THE NEW AUSTRALIAN TAKEOVER PANEL
THE END OF LEGALISM AND TACTICAL LITIGATION?

INTRODUCTION

As part of the Corporate Law Economic Reform Program (CLERP) in Australia, the Corporate Law Economic Reform Program Act 1999 (CLERP Act) was enacted and commenced on 13 March 2000. The CLERP Act introduced profound changes to Australian corporate law, affecting areas of law such as fundraising, directors' duties and other aspects of corporate governance, compulsory acquisitions and takeovers. In regard to takeovers, the main changes include the reconstitution of the Corporations and Securities Panel (Panel) for replacing the courts and the Administrative Appeals Tribunal (AAT) as the principal forum to resolve takeover disputes during the bid period.

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[1] See Robert Baxt et al "CLERP" EXPLAINED (Sydney, CCH Australia Ltd, 2000); Jennifer Hill and WJ Koeck "CLERP: What it means for corporate Australia" 2000 (Feb) AUSTRALIAN COMPANY SECRETARY 18. Pursuant to the CLERP Act, Chapters 6 to 6C have replaced the takeover and compulsory acquisition provisions in the former Chapter 6 of the Corporations Law (CL). Chapter 6 and Part 6.10 are headed "Takeovers" and "Review and Intervention" respectively.

[2] In this article the word "Panel" will be used in respect of the Corporations and Securities Panel before and after its reconstitution pursuant to the CLERP Act. The phrase "old Panel" will be used in respect of the Panel before the CLERP Act amendment.

[3] Pursuant to s 9 CL a "bid period" in respect of an off-market bid starts when the bidder's statement is given to the target and ends one month later if no offers are made under the bid, or at the end of the offer period. In respect of a market bid, the
This shift in focus from takeover litigation in the courts to takeover dispute resolution before the Panel is a bold attempt to deal with tactical litigation, the bane of efficient takeover activity, and its related delay and costs, experienced in Australia over the last decade and a half. However, the CLERP Act did not change the hybrid nature of the regulatory regime for takeovers in Australia. It remains a mixture of black-letter law contained in Chapter 6 CL, underpinned by some “fuzzy law” fall back in the form of the Eggleston Principles, the exemption and modification powers of the Australian Securities and Investments Commission (ASIC), and the array of powers and functions of the Panel.

The question that arises in Australian takeover regulation is whether the CLERP Act amendments and the Panel are the answer to legalism and tactical litigation in takeover activity. This article will first delineate the concepts of black letter law, legalism and tactical litigation. Thereafter an overview of the Panel’s predecessors will be provided, followed by an analysis of Part 6.10 CL and a discussion of the emasculation of the court. In analysing Part 6.10 CL, reference will – where appropriate - be made to the Irish Takeover Panel (Irish Panel), being the most recent example where the model of the highly successful City of London Panel on Takeovers and Mergers (London Panel) has been followed, albeit that the Irish Panel is a statute-based body. Finally, against the backdrop of

4 The Eggleston Principles (named after the chairman of the Company Law Advisory Committee, RM Eggleston) are principles for takeover regulation in Australia which were stated in the Second Interim Report to the Standing Committee of the Attorney-General, Disclosure of Substantial Shareholdings and Takeover Bids (Canberra, AGPS, 1969).

5 Alan Cameron “The Commission and the Panel”, address by the then chairman of ASIC to the Panel, Melbourne, 8 June 1999, 2 at <http://intranet/home/library/8-6-99.htm>


7 The London Panel supervises conduct during takeover proceedings through the City Code on Takeovers and Mergers (City Code) as well as the Rules Governing Substantial Acquisitions of Shares. In contrast to the Irish Panel, the City Code is self-regulatory. The City Code guarantees that all shareholders are treated fairly and equally in relation to takeovers and provides an orderly framework within which takeovers can take place. The London Panel example has also been followed in South Africa: see Chapter XVA of the South African Companies Act 61 of 1973, and the Securities Regulation Code on Takeovers and Mergers and the Rules under s 440C(4)(A), (B), (C) and (F) of the Companies Act 1973, promul-