⁹ it can make a broad range of orders including restraining the exercise of voting rights, directing the disposal of shares and vesting shares in the Australian Securities and Investments Commission ('Australian Commission').⁴⁰ The Panel also publishes Guidance Notes in relation to the exercise of its powers.⁴¹

Takeover disputes are resolved by the Australian Panel based primarily on the purposes of the takeover provisions.⁴² These purposes set out the underlying policy of ensuring 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.⁴³ The purposes are implemented in the takeover provisions in Chapter 6 of the Corporations Act 2001 (Cth) through a prohibition against a person acquiring more than 20 percent of the voting power in a company,⁴⁴ with one of the key exceptions involving making a general

³⁶ See Australian Act, s. 657C.

³⁷ Ibid., ss. 657A and 657D.

³⁸ See *ibid.*, ss. 602A and 657A(1)–(3).

³⁹ Ibid., s. 657D(2). This limitation is designed to avoid the Panel exercising judicial power contrary to Chapter III of the Australian Constitution: see, for example, *A-G (Cth) v. Breckler* (1999) 197 CLR 83. The High Court has upheld the constitutionality of the Australian Panel: see *Attorney-General (Cth) v. Alinta Ltd* (2008) 233 CLR 542.

⁴⁰ Australian Act, ss. 9 ('remedial order') and 657D(2). Orders must also not 'unfairly prejudice any person': see Australian Act, s. 657D(1).

⁴¹ Takeovers Panel, *Guidance Notes*, www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=GN, last accessed 16 December 2016.

⁴² Australian Act, s. 657A(3)(a)(i). See Takeovers Panel, *Guidance Note 1 – Unacceptable Circumstances*, www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance_notes/current/001.htm&pageID=&Year=, last accessed 16 December 2016.

⁴³ Australian Act, s. 602. Paragraphs 602(b) and (c) are known as the Eggleston Principles and originate from the Company Law Advisory Committee, *Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and Takeovers* (1969).

⁴⁴ This does not apply where a company has 50 or fewer members and its shares are not traded on the stock exchange, but extends to certain indirect forms of investments that are so traded: see Australian Act, ss. 604 and 606.

offer to all target shareholders.⁴⁵ There are also detailed legislative requirements in relation to such offers, including on the terms, timing and disclosure of information.⁴⁶

The Australian Panel comprises legal and commercial experts in takeovers,⁴⁷ and relies on less formal procedures than a court.⁴⁸ Proceedings are generally conducted based on written submissions, with parties only rarely appearing before the Panel in oral conferences.⁴⁹ Matters are decided by a ‘sitting Panel’ comprising three members,⁵⁰ from a current total of 39 part-time members.⁵¹ There is an internal Panel review process for matters concerning unacceptable circumstances, with the Review Panel comprising another three members of the Panel and having similar powers to the original Panel.⁵² The Panel is supported by an Executive that comprises four permanent staff (its Director, Counsel and two support staff), and up to two secondees (usually from law firms).⁵³ The Executive does not perform any of the roles of the Panel, and consequently does not make decisions in relation to any circumstances discussed with market participants.⁵⁴

As the corporate and securities law regulator, the Australian Commission monitors market developments, brings actions to enforce the law and makes decisions regarding exemptions and modifications of the provisions relating to takeovers and information about ownership.⁵⁵ Where the Australian Commission makes such decisions in the context of a takeover bid, they are subject to administrative review by the Australian Panel.⁵⁶ In order to facilitate cooperation between them, the Commission and Panel have entered into a Memorandum of Understanding that covers such matters as information sharing, consultation and policy

⁴⁵ Australian Act, s. 611, item 1.

⁴⁶ See, for example, Australian Act, Pt 6.4–6.6.

⁴⁷ Panel members are appointed by the Federal Government based upon their knowledge or experience in at least one of the fields of business, administration of companies, financial markets, financial products and services, law, economics and accounting: Australian Securities and Investments Commission Act 2001 (Cth) s. 172(4).

⁴⁸ See generally Emma Armson, ‘The Australian Takeovers Panel: Commercial Body or Quasi-Court?’ (2004) 28 *Melbourne University Law Review* 565-588.

⁴⁹ Takeovers Panel, *The Panel and Process*, www.takeovers.gov.au/content/DisplayDoc.aspx?doc=Panel_process/the_Panel_process.htm, last accessed 16 December 2016.

⁵⁰ See Australian Securities and Investments Commission Act 2001 (Cth), s. 184(1).

⁵¹ The Panel’s current members include solicitors, investment bankers and advisors, company directors and barristers: see Takeovers Panel, *About, Panel Members*, www.takeovers.gov.au/content/DisplayDoc.aspx?doc=about/Panel_members.htm, last accessed 16 December 2016.

⁵² See Australian Act, s. 657EA; Australian Securities and Investments Commission Act 2001 (Cth), s. 184. Panel decisions are also subject to review by the courts: see Administrative Decisions (Judicial Review) Act 1977 (Cth) ss. 3 and 5; Judiciary Act 1903 (Cth) s. 39B; Australian Constitution s. 75.

⁵³ See Takeovers Panel, *About the Panel*, www.takeovers.gov.au/content/DisplayDoc.aspx?doc=about/about_the_Panel.htm, last accessed 16 December 2016.

⁵⁴ *Ibid.*

⁵⁵ See Australian Securities and Investments Commission Act 2001 (Cth) subss. 1(2)(a), (d) and (g); Australian Act, ss. 655A and 673.

⁵⁶ *Ibid.*, s. 656A.

development.⁵⁷ The Panel is also required to give the Commission an opportunity to make submissions in relation to its orders and declarations.⁵⁸

The continuing role of the courts presents a significant challenge to the operation of the Australian Panel, which seeks to minimise ‘tactical litigation’ and instead allow shareholders to decide upon the merits of a takeover bid.⁵⁹ In order to make the Panel the primary forum for resolving takeover disputes,⁶⁰ the legislation defers the ability of persons other than the Australian Commission and governmental authorities to apply to the court in relation to a takeover bid until the end of the takeover bid period.⁶¹ Although the courts and Panel can have overlapping jurisdiction,⁶² the Panel will generally decline to conduct proceedings if the matter is before the courts.⁶³ In addition, applications for judicial review of Panel decisions can be made to the High Court under section 75(v) of the Australian Constitution during the takeover bid,⁶⁴ and subsequently in the Federal Court.⁶⁵ This has resulted in three Australian Panel decisions being set aside since it started exercising its current powers in 2000.⁶⁶

C Criteria to assess panel bodies

This section addresses the question whether the UK Panel objectives of speed, flexibility and certainty can be applied to other Panels. First, the section focuses on historical developments in relation to the criteria in the UK. It then discusses the similar policy goals sought to be achieved by the introduction of the Australian Panel’s current powers. Finally, the section examines the application of the criteria to takeover bodies, with a particular focus on their relevance in the UK and Australia.⁶⁷

1 Historical development

The three objectives of providing speed, flexibility and certainty have become the benchmark for the operations of the UK Panel. The first two aims of speed and flexibility were introduced in the Panel’s first annual report,⁶⁸ with subsequent annual reports raising

⁵⁷ See ‘Memorandum of Understanding Between The Australian Securities and Investments Commission & The Corporations and Securities Panel (the Takeovers Panel)’, August 2001, takeovers.gov.au/content/Resources/mou/mou.aspx, last accessed 16 December 2016.

⁵⁸ See Australian Act, ss. 656B(3)(b)(i), 657A(4)(c), 657D(1)(c) and (3)(c).

⁵⁹ See Corporate Law Economic Reform Program, ‘Takeovers — Corporate Control: A Better Environment for Productive Investment’ (Paper No 4, 1997), p. 36; Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 38.

⁶⁰ *Ibid.*, s. 659AA.

⁶¹ *Ibid.*, s. 659B. The court’s powers under the Act are also limited where the Panel has refused to make a declaration of unacceptable circumstances: see *ibid.*, s. 659C.

⁶² See, for example, *Lionsgate Australia Pty Ltd v. Macquarie Private Portfolio Management Ltd* (2007) 240 ALR 385 at 396–8.

⁶³ *Re Taipan Resources NL* (No. 2) (2000) 36 ACSR 704 at 709–10.

⁶⁴ See Australian Act, s. 659B(5).

⁶⁵ See Emma Armson, ‘The Australian Takeovers Panel and Judicial Review of its Decisions’ (2005) 26 *Adelaide Law Review* 327–358 at 334–40.

⁶⁶ See *Glencore International AG v. Takeovers Panel* (2005) 220 ALR 495; *Glencore International AG v. Takeovers Panel* (2006) 151 FCR 77; *Queensland North Australia Pty Ltd v. Takeovers Panel* (2015) 320 ALR 726; *Queensland North Australia Pty Ltd v. Takeovers Panel* (No. 2) (2015) 236 FCR 370.

⁶⁷ These criteria are also discussed in Wan, chapter 13, pp. ___ in relation to the Singapore Council.

⁶⁸ See, for example, The Takeover Panel, *Report on the Year ended 31st March 1969*, pp. 4–5 and 11–12.

concerns about situations where there was uncertainty for market participants.⁶⁹ Importantly, the three objectives were adopted by the Court of Appeal in its landmark 1987 decision in *R v. Panel on Take-overs and Mergers, Ex parte Datafin Plc & Anor*⁷⁰ (*Datafin*). The *Datafin* decision was particularly significant in establishing the following approach to the court's role in reviewing UK Panel decisions, which has been crucial in facilitating certainty in relation to the Panel's decision-making:

in the light of the special nature of the panel, its functions, the market in which it is operating, the time scales which are inherent in that market and the need to safeguard the position of third parties, who may be numbered in thousands, all of whom are entitled to continue to trade upon an assumption of the validity of the panel's rules and decisions, unless and until they are quashed by the court, I should *expect the relationship between the panel and the court to be historic rather than contemporaneous*. I should *expect the court to allow contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders which would enable the panel not to repeat any error and would relieve individuals of the disciplinary consequences of any erroneous finding of breach of the rules*.⁷¹

It was observed in the *Datafin* decision that the UK Panel operated at that time 'without visible means of legal support'.⁷² This changed in 2006, when the UK Panel was given a legislative basis.⁷³ Prior to this change, the UK Department of Trade and Industry expressed concerns that it would undermine the 'speed, flexibility and certainty' provided by the UK regulatory system.⁷⁴ These criteria have been emphasised as 'essential characteristics of the Panel system' in the introduction to the UK Panel appearing in its annual reports since 1992.⁷⁵

Although there are significant differences in the way in which the Australian Panel operates compared to its UK counterpart, the UK was the key overseas jurisdiction cited in support of giving the Australian Panel its current decision-making powers. These powers were given to the Australian Panel in reforms to the legislation implemented in 2000 ('Australian Panel reforms').⁷⁶ In the paper setting out the reform proposals, the UK Panel was highlighted as having 'the reputation of resolving takeover disputes promptly and effectively'.⁷⁷ The criteria

⁶⁹ See, for example, The Takeover Panel, *Report on the Year ended 31st March 1973*, p. 6; The Takeover Panel, *Report on the Year ended 31st March 1974*, p. 15.

⁷⁰ [1987] QB 815, especially at 835 and 839. See also at 820, 840 and 846.

⁷¹ *Ibid.*, at 842 (emphasis added).

⁷² *Ibid.*, at 834.

⁷³ Companies Act 2006 (UK), s. 942. This resulted from the implementation of the Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids ('Takeover Directive').

⁷⁴ See Department of Trade and Industry ('DTI'), *Company Law Implementation of the European Directive on Takeover Bids: A Consultative Document*, January 2005, para. 2.33.

⁷⁵ See, for example, The Takeover Panel, *Report and Accounts for the Year Ended 31 March 2016*, p. 5.

⁷⁶ See Corporate Law Economic Reform Program, 'Takeovers — Corporate Control', pp. 32 and 36. This paper set out the policy aims for the Australian Panel reforms, which were implemented in the Corporate Law Economic Reform Program Act 1999 (Cth).

⁷⁷ Corporate Law Economic Reform Program, 'Takeovers — Corporate Control', p. 36.

of speed, flexibility and certainty are also consistent with the aims of the Australian Panel reforms. These aims were 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.⁷⁸ This is also consistent with Parliamentary debate some time before the Australian Panel was introduced, which referred to the desirability of introducing a Panel-based system in light of the speed and flexibility of the UK model.⁷⁹

2 Application

a Speed

The objective of speedy decision-making in the context of a takeover matter is based on the effect that delay can have on a takeover bid. There are high financial stakes for the bidder in making a general offer to purchase all of the remaining target shares, as required in different circumstances in each jurisdiction.⁸⁰ This is due to the risks and timing pressures involved in making such an offer, particularly where the bidder needs to obtain finance for cash payment as part of the offer. The Australian Panel reforms were proposed in part in response to concerns that target directors could seek to stymie an unwanted takeover bid by making an application to the courts on the basis of deficiencies in disclosure documentation.⁸¹ It was argued that target directors could bring litigation for a tactical purpose to delay or prevent the takeover as a result of the delays involved in the court process.⁸² This would undermine the disciplinary effect of takeovers on company management, as the threat of takeover provides a strong incentive for directors to ensure that their company is operating efficiently.⁸³ Accordingly, the overall aim of the Australian Panel reforms was for the inevitable disputes in hostile bids ‘to be resolved as quickly and efficiently as possible’ to allow the outcome of the bid to be decided by target shareholders ‘on the basis of its commercial merits’.⁸⁴ This is consistent with the General Principles in the Code jurisdictions, which seek to ensure that target shareholders are not denied the opportunity to decide on the merits of the takeover bid as a result of the actions of the target board.⁸⁵

⁷⁸ Ibid., p. 32. See also Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth), p. 38.

⁷⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 1983, pp. 3034–5 (John Spender). See also Emma Armson, ‘Evolution of Australian Takeover Legislation’ (2013) 39 *Monash University Law Review* 654–701 at 672–3.

⁸⁰ See above nn. 10–11 and accompanying text.

⁸¹ Corporate Law Economic Reform Program, ‘Takeovers — Corporate Control’, p. 38.

⁸² Ibid., p. 37.

⁸³ See, for example, Jonathan Farrer, ‘Reforming Australia’s Takeover Defence Laws: What Role for Target Directors?’ (1997) 8 *Australian Journal of Corporate Law* 1–24 at 2–6, 9–10; James Mayanja, ‘Reforming Australia’s Takeover Defence Laws: What Role for Target Directors? A Reply and Extension’ (1999) 10 *Australian Journal of Corporate Law* 162–191 at 162–4; Corporate Law Economic Reform Program, ‘Takeovers — Corporate Control’, pp. 7–8.

⁸⁴ Corporate Law Economic Reform Program, ‘Takeovers — Corporate Control’, p. 36.

⁸⁵ See Hong Kong Takeover Code, General Principle 9; Singapore Code, General Principle 7; UK Code, General Principle 3.

Speed is undoubtedly an aim of both the Australian and UK Panels,⁸⁶ consistent with the need to deal quickly and efficiently with takeover matters discussed above. It is difficult to establish empirically the extent to which the UK Panel meets this goal. This is because the UK Panel Executive undertakes a significant proportion of the decision-making without published reasons and the UK Panel's internal records are not accessible for confidentiality reasons. However, in practice, the Executive often communicates its decisions over the phone within short timeframes.

The Australian Panel has also endeavoured to deal with matters efficiently in response to the reform aim of speed in decision-making.⁸⁷ This is reflected in the time that the Panel takes both to make its decisions and provide reasons for those decisions. Studies of the Australian Panel's operations in its early years raise the question whether the expectation that the Panel would 'be well placed to act with speed in every case' was a realistic one.⁸⁸ These studies demonstrate that the Panel's ability to achieve this goal has varied over time.⁸⁹ This would appear to be a function of such factors as the number of matters being considered by the Panel at any time and the complexity involved in each matter.

b Flexibility

A Panel-based system can provide flexibility in the sense of both its procedures and substantive approach to decision-making.⁹⁰ By way of contrast, the limitations of the courts in dealing with takeover disputes were recognised by members of Australia's highest court in its decision in *Attorney-General (Cth) v. Alinta Ltd* ('*Alinta*').⁹¹ This decision upheld the constitutionality of the Australian Panel following the Australian Panel reforms.⁹² In *Alinta*, Gleeson CJ noted that the judicial process was 'ill-adapted' to take account of the considerations and interests that the Panel was required to contemplate.⁹³ His Honour pointed out that judges are appointed based on their legal knowledge and experience and that any other talents are not assessed. Gleeson CJ also noted that the adversarial setting of a court limits the information that it can legitimately take into account.⁹⁴ Similarly, Kirby J thought that the courts had 'disadvantages and defects' in dealing with takeover disputes, primarily due to their composition, appeal provisions, procedures and scope for collateral challenge.⁹⁵ This was reflected in his Honour's conclusion that:

⁸⁶ See The Takeover Panel, *Report and Accounts for the Year Ended 31 March 2013*, p. 19.

⁸⁷ See above n. 78 and accompanying text.

⁸⁸ Corporate Law Economic Reform Program, 'Takeovers — Corporate Control', p. 37.

⁸⁹ See Emma Armson, 'An Empirical Study of the First Five Years of the Takeovers Panel' (2005) 27 *Sydney Law Review* 665-682; Chris Miller, Rebecca Campbell and Ian Ramsay, 'The Takeovers Panel: An Empirical Study' (2006) 3 *Macquarie Journal of Business Law* 199-240.

⁹⁰ See, for example, Armson, 'Evolution of Australian Takeover Regulation', 672.

⁹¹ (2008) 233 CLR 542.

⁹² *Ibid.* The High Court had previously confirmed the constitutionality of the pre-2000 incarnation of the Panel, the Corporations and Securities Panel (as it then was), in *Precision Data Holdings Ltd v. Wills* (1991) 173 CLR 167 at 190-2.

⁹³ *Attorney-General (Cth) v. Alinta Ltd* (2008) 233 CLR 542 at 551.

⁹⁴ *Ibid.*, at 551-2.

⁹⁵ *Ibid.*, at 562.

it was open to the Federal Parliament to conclude that the nature of takeover disputes was such that they required, ordinarily, prompt resolution by decision-makers who enjoyed substantial commercial experience and could look not only at the letter of the Act but also at its spirit, and reach outcomes according to considerations of practicality, policy, economic impact, commercial and market factors and the public interest.⁹⁶

Commentators have remarked on the flexibility in the approach adopted by the UK Panel.⁹⁷ As in the case of the speed criterion, it is difficult to gather empirical evidence to establish the extent to which the UK Panel operates flexibly given that much of its decision-making is not recorded in documents available to the public.⁹⁸ However, the Panel exercises its powers to waive compliance with the UK Code where it is appropriate.⁹⁹ It has also been observed that the UK Panel has endured as a result of the speed with which it is able to respond to developments, which has pre-empted calls for legislative intervention.¹⁰⁰ This reflects the UK Panel's ability to change the UK Code and its policies in light of market developments.

The objective of providing flexibility is also applicable to the role of the Australian Panel. The key Australian Panel reform aim relevant to the criterion of flexibility is 'informality' in decision-making.¹⁰¹ This is reflected in the streamlined procedures adopted by the Australian Panel, including relying generally on written submissions rather than oral evidence.¹⁰² In relation to its substantive approach to decision-making, it is considered that the concept of flexibility should incorporate the goal of providing a 'commercial' approach.¹⁰³ This is consistent with the Australian Panel making decisions based on the 'spirit' as well as the letter of the law, with an approach that is less technical and avoids 'excessive legalism'.¹⁰⁴ These aims are assisted by the specialist expertise of Panel members (including industry representatives and specialist lawyers),¹⁰⁵ which were expected to 'bring greater understanding and expertise to takeover disputes'.¹⁰⁶ Although it does not determine the substance of the takeover rules like its UK counterpart, the Australian Panel provides guidance notes in order to inform market participants of the factors that it takes into account in making its decisions.¹⁰⁷ One example of how the Australian Panel has demonstrated

⁹⁶ *Ibid.*, at 562–3.

⁹⁷ See, for example, Armour and Skeel, 'Who Writes the Rules for Hostile Takeovers, and Why?' at 1729 and 1745; Jonathan Mukwiri, 'The Myth of Tactical Litigation in UK Takeovers' (2008) 8 *Journal of Corporate Law Studies* 373–388 at 375.

⁹⁸ See above text accompanying n. 86 and following.

⁹⁹ See, for example, The Takeover Panel, *Report and Accounts for the Year Ended 31 March 2013*, p. 19.

¹⁰⁰ Armour, Jacobs and Milhaupt, 'The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets', at 238.

¹⁰¹ See above n. 78 and accompanying text.

¹⁰² See above text accompanying n. 48 and following.

¹⁰³ See Armson, 'Evolution of Australian Takeover Regulation', at 672–3 and 698.

¹⁰⁴ Corporate Law Economic Reform Program, 'Takeovers — Corporate Control', pp. 37–8 and 40–1.

¹⁰⁵ *Ibid.*, p. 32.

¹⁰⁶ *Ibid.*, p. 37.

¹⁰⁷ See above n. 41.

flexibility in implementing the policy underlying the takeover provisions is the introduction of a frustrating action policy similar to that applied in the UK.¹⁰⁸

c Certainty

Parties involved in a takeover seek certainty to allow them to make properly informed and timely decisions. It is contended that certainty can be evaluated using two key elements. The first element is consistency in decision-making,¹⁰⁹ which requires that persons in a similar situation ‘receive similar treatment and outcomes’.¹¹⁰ Secondly, certainty is achieved through finality, namely where the matter is determined finally by the Panel or like body.¹¹¹ This element incorporates decisions made under the internal review processes set up for the takeover body. However, finality is affected adversely by the availability of judicial review. Although judicial review is important to ensure that the takeover body acts according to the law, this creates a tension where the system has been established to avoid court proceedings in relation to the same matters. In this context, the potential for court challenges to decisions of the takeover body can undermine the very purpose of the system.

The UK system of takeover regulation has sought to achieve certainty by relying on its internal appeal processes rather than judicial review.¹¹² It has achieved this aim to date through the operation of the *Datafin* principle.¹¹³ Significantly, there have only been three judicial review cases brought in relation to UK Panel decisions since 1968 and none of them has been successful.¹¹⁴ It is also important to note that the implementation of a legislative basis for the UK Panel in 2006 has not affected the applicability of the *Datafin* decision, notwithstanding concerns raised at that time.¹¹⁵ As a result, the *Datafin* principle continues to play a crucial role in creating strong disincentives for judicial review applications. In particular, the self-regulatory nature of the system has led to few court cases in relation to UK Panel decisions. This is because, apart from implementing statutory recognition of the UK Panel, the 2006 legislative changes maintained the essential features of the existing takeover regulatory regime. That is, the Panel determines the rules governing takeover bids, there is a system of hearings and appeals within the organisational structure of the Panel and there is a public interest in ensuring that the Panel continues to be able to provide ‘speed, flexibility and certainty’ in its decision-making.

¹⁰⁸ See generally Armson, ‘The Frustrating Action Policy’.

¹⁰⁹ See, for example, Brian J. Preston, ‘Characteristics of Successful Environmental Court and Tribunals’ (2014) 26 *Journal of Environmental Law* 365-393 at 378.

¹¹⁰ Kevin Whitaker, Michael Gottheil and Michael Uhlmann, ‘Consistency In Tribunal Decision Making: What Really Goes On Behind Closed Doors’ in Laverne A. Jacobs and Anne L. Mactavish (eds.), *Dialogue Between Courts And Tribunals – Essays In Administrative Law and Justice (2001-2007)*, papers.ssrn.com/sol3/papers.cfm?abstract_id=2332875#page=358, last accessed 16 December 2016, p. 354.

¹¹¹ See, for example, The Takeover Panel, *Report on the Year ended 31st March, 1989*, p. 10; Mukwiri, ‘The Myth of Tactical Litigation’, at 377.

¹¹² See, for example, The Takeover Panel, *Report and Accounts for the Year Ended 31 March 2013*, p. 8.

¹¹³ See above n. 71 and accompanying text.

¹¹⁴ See *R v. Panel on Take-overs and Mergers, Ex parte Datafin plc* [1987] 1 QB 815; *R v. Panel on Take-overs and Mergers, Ex parte Guinness Plc* [1990] 1 QB 146; *R v. Panel on Take-overs and Mergers, ex parte Fayed and Ors* [1992] BCC 524.

¹¹⁵ See, for example, Mukwiri, ‘The Myth of Tactical Litigation’, at 377.

Similarly, the Australian Panel reforms have sought to achieve certainty in relation to decision-making by the Australian Panel. In relation to consistency, one of the key aims of the reforms was to provide ‘uniformity’ in decision-making,¹¹⁶ with the Panel expected to ‘be well placed ... to apply uniform standards’.¹¹⁷ However, it was also conceded that an appeal process would be required ‘to provide appropriate protection against erroneous decisions and facilitate uniform standards’.¹¹⁸ As discussed above, one of the key aims of the Australian Panel reforms was to allow the target’s shareholders to decide upon the merits of a takeover bid. This was sought to be achieved by removing the opportunity for parties to bring court proceedings in order to delay or stymie the bid, and instead placing takeover disputes before a commercial body set up to hear matters informally and quickly.¹¹⁹

In relation to finality, it was envisaged that the Australian Panel would be protected from judicial review ‘whilst it operated in good faith and within reasonable bounds and complied with the procedures in the legislation and the rules of natural justice’.¹²⁰ However, the entrenched ability to challenge the decisions of Panel members in the High Court under section 75(v) of the Australian Constitution has meant that judicial review applications continue to be an issue for the Australian Panel. In particular, the first two judicial review applications in relation to Panel decisions following the 2000 reforms were successful,¹²¹ leading to concerns that this would create a pattern of challenging Panel decisions in the courts.¹²² However, subsequent judicial review decisions have generally reinforced the Panel’s decision-making.¹²³

D Issues to consider in applying criteria

The criteria of speed, flexibility and certainty raise a number of issues that need to be considered in the context of their application. Firstly, there are overlapping elements and tensions between different parts of the criteria that need to be identified and taken into account. Secondly, there are two other important considerations relevant to the operation of Takeover Panels and like bodies, namely fairness and transparency.

¹¹⁶ Corporate Law Economic Reform Program, ‘Takeovers — Corporate Control, p. 32.

¹¹⁷ *Ibid.*, p. 37.

¹¹⁸ *Ibid.*, p. 40.

¹¹⁹ See Corporate Law Economic Reform Program, ‘Takeovers — Corporate Control, p. 36; Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 38.

¹²⁰ Corporate Law Economic Reform Program, ‘Takeovers — Corporate Control, p. 40.

¹²¹ *Glencore International AG v. Takeovers Panel* (2005) 220 ALR 495; *Glencore International AG v. Takeovers Panel* (2006) 151 FCR 77.

¹²² See, for example, Armson, ‘The Australian Takeovers Panel and Judicial Review of its Decisions’, at 357.

¹²³ See *CEMEX Australia Pty Ltd v. Takeovers Panel* (2008) 106 ALD 5; *CEMEX Australia Pty Ltd v. Takeovers Panel* (2009) 177 FCR 98; *Tinkerbelle Enterprises Pty Limited as Trustee for The Leanne Catelan Trust v. Takeovers Panel* (2012) 208 FCR 266; *Queensland North Australia Pty Ltd v. Takeovers Panel* (2014) 100 ACSR 358. The last decision was overturned on appeal to the Full Federal Court: see *Queensland North Australia Pty Ltd v. Takeovers Panel* (2015) 320 ALR 726; *Queensland North Australia Pty Ltd v. Takeovers Panel (No. 2)* (2015) 236 FCR 370. However, the matter was remitted to the Panel and its second decision was subsequently upheld: *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* (2015) 328 ALR 664.

1 Relationship between criteria

Applying the criteria of speed, flexibility and certainty can lead to challenges in light of the relationship between them. There are two key issues to consider in this context, namely the existence of overlap and tensions between the criteria. The first issue of overlap applies to the criteria of speed and flexibility, particularly in relation to the issue of procedural flexibility. In other words, the mechanisms providing flexibility in a takeover body's operations can also facilitate timely decision-making. For example, the primary method of communicating in Australian Panel proceedings is by email,¹²⁴ with the Panel usually making its decisions based on written submissions from the parties.¹²⁵ Recent legislative amendments also allow the Australian Panel President to give directions as to which members should constitute a sitting Panel for a particular matter, and for the members to participate in proceedings, where they are outside Australia.¹²⁶ This creates an overlap between the elements of the regulatory system that provide for both speed and procedural flexibility. However, given that these elements complement each other, this is merely a question of characterisation rather than impacting upon the assessment of whether the takeover body meets these criteria.

On the other hand, there are tensions between the flexibility afforded to the takeover body in making its decisions and the aim of providing certainty in terms of consistency in decision-making. In essence, the exercise of discretionary power by a takeover body based on the policy underlying the takeover regulation creates a tension between allowing flexibility in the operation of the regulatory regime and providing certainty for market participants.¹²⁷ As discussed above, each of the systems in Australia, HK, Singapore and the UK rely upon general principles to shape the decision-making of the relevant takeover body in each jurisdiction.¹²⁸ In particular, the takeover bodies apply an approach based on maintaining the 'spirit' underlying the regulatory system. This flexibility in the system assists with reducing complexity in the takeover regulation, by avoiding the need for the rules to account for every situation.¹²⁹ It also allows the Takeover Panel or like body to adopt a less technical approach, consistent with the broad aim of it adopting a 'commercial' or 'pragmatic' approach in its decision-making.¹³⁰ However, the uncertainty arising from the use of such discretion can create difficulties for market participants.

¹²⁴ Takeovers Panel, *Process Information*, www.takeovers.gov.au/content/proformas/process_information.aspx, last accessed 16 December 2016 ('Australian Panel Process Information') at [27].

¹²⁵ However, the Panel may decide to conduct a conference to hear oral evidence if this is considered to be more efficient: see *ibid.*, at [25]; Takeovers Panel, *Procedural Rules* (1 June 2010), www.takeovers.gov.au/content/rules_for_proceedings/default.aspx, last accessed 16 December 2016 ('Australian Panel Rules'), r. 6.4.1 note 1.

¹²⁶ See Corporations Legislation Amendment (Deregulatory and Other Measures) Act 2015 (Cth), Sch 2, Pt 1, it 1–2; Explanatory Memorandum, Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014 (Cth) at [5.4]–[5.5].

¹²⁷ See, for example, France Houle and Lorne Sossin, 'Tribunals And Policy-Making: From Legitimacy To Fairness' in Laverne A. Jacobs and Anne. L. Mactavish (eds.), *Dialogue Between Courts And Tribunals – Essays In Administrative Law and Justice (2001-2007)*, papers.ssrn.com/sol3/papers.cfm?abstract_id=2332875#page=358, last accessed 16 December 2016, p. 106.

¹²⁸ See text following n. 8.

¹²⁹ See, for example, Armson, 'Evolution of Australian Takeover Legislation', at 672–3.

¹³⁰ See below text accompanying nn. 168–169.

In light of these concerns, it is important to ensure that the general principles applied by the takeover bodies are expressed in clear terms and that the decision-maker provides guidance on how they will exercise their discretion in order to minimise uncertainty.¹³¹ However, this results in tension between the aims of flexibility and certainty (in terms of consistency) in decision-making, particularly where the Takeover Panel or like body first applies new policies.¹³² Consequently, the takeover body needs to achieve an appropriate balance between flexibility and clarity in the exercise of its regulatory discretions.¹³³ This also presents challenges in terms of assessing the extent to which the body meets the criteria of flexibility and certainty in this context.

2 Other considerations

a Fairness

The criteria of speed, flexibility and certainty focus primarily on ensuring that the takeover body operates efficiently. This gives rise to questions as to the extent to which the system is operating fairly. One of the most important means of achieving fairness is through consistency in decision-making.¹³⁴ In addition, each of the systems operating in Australia, HK, Singapore and the UK focusses on protecting the interests of target shareholders. This is implemented through the regulatory regimes, which reflect general principles designed to ensure that target shareholders receive similar treatment, sufficient information and enough time in relation to the takeover offer.¹³⁵ The Introduction to the UK Code also emphasises that it reflects ‘the collective opinion of those professionally involved in the field of takeovers ... as to how fairness to offeree [target] company shareholders ... can be achieved’.¹³⁶

Procedural fairness is implemented through the ability of persons affected by a decision to have the opportunity to put forward their case before the decision is made. For example, the UK Panel Executive hears the views of the other parties involved before making a binding ruling.¹³⁷ Similarly, the Australian Panel is required to give persons affected by a final order, parties to the proceedings and the Australian Commission the opportunity to make submissions before making the order.¹³⁸ The Australian Panel also normally provides parties with an opportunity to comment on the proposed decision (including any declaration and orders) that it proposes to make, although such comments are ‘limited to matters of fact or

¹³¹ See, for example, Ian Ramsay, ‘Corporate Law in the Age of Statutes’ (1992) 14 *Sydney Law Review* 474-494 at 482-3; Australian Securities and Investments Commission, *Regulatory index – Takeovers and reconstructions*, www.asic.gov.au/regulatory-resources/regulatory-index/takeovers-and-reconstructions/, last accessed 16 December 2016; Takeovers Panel, *Guidance Notes*, www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=GN, last accessed 16 December 2016.

¹³² See, for example, above n. 108 and accompanying text.

¹³³ See, for example, Michael H. McHugh, ‘The Growth of Legislation and Litigation’ (1995) 69 *Australian Law Journal* 37-48 at 48; Ramsay, ‘Corporate Law in the Age of Statutes’, at 482 and 493-4.

¹³⁴ See, for example, Houle and Sossin, ‘Tribunals And Policy-Making’, p. 106; above n. 110 and accompanying text.

¹³⁵ See above nn. 9, 12 and accompanying text.

¹³⁶ UK Code, Introduction, A2.

¹³⁷ *Ibid.*, Introduction, A11. The UK Hearings Committee can vary its procedural rules as considered appropriate for the ‘fair and just conduct and determination of the case’: *ibid.*, Appendix 9, r. 3.1.

¹³⁸ Australian Act, s. 657D(1).

unfair prejudice'.¹³⁹ Both the UK Panel Executive and Australian Panel can make conditional rulings or interim orders respectively on an ex-parte basis in the case of urgent matters.¹⁴⁰

Notwithstanding this, there is an inevitable tension between procedures designed to ensure the efficient resolution of disputes and those providing procedural fairness to the fullest possible extent. This is recognised in the legislation governing the proceedings of the Australian Panel, which makes it clear that the legislation or accompanying regulations may contain provisions that would override the rules of procedural fairness.¹⁴¹ These tensions are also reflected in the objects of the Australian Panel procedures set out in the accompanying regulations. That is, the objects are to ensure that the proceedings are 'as fair and reasonable' and 'conducted with as little formality ... [and] in as timely manner', as permitted by the legislative requirements and 'a proper consideration of the matters before the Panel'.¹⁴² An example of the tension between efficiency and fairness can be found in the Australian Panel's approach of deciding matters based on written submissions rather than using oral hearings as a general rule for its proceedings.¹⁴³ However, the Panel may decide to hold a hearing if it would expedite the proceedings or if it is required for a 'better understanding of evidence, issues or arguments'.¹⁴⁴ It should also be noted that the courts play a role in ensuring that procedural fairness is complied with when deciding judicial review applications.¹⁴⁵ In this context, it has been confirmed in Australia that procedural fairness does not require an oral hearing to be held in every case.¹⁴⁶

b Transparency

Another key issue for Takeover Panels and like bodies relates to transparency in decision-making. Unlike courts, the processes of takeover bodies are usually conducted in private.¹⁴⁷ A party may also be allowed to withhold confidential and/or commercially sensitive information from other parties.¹⁴⁸ However, this would only be allowed in exceptional circumstances due to procedural fairness concerns.¹⁴⁹ The primary rationale for this approach is to ensure that the takeover body can make its decisions based on all available material, without compromising the confidentiality of commercially sensitive information. This is important not only to protect the financial and other interests of the bodies to whom the

¹³⁹ See Australian Panel Rules, r. 7.1.1 note 1; Australian Act, s. 657D(1).

¹⁴⁰ See UK Code, Introduction, A11; Australian Act, s. 657E(1).

¹⁴¹ Australian Securities and Investments Commission Act 2001 (Cth), s. 195(4).

¹⁴² Australian Securities and Investments Commission Regulations 2001 (Cth), r. 13. See also Australian Panel Rules, r. 1.1.1.

¹⁴³ Australian Panel Rules, r. 1.1.1 note 1(a).

¹⁴⁴ *Ibid.*, r. 6.4.1 note 1. See also Australian Panel Process Information, at [25].

¹⁴⁵ See below n. 174 and accompanying text.

¹⁴⁶ *Tinkerbell Enterprises Pty Limited as Trustee for The Leanne Catelan Trust v. Takeovers Panel* (2012) 208 FCR 266 at 298.

¹⁴⁷ See Australian Panel Rules, r. 1.1.1 note 1(b); Hong Kong Takeover Code, rr. 13.2–13.3; UK Code, Appendix 9, r. 3.3 (with Appendix 9 containing the *Hearings Committee Rules of Procedure*); The Takeover Appeal Board, *Rules of the Takeover Appeal Board*, www.thetakeoverappealboard.org.uk/rules.html, last accessed 16 December 2016 ('UK Board Rules'), r. 2.12. See also discussion in Wan, chapter 13, pp. ____.

¹⁴⁸ See Australian Panel Rules, r. 2.3.1; Hong Kong Takeover Code, r. 13.4; UK Code, Appendix 9, r. 3.4; UK Board Rules, r. 2.13.

¹⁴⁹ See Australian Panel Rules, r. 2.3.1 note 2; Hong Kong Takeover Code, r. 13.4.

information relates, but also to ensure that confidential information is handled in an appropriate manner given the implications for market integrity. In particular, there are concerns to avoid trading based on inside information.¹⁵⁰ Loss of confidentiality also triggers requirements to disclose information to the market that is material to the market price of securities.¹⁵¹

As a result, there are restrictions affecting access to information arising out of the proceedings of takeover bodies. For example, recordings of UK Hearings Committee and Takeover Appeal Board hearings are retained for administrative purposes only during the course of the proceedings, with transcripts available to parties subject to confidentiality conditions.¹⁵² The UK Code also requires that confidential information concerning a proposed offer only be passed to a person if necessary and where they are made aware of the need for secrecy.¹⁵³ Similarly, each party to proceedings in the Australian Panel is required to make two undertakings concerning its own conduct and that of its directors, officers and advisers to protect confidentiality in relation to the proceedings.¹⁵⁴ The first prevents the use or disclosure of confidential information provided to a party in the proceedings, except in relation to use in the proceedings or where disclosure is required under the law or securities exchange listing rules.¹⁵⁵ Secondly, parties are required to undertake not to canvas any issue relevant to the proceedings in the media unless the statement only identifies the parties, subject matter and/or broad nature of the unacceptable circumstances or orders sought (without discussing their merits).¹⁵⁶

These limitations are consistent with what would be expected of a commercially-orientated body making decisions in the context of confidential and market-sensitive information. However, the bodies are accountable to the parties (and the public) through the giving of reasons for their decisions.¹⁵⁷ This information is more easily accessed in the case of the Australian Panel compared to its UK counterpart, as the Australian Panel decisions are set out separately from the Panel's media releases.¹⁵⁸ The only exception is for confidential or

¹⁵⁰ See Australian Act, s. 1043A; Hong Kong Takeover Code, r. 13.4; Singapore Code, r. 11.1; UK Code, r. 4.1.

¹⁵¹ See, for example, Australian Act, s. 674; Australian Securities Exchange, *ASX Listing Rules*, rr. 3.1 and 3.1A.2, www.asx.com.au/regulation/rules/asx-listing-rules.htm, last accessed 16 December 2016; United Kingdom Listing Authority, *Disclosure Rules and Transparency Rules*, www.fshandbook.info/FS/html/FCA/DTR, last accessed 16 December 2016, DTR 2.

¹⁵² See UK Code, Appendix 9, r. 5.10; UK Board Rules, r. 2.17.

¹⁵³ UK Code, r. 2.1. See also Hong Kong Takeover Code, r. 1.4; Singapore Code, r. 2.

¹⁵⁴ Australian Panel Rules, Annexure A.

¹⁵⁵ *Ibid.*, para. A.

¹⁵⁶ *Ibid.*, para. B.

¹⁵⁷ These are available on the websites of the relevant bodies, namely Australian Panel (www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=RD, last accessed 16 December 2016), HK Panel and Takeovers Appeal Committee (www.sfc.hk/web/EN/regulatory-functions/listings-and-takeovers/takeovers-and-mergers/decisions-and-statements/panel-and-appeal-committee.html, last accessed 16 December 2016), Singapore Council (www.mas.gov.sg/sic, last accessed 16 December 2016), UK Executive and Hearings Committee (www.thetakeoverpanel.org.uk/statements/panel-statements, last accessed 16 December 2016), UK Takeover Appeal Board (www.thetakeoverappealboard.org.uk/statements.html, last accessed 16 December 2016).

¹⁵⁸ See Takeovers Panel, *Media Releases*, www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=MR, last accessed 16 December 2016.

withdrawn matters before the Australian Panel, for which reasons are not published.¹⁵⁹ In relation to UK Panel Executive decisions, it would appear that those made on a day-to-day basis are generally not announced in Panel Statements, which makes it difficult to assess much of its work. However, such decisions can be appealed to the UK Hearings Committee and Takeover Appeal Board, from which reasons are generally available.¹⁶⁰

E How to test whether a body is meeting the criteria

Determining whether a takeover body meets the criteria of speed, flexibility and certainty involves both a quantitative and qualitative assessment of its work. Empirical analysis plays a crucial role in relation to the speed criterion, and is also relevant to the certainty criterion. On the other hand, qualitative analysis is required in order to assess the flexibility criterion, as well as key aspects of the criterion of certainty. Each criterion is examined separately in the sections below.

1 Speed

In theory, speed should be easiest criterion to assess. This is because it is clear what the criterion relates to, namely the timing of decision-making. As a result, it should be a straightforward matter to assess the speed with which the takeover body responds to applications or similar requests for a decision or ruling by a market participant, taking into account any delay resulting from the body's review processes and/or judicial review. This would require information on the dates of the application or request, that the decision(s) are conveyed to the parties and, where applicable, of making the reasons available to the parties and the public. One possible complication would be where the criterion is defined to encompass the speed with which the Takeover Panel or like body responds to market developments. However, this importantly involves a subjective analysis of the extent to which the takeover body's response meets the concerns held by the body, other corporate law regulators and/or market participants. Given this, the question of the response to market developments can be considered in the context of the criterion of flexibility.

As a result, the assessment of speed focuses on an empirical analysis of the time taken by the takeover body to make its decisions, in light of internal and/or judicial review. This relies on the accessibility of data concerning the timing of applications and decision-making by the takeover body. In the case of the UK Panel, much of its decision-making is undertaken by the UK Panel Executive, with information on its day-to-day decisions unavailable for confidentiality reasons.¹⁶¹ Consequently, the speed of the UK Panel can only be assessed objectively in relation to the smaller number of decisions made by its Hearings Committee and the Takeover Appeal Board. This involves the collection of information concerning the

¹⁵⁹ See Takeovers Panel, 2009 Reasons for Decisions, *Confidential* [2009] ATP 24, www.takeovers.gov.au/content/ListDocuments.aspx?pageid=&doctype=RD&year=2009, last accessed 16 December 2016.

¹⁶⁰ See UK Code, Introduction, A13 and Appendix 9, r. 6.5.

¹⁶¹ See above text accompanying n. 86 and following.

dates of applications and decisions from Statements published on the websites of each of these bodies.¹⁶²

For the Australian Panel, the assessment of speed is a more straightforward exercise due to its more limited jurisdiction. That is, rather than acting on its own volition, the Panel only decides two kinds of applications. These relate to whether particular circumstances are unacceptable¹⁶³ or to the review of decisions of the Australian Commission to exercise certain exemption and modification powers in the context of a takeover bid.¹⁶⁴ Reasons for the Australian Panel's decisions in relation to these applications are published on its website on separate pages containing only the reasons for decisions of each year, with the decisions numbered sequentially for each year.¹⁶⁵ Accordingly, it is easier to access the decisions of the Australian Panel.

2 Flexibility

The criterion of flexibility is more difficult to both define and assess. Flexibility is generally a characteristic ascribed to commercial panels and other bodies in contrast to decisions made by bodies such as courts. For example, a key element that provides flexibility for Takeover Panels and like bodies is the ability to make decisions based on broad-based principles or 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 in addition to their substance. Flexibility is also enhanced in the UK through the fact that the Panel has the role of determining the content of the takeover rules.¹⁶⁶ This allows the UK Panel to respond to market developments more quickly than in the case of the legislative provisions applying in Australia.

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, the members of the takeover bodies are appointed in light of their experience in a range of different fields. For example, members of the UK Code Committee represent 'a spread of shareholder, corporate, practitioner and other interests within the Panel's regulated community'.¹⁶⁷ Similarly, Australian Panel members

¹⁶² See above n. 157.

¹⁶³ See Australian Act, ss. 657A and 657C.

¹⁶⁴ Ibid., s. 656A.

¹⁶⁵ See *Takeovers Panel, Reasons for Decisions*, www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=RD, last accessed 16 December 2016. The only exception is for confidential or withdrawn matters: see above n. 159.

¹⁶⁶ See above nn. 21, 24 and accompanying text. The HK and Singapore Codes are also non-statutory: see Hong Kong Takeover Code, Int-1; Singapore Code, Introduction, 1. Although the Australian rules are determined in legislative provisions, the corporate law regulator has a broad power to exempt or modify persons from the operation of the takeover provisions and the Panel is given the power to review these exemption and modification decisions: see Australian Act, ss. 655A and 656A.

¹⁶⁷ See UK Code, Introduction, A9;

above n. 28. HK Panel members are also drawn from the financial and investment community: Hong Kong Takeover Code, Int-12. On the other hand, Singapore Council members are mostly from the private sector, with some public sector representatives: Singapore Code, Introduction, 2.

are appointed based on experience in fields including business, financial markets, law, economics and accounting.

These factors combine to produce a different approach to decision-making compared to court decisions enforcing legislative provisions. For example, it has been observed that pragmatism is an important feature of UK Panel decision-making.¹⁶⁸ Similarly, it was pointed out in Parliamentary debate some time before the Australian Panel was introduced 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.¹⁶⁹ This element of flexible decision-making is difficult to assess quantitatively. Instead, it involves a qualitative analysis of the Panel’s decisions to determine the extent to which they reflect the characteristics of commercial and pragmatic approaches (rather than legalistic or technical ones). Consequently, there are a number of factors that need to be taken into account in assessing whether the takeover body meets the flexibility criterion. These include the expertise of the decision-makers, the use of principles or policy to make decisions and the extent to which a commercial approach or pragmatism is used. It is contended that the most appropriate way to ascertain this is to analyse case studies in relation to particular types of decisions or issues.

3 Certainty

As discussed above, there are two elements relevant to the criterion of certainty. The first element relates to the consistency of decision-making by the takeover body. Like the flexibility criterion, an assessment of consistency requires a qualitative analysis of the decisions and is one of the more difficult assessments to carry out. The complexity of this task is exacerbated by the tension arising between the flexibility and certainty criteria in this context, given that the exercise of discretion based on policy considerations can lead to some uncertainty in relation to outcomes.¹⁷⁰ One of the ways in which this uncertainty can be minimised is for the takeover body to provide guidance on how the discretion will be exercised.¹⁷¹ Accordingly, it is contended that consistency should be assessed through a case study analysis similar to that proposed in relation to flexibility. This would take into account the extent to which guidance has been provided in relation to the issues relevant to the decisions covered by the case study.

An assessment of consistency in this context should also include an examination of the impact of the takeover body’s internal review processes. For example, the UK Panel has a system of appeals from Executive rulings to the Hearing Committee, and from the Hearings

¹⁶⁸ See, for example, Robert Falkner, ‘Non-Statutory Takeover Panel: Advantage or Anachronism?’ (1990) 9 *International Financial Law Review* 15-17 at 16; 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), [www.aktiemarknadsnamnden.se/UserFiles/AMN25ar_kap06_utankOM_kap06-165x242%20\(2\).pdf](http://www.aktiemarknadsnamnden.se/UserFiles/AMN25ar_kap06_utankOM_kap06-165x242%20(2).pdf), last accessed 16 December 2016, pp. 71 and 80.

¹⁶⁹ See Armson, ‘Evolution of Australian Takeover Regulation’, at 672–3.

¹⁷⁰ *Ibid.*, at 696–7.

¹⁷¹ *Ibid.*

Committee to the Takeover Appeal Board.¹⁷² In Australia, an application may only be made for a Review Panel to re-decide matters relating to unacceptable circumstances.¹⁷³ The effect of internal review on consistency can be assessed using an empirical and qualitative analysis of the matters that are subject to such review. In particular, it can be determined how frequently the review led to a different outcome, and the extent to which this is the result of a different conclusion based on the same facts or new circumstances arising.

The impact of judicial review on the second element of finality is a more vexed issue for Takeover Panels and like bodies. On the one hand, it is important for takeover bodies to be subject to judicial review in order to ensure that they act according to the law.¹⁷⁴ However, on the other, the ability for parties to obtain judicial review of the decision of the takeover body in the courts can undermine the policy rationale for decision-making by such bodies (particularly in relation to speed and certainty). The UK Panel has to date benefited from the courts adopting an approach of judicial restraint in relation to review of Panel decisions. That is, the principles applied in *Datafin* and subsequent judicial review decisions have allowed the UK Panel to operate without the impact of tactical litigation. In Australia, judicial review is a greater threat to certainty of Panel decision-making in light of the courts adopting a less restrictive approach. There were concerns that early judicial review decisions had undermined the ability of the Australian Panel to operate effectively, although consequential legislative changes and subsequent judicial decisions have lessened these concerns. As discussed in relation to internal review above, the impact of judicial review can be assessed using an empirical and qualitative analysis of the matters that are subject to such review. In addition to analysing the frequency of different outcomes and the factors leading to this, it is also important to consider the general approach adopted by the courts in relation to judicial review applications given its impact on the certainty criterion.

F Conclusion

In response to the first of the key questions identified above, it is contended that the objectives of speed, flexibility and certainty can be applied generally to Takeover Panels and like bodies. These objectives have been a touchstone for the UK Panel's operations over a number of decades, with that Panel providing the model for other takeover bodies around the world. In Asia, this is particularly relevant to the systems in HK and Singapore. Although the Australian Panel operates quite differently from the other jurisdictions, the three objectives are consistent with the policy aims of introducing the Panel system to provide an effective takeover dispute resolution body. Each of these systems is also based on similar aims and regulatory principles, notwithstanding the differences in the way that the takeover bodies operate.

¹⁷² See above nn. 28, 31 and accompanying text. Similarly, disciplinary rulings of the HK Panel are subject to review by its Takeovers Appeal Committee: see Hong Kong Takeover Code, rr. 14–15.

¹⁷³ See above n. 52 and accompanying text. The Panel President must approve such applications where the initial Panel has declined to make a declaration of unacceptable circumstances: Australian Act, s. 657EA(2). On the other hand, a Panel decision to review a decision by the Australian Commission to exempt one or more persons from the takeover provisions, or modify their operation, is not subject to internal review by the Panel: *ibid.*, s. 657EA(1).

¹⁷⁴ See generally Armson, 'The Australian Takeovers Panel and Judicial Review of its Decisions', at 327.

The second question concerns whether there are other considerations that create difficulties in applying the criteria of speed, flexibility and certainty. Firstly, challenges arise from overlap and tensions between the criteria. Less significantly, there is an overlap between the criteria of speed and procedural flexibility, as features of a takeover body's operations that provide flexibility in a takeover can also facilitate timely decision-making. However, given their complementary nature, this is merely a question of characterisation rather than impacting upon the assessment of whether the takeover body meets these criteria. On the other hand, the tension that arises between the flexibility afforded to the takeover body in making its decisions, and the aim of providing certainty in terms of consistency in decision-making, presents more of a challenge. This requires the takeover body to achieve an appropriate balance between the two aims, with a particular focus on providing guidance on the exercise of its discretions.

There are also two other important considerations relevant to the operation of Takeover Panels and like bodies, namely fairness and transparency. It is contended that fairness is taken into account in relation to the criteria of certainty (in terms of consistency in decision-making) and flexibility (through the application of regulatory rules and principles that are founded upon ensuring appropriate treatment of target shareholders). Procedural fairness is also facilitated through processes designed to ensure that persons affected by a decision of a takeover body have the opportunity to put forward their case beforehand. However, there is a tension between procedures providing procedural fairness to the fullest possible extent and those designed to ensure the efficient resolution of disputes. Limitations on access to information arising out of the proceedings are also needed to ensure that Takeover Panels and like bodies can make their decisions based on all available material, without compromising the confidentiality of commercially sensitive information. Although these impact upon transparency in decision-making, such limitations are consistent with what would be expected of a commercially-orientated body making such decisions. However, the takeover bodies are accountable to the parties and the public through the giving of reasons for their decisions.

In response to the final question, this chapter examines in detail how to assess the performance of Takeover Panels and like bodies using the criteria of speed, flexibility and certainty. This involves both a quantitative and qualitative assessment of decisions made by the relevant body. Empirical analysis can be used to assess the speed of decision-making and the impact of judicial review of decisions on certainty. In contrast, an evaluation of the conflicting criteria of flexibility and certainty (particularly in terms of consistency in decision-making) requires a qualitative analysis of the body's decisions. The best way of assessing these elements is to evaluate the work of the Takeover Panel or like body using case studies focussing on different categories of decisions. This assessment would need to be conducted taking into account factors relevant to the particular jurisdiction, including such matters as the level of concentration in shareholding structures.

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