

# EVOLUTION OF AUSTRALIAN TAKEOVER LEGISLATION

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*Corporate takeover legislation has evolved significantly since it was first introduced in Australia. Starting with only a handful of provisions in the state based legislation enacted from 1961, the takeover provisions now in chs 6–6C of the Corporations Act 2001 (Cth) form the basis of a complex regulatory regime. Since 1981, the legislation has been supplemented by a regulatory power to exempt persons from and modify the operation of the takeover provisions. There has also been a shift towards the resolution of takeover disputes by non-judicial bodies. From 1991, the regulator was given the power to apply to the Corporations and Securities Panel for orders where it considered circumstances to be unacceptable based on the principles underlying the legislation, even if the letter of the law had been complied with. This role was expanded in 2000 by allowing any interested party to apply to the Panel and limiting the ability to commence court proceedings during a takeover. This article analyses the forces driving each of these developments, with a particular focus on the resulting tensions and the evolution of the principles underlying the legislation.*

## I INTRODUCTION

Corporate takeover legislation has evolved significantly since it was first introduced in Australia. Starting with only a handful of provisions in the state based legislation enacted from 1961,<sup>1</sup> the takeover provisions now in chs 6–6C of the *Corporations Act 2001* (Cth) form the basis of a complex regulatory regime. Since 1981, the legislation has been supplemented by a regulatory power to exempt persons from and modify the operation of the takeover provisions.<sup>2</sup> There has also been a shift towards the resolution of takeover disputes by non-judicial bodies. In 1991, the regulator was given the power to apply to the Corporations and Securities Panel (CSP) for orders where it considered circumstances to be unacceptable based on the principles underlying the legislation, even if the letter of the law had been complied with.<sup>3</sup> This role was expanded in 2000 by allowing

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1 See, eg, *Companies Act 1961* (NSW) ss 6, 46–7, 184, sch 10. See also *Companies Act 1961* (Qld); *Companies Act 1962* (SA); *Companies Act 1962* (Tas); *Companies Act 1961* (Vic); *Companies Act 1961* (WA); *Companies Ordinance 1962* (ACT); *Companies Ordinance 1962* (NT).

2 See *Companies (Acquisition of Shares) Act 1980* (Cth) ss 57–8; *Corporations Act 1989* (Cth) s 82 ('Corporations Law'). See also *Corporations Law* ss 728–30; *Corporations Act 2001* (Cth) ss 655A, 669, 673.

3 See *Corporations Law* ss 732–4.

any interested party to apply to the CSP and limiting the ability to commence court proceedings during a takeover.<sup>4</sup> The CSP was subsequently renamed the Takeovers Panel in 2001.<sup>5</sup> This article analyses the forces driving each of these developments, with a particular focus on the resulting tensions and the evolution of the principles underlying the legislation.

Takeovers play a critical role in corporate governance. This is because the threat of a takeover resulting in replacement of the company's existing management provides a strong incentive for the directors to ensure that the company is operating efficiently.<sup>6</sup> It has been observed that the stock (or capital) market provides an 'objective standard of managerial efficiency'.<sup>7</sup> Accordingly, if a company's shares are performing poorly on the stock market, this is commonly considered to be an indication of poor management and makes the company an attractive target for a takeover.<sup>8</sup> This assumes that the capital market is operating efficiently, namely that prices 'fully reflect' all available information (including that concerning managerial performance).<sup>9</sup> Henry Manne identified another market operating in this context, which he referred to as the 'market for corporate control'.<sup>10</sup> This market performs the function of allowing control of a company to shift to those who can manage corporate assets most profitably.<sup>11</sup>

A takeover is one of the key ways in which the control of a company can change.<sup>12</sup> It involves the purchaser ('bidder') acquiring the shares in the company ('target') directly from its shareholders ('target shareholders'). Whether the bidder succeeds

4 See *Corporations Law* pt 6.10 div 2 sub-div B, especially ss 657C, 659AA–659C. These provisions were replicated in the *Corporations Act 2001* (Cth), subject to amendments in 2007: see below nn 277–83 and accompanying text.

5 See below n 274 and accompanying text.

6 See, eg, Jonathan Farrer, 'Reforming Australia's Takeover Defence Laws: What Role for Target Directors?' (1997) 8 *Australian Journal of Corporate Law* 1, 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, 162–4; Corporate Law Economic Reform Program, 'Takeovers — Corporate Control: A Better Environment for Productive Investment' (Paper No 4, 1997) 7–8 ('CLERP 4').

7 Henry G Manne, 'Mergers and the Market for Corporate Control' (1965) 73 *Journal of Political Economy* 110, 113.

8 See, eg, 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, 5; Manne, above n 7, 112–13.

9 Under the efficient capital market hypothesis, there are different forms of efficiency that reflect the extent to which information is reflected in market prices, namely weak form (only historical prices incorporated), semi-strong form (all publicly available information) and strong form (all public and private information): see, eg, Eugene F Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25 *Journal of Finance* 383, 383. It is generally considered that the Australian and other developed capital markets are at most semi-strong efficient: see, eg, Mark Blair and Ian Ramsay, 'Mandatory Corporate Disclosure Rules and Securities Regulation' in Gordon Walker, Brent Fisse and Ian Ramsay (eds), *Securities Regulation in Australia and New Zealand* (LBC Information Services, 2<sup>nd</sup> ed, 1998) 55, 79–80; Gill North and Ross P Buckley, 'A Fundamental Re-Examination of Efficiency in Capital Markets in Light of the Global Financial Crisis' (2010) 33 *University of New South Wales Law Journal* 714, 729. See also Alan Dignam and Michael Galanis, 'Australia Inside-Out: The Corporate Governance System of the Australian Listed Market' (2004) 28 *Melbourne University Law Review* 623, 647–8.

10 Manne, above n 7, 113.

11 See, eg, Fischel, above n 8, 5.

12 The other key examples are the removal of management at shareholder meetings, and the consensual merger of two entities: see, eg, *ibid* 5; Manne, above n 7, 114.

in obtaining control of the target will depend on whether sufficient numbers of target shareholders accept the bidder's takeover offer, which is made to them individually. This gives rise to a number of conflicting interests between the parties involved. One of the clearest examples is the opposing aims of the bidder and the target shareholders in relation to the price paid for the shares and the amount of information provided by the bidder. The directors of the target will also have a conflict of interest as they are likely to lose their positions if the takeover succeeds, assuming that one of its aims is to install more efficient management.<sup>13</sup> The target directors will be particularly concerned if the takeover is proceeding without their support (in a 'hostile' bid).

Another significant source of conflict results from the fact that the bidder will usually pay a premium in addition to the market value of the shares in order to obtain control of the company ('control premium'). There is considerable debate concerning who should be entitled to the control premium.<sup>14</sup> Although it has been argued that this is a corporate asset,<sup>15</sup> the debate usually focuses on the differing interests of the target shareholders. On the one hand, it is considered that those shareholders who have sufficient shares to deliver control to the bidder should be entitled to receive the premium.<sup>16</sup> It is argued that any change in control of the target could benefit the remaining shareholders where it results in improved management.<sup>17</sup> In addition, it would be in the interests of the bidder to reduce its costs by contracting with the least number of target shareholders required to achieve its objective. On the other hand, it is argued that the non-controlling or 'minority' shareholders should be able to receive an equal share of the control premium by selling their shares to the bidder at the same price.<sup>18</sup>

These conflicts give rise to questions as to the extent investors should be protected and whether disclosure requirements are needed to ensure that the market for corporate control is properly informed. This explains much of the reasoning behind regulating takeovers. For example, it has been observed that the development of the hostile bid from the 1950s in the United Kingdom led to concerns about 'unequal treatment of shareholders, the provision of inadequate information, the inadequacy of shareholder remedies, asset-stripping activities by

13 See above n 8 and accompanying text. Other rationales for takeovers include the creation of synergies in combining different businesses and the exploitation of particular assets in the target: see, eg, John C Coffee Jr, 'Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance' (1984) 84 *Columbia Law Review* 1145, 1162–73; Roberta Romano, 'A Guide to Takeovers: Theory, Evidence and Regulation' (1992) 9 *Yale Journal on Regulation* 119, 122–54.

14 See, eg, Frank H Easterbrook and Daniel R Fischel, 'Corporate Control Transactions' (1982) 91 *Yale Law Journal* 698, 715–16.

15 See, eg, Adolf A Berle Jr, '"Control" in Corporate Law' (1958) 58 *Columbia Law Review* 1212, 1225.

16 See, eg, Easterbrook and Fischel, above n 14, 710.

17 See, eg, Alfred Hill, 'The Sale of Controlling Shares' (1957) 70 *Harvard Law Review* 986, 988, 1038–9.

18 See, eg, William D Andrews, 'The Stockholder's Right to Equal Opportunity in the Sale of Shares' (1965) 78 *Harvard Law Review* 505, 506; Richard W Jennings, 'Trading in Corporate Control' (1956) 44 *California Law Review* 1, 39.

bidders, and gradually the identification of the social costs of some takeovers'.<sup>19</sup> In Australia, takeovers were initially subject to self-regulation through disclosure requirements imposed by the Associated Stock Exchanges.<sup>20</sup> These requirements formed the basis of Australia's first corporate takeover legislation, which was introduced by the states from 1961.<sup>21</sup>

This article examines the evolution of corporate takeover legislation in Australia. It analyses the key drivers for legislative change in this area, with a particular focus on the themes and tensions arising from these developments. The takeover legislation examined in the article relates to the conduct of the parties involved in a takeover, rather than determining whether the takeover should proceed on competition, foreign investment, or other policy grounds relating to specific industries.<sup>22</sup> Part II of the article focuses on the historical development of the legislation. In particular, it analyses the different rationales given for the introduction of the successive takeover laws in Australia from 1961. Part III evaluates the significant themes and tensions underpinning the development of this legislation. The first of these relate to the principles underlying the laws, which involve the occasionally diverging aims of promoting efficiency in the market for corporate control and providing shareholder protection. Secondly, developments in the regulatory approach are examined, with a particular focus on the tension between providing certainty through the use of legislation and the increasing use of regulatory discretions. Finally, these earlier themes are analysed in the context of takeover dispute resolution. In particular, this section examines the factors leading to the shift from a court based approach to decision-making by a non-judicial Panel. Part IV concludes with some final observations regarding these trends and future challenges.

19 John H Farrar, 'Fuzzy Law, the Modernization of Corporate Laws, and the Privatization of Takeover Regulation' in John H Farrar (ed), *Takeovers: Institutional Investors, and the Modernization of Corporate Laws* (Oxford University Press, 1993) 1, 6. See also Peter Frazer, 'The Regulation of Takeovers in Great Britain' in John C Coffee Jr, Louis Lowenstein and Susan Rose-Ackerman (eds), *Knights, Raiders and Targets: The Impact of the Hostile Takeover* (Oxford University Press, 1988) 436, 437; 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, 1756–64; 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* 221, 235–7.

20 See New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 November 1961, 2597 (Norman Mannix); H A J Ford, 'Uniform Companies Legislation' (1962) 4 *University of Queensland Law Journal* 133, 153.

21 New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 November 1961, 2597 (Norman Mannix). See also below n 23 and accompanying text.

22 See, eg, *CLERP 4*, above n 6, 5.

## II HISTORICAL DEVELOPMENT

### A 'Uniform' Companies Acts

Takeover legislation was first implemented in Australia in the Uniform Companies Acts (UCA), which were enacted for each state and territory in 1961–62.<sup>23</sup> The analysis in this article will focus primarily on the New South Wales legislation, which led the way in introducing the pivotal concept of a 'relevant interest' in subsequent reforms to the legislation in 1971.<sup>24</sup> In his Second Reading Speech for the Companies Bill 1961 (NSW), the Minister for Justice noted the 'spectacular increase' in the number of takeover offers in preceding years and concluded that the techniques adopted had resulted in shareholders facing pressure to make a decision with inadequate time and information.<sup>25</sup> To remedy this, the Minister stated the need for the 'widest possible disclosure' by the bidder.<sup>26</sup> He also noted that the Bill contained a 'comprehensive code for the protection of the target shareholders' based on 'existing stock exchange regulations ... and regulations approved by the Board of Trade' under the *Prevention of Fraud (Investments) Act 1958* (UK).<sup>27</sup> The twin goals of disclosure and investor protection were listed as the first two purposes of the legislation as a whole, namely:

(1) to provide for the more effective disclosure of the affairs of companies in the interests of shareholders, creditors and the community at large; [and] (2) to provide for the greatest measure of protection to the investing public without unduly hampering commercial operations ...<sup>28</sup>

Compact by today's standards, the UCA takeover provisions comprised a handful of sections and schedules covering 15 pages in the New South Wales legislation.<sup>29</sup> The provisions applied to offers by the offeror corporation ('bidder') for all of the shares (or of a particular class of shares) of a company ('full bid') or for a proportion of those shares ('partial bid') in certain situations. First, the provisions applied to a 'scheme' involving a full bid in relation to the shares of the offeree corporation ('target').<sup>30</sup> Secondly, the provisions applied to a scheme involving a partial bid, where the shares to be acquired and any already held by the bidder and any related corporations gave the right to control the exercise of at least one-third

23 See *Companies Act 1961* (NSW); *Companies Act 1961* (Qld); *Companies Act 1962* (SA); *Companies Act 1962* (Tas); *Companies Act 1961* (Vic); *Companies Act 1961* (WA); *Companies Ordinance 1962* (ACT); *Companies Ordinance 1962* (NT). This followed a Commonwealth Parliamentary Committee report recommending constitutional reform to allow federal company law in light of pessimism about the chances of state uniform legislation being implemented and maintained: Joint Committee on Constitutional Review, Parliament of Australia, *Report from the Joint Committee on Constitutional Review* (1959) 112 [812], 112–13 [821].

24 See below n 73 and accompanying text.

25 New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 November 1961, 2597 (Norman Mannix).

26 Ibid 2598.

27 Ibid 2597.

28 Ibid 2591.

29 See *Companies Act 1961* (NSW) ss 6, 46–7, 184, sch 10.

30 Ibid s 184(1) (definition of 'take-over scheme' para (a)).

of the voting power of the target at a general meeting.<sup>31</sup> The primary function of the UCA provisions was to ensure that certain information was disclosed to the target and its shareholders by complying with the checklist of requirements in sch 10.<sup>32</sup> This information was required to be provided within set time frames.<sup>33</sup> It was an offence to fail to comply with these requirements, with the bidder or target and each of its officers who were in default liable to a penalty.<sup>34</sup> In addition, the bidder and its directors were liable to compensate an accepting target shareholder for losses resulting from any untrue statement, or wilful non-disclosure of material known to be material, in the bidder's disclosure statement.<sup>35</sup> This could also lead to an offence committed by a person authorising or causing the issue of such a deficient statement by the bidder.<sup>36</sup>

## **B Eggleston Report**

The first major review of the uniform companies legislation was conducted by the Company Law Advisory Committee (Eggleston Committee), which was appointed by the Standing Committee of Attorneys-General in 1967. The Committee was named after its chairman, Sir Richard Eggleston, who was a former judge, and also comprised a private sector lawyer and accountant.<sup>37</sup> Significantly, its terms of reference focussed on shareholder protection, in light of a series of corporate crashes in the 1960s that had resulted in substantial losses for small investors.<sup>38</sup> Accordingly, the terms of reference were:

To enquire into and report on the extent of the protection afforded to the investing public by the existing provisions of the Uniform Companies

31 Ibid s 184(1) (definition of 'take-over scheme' para (b)). Under s 6(5) of this Act, companies were related if they were a holding company or subsidiary of the other, or subsidiaries of the same holding company.

32 For the bidder, these disclosures involved details relating to any conditions attaching to the offer, the bidder and its holdings in the target, the consideration payable, any payments to or arrangements with target directors, any known material change in the financial position of the target since the balance sheet was last presented to the shareholders, and market or sale prices for target shares prior to the scheme: *ibid* sch 10 pts A–B. This also included the provision of financial reports similar to that required for a prospectus if the consideration included shares as payment: at sch 10 pt B cl 1(d)(i), sch 5 pt II cls 20, 23. The target was required to disclose information relating to whether its board of directors had made a recommendation regarding acceptance, its directors' holdings in the target and their current intentions concerning the offer, any payment or agreement between the bidder and target directors relating to the scheme, sale prices for target shares (if not listed) prior to the scheme and whether there had been any material change in the financial position of the target since the balance sheet was last presented to the shareholders: at sch 10 pt C.

33 Target companies received 14 to 28 days notice of the scheme and were required to provide their statement within 14 days, and bidders were required to give notice of when offers were made and keep offers open for at least one month: *ibid* ss 184(2), (3), (5), sch 10 pt A cl 1.

34 The maximum penalty was imprisonment for three months or a fine of £500: *ibid* s 184(6).

35 *Ibid* ss 46(1), 184(7).

36 *Ibid* ss 47(1), 184(7). The maximum penalty was imprisonment for one year and/or a fine of £1000: at s 47(1).

37 Tony Greenwood, 'In Addition to Justin Mannolini' (2000) 11 *Australian Journal of Corporate Law* 308, 309.

38 New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 September 1971, 911 (John Waddy).

Acts and to recommend what additional provisions (if any) are reasonably necessary to increase that protection.<sup>39</sup>

The Eggleston Committee's *Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and Takeovers* in 1969 has had a lasting impact on Australian takeover law.<sup>40</sup> This is perhaps surprising given that the Committee deliberated on these issues for only a month over the Christmas period.<sup>41</sup> In its report, the Committee made the following statement, known as the Eggleston principles, which has become a cornerstone of our system of takeover regulation:

We agree with the general principle that if a natural person or corporation wishes to acquire control of a company by making a general offer to acquire all the shares, or a proportion sufficient to enable him to exercise voting control, limitations should be placed on his freedom of action so far as is necessary to ensure:

- (i) that his identity is known to the shareholders and directors;
- (ii) that the shareholders and directors have a reasonable time in which to consider the proposal;
- (iii) that the offeror is required to give such information as is necessary to enable the shareholders to form a judgment on the merits of the proposal and, in particular, where the offeror offers shares or interests in a corporation, that the kind of information which would ordinarily be provided in a prospectus is furnished to the offeree shareholders;
- (iv) that so far as is practicable, each shareholder should have an equal opportunity to participate in the benefits offered.<sup>42</sup>

These principles provide a broad conception of shareholder protection in the context of a takeover. The first three principles are fundamental in aiming to provide an informed market in which target shareholders are selling their shares and reasonable time in which to make their decision. The Committee was also concerned to ensure that shareholders knew which person(s) were in the position to determine the future of the company through their voting power. They consequently recommended the introduction of a requirement to disclose substantial shareholdings for interests giving control over voting power at a 10 per cent threshold, consistent with the figure that was applicable

39 Company Law Advisory Committee, Parliament of New South Wales, *Report to the Standing Committee of Attorneys-General on Accounts and Audit* (1970) [1].

40 Company Law Advisory Committee, Parliament of New South Wales, *Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and Takeovers* (1969) ('Eggleston Report'). Although this was an interim report, there was no final report: see R I Barrett, 'Towards Harmonised Company Legislation — "Are We There Yet?"' (2012) 40 *Federal Law Review* 141, 153 n 62.

41 Robert Baxt, 'Commentary' in *Takeovers and Corporate Control: Towards a New Regulatory Environment* (Centre for Independent Studies, 1987) 89, 93.

42 *Eggleston Report*, above n 40, 8 [16].

in the United Kingdom and United States at the time.<sup>43</sup> Indeed, ensuring that a market is informed is one of the foundations of any properly performing market mechanism.<sup>44</sup> It was also a key driver for the introduction of disclosure based requirements for takeovers in the UCA.<sup>45</sup>

A key focus of the *Eggleston Report* was to close loopholes in relation to the operation of the existing disclosure provisions. This led to a number of significant recommendations for legislative change, the most important of which was to lower the threshold at which the takeover provisions applied to a partial bid from one-third to 15 per cent of the voting power at a general meeting.<sup>46</sup> This recommendation was based on the Committee's view that any person aiming for control of a parcel of at least 15 per cent is likely to be seeking control of the company itself, and that there was no disadvantage to setting the figure at 15 per cent rather than an intermediate level between 15 per cent and one-third.<sup>47</sup> Other recommendations included closing loopholes by applying the provisions to natural persons making takeover offers and to persons who make a joint offer.<sup>48</sup> Another significant abuse identified in the report was "[f]irst come first served" invitations, in which a broker could invite target shareholders to make offers to sell their shares at a certain price and indicate that the first offers would be accepted up to a particular percentage of the company's share capital.<sup>49</sup> This raised concerns that such invitations could be made without identifying the buyer, and placed pressure on shareholders to make a quick decision without the information required under the UCA, as they did not know whether the buyer would accept offers above the nominated percentage.<sup>50</sup> Consequently, the Committee recommended that the definition of an 'offer' be extended to include an invitation to make an offer.<sup>51</sup>

The fourth Eggleston principle of 'equal opportunity' has had a far-reaching influence, arguably further than was originally intended. It is clear that this principle of ensuring that target shareholders have an equal opportunity to participate in the benefits on offer was a key factor in the Eggleston Committee's desire to stamp out the practice of 'first come first served' invitations discussed above. The Committee emphasised that such invitations would inevitably lead to inequality between the target shareholders as many would not become aware of the invitation in time to make an offer.<sup>52</sup> However, it is clear that the Committee did not consider that the equal opportunity principle required all shareholders to

43 Ibid 5 [3]–[4].

44 See above n 9 and accompanying text.

45 See above nn 25–8 and accompanying text.

46 See *Eggleston Report*, above n 40, 10 [27]. See also above n 31 and accompanying text.

47 *Eggleston Report*, above n 40, 10 [27].

48 Ibid 8 [17], 10 [29]. Cf *Colonial Sugar Refining Co Ltd v Dilley* (1967) 116 CLR 445, affd *Blue Metal Industries Ltd v Dilley* (1969) 117 CLR 651.

49 *Eggleston Report*, above n 40, 9 [22].

50 Ibid.

51 Ibid 9 [24].

52 Ibid 9 [22]. However, there was criticism of the Committee's approach at that time. For example, in relation to 'first come first served' bids, see John R Peden, *Control of Company Take-Overs* (Law Book, 1970) 18–19, 31–2.



receive an offer once the bidder reached a certain threshold. Instead, it concluded that the bidder should be able to make one or more share purchases on the stock market irrespective of whether they have already acquired control.<sup>53</sup>

Three specific situations involving equal opportunity were identified in the *Eggleston Report*. First, it was noted that the law already dealt partly with the concern that non-accepting shareholders not be left as a small minority where the offer is to purchase all or a high proportion of the shares.<sup>54</sup> Secondly, the Eggleston Committee concluded that a bidder should pay to those who have already accepted any increase in price obtained by one or more of the remaining shareholders.<sup>55</sup> Finally, the report considered the suggestion that, where a bidder is seeking only a proportion of the total shareholding in a partial bid, every shareholder should be able to accept the offer for that proportion of their shareholding.<sup>56</sup> Although later implemented in 1986,<sup>57</sup> the Eggleston Committee concluded that the suggested rule would involve 'great difficulties' and that 'it is impossible to secure complete equality in this respect'.<sup>58</sup> In doing so, the Committee recognised that the existing law did not require an offer to be made to all shareholders or entitle them to dispose of an equal proportion of their shares.<sup>59</sup>

The Eggleston Committee made it clear that it did not wish to discourage bids where the safeguards to protect shareholders were observed.<sup>60</sup> It accordingly recommended legislative amendments to ensure 'as far as practicable' that compliance could not be avoided.<sup>61</sup> However, the Committee recognised that legislative changes dealing with problems arising from the existing provisions would not be the end of the matter:

if we had felt ourselves able to take a more leisurely approach to the subject, we would have wished to compile a draft embodying all the recommendations in this report. Even then, we would expect that situations which we had not envisaged would arise, and that loopholes would be found which would require further legislative treatment. The problems relating to take-overs are complex and difficult, and while it is unlikely that a perfect solution can be found, our recommendations, if adopted, will in our view add substantially to the protection and equitable treatment of shareholders and should be effective to deal with those abuses which have come to our attention.<sup>62</sup>

53 *Eggleston Report*, above n 40, 11 [35].

54 See, eg, *Companies Act 1961* (NSW) s 185; *Eggleston Report*, above n 40, 8 [18(a)].

55 *Eggleston Report*, above n 40, 8 [18(b)], [19]–[20].

56 *Ibid* 8 [18(c)].

57 See below nn 158–9 and accompanying text.

58 *Eggleston Report*, above n 40, 9 [21].

59 *Ibid*.

60 *Ibid* 7 [15].

61 *Ibid*.

62 *Ibid* 15 [56].

## C 1971 Amendments

Reforms flowing from the *Eggleston Report* were implemented in the various states and territories from 1971.<sup>63</sup> As a result of these amendments, the takeover and substantial shareholding provisions swelled to 58 pages in the New South Wales legislation, just under four times its size in 1961.<sup>64</sup> The Second Reading Speech for the draft legislation acknowledged that the takeover code was ‘both experimental and highly technical’, having no known ‘counterpart elsewhere in the world’.<sup>65</sup> The level of technicality employed was explained as a response to growing complexity in the business world and sophisticated ways of avoiding the law, with the legislation needing to become ‘increasingly sophisticated as it closes the loopholes’.<sup>66</sup> The 1971 amending legislation had been criticised on the basis that it placed ‘undue emphasis [on] the protection of investors to the exclusion of other facets of company law’.<sup>67</sup> In response, the Second Reading Speech emphasised the need for the company as a legal form to have the community’s confidence and that it was important that protection of the public be given first priority given corporate collapses in the early 1960s.<sup>68</sup>

The 1971 legislation implemented the important changes foreshadowed in the *Eggleston Report*. For example, it introduced disclosure requirements for substantial shareholdings at the level of 10 per cent,<sup>69</sup> applied the takeover provisions to natural persons,<sup>70</sup> and reduced the threshold for acquisitions to which the takeover provisions applied to partial bids from one-third to 15 per cent of voting power at a general meeting.<sup>71</sup> The key concepts of a person being ‘entitled’ to ‘voting shares’ (including interests held by their ‘associates’) were also introduced to capture control over voting,<sup>72</sup> with New South Wales becoming

63 See, eg, *Companies (Amendment) Act 1971* (NSW).

64 See *Companies Act 1961* (NSW) ss 6A, 69A–69N, 180A–180Y, sch 10. Cf above n 29 and accompanying text.

65 New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 September 1971, 916 (John Waddy).

66 Ibid 911.

67 Ibid 910.

68 Ibid 911. See also above nn 38–9 and accompanying text.

69 *Companies Act 1961* (NSW) pt IV div 3A, especially s 69C.

70 See ibid ss 180A(1) (definition of ‘offeror’), 180C(1), (3).

71 Ibid s 180C(2)(a).

72 See ibid ss 5(1) (definition of ‘voting share’), 6A(6), 180A(5)–(8), 180D. Similar to the current law, the definition of ‘voting share’ excluded shares for which voting rights were limited to specific situations, instead applying to ordinary shares with an entitlement to vote at general meetings: see *Companies Act 1961* (NSW) s 5(1) (definition of ‘voting share’); *Corporations Act 2001* (Cth) s 9 (definition of ‘voting share’).

the first jurisdiction to implement the term ‘relevant interest’.<sup>73</sup> To avoid the difficulties identified with ‘first come, first served’ invitations,<sup>74</sup> new provisions were introduced to apply to the making of invitations that were modelled on the disclosure requirements for offers.<sup>75</sup> Other significant reforms included requiring increases in consideration to be paid to shareholders who had already accepted the offer,<sup>76</sup> and making it an offence to announce an offer that was not intended or could not be performed.<sup>77</sup> The Supreme Court was also granted wide powers to make orders for non-compliance with the takeover provisions on the application of the Commission<sup>78</sup> or target.<sup>79</sup> This included the power to restrain the transfer of shares, cancel contracts, and direct a person to do (or restrain from doing) an act to secure compliance with the provisions.<sup>80</sup> In exercising these powers, the Court was required to be satisfied that the order would not ‘unfairly prejudice any person’.<sup>81</sup> It also had the power to excuse a person in the case of ‘inadvertence, mistake or circumstances beyond [their] control’.<sup>82</sup>

Three changes in the 1971 legislation attracted particular controversy, and were referred to in the Second Reading Speech. The first related to arguments that the Court’s power to order a sale of shares for non-compliance with the substantial shareholding provisions was ‘excessively punitive’.<sup>83</sup> Secondly, there was controversy in relation to reforms to liability arising out of misleading takeover disclosure documents. There were particular concerns raised about applying criminal and civil liability to bidders where their statement contained false or misleading statements or omissions that were ‘material’ (rather than based on

73 See, eg, *Companies Act 1961* (NSW) ss 6A, 126–7, 180A(5), 180D(2)(b), pt IV div 3A; A G Hartnell, ‘Relevant Interests — “Control” in the Eighties’ (1988) 6 *Company and Securities Law Journal* 169, 169–70. For the purposes of applying the 15 per cent threshold, a person’s voting power was calculated by reference to the votes attached to voting shares to which a person was entitled, also taking into account voting shares subject to certain offers or invitations made by the person or associated persons within the previous four months: *Companies Act 1961* (NSW) ss 180C(2)(a), 180D(1)(b). A person was entitled to shares in which they and their associates had a relevant interest: at s 180A(5). Relevant interests comprised the power to control the exercise of the right to vote relating to the share or exercise control over its disposal, and took into account informal arrangements (whether or not enforceable): at ss 6A(1)(c), (2)–(3). A person was also deemed to have the same powers as a body corporate where, for example, they and/or their associates held at least 15 per cent of the votes attached to the voting shares in that body corporate: at s 6A(5). The person’s associates were defined to include related corporations, and bodies corporate and individuals accustomed to act in accordance with the person’s directions: at ss 6(5), 6A(6).

74 See above nn 49–50 and accompanying text.

75 *Companies Act 1961* (NSW) ss 180C(3)–(4), (6).

76 *Ibid* s 180L(4).

77 *Ibid* s 180Q.

78 This was the Corporate Affairs Commission in New South Wales: see, eg, H A J Ford, *Principles of Company Law* (Butterworths, 1974) 3 [101] n 1. For an explanation of the functions of the Corporate Affairs Commission, see Bernard Mees and Ian Ramsay, ‘Corporate Regulators in Australia (1961–2000): From Companies’ Registrars to ASIC’ (2008) 22 *Australian Journal of Corporate Law* 212, 223–5.

79 *Companies Act 1961* (NSW) s 180R.

80 *Ibid*.

81 *Ibid* s 180T(1).

82 *Ibid* s 180S.

83 New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 September 1971, 915 (John Waddy). See also *Companies Act 1961* (NSW) s 69N, especially para (1)(e).

an ‘untrue statement’ or ‘wilful non-disclosure’), and requiring the defence to establish that a material non-disclosure was unintentional or not known to be material.<sup>84</sup> Finally, the most significant controversy surrounded the specific exclusion from the takeover requirements of offers made in the ordinary course of trading on the stock exchange.<sup>85</sup> Indeed, the Second Reading Speech referred to suggestions that this ‘may provide a gap in the Act through which all the remaining provisions of the part could be avoided’,<sup>86</sup> and noted that the NSW Attorney-General would be watching this position carefully after the new provisions commenced.<sup>87</sup> In defence of the new exception, the speech referred to concerns raised by members of the Eggleston Committee that the bidder would be forced out of the market if they were required to pay the same amount to all accepting shareholders that they pay for on-market purchases.<sup>88</sup> The Committee’s conclusion was based on the importance of a free market:

it is generally recognised that where an offeror has announced his intention of making an offer to shareholders generally, it is unfair for him to offer a special inducement to a particular shareholder or group of shareholders. These considerations do not apply to stock market transactions, in which the market is available to everyone. In the light of our views as to the important function which the market performs while a takeover offer is current, and the desirability of freedom in that market, we recommend that the existing draft be adhered to.<sup>89</sup>

## D Rae Report

The Senate Select Committee on Securities and Exchange (Rae Committee) was appointed to consider whether a national securities and exchange commission should be established to deal with improper practices relating to public company shares, including stock price manipulation and insider trading.<sup>90</sup> Its report in 1974, known as the *Rae Report*, recommended that the Federal Government implement national companies and securities legislation and establish a national regulatory body for the securities market.<sup>91</sup> In making this recommendation, it

84 See New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 September 1971, 919–20 (John Waddy); *Companies Act 1961* (NSW) s 180J.

85 *Companies Act 1961* (NSW) s 180C(7).

86 New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 September 1971, 918 (John Waddy).

87 Ibid 918–19.

88 R M Eggleston, Company Law Advisory Committee, *Memorandum on Take-Over Bids and Stock Exchange Purchases* (29 June 1970) <[http://www.takeovers.gov.au/content/Resources/eggleston\\_committee/takeover\\_bids\\_and\\_stock\\_exchange\\_purchases.aspx](http://www.takeovers.gov.au/content/Resources/eggleston_committee/takeover_bids_and_stock_exchange_purchases.aspx)> (*‘Eggleston Memorandum’*). This memorandum was drafted by the Chairman with the agreement of another Eggleston Committee member (the other member was absent overseas, but agreed with the general conclusion): at [15]. See also New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 September 1971, 918 (John Waddy).

89 *Eggleston Memorandum*, above n 88, [13]. See also at [4]–[6].

90 Senate Select Committee on Securities and Exchange, Parliament of Australia, *Australian Securities Markets and their Regulation* (1974) Report pt 1, vol 1, v (*‘Rae Report’*).

91 Ibid 16.14–16.15.

considered that there should be legislative action to pursue ‘two broad, sometimes conflicting, objectives of national policy’, namely:

- (i) The first is to maintain, facilitate and improve the performance of the capital market in the interests of economic development, efficiency and stability.
- (ii) The second is to ensure adequate protection of those who invest in the securities of public companies and in the securities market.<sup>92</sup>

In answering the question whether national securities market regulation should be left essentially to self-regulatory or non-government bodies, the Rae Committee considered the operation of the City Panel on Takeovers and Mergers (UK Panel).<sup>93</sup> The Committee concluded that ‘we do not believe that a body modelled on the City Panel provides the answer to the need in Australia for an effective regulatory body’.<sup>94</sup> However, the Committee’s reasoning emphasised that it came to this conclusion in relation to the regulation of securities markets more generally. First, the Committee pointed out that the UK Panel was only concerned with the limited function of scrutinising takeovers and mergers.<sup>95</sup> Secondly, it considered that a body without legislative investigatory powers or the power to apply government sanctions would not deal successfully with matters involving ‘inquiry into fraud or abuse’.<sup>96</sup> Indeed, the Committee observed ‘an element of wishful thinking’ by merchant bankers that establishing such a Panel would ‘remove the need for a government regulatory body’.<sup>97</sup> Finally, the Committee noted that ‘the Australian market [was] far more dispersed’ than the City of London in which the UK Panel operated and that the public interest needed protection by a government body ‘not dominated by sectional interests’.<sup>98</sup> In summary, the Committee was ‘convinced that self-regulatory bodies such as the City Panel are not the *whole* answer to the problem of the regulation of the Australian securities market’.<sup>99</sup> However, it was recognised that self-regulatory bodies were useful in complementing a government body, setting out and enforcing broad standards of behaviour for its members, and performing detailed and routine tasks such as market surveillance.<sup>100</sup>

92 Ibid 16.15.

93 Ibid 16.7.

94 Ibid 16.8. It also noted criticisms of the UK Panel, including that its rules were ‘too vague’ and decisions ‘may depend on its members’ personal views of business morality’: *ibid* 16.7–16.8.

95 Ibid 16.8.

96 Ibid 16.8–16.9.

97 Ibid 16.9.

98 Ibid.

99 Ibid 16.12 (emphasis added).

100 Ibid 16.12–16.13.

## **E Companies (Acquisition of Shares) Codes**

### **1 Preceding Developments**

The effectiveness of the 1971 amendments was particularly called into question as a result of the Victorian Supreme Court decision in *Cuming Smith & Co Ltd v Westralian Farmers Co-operative Ltd*.<sup>101</sup> In that case, it was found that acquisitions totalling 50.6 per cent of the target company did not breach the *Companies Act 1961* (Vic), primarily on the basis that they did not constitute an 'offer' or 'invitation' within the meaning of the Act.<sup>102</sup> Kaye J observed that 'many provisions' of the legislation were 'capable of circumvention by selection of forms of expression used when making an offer and when extending an invitation, or by timing the despatch of an offer or invitation'.<sup>103</sup> This meant that the interests of the target and investors were 'at risk because of the ease with which control of a target company might be wrested by means which would appear to defeat the policy of the legislation'.<sup>104</sup> The legalistic approach adopted in this decision also prompted commentators to question whether the situation would improve under the subsequent legislation.<sup>105</sup>

On 22 December 1978, the Commonwealth and the states agreed to establish the first co-operative scheme underpinning corporate regulation in Australia.<sup>106</sup> This resulted in the introduction of the Company Takeovers Bill 1979 (Cth) into the Federal Parliament on 20 November 1979. The provisions in this Bill were amended in light of public consultation and reintroduced as the Companies (Acquisition of Shares) Bill 1980 (Cth) on 2 April 1980.<sup>107</sup> In light of concerns with the delay in this process, Queensland, Western Australia and South Australia

101 [1979] VR 129.

102 Ibid 161–2.

103 Ibid 162. Examples provided included delaying the making of a subsequent offer by a further day and by extending an invitation to offer shares for acquisition to another member.

104 Ibid. It had previously been observed that the corresponding provisions in New South Wales were 'to a large extent ineffective, a trap for the unwary, and a temptation for the ingenious': David Block, 'Does the New Take-Over Legislation Achieve its Objective?' (1973) 1 *Australian Business Law Review* 236, 236.

105 See, eg, R Baxt, 'The New Takeover Code' (1980) 8 *Australian Business Law Review* 50, 53; Lesley Hitchens, 'The Regulation of Takeovers: The American and the Australian Experience' (1982) 5 *University of New South Wales Law Journal* 153, 167. This also raised the issue whether the law would be better served by adopting a principles based approach: see, eg, Quentin Digby, 'The Principal Discretionary Powers of the National Companies and Securities Commission under the Takeovers Code' (1984) 2 *Company and Securities Law Journal* 216, 217.

106 See *National Companies and Securities Commission Act 1979* (Cth) s 3(1) (definition of 'agreement'), sch 1.

107 See Commonwealth, *Parliamentary Debates*, House of Representatives, 2 April 1980, 1633–4 (Ransley Garland).

passed interim legislation modelled on the original Commonwealth Bill, which operated before the commencement of the new co-operative scheme.<sup>108</sup>

## 2 Legislative Framework

Commencing on 1 July 1981, the *Companies (Acquisition of Shares) Act 1980* (Cth) ('CASA') introduced many of the elements of our current takeover regulatory framework. First, the substance of the law was determined at the federal level, in consultation with the states and territories.<sup>109</sup> Secondly, the National Companies and Securities Commission (NCSC) became the first federal body responsible for administering corporate and securities law.<sup>110</sup> However, the NCSC did not operate as a truly national regulator, as it delegated administrative responsibilities to state and territory authorities.<sup>111</sup> Thirdly, the legislation gave the regulator the power to exempt persons from and modify the operation of the law.<sup>112</sup> In exercising these powers, the regulator was required to have regard to both ensuring that the Eggleston principles were complied with and the desirability that acquisitions take place in an 'efficient, competitive and informed market' (known as the 'Masel principle').<sup>113</sup> The Second Reading Speech by the Minister for Business and Consumer Affairs reinforced the importance of these matters, and set out the philosophy underlying the CASA provisions:

Although varying views have been expressed as to the extent to which the freedom of bidders should be controlled, the new code seeks to close loopholes in the present legislation and to improve the effectiveness of the existing controls. We do not wish to discourage the making of takeover bids in cases in which there are adequate safeguards for the protection of shareholders. The new code seeks to ensure that, as far as practicable, those safeguards will now be observed in all takeovers. I see this code as an assistance to efficient and economically viable takeover activity. The code will promote investor confidence and encourage an informed and efficient market in securities.<sup>114</sup>

108 See *Company Take-Overs Act 1979* (Qld); *Company Take-Overs Act 1979* (WA); *Company Take-Overs Act 1980* (SA). Curiously, the Queensland legislation lowered the threshold at which the takeover prohibition applied from the 20 per cent level adopted elsewhere to 12.5 per cent. The Second Reading Speech noted that this was considered to be 'a more realistic figure', although it was stressed that Queensland would 'adopt entirely' the uniform legislation when it was passed by the Federal Parliament: Queensland, *Parliamentary Debates*, Legislative Assembly, 6 December 1979, 2363–4 (William Lickiss).

109 However, unlike the current law, the takeover code operated in each jurisdiction through legislation applying the CASA. For an outline of the basic elements of the co-operative scheme, see Commonwealth, *Parliamentary Debates*, House of Representatives, 27 August 1980, 804–5 (Ransley Garland).

110 *National Companies and Securities Commission Act 1979* (Cth) s 5(1).

111 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 April 1980, 1634 (Ransley Garland).

112 CASA ss 57–8.

113 Ibid s 59. The author of this principle has been identified as Leigh Masel in his role as Chairman elect of the NCSC, in an article written by one of its inaugural Commissioners: see Greenwood, above n 37, 311.

114 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 April 1980, 1635 (Ransley Garland).

Many of the key substantive reforms contained in the *CASA* takeover provisions have continued to the present day. Of these, the most significant was the introduction of a general prohibition on acquisitions that would entitle a person to increase above 20 per cent or between 20 and 90 per cent of the voting shares in a company.<sup>115</sup> The 20 per cent threshold was considered appropriate as it would 'in most cases' occur before the point at which control had passed.<sup>116</sup> This prohibition was then made subject to a series of exceptions.<sup>117</sup> These included the existing exceptions for the making of offers under a takeover scheme in accordance with the takeover provisions,<sup>118</sup> for acquisitions in companies with 15 or fewer members and for larger proprietary companies where all of the members consented.<sup>119</sup> There were also two key exceptions introduced in *CASA*, with the first allowing 'gradual' (or creeping) acquisitions of not more than three per cent in each six months.<sup>120</sup> The aim of this provision was to impose a six-month freeze,<sup>121</sup> enabling control to 'pass slowly enough for the people involved to make informed decisions'.<sup>122</sup> Secondly, *CASA* included a novel procedure for making takeover announcements on the floor of the stock exchange, under which the bidder(s) could make an unconditional offer to acquire all shares in that class for a period of a month.<sup>123</sup> Significantly, the previous general exception that had allowed unlimited on-market purchases was replaced by a new provision only allowing the bidder to make such purchases where they had offered to acquire all of the target shares under a takeover scheme or announcement.<sup>124</sup> An earlier version of the provision would have provided an exception where the takeover scheme involved an offer for at least 20 per cent of the target company's shares, but this was abandoned in light of criticism that 'this could allow market raids leaving a large number of small shareholders locked in'.<sup>125</sup>

Other important changes were designed to place controls on target company management to 'restrict the use of unreasonable defence tactics'.<sup>126</sup> This included granting the Supreme Court power to invalidate unfair or unconscionable agreements between the target company and its officers, or to require payments or

115 *CASA* ss 11(1)–(2). This prohibition also extended to invitations under s 11(3) of the Act.

116 Explanatory Memorandum, Companies (Acquisition of Shares) Bill 1980 (Cth) 27 [46].

117 *CASA* ss 12–17.

118 *Ibid* ss 16, 18–31.

119 *Ibid* s 13(1).

120 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 April 1980, 1635 (Ransley Garland).

121 Explanatory Memorandum, Companies (Acquisition of Shares) Bill 1980 (Cth) 36 [60].

122 *Ibid* 27 [46]. This exception required that the 'relevant person', whose entitlement would otherwise have breached the 20 per cent threshold, be entitled to not less than 19 per cent for the six months prior to the acquisition: *CASA* s 15.

123 See *CASA* ss 17, 32–4. See especially at s 17(2).

124 See *ibid* ss 13(3), (5); Explanatory Memorandum, Companies (Acquisition of Shares) Bill 1980 (Cth) 32–4 [55]–[57]. Cf above nn 85–8 and accompanying text.

125 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 April 1980, 1635 (Ransley Garland).

126 *Ibid*.



benefits to be repaid.<sup>127</sup> Such tactics were also considered to include ‘wilful non-disclosure’ by target directors.<sup>128</sup> To address this concern, *CASA* extended the criminal and civil liability provisions to apply to the target (as well as bidders) in relation to their disclosure statements for takeover schemes and announcements.<sup>129</sup> It also included a general disclosure test (in addition to the existing checklist of matters) requiring the disclosure of any information that was material to the target shareholder’s decision whether or not to accept the offer, where the information was known to the relevant person(s) and had not previously been disclosed to those shareholders.<sup>130</sup> The Supreme Court was given broad powers in relation to breaches of the takeover code,<sup>131</sup> including an ability to excuse non-compliance due to inadvertence.<sup>132</sup> These were subject to a requirement that the Court not make orders if satisfied that it would ‘unfairly prejudice any person’.<sup>133</sup> This included the power to make orders as necessary to protect the interests of a person affected by a takeover scheme or arrangement, such as requiring the bidder or target company to supply specified information to target shareholders, restraining the exercise of voting power in the target, and directing the disposal of target shares or vesting them in the NCSC.<sup>134</sup>

One of the most significant (and controversial) reforms was the power given to the NCSC to declare an acquisition of, or other conduct in relation to, shares to be unacceptable.<sup>135</sup> The NCSC had the power to make a declaration where a person acquired shares or engaged in conduct in relation to shares in circumstances where:

- (a) the shareholders and directors of a company did not know the identity of a person who proposed to acquire a substantial interest in the company;
- (b) the shareholders and directors of a company did not have a reasonable time in which to consider a proposal under which a person would acquire a substantial interest in the company;
- (c) the shareholders and directors of a company were not supplied with sufficient information to enable them to assess the merits of a proposal under which a person would acquire a substantial interest in the company; or

127 See *CASA* s 50; Explanatory Memorandum, Companies (Acquisition of Shares) Bill 1980 (Cth) 79–80 [154]–[155].

128 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 April 1980, 1635 (Ransley Garland).

129 See *CASA* ss 16–17, 22, 32, 44. See especially ss 44(1)–(3), (11)–(13). Cf above n 84 and accompanying text.

130 See *CASA* sch 1 pt A item 4(f), pt B item 2(k), pt C item 4(f), pt D item 2(j).

131 See *ibid* ss 45–9.

132 *Ibid* s 48(1).

133 *Ibid* s 49(1).

134 *Ibid* s 47(1).

135 *Ibid* s 60.

- (d) the shareholders of a company did not all have equal opportunities to participate in any benefits accruing to shareholders under a proposal under which a person would acquire a substantial interest in the company.<sup>136</sup>

Where the NCSC had made such a declaration, the Supreme Court could either reverse the NCSC's decision or make certain orders.<sup>137</sup> The NCSC could only make a declaration where it was satisfied that one of the Eggleston principles had not been complied with.<sup>138</sup> That is, unlike for its exemption and modification powers, the NCSC was not required to take into account the desirability of an 'efficient, competitive and informed market' in its decision on whether to make a declaration in relation to an unacceptable acquisition or unacceptable conduct.<sup>139</sup> This omission is surprising given that the Explanatory Memorandum emphasised that the purpose of the NCSC's power to make a declaration was 'to discourage activities which would frustrate the aims of the code'.<sup>140</sup>

### 3 Subsequent Amendments

There was significant criticism of both the complexity and length of the *CASA* provisions, and the NCSC's implementation of its powers.<sup>141</sup> The provisions in relation to the NCSC's powers were narrow in a number of respects, but convoluted in others, particularly in its creation of different types of declarations and orders.<sup>142</sup> There were consequently a number of amendments made to the provisions. For example, in 1982 the NCSC was given a period of 90 days (rather than 14 days) to make a declaration of an unacceptable acquisition or unacceptable conduct, and the power to make its own orders following a declaration.<sup>143</sup> Significantly, the statement of the Eggleston principles for the purposes of both declarations was also amended to require target shareholders to have 'reasonable', in addition

136 Ibid s 60(7). See also 60(1).

137 Ibid ss 60(1)–(2). In the case of an unacceptable acquisition, these orders include restraining the exercise of voting or disposal of the shares, directing the disposal of shares or ordering that the exercise of voting or other rights be disregarded: at s 45(1). For unacceptable conduct, the Court could make such orders to protect the rights of any person affected or ensure that the takeover proceeds as far as possible as if the conduct had not occurred: at ss 60(3)–(4). Cf above nn 131–4 and accompanying text.

138 *CASA* s 60(7).

139 Ibid s 59.

140 Explanatory Memorandum, Companies (Acquisition of Shares) Bill 1980 (Cth) 85 [170]. Cf above n 114 and accompanying text. However, this is arguably consistent with the process surrounding the creation of the Masel principle: see above n 113 and accompanying text.

141 See, eg, Elaine Hutson, 'Regulation of Corporate Control in Australia: A Historical Perspective' (1998) 7 *Canterbury Law Review* 102, 108–10; Mees and Ramsay, above n 78, 234–5.

142 In light of concerns about the drafting, a plain English rewrite of the Code was produced by the Victorian Law Reform Commission (including Mr Leigh Masel), in consultation with Professor Robert Eagleson (University of Sydney, Department of English) and a number of expert consultants: see Victorian Law Reform Commission, *Plain English and the Law*, Report No 9 (1987) 2 [2], 5 [10]. See also the Plain English Rewrite Takeovers Code: at app 2.

143 See *Statute Law (Miscellaneous Amendments) Act (No 1) 1982* (Cth) s 132. This involved yet another variation on the list of orders, including allowing orders restraining the disposal or acquisition of certain shares or the exercise of voting rights in those shares, and directing a company not to issue shares or register a share transfer: *CASA* s 60A(1).

to 'equal', opportunities to participate in the benefits under the proposal.<sup>144</sup> In addition, the NCSC's powers to make a declaration of unacceptable conduct were expanded in 1983 to apply prior to the commencement of a takeover scheme or announcement.<sup>145</sup>

In debating the 1983 amending legislation, the Hon John Spender QC MP (Member for North Sydney) lamented the growth of the takeover legislation.<sup>146</sup> He concluded that this 'overregulation' had resulted from implementing systems that sought to 'cover all possible situations ... in preference to seeking to establish simpler and more flexible systems'.<sup>147</sup> The Member also emphasised three key deficiencies of a court-administered code, in contrast to the speed and flexibility of the Code on Takeover and Mergers operating in the United Kingdom ('*UK Code*').<sup>148</sup> The first of these deficiencies was inflexibility in operation, particularly given that courts deal with the law rather than whether conduct infringes its 'spirit'.<sup>149</sup> Secondly, it was argued that court-administered codes were bound to be more technical, as the law needed to be updated to defeat new tactics.<sup>150</sup> Finally, although courts could move swiftly in urgent cases, their structure, rules and procedures meant that they could not 'match the speed that could reasonably be expected under an efficiently administered code that was similar in essential respects to the [UK] code'.<sup>151</sup>

Instead, the Member for North Sydney proposed that legislation be drafted using general propositions or rules where possible, with interpretation left to the courts, and that 'extra-judicial procedures aimed at providing quick, cheap and flexible answers' be employed in commercial areas such as takeovers.<sup>152</sup> Although the Minister for Trade noted the conclusion in the *Rae Report* that the UK Panel model would not be effective in the Australian context, he acknowledged that there was 'a great deal of merit' in what had been said by Mr Spender:

There is a problem with over-regulation. It leads to a great deal of litigation. Every technical point is taken, and this is a problem. But I am reminded that clause 132 of the Bill provides for the courts to interpret this legislation having regard to the provision now in section 15AA of the Acts Interpretation Act; in other words, to interpret this legislation having regard to its purpose. If the courts are able to adopt a commercial approach

144 See *Statute Law (Miscellaneous Amendments) Act (No 1) 1982* (Cth) s 132.

145 See *Companies and Securities Legislation (Miscellaneous Amendments) Act 1983* (Cth) s 17. This amendment also resulted in the Eggleston principles being repeated in both ss 60(1) and (3) of *CASA*, instead of in one subsection as previously (s 60(7)).

146 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 1983, 3034 (John Spender).

147 *Ibid* 3035.

148 *Ibid*.

149 *Ibid*.

150 *Ibid*.

151 *Ibid*.

152 *Ibid* 3036.

it may be possible to get legislation in more general terms and then, as ... suggested, leave it to the courts' interpretation.<sup>153</sup>

The Companies and Securities Law Review Committee (CSLRC) subsequently delivered two important reports relating to the *CASA* provisions.<sup>154</sup> In its first report on the takeover threshold, the CSLRC was not convinced that the 20 per cent threshold was inappropriate and concluded that '[t]he efficiency of the market and the legitimate expectations of shareholders seem, for the time being, to be sufficiently and properly protected'.<sup>155</sup> The CSLRC's second report related to partial takeover bids, which at that time could be made for either a specified proportion of each shareholder's holding ('proportional bid') or for all or part of their holding up to a specified maximum percentage of the company's capital ('pro-rata bids').<sup>156</sup> The principal concern relating to pro-rata bids was that they placed pressure on target shareholders to accept an offer irrespective of its merits due to concerns that they would be left behind in the minority if they did not.<sup>157</sup> Accordingly, the CSLRC recommended that partial bids be confined to proportional bids and that bidders be prohibited from including conditions that placed a maximum limit on the number of shares that they would accept.<sup>158</sup> These changes were included in amendments made to the *CASA* provisions in 1986.<sup>159</sup> The report on partial bids also preceded the introduction of a general prohibition on escalation agreements within six months before a takeover bid, where a benefit is paid in connection with the purchase of target shares by reference to the consideration to be paid under the takeover bid.<sup>160</sup> In contrast, the CSLRC had only recommended that a person be prohibited from making a partial bid if it resulted in an obligation to provide a payment under a pre-existing escalation agreement.<sup>161</sup> It is also interesting to note that the CSLRC's discussion paper on

153 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 1983, 3041 (Lionel Bowen, Minister for Trade).

154 The CSLRC was established under an agreement between the Commonwealth and state governments to assist the Ministers in those governments responsible for corporate law, comprising the Ministerial Council for Companies and Securities, by researching and advising on law reform relating to companies and securities industry regulation: *National Companies and Securities Commission Act 1979* (Cth) s 3(1), sch 1 cl 21.

155 Companies and Securities Law Review Committee, Parliament of Australia, *The Takeover Threshold* (1984) [110]–[111] <[http://www.takeovers.gov.au/content/Resources/cslrc/cslrc\\_report\\_no\\_1.aspx](http://www.takeovers.gov.au/content/Resources/cslrc/cslrc_report_no_1.aspx)>.

156 *CASA* s 16.

157 See Companies and Securities Law Review Committee, Parliament of Australia, *Partial Takeover Bids* (Discussion Paper No 2) (1985) [12]; Companies and Securities Law Review Committee, Parliament of Australia, *Partial Takeover Bids* (Report) (1985) [12].

158 Companies and Securities Law Review Committee, Parliament of Australia, *Partial Takeover Bids* (Report) (1985) [38].

159 See *Companies and Securities Legislation Amendment Act 1986* (Cth) s 6; Explanatory Memorandum, Companies and Securities Legislation Amendment Bill 1986 (Cth) 13 [25], 14 [29].

160 See *Companies and Securities Legislation Amendment Act 1986* (Cth) s 10; Explanatory Memorandum, Companies and Securities Legislation Amendment Bill 1986 (Cth) 20–1 [49]–[53]. Cf *Corporations Act 2001* (Cth) s 622.

161 Companies and Securities Law Review Committee, Parliament of Australia, *Partial Takeover Bids* (Report) (1985) [73]. Although the CSLRC noted the inequitable effects of escalation agreements, as they allow some (typically institutional) shareholders to sell their shares before the bid at a price eventually reflecting the bid price, the Committee did not consider it appropriate to recommend their prohibition: at [72]–[73].

partial bids had sought comments on whether the following principle should be enshrined in the legislation alongside the Eggleston principles: 'that as far as reasonably practicable the value of any premium for control should be at all times proportionately vested in each voting share'.<sup>162</sup> However, the CSLRC concluded that it would be inappropriate to make such a recommendation given a lack of consensus in the commercial community on this issue.<sup>163</sup>

## F Corporations Law

On 1 January 1991, the takeover provisions were transferred into ch 6 of the *Corporations Law*. This followed an unsuccessful attempt by the Federal Government to implement national legislation, which was struck down by the High Court on constitutional grounds.<sup>164</sup> The *Corporations Law* was consequently founded on a co-operative scheme similar to that underpinning earlier *CASA* provisions.<sup>165</sup> Given that the highest priority at the time was to implement a national regulatory regime, the new legislation mostly re-enacted the previous requirements.<sup>166</sup> The key reforms in the context of takeover provisions involved the regulator no longer checking (or pre-vetting) disclosure statements, profit forecasts and asset valuations during a takeover, only allowing the regulator to issue notices to trace the beneficial ownership in shares and a consequential decrease in the threshold for substantial shareholding notices from 10 per cent to 5 per cent.<sup>167</sup> There were also changes to the structure of the provisions in light of suggestions in a report by the Victorian Law Reform Commission.<sup>168</sup> However, the basic framework of the takeover provisions was retained:

Any comprehensive review of the takeovers legislation would involve the question whether the basic Eggleston principles underlying the code are still appropriate (in particular the concept that each voting share in a company has attached to it an equal proportion of the value of any premium for control). Given the timing considerations, it is not practicable to give the subject the rigorous analysis it warrants or to engage in adequate public consultation before introduction of the initial legislation. A comprehensive

162 Companies and Securities Law Review Committee, Parliament of Australia, *Partial Takeover Bids* (Discussion Paper No 2) (1985) [52].

163 Companies and Securities Law Review Committee, Parliament of Australia, *Partial Takeover Bids* (Report) (1985) [9]–[10].

164 See *New South Wales v Commonwealth* (1990) 169 CLR 482; Mees and Ramsay, above n 78, 242.

165 The *Corporations Law* was contained in s 82 of the *Corporations Act 1989* (Cth), which applied in the Australian Capital Territory. It operated as the law of each of the states and the Northern Territory through application legislation in those jurisdictions.

166 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 May 1988, 2993 (Lionel Bowen).

167 Ibid 2994.

168 Ibid. See also above n 142.

review of the basic approach of the takeovers legislation could follow the commencement of the Commonwealth scheme.<sup>169</sup>

With the introduction of the new co-operative scheme, the Explanatory Memorandum accompanying the Corporations Legislation Amendment Bill 1990 (Cth) emphasised that the regulatory framework needed (amongst other things) to promote efficiency, while ensuring that shareholder interests and those of the broader community were protected.<sup>170</sup> The application of the Eggleston principles was considered by a Parliamentary Committee report on *Corporate Practices and the Rights of Shareholders* ('Lavarch Report') not long after the new legislative regime was enacted.<sup>171</sup> In the context of considering the equal opportunity principle implemented in s 731(d) of the *Corporations Law*, Professor Robert Baxt gave evidence which questioned the 'uncritical acceptance of the proposition that all shareholders in a company have to be treated equally in the context of their shareholding'.<sup>172</sup> In particular, Baxt argued that, provided 'meaningful disclosure' is given by a person who is in a position to control the company, there is no reason why that person should not be able to extract a premium for the 'special market shares' that they hold.<sup>173</sup> The Commonwealth Treasury also commented on the difficulty of providing an economic rationale for the equal opportunity principle and that large shareholdings may be accorded a higher value in the market place due to their 'special significance' in relation to control of the company.<sup>174</sup> However, the Acting Secretary to the Treasury emphasised that '[n]evertheless, considerable emphasis is given in Australian law to ensuring that all shareholders are offered an equal price for their shares in takeovers'.<sup>175</sup> The *Lavarch Report* concluded that the Committee had not been persuaded that it would be in the interests of holders of small share parcels to remove the equal opportunity provision in s 731(d), and that there was no justification for amending the provision.<sup>176</sup> However, it also found that, although the regulation of takeovers was in the interests of shareholders generally by ensuring that they receive adequate information in relation to their decision on whether to sell their shares, 'the time and resources involved, in the recent past, in the administration of the takeover code would seem to be disproportionate to the objectives sought to be achieved'.<sup>177</sup>

169 Explanatory Memorandum, Corporations Bill 1988 (Cth) 15 [29]. Interestingly, this statement of the effect of the equal opportunity principle reflects the wording previously rejected by the CSLRC (although its recommendation to allow only proportional bids arguably achieved a similar result): see above nn 162–3, 156–8 and accompanying text.

170 Explanatory Memorandum, Corporations Legislation Amendment Bill 1990 (Cth) 11 [25].

171 As its full title suggests, the *Lavarch Report* resulted from an inquiry into the impact of particular corporate practices impacting on shareholder rights, including the adequacy of controls necessary to protect shareholders (particularly minority shareholders): see House Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Corporate Practices and the Rights of Shareholders* (1991) xv ('*Lavarch Report*').

172 Ibid 59 [3.3.14].

173 Ibid.

174 Ibid 60 [3.3.16].

175 Ibid 60 [3.3.17].

176 Ibid 62 [3.3.24].

177 Ibid 62 [3.3.23].

The new legislative regime in the *Corporations Law* implemented two significant changes to the regulatory framework. First, it heralded the first truly national corporate and securities law regulator, the Australian Securities Commission (ASC).<sup>178</sup> This avoided the inefficiencies that had resulted from the delegation of the NCSC's functions to its state and territory counterparts, and instead allowed resources to be provided to a single body.<sup>179</sup> It also increased the accountability of the regulator by making it accountable to a single Minister and subject to parliamentary scrutiny.<sup>180</sup> Secondly, the NCSC's power to make declarations in relation to unacceptable conduct in the context of a takeover was transferred into a new body, the Corporations and Securities Panel.<sup>181</sup> The Explanatory Memorandum accompanying the Corporations Bill 1988 (Cth) explained that the CSP was established to overcome criticism that the NCSC had been 'acting as prosecutor, judge and jury'.<sup>182</sup> Interestingly, it was envisaged that cases involving unacceptable conduct would 'amount to about five per year',<sup>183</sup> and that the CSP could be given further functions if it proved to be 'an effective means of hearing a large number of adjudicative hearings'.<sup>184</sup> Confusingly, the subsequent detailed explanation of the provisions in relation to unacceptable acquisitions and conduct was based incorrectly on the ASC having the power to make the declaration and orders, without referring to the CSP.<sup>185</sup> The explanatory material accompanying the Australian Securities Commission Bill 1988 (Cth) then indicated that the responsible Minister would direct the CSP to perform the ASC's function of declaring conduct unacceptable.<sup>186</sup> However, this was corrected in subsequent amendments to these explanatory documents.<sup>187</sup>

178 See *Australian Securities Commission Act 1989* (Cth) ss 1, 7.

179 Explanatory Memorandum, Corporations Bill 1988 (Cth) 7–8 [11(b)]. This led to a revised role for the renamed Ministerial Council for Corporations ('MINCO'), which did not have the power to direct the regulator: Cf *National Companies and Securities Commission Act 1979* (Cth) s 3(1) (definition of 'Ministerial Council'), sch 1 cl 22(1)(f). MINCO was instead consulted on legislative changes in relation to the securities and futures related matters for which the Commonwealth has sole legislative responsibility (including takeovers), and was given the power to approve changes on other company law matters: see Commonwealth Attorney-General's Department, *Corporations Legislation Amendment Bill (No 2) 1991 Draft Legislation and Explanatory Paper* (1991) [7]–[8].

180 See, eg, *Lavarch Report*, above n 171, 9–10 [1.3.10].

181 *Australian Securities Commission Act 1989* (Cth) s 171.

182 Explanatory Memorandum, Corporations Bill 1988 (Cth) 18 [45].

183 *Ibid* 18–19 [45].

184 *Ibid* 19 [45].

185 *Ibid* 560–4 [2248]–[2264]. Cf Corporations Bill 1988 (Cth) cls 733–6.

186 Explanatory Memorandum, Australian Securities Commission Bill 1988 (Cth) 110–11 [357]. This paragraph had the heading 'Cl. 175: Certain functions and powers may be vested in Panel', whereas cl 175 of the Bill as it was introduced into Parliament related to a Panel member's term of office: at 110 [357]; Australian Securities Commission Bill 1988 (Cth) cl 175.

187 Takeovers Panel, *Corporations Bill: Explanatory Memorandum: Corrigendum to Paragraphs 2248–2262 — Declarations of Unacceptable Acquisition or Conduct in Takeovers and Related Matters and ASC Bill: Explanatory Memorandum — Corrigendum to Para.357 — Conferral of Powers on the Corporations and Securities Panel* <[http://www.takeovers.gov.au/content/Resources/acts\\_bills\\_ems/downloads/Corporations\\_ASC\\_ExMem\\_1988\\_corrigenda.pdf](http://www.takeovers.gov.au/content/Resources/acts_bills_ems/downloads/Corporations_ASC_ExMem_1988_corrigenda.pdf)>.

In a Parliamentary Committee report on the legislative package, the *Edwards Report*,<sup>188</sup> the Committee was evenly divided on whether there should be changes to the CSP reforms. With the Chairman's casting vote, the majority was persuaded by the NCSC's argument that its investigative and adjudicative powers over unacceptable conduct regulated market conduct more effectively through integrating litigation and investigation.<sup>189</sup> Accordingly, the majority recommended that the Corporations Bill 1988 (Cth) be amended to give the ASC the power to make declarations in relation to unacceptable acquisitions or conduct, and that the CSP should instead have the role of reviewing the declaration and deciding upon any appropriate orders.<sup>190</sup> In recommending against such a change, the dissenting members considered that the publicised referral of matters by the ASC to the CSP would have 'an equivalent impact upon market operations' as the NCSC's powers had.<sup>191</sup> The dissenting report also cited the 'overwhelming weight of evidence' given by the business community in support of the CSP's new powers and its members' 'fundamental objection' to a body being 'both prosecutor and jury when other equally effective and convenient alternative mechanisms' were available.<sup>192</sup>

Notwithstanding the majority view in the *Edwards Report*, the *Corporations Law* gave the CSP the power to make a declaration that unacceptable circumstances had occurred in relation to an acquisition of shares or as a result of conduct by a person in relation to a company's shares or affairs.<sup>193</sup> This power could only be enlivened on the ASC's application, where it appeared to the ASC that such unacceptable circumstances had or may have occurred.<sup>194</sup> As a general rule, the ASC was given 60 days after the acquisition or conduct to make its application, with the CSP having a further 30 days to make any declaration.<sup>195</sup> Before making a declaration, the CSP was required to conduct an inquiry giving each person to whom the declaration related an opportunity to make submissions.<sup>196</sup> It was also required to be satisfied that it was in the public interest to make the declaration, having regard to the policy factors taken into account by the ASC in exercising its exemption and modification powers and any other matters considered relevant.<sup>197</sup> Significantly, this meant that the CSP was required not only to have regard to the Eggleston principles, but also the desirability of acquisitions taking place

188 Joint Select Committee on Corporations Legislation, Parliament of Australia, *Report of the Joint Select Committee on Corporations Legislation* (1989) ('*Edwards Report*').

189 Ibid 163 [13.75].

190 Ibid 163–4 [13.75]–[13.76].

191 Ibid 219 [3].

192 Ibid 219–20 [3].

193 *Corporations Law* s 733(3).

194 Ibid s 733(1).

195 Ibid ss 733(2), (4). This reflected the 90-day period previously given to the NCSC: see above n 143 and accompanying text.

196 *Corporations Law* s 733(5).

197 Ibid s 733(3). As in the case of court orders under *CASA*, the Panel could not make an order if it was satisfied that it would 'unfairly prejudice any person': at s 734(7). See also above n 133 and accompanying text. Cf above n 81 and accompanying text.



in an ‘efficient, competitive and informed market’.<sup>198</sup> Where the CSP made a declaration, it could make similar orders to those available to the Court under *CASA*, except for an order vesting shares in the regulator.<sup>199</sup> The CSP also had the power to make interim orders,<sup>200</sup> and the ASC could apply for a court order where a person contravened a final order of the CSP.<sup>201</sup> Similar to the current Panel, members of the CSP were appointed based on their professional experience in fields such as business, the administration of companies and law.<sup>202</sup>

During the nearly 10 years of its operation, the CSP only made decisions in relation to four matters prior to the implementation of the *Corporate Law Economic Reform Program Act 1999* (Cth) (*CLERP Act*).<sup>203</sup> The first matter to come before the CSP led to an unsuccessful constitutional challenge in the High Court.<sup>204</sup> This initial matter demonstrated that the CSP’s processes could be used to delay proceedings, undermining its intended role as a ‘peer review group body which would be able to come to quick decisions on matters relating to takeovers to ensure that participants in a takeover and affected shareholders were able to make decisions on the basis of full information’.<sup>205</sup> In particular, the CSP’s structure and procedures were ‘found to be ineffective’ as its hearing powers did not dissuade ‘time wasting litigation between the parties’, natural justice requirements impeded ‘quick commercial decisions’, the CSP’s jurisdiction did not extend to conduct by target directors and it could not enforce undertakings by parties in its proceedings.<sup>206</sup> Consequently, legislative amendments in 1995 allowed the CSP to adopt an ‘inquisitorial role’ by conducting an expeditious inquiry on the facts based on written submissions, and avoid hearings involving ‘time consuming’ oral argument and witness evidence.<sup>207</sup> Similarly, the procedural fairness requirements applicable were clarified in the *Australian Securities Commission Regulations 1990* (Cth) to ensure that the CSP was not bound by the rules of evidence, but was instead required to act ‘as fairly and reasonably’, ‘with as little formality, and in ‘as timely a manner’ as permitted by the regulatory requirements

198 *Corporations Law* s 731. Cf text accompanying above n 139.

199 See *Corporations Law* s 734(2); *CASA* s 60(4). The list of possible CSP orders also included those that had been available to the NCSC under *CASA* s 60A(1).

200 See *Corporations Law* ss 733A, 733B, 735(2)–(3). Sections 733A and 733B were inserted subsequently to make it clear that the CSP had the power to make such orders: Explanatory Memorandum, Corporations (Unlisted Property Trusts) Amendment Bill 1991 (Cth) 1 [2], 3 [6], 5–6 [11]–[17].

201 *Corporations Law* s 736. The remedial orders available to the Court included the power to vest shares in the ASC: at s 613(1)(e).

202 The key difference being the addition of the field of ‘financial products and financial services’ in the later legislation: see *Australian Securities and Investments Commission Act 1989* (Cth) s 172(4); *Australian Securities and Investments Commission Act 2001* (Cth) s 172(4).

203 See *Re Titan Hills Australia Ltd* (1992) 10 ACLC 131 (*‘Re Titan Hills’*); *Re Pivot Nutrition Pty Ltd* (1997) 15 ACLC 369; *Re Australian Securities Commission and John Fairfax Holdings Ltd* (1997) 25 ACSR 441; *Re ASIC and Wesfi Ltd* (1999) 17 ACLC 1,690.

204 See *Re Titan Hills* (1992) 10 ACLC 131; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 (*‘Precision Data’*).

205 Explanatory Memorandum, Corporations Legislation Amendment Bill 1994 (Cth) 58 [278].

206 *Ibid* 58 [279]–[280]. In relation to the jurisdictional issue, see below nn 216–17 and accompanying text.

207 *Ibid* 59 [282]. A key focus of the amendments was to replace references to the Panel conducting hearings, and instead focus on its inquiries: see *Corporations Legislation Amendment Act 1994* (Cth) sch 4 pt 1.

and a proper consideration of the matter.<sup>208</sup> The Explanatory Memorandum accompanying the Bill implementing the 1995 changes made it clear that the CSP was not required to behave like a court and that it had a 'wide discretion to control its processes', including the number of witnesses called.<sup>209</sup> However, the Bill's attempt to remove the operation of the rules of natural justice was diluted during its passage through Parliament, with the substituted provision applying the rules of procedural fairness to the extent that they are not inconsistent with the legislation or regulations.<sup>210</sup> There were also other reforms designed to allow the CSP to make 'speedy commercial decisions'.<sup>211</sup> These reforms included allowing the CSP to make enforceable undertakings, presuming that inquiries would be held in private; and removing a party's previous entitlement to have a hearing, be represented by a legal adviser and to refer any question of law arising to the Court.<sup>212</sup>

There were also a number of amendments to the definition of 'unacceptable circumstances' under the *Corporations Law*. At the start, the CSP inherited the same bases for making a declaration as applied to the NCSC with only a few minor exceptions.<sup>213</sup> That is, the existence of unacceptable circumstances was defined solely by reference to the Eggleston principles.<sup>214</sup> The most significant difference under the *Corporations Law* was the requirement that target shareholders and directors be supplied with 'enough information' to assess the proposal's merits, instead of the *CASA* requirement of 'sufficient information'.<sup>215</sup> In 1995, the jurisdiction of the CSP was expanded to allow it to make a declaration based on the equal opportunity principle due to the actions of target company directors, including where those directors' actions caused or contributed to the acquisition not proceeding.<sup>216</sup> This amendment was designed to capture defensive tactics defeating the 'spirit' of the takeover provisions, including 'illegitimate spoiling action', and 'defensive or frustrative actions' removing minority shareholders'

208 See *Australian Securities Commission Regulations 1990* (Cth) reg 16(2); *Australian Securities Commission Act 1989* (Cth) s 195(1), as amended by *Corporations Legislation Amendment Act 1994* (Cth) sch 4 pt 1 item 20.

209 Explanatory Memorandum, Corporations Legislation Amendment Bill 1994 (Cth) 64–5 [322].

210 Corporations Legislation Amendment Bill 1994 (Cth) sch 4 item 20. Cf *Corporations Legislation Amendment Act 1994* (Cth) sch 4 pt 1 item 20. For a discussion of the key concerns in relation to this issue, see, eg, Explanatory Memorandum, Corporations Legislation Amendment Bill 1994 (Cth) 65–7 [318]–[325]; Department of the Parliamentary Library (Cth), *Bills Digest*, No 59 of 1994, 21 April 1994, 4–5.

211 Explanatory Memorandum, Corporations Legislation Amendment Bill 1994 (Cth) 68 [339], 69 [348].

212 See *Australian Securities Commission Act 1989* (Cth) ss 189(1), 191(2), 194, 196(1), 201A, as amended by *Corporations Legislation Amendment Act 1994* (Cth) sch 4 pt 1 items 8, 11, 18–19, 21, 30; Explanatory Memorandum, Corporations Legislation Amendment Bill 1994 (Cth) 61 [296]–[297], 62 [302], 63 [312]–[313], 67 [338].

213 See above n 136 and accompanying text.

214 *Corporations Law* s 732 originally provided that unacceptable circumstances were taken to have occurred 'if, and only if' circumstances based on non-compliance with the Eggleston principles existed. However, unlike the NCSC, the CSP was required to take into account the criteria of an 'efficient, competitive and informed market': see text accompanying above nn 139, 198.

215 See *CASA* ss 60(1), (3); *Corporations Law* s 732(1).

216 *Corporations Law* s 732(2).

opportunity to participate in the benefits of the takeover.<sup>217</sup> Additional bases for a declaration were subsequently included as a result of the rewrite of the share buy-back and share capital provisions resulting from the Corporations Law Simplification Program. That is, to counterbalance reforms making it easier to undertake such transactions,<sup>218</sup> the CSP was given the power to make a declaration relating to unacceptable circumstances where a buy-back, capital reduction or company's acquisition of at least five per cent of its voting shares was unreasonable having regard to its effect on the control of any company.<sup>219</sup> Further amendments to the CSP's jurisdiction were proposed under the Simplification Program,<sup>220</sup> but this Program was subsequently replaced by the Corporate Law Economic Reform Program (CLERP) following a change in Federal Government.

### G CLERP Reforms

The Policy Framework Paper outlining the CLERP agenda stated that its objective was to 'promote business and market activity ... by enhancing market efficiency and integrity and investor confidence'.<sup>221</sup> Three of the key principles underlying these reforms were market freedom (while recognising that business regulation can enhance market integrity and efficiency), investor protection and information transparency.<sup>222</sup> Disclosure was considered to have a key role in promoting both efficiency and integrity in the market, by allowing rational investment decision-making and encouraging investment through increased confidence in the market.<sup>223</sup> These principles were reinforced in the *CLERP 4* paper setting out the CLERP takeover reform proposals which focussed on the three themes of market efficiency and confidence, competition issues and reducing transaction costs.<sup>224</sup>

First, in relation to market efficiency and confidence, the *CLERP 4* paper found that the requirements in the Eggleston principles to disclose sufficient information (including the bidder's identity) and allow reasonable time to consider the proposal were needed to address informational imbalances between

217 Explanatory Memorandum, Corporations Legislation Amendment Bill 1994 (Cth) 68 [341], 68–9 [345].

218 See Explanatory Memorandum, First Corporate Law Simplification Bill 1995 (Cth) 11 [5.3]–[5.4], 13 [5.16]; Explanatory Memorandum, Company Law Review Bill 1997 (Cth) 11 [3.21]–[3.22], 66 [12.35], 72–3 [12.74].

219 *Corporations Law* ss 732(1)(e)–(g). For a discussion of these provisions (particularly paragraph (e)) and their removal, see *Village Roadshow Ltd [No 2]* [2004] ATP 12 (1 July 2004) [41]–[47].

220 The Simplification Task Force proposed expanding the definition of unacceptable circumstances to include changes in control of a company, irrespective of whether there was an acquisition of a substantial interest: Simplification Task Force, Attorney-General's Department (Cth), *Takeovers: Proposal for Simplification* (1996) 8. It also sought comments on the possible extension of the CSP's jurisdiction concerning the conduct of target directors and whether any person with an interest in a takeover should be able to apply to the CSP: at 19–20.

221 Treasury, Australian Government, *Corporate Law Economic Reform Program Policy Framework* (1997) 1. Similar comments were made in the Second Reading Speech for the Corporate Law Economic Reform Program Bill 1998 (Cth), see Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 1998, 1284 (Joe Hockey).

222 Treasury, above n 221, 3.

223 Ibid.

224 *CLERP 4*, above n 6, iii.

the bidder and target shareholders.<sup>225</sup> It concluded that the costs of this disclosure were ‘clearly outweighed by the benefits of facilitating an efficient market and protecting investors’.<sup>226</sup> Similarly, the *CLERP 4* paper found that ‘investor confidence [was] a crucial feature of [an] efficient financial market’.<sup>227</sup> However, it was considered that investors (especially retail investors) would be less likely to buy shares if they may be disadvantaged if left as a minority after a change in control.<sup>228</sup> Consequently, the *CLERP 4* paper found that the equal opportunity principle not only provided fairness, but also encouraged investor confidence by giving minority shareholders an opportunity to sell their shares to a buyer at the same price as the controlling shareholder.<sup>229</sup> The paper also noted that the *UK Code* was similarly based on providing disclosure of relevant information and equal treatment for shareholders.<sup>230</sup> Despite the potential costs of the equal opportunity principle,<sup>231</sup> it was proposed that the principle be retained on the basis that it promoted investor and market confidence (with potential risks to our market’s reputation if it were to be removed), and that any costs could be offset by gains in other areas (such as the proposed introduction of the mandatory bid rule).<sup>232</sup> Accordingly, it was found that, ‘[i]n the absence of strong evidence to the contrary, it would appear that the potential benefits of the [equal opportunity] principle exceed the potential costs’.<sup>233</sup> Secondly, in order to promote competitive and regulatory neutrality, it was proposed that the takeovers provisions apply to federal, state and territory governments and their business enterprises,<sup>234</sup> that the provisions also apply to listed managed investment schemes,<sup>235</sup> and that the scheme of arrangement provisions in pt 5.1 of the *Corporations Law* continue to be allowed as an alternative to the takeover provisions.<sup>236</sup>

Finally, the *CLERP 4* paper proposed three key reforms in order to reduce transaction costs, namely introducing a mandatory bid procedure, implementing new compulsory acquisition powers and expanding the role of the CSP.<sup>237</sup>

225 Ibid 9–10.

226 Ibid 10.

227 Ibid.

228 Ibid 11.

229 As a result, any premium paid above the market price of the shares (‘control premium’) is shared amongst all shareholders: *ibid*.

230 Ibid 12. This was the jurisdiction that most closely resembled the approach in the Eggleston principles: at 12–13.

231 It was recognised that the equal opportunity principle could allow minority shareholders to ‘free-ride’ on the efforts of the controlling shareholders by allowing them to capture some of the premium paid for control of a large shareholding. This could have the result of either the same premium being distributed amongst all shareholders (resulting in a lower premium paid to all), or higher costs for the bidder if the price reflecting the value of the control parcel is paid to all shareholders (reducing its incentives to make a takeover and thus the corresponding impact on managerial behaviour): *ibid* 15.

232 Ibid 16.

233 Ibid.

234 Ibid 54–6.

235 Ibid 45–7. The *CLERP 4* paper also contained proposals to allow a simple majority of unit holders to be able to remove the managers of a listed managed investment scheme and approve acquisitions of the manager or the management rights for the scheme: at 47–50.

236 Ibid 52–3.

237 Ibid 1–3.

Comments were sought on whether a mandatory bid rule should be introduced to allow an acquisition to exceed the 20 per cent threshold provided it was immediately followed by the announcement of a mandatory takeover bid.<sup>238</sup> It was proposed that the mandatory bid be made for all of the outstanding shares, be at a price at least matching the highest price paid by the bidder in the preceding four months, include cash consideration as an alternative and not be subject to any conditions.<sup>239</sup> The mandatory bid proposal came with a significant potential cost, namely the ‘possible adverse impact on a competitive market for corporate control by reducing the opportunity for auctions for control’.<sup>240</sup> However, the *CLERP 4* paper identified the potential benefits as including increasing certainty regarding bid outcomes, lowering bid costs and discouraging defensive behaviour by target directors.<sup>241</sup> In relation to compulsory acquisition, the *CLERP 4* paper proposed two new powers to allow a person who has acquired overwhelming ownership of either a class of securities or all of the securities of the company to achieve 100 per cent control of that class or company.<sup>242</sup> The primary policy goal was to facilitate the market efficiency gains arising from 100 per cent control, while at the same time providing shareholder protection through rules preventing acquisitions at an unfair value.<sup>243</sup>

The *CLERP 4* reforms expanding the role of the CSP have been the most significant in terms of their impact on the operation of the takeover provisions. In essence, these reforms involved a reconstituted Panel replacing the courts as the ‘primary forum for resolving takeover disputes’ during a takeover bid, by allowing all interested parties to make applications to the Panel and limiting the involvement of the courts during that time.<sup>244</sup> The UK was the key overseas jurisdiction cited in support of this approach, with its panel having ‘the reputation of resolving takeover disputes promptly and effectively’.<sup>245</sup> The advantages of ‘an effective panel for dispute resolution’ were considered to be:

- specialist expertise, with representation from industry as well as specialist lawyers;
- speed, informality and uniformity in decision making;
- the minimisation of tactical litigation; and
- the freeing up of court resources to attend to other priorities.<sup>246</sup>

238 Ibid 19, 23.

239 Ibid 24–5.

240 Ibid 21.

241 Ibid 21–2.

242 Ibid 29–31. This was applied to a person who, either alone or with a related body corporate, had full beneficial interests in at least 90 per cent of the class of securities or, in the case of the whole company, of all of the securities in the company (by value) together with voting power of at least 90 per cent: see *Corporations Law* ss 664A(1)–(3).

243 See *CLERP 4*, above n 6, 27–9; *Corporations Law* s 664F (especially sub-s (3)).

244 *CLERP 4*, above n 6, 41. See also *Corporations Law* ss 659AA–659C.

245 *CLERP 4*, above n 6, 36.

246 Ibid 32.

This approach was designed to avoid the tactical use of litigation to disrupt the bid, in light of concerns that courts may not be able to deal with the matter effectively in the time available.<sup>247</sup> In contrast, the Panel was expected to ‘bring greater understanding and expertise to takeover disputes’ and to ‘be well placed to act with speed in every case and to apply uniform standards’.<sup>248</sup> The *CLERP 4* paper also noted criticism of certain court decisions based on the view that ‘they set the standards of disclosure at an unrealistically high level’.<sup>249</sup> However, the fact that litigation often highlighted inadequacies in bidders’ disclosure documents demonstrated that a dispute resolution mechanism was needed to ensure compliance with the law.<sup>250</sup> The overall aim of the 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 resolved by target shareholders ‘on the basis of its commercial merits’.<sup>251</sup>

With the exception of the mandatory bid rule,<sup>252</sup> the CLERP takeover reforms were implemented with the commencement of the *CLERP Act* on 13 March 2000. The *CLERP Act* also incorporated the rewriting of the takeover provisions that was undertaken as part of the Simplification Program, including addressing anomalies that had been identified by the Companies and Securities Advisory Committee in its 1994 report.<sup>253</sup> Some of the more significant changes involved only applying the takeover provisions to unlisted companies with more than 50 members,<sup>254</sup> introducing a new concept of ‘voting power’ measured by the number of votes attached to voting shares rather than the number of those shares,<sup>255</sup> and extending the maximum offer period from six to 12 months.<sup>256</sup> In addition, there was a raft of changes designed to harmonise the disclosure and liability regimes for the fundraising and takeover provisions, with regard had to ‘the desirability of avoiding the inclusion of information that would provide a basis for engaging in

247 See *ibid* 35.

248 *Ibid* 37.

249 *Ibid* 36.

250 *Ibid*.

251 *Ibid*.

252 Although the mandatory bid rule was included in the Corporate Law Economic Reform Program Bill 1998 (Cth), it was abandoned by the Government as it was not supported by the non-government parties at the time (namely the Australian Labor Party and the Australian Democrats): see Commonwealth of Australia, *Government Response to the Report of the Parliamentary Joint Committee on Corporations and Securities on the Mandatory Bid Rule* (2000). The report was tabled in the Senate and the House of Representatives on 9 November 2000.

253 See Legal Committee of the Companies and Securities Advisory Committee, Parliament of Australia, *Anomalies in the Takeovers Provisions of the Corporations Law Report* (1994); Simplification Task Force, above n 220, 23–5. Interestingly, the *Anomalies in the Takeovers Provisions of the Corporations Law Report* did not identify anomalies in relation to the operation of the CSP.

254 *Corporations Law* s 606(1)(a). Prior to the *CLERP Act*, the takeover provisions did not apply to companies with 15 members or less, or larger proprietary companies provided their members consented in writing to the provisions not applying: *Corporations Law* s 619(1).

255 *Corporations Law* s 610. Cf *Corporations Law* ss 609, 615 (prior to the *CLERP Act*).

256 *Corporations Law* s 624(1). Cf *Corporations Law* s 638(3) (prior to the *CLERP Act*).

litigation with a view to frustrating a bid'.<sup>257</sup> The new provisions placed a greater reliance on general disclosure tests, with the bidder's statement offering securities as consideration required to contain the same material that would be included in a prospectus and the requirements for a target's statement replacing the previous checklist with a general disclosure test based on the fundraising provisions.<sup>258</sup> Civil liability arose from a bidder's and target's statement containing misleading or deceptive statements and omissions (including if a new circumstance arose subsequently),<sup>259</sup> with criminal liability applied where such matters were material from the point of view of target shareholders.<sup>260</sup> A supplementary bidder's or target's statement was also introduced to remedy such deficiencies.<sup>261</sup> Defences to civil and criminal liability operated where the person did not know of the misleading or deceptive statement, omission or new circumstance, if they reasonably relied on a person other than their director, employee or agent, or if they withdrew their consent to the relevant statement.<sup>262</sup>

The *CLERP Act* also consolidated the purposes of the takeover provisions in ch 6 into one provision. Accordingly, s 602 of the *Corporations Law* provided that:

The purposes of this Chapter are to ensure that:

- (a) the *acquisition of control* over:
  - (i) the voting shares in a listed company, or an unlisted company with more than 50 members; or
  - (ii) the voting shares in a listed body; or
  - (iii) the voting interests in a listed managed investment scheme;

257 Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 49 [7.85]. The reforms also involved bringing the procedural rules for off-market bids (previously takeover schemes) and market bids (previously takeover announcements) into line where possible, including replacing the separate disclosure statements for each type of bid with a single bidder's statement and target's statement: see Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 46 [7.65]; *Corporations Law* ss 636(1), 638(1); *Corporations Law* s 750 (prior to the *CLERP Act*).

258 See *Corporations Law* ss 636(1)(g), 638(1), 710(1). For example, a target's statement was required to contain information known to the target's directors that shareholders and their professional advisors would reasonably require and expect to make an informed assessment concerning whether to accept the takeover offer: *Corporations Law* s 638(1). Cf *Corporations Law* s 750 pts B, D (prior to the *CLERP Act*).

259 *Corporations Law* s 670A(1). Under s 670B, liability attached to the bidder or target and its directors for any such contraventions (subject to certain exceptions for directors not present or voting against the adoption of the statement): at s 670B(1) items 1–3, 6–7. Other persons were liable with their consent relating to the statement or if they were involved in the contravention: at s 670B(1) items 10–11.

260 *Corporations Law* s 670A(3).

261 See *Corporations Law* ss 643–4; Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 50 [7.94]–[7.98].

262 *Corporations Law* s 670D. To prevent these defences being sidestepped through the use of the general misleading and deceptive conduct provisions in s 995 of the *Corporations Law*, s 12DA of the *Australian Securities and Investments Commission Act 1989* (Cth) and s 52 of the *Trade Practices Act 1974* (Cth), the operation of the latter provisions were excluded in relation to takeover documents contravening s 670A: see *Corporations Law* s 995(2A)(a); *Australian Securities and Investments Commission Act 1989* (Cth) s 12DA(1A).

- takes place in an efficient, competitive and informed market;*  
and
- (b) the holders of the shares or interests, and the directors of the company or body or the responsible entity for the scheme:
    - (i) *know the identity of any person who proposes to acquire a substantial interest* in the company, body or scheme; and
    - (ii) have a *reasonable* time to consider the proposal; and
    - (iii) are given *enough information* to enable them to assess the merits of the proposal; and
  - (c) as far as practicable, the holders of the relevant class of voting shares or interests all have a *reasonable and equal opportunity to participate in any benefits accruing to the holders* through any proposal under which a person would acquire a substantial interest in the company, body or scheme; and
  - (d) *an appropriate procedure is followed as a preliminary to compulsory acquisition* of voting shares or interests or any other kind of securities under Part 6A.1.<sup>263</sup>

This was the first time that the Masel principle of an ‘efficient, competitive and informed market’ was given equal prominence to the Eggleston principles as an overarching goal of the takeover provisions.<sup>264</sup> The basis upon which the Panel could make a declaration of unacceptable circumstances was also expanded beyond the previous list of the Eggleston principles and unreasonable share capital transactions.<sup>265</sup> Instead, the power to make a declaration was enlivened if it appeared to the Panel that the circumstances:

- (a) are unacceptable having regard to the effect of the circumstances on:
  - (i) the control, or potential control, of the company or another company; or
  - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company; or
- (b) are unacceptable because they constitute, or give rise to, a contravention of a provision of this Chapter [Chapter 6] or of Chapter 6A, 6B or 6C.<sup>266</sup>

263 *Corporations Law* s 602 (emphasis added). This is the same wording as in the current version of s 602 in the *Corporations Act 2001* (Cth).

264 Cf above n 214 and accompanying text.

265 Cf *Corporations Law* s 732(1) (prior to the *CLERP Act*). See also above nn 213–19 and accompanying text.

266 *Corporations Law* s 657A(2).



The Panel was given broad powers to make remedial orders similar to a court, in order to protect the interests of persons affected by the circumstances and ensure the proposed takeover proceeded as far as possible in a way that it would have had the unacceptable circumstances not occurred.<sup>267</sup> In order to avoid parties commencing litigation in order to defeat the purposes of the Panel reforms, a privative clause was inserted to delay court proceedings in relation to a takeover bid until after the end of the bid period.<sup>268</sup> Similarly, the Court's powers under the *Corporations Law* were in essence limited to determining liability and ordering payment compensation, so that the transaction could not be unwound where the Panel had refused to make a declaration.<sup>269</sup> In order to minimise tactical litigation, challenges to decisions of the Australian Securities and Investments Commission (ASIC) in relation to takeovers were also excluded from review by the Administrative Appeals Tribunal.<sup>270</sup> The Panel was instead given the jurisdiction to review ASIC takeover exemption and modification decisions.<sup>271</sup>

## H Post-CLERP Developments

There were two important legislative developments in 2001. First, Australia was finally given a single national regulatory regime for corporate and securities law on 15 July with the commencement of the *Corporations Act 2001* (Cth).<sup>272</sup> However,

267 This was subject to the exception that it could not direct a person to comply with the law: *Corporations Law* s 657D(2). The exception was required in order to avoid the Panel exercising judicial power contrary to ch III of the *Australian Constitution*: see, eg, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *A-G (Cth) v Breckler* (1999) 197 CLR 83. This was also the reason why the legislation relied on court enforcement of Panel orders: see *Corporations Law* s 657G.

268 This was subject to an exception for government authorities and the corporate law regulator, which was renamed the Australian Securities and Investments Commission on 1 July 1998: see *Corporations Law* s 659B; *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth) sch 1 cls 7–8. It was recognised that this did not affect the jurisdiction of the High Court under s 75 of the *Australian Constitution*: see *Corporations Act 1989* (Cth) s 59A(4); *Corporations Act 2001* (Cth) s 659B(5). This is because the High Court's jurisdiction under s 75 is constitutionally entrenched: see, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; Bruce Dyer, 'Intersections Between Corporate Law and Administrative Law' in Judith S Jones and John McMillan (eds), *Public Law Intersections: Papers Presented at the Public Law Weekend — 2000 & 2001* (Centre for International and Public Law, 2003) 19, 29–30.

269 *Corporations Law* s 659C.

270 See above n 268; *Corporations Law* s 1317C(ga)–(gc); Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 39 [7.21].

271 This applied to decisions relating to substantial holding and beneficial ownership information during a takeover bid and relating to the takeover provisions generally: see *Corporations Law* s 656A. However, the provision enabling internal Panel reviews (which was inserted during the passage of the Corporate Law Economic Reform Program Bill 1998 (Cth) through Parliament) only applied to Panel decisions relating to unacceptable circumstances: see, eg *Corporations Law* s 657EA; Supplementary Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 8–9 [3.22]–[3.25]; Michael Hoyle, 'An Overview of the Role, Functions and Powers of the Takeovers Panel' in Ian Ramsay (ed), *The Takeovers Panel and Takeovers Regulation in Australia* (Melbourne University Press, 2010) 39, 67–8.

272 This was enabled by the states referring to the Commonwealth the power to enact and amend the *Corporations Act 2001* (Cth) and *Australian Securities and Investments Commission Act 2001* (Cth), in the light of High Court decisions that had undermined the constitutional foundations of the *Corporations Law* scheme: see Explanatory Memorandum, Corporations Bill 2001 (Cth) 7–8 [4.5]–[4.10].

this did not involve any substantive policy changes to the law.<sup>273</sup> Secondly, the name of the Panel was changed from the CSP to the Takeovers Panel on 27 September, to more accurately reflect the Panel's role.<sup>274</sup> The next significant changes to the legislation occurred in 2007, following the first judicial review proceedings relating to Panel decisions since the CLERP reforms. The resulting Federal Court decisions, the *Glencore* cases, invalidated the Panel's declarations and orders,<sup>275</sup> and generated substantial concerns that the Panel's jurisdiction had been interpreted too narrowly for it to perform its role effectively.<sup>276</sup>

Accordingly, a number of legislative changes were made in 2007 to remove many of the limitations placed on the Panel's decision-making in the *Glencore* cases.<sup>277</sup> There were three key amendments to the Panel's power to make a declaration of unacceptable circumstances in s 657A of the *Corporations Act 2001* (Cth).<sup>278</sup> First, the precondition to this power in s 657A(2)(a) was amended to make it clear that it is the role of the Panel to satisfy itself as to the effect or likely effect of the relevant circumstances.<sup>279</sup> Secondly, a new paragraph was inserted in s 657A(2) to provide an additional basis upon which the Panel can make a declaration. Significantly, the new s 657A(2)(b) empowers the Panel to make a declaration if it appears to the Panel that the circumstances 'are otherwise unacceptable ... having regard to the purposes of [ch 6] set out in section 602'.<sup>280</sup> Finally, the old s 657A(2)(b) became s 657A(2)(c) and now includes references to both the past and future tense in relation to the circumstances constituting or giving rise to a contravention of the relevant provisions of the *Corporations Act 2001* (Cth).<sup>281</sup> In addition, the Panel's power to make orders in s 657D(2)(a) was transformed to allow an 'en globo' (or collective) assessment of loss if the Panel is satisfied that the rights of 'a group of persons' have been affected.<sup>282</sup> This section was also amended to allow the Panel to protect any rights or interests of affected persons and not just those affected by the relevant circumstances.<sup>283</sup>

273 See Explanatory Memorandum, Corporations Bill 2001 (Cth) 5 [3.1]; Explanatory Memorandum, Australian Securities and Investments Commission Bill 2001 (Cth) 5 [3.1].

274 See Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) 193 [20.59]–[20.60]; *Financial Services Reform Act 2001* (Cth) s 3, sch 3 items 1–4; Takeovers Panel, 'New Name for the Takeovers Panel' (Media Release, TP01/087, 11 October 2001).

275 See *Glencore International AG v Takeovers Panel* (2005) 220 ALR 495, 511–12 [58] (Emmett J); *Glencore International AG v Takeovers Panel* (2006) 151 FCR 77, 108 [136] (Emmett J).

276 See Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 1–2 [1.3]–[1.6].

277 See *Corporations Amendment (Takeovers) Act 2007* (Cth) sch 1 items 3–4; Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 1–2 [1.1]–[1.6].

278 A new definition of 'substantial interest' was also inserted at this time: see below nn 358–62 and accompanying text.

279 Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 5 [3.7]. See also Emma Armson, 'Attorney-General (*Commonwealth*) v *Alinta Limited*: Will the Takeovers Panel Survive Constitutional Challenge?' (2007) 29 *Sydney Law Review* 495, 498–9.

280 See also Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 5 [3.8].

281 See *ibid* 5–6 [3.9].

282 *Ibid* 6 [3.11]. See *CEMEX Australia Pty Ltd v Takeovers Panel* (2008) 106 ALD 5, 17–18 [46]–[49] (Stone J); *CEMEX Australia Pty Ltd v Takeovers Panel* (2009) 177 FCR 98, 114 [78]–[80] (Ryan, Jacobson and Foster JJ).

283 See Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 6 [3.11].

In a crucial test for the CLERP reforms to the Panel, it survived a constitutional challenge in *Attorney-General (Cth) v Alinta Ltd.*<sup>284</sup> The High Court in *Alinta* reversed a Full Federal Court decision, which had prevented the Panel from exercising its power to make a declaration of unacceptable circumstances based upon a contravention of the *Corporations Act 2001* (Cth) for eight months.<sup>285</sup> This uncertainty was removed by the High Court in December 2007, when it published its unanimous orders in support of the constitutional validity of the Panel.<sup>286</sup> The reasons of Kirby J in *Alinta* provided the following endorsement of the Panel's new role:

it was open to the Federal Parliament to conclude that the nature of takeovers 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.<sup>287</sup>

### III THEMES AND TENSIONS

#### A Policy Goals

The above analysis of the historical development of Australian takeover legislation demonstrates clearly that there are two main goals underlying the provisions, namely promoting the efficiency of the market for corporate control and providing shareholder protection. Investor protection was a key reason for the introduction of the original UCA provisions, although there was also concern that commercial operations were not 'unduly' hampered.<sup>288</sup> Although market efficiency was not an explicit goal, the UCA provisions were also designed to improve the effectiveness of disclosure.<sup>289</sup> The *Eggleston Report* had a similar emphasis on shareholder protection, with the Committee tasked with examining the extent to which the UCA provided protection to investors and recommending any necessary improvements.<sup>290</sup> As a result, it is not surprising that the Eggleston principles that have since become the cornerstone of the takeover provisions focus on shareholder protection.<sup>291</sup> However, the efficiency of both the capital market

284 (2008) 233 CLR 542 ('*Alinta*'). The High Court had previously confirmed the constitutionality of the CSP in *Precision Data* (1991) 173 CLR 167, 190–2 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). Cf above n 204 and accompanying text.

285 *Australian Pipeline Ltd v Alinta Ltd* (2007) 159 FCR 301, 326 [95]–[98] (Finkelstein J, dissenting), 386–7 [401]–[403], 394–5 [426]–[431] (Gyles and Lander JJ). For an analysis of this decision, see, eg, Armson, 'Will the Takeovers Panel Survive Constitutional Challenge?', above n 279.

286 *Alinta* (2008) 233 CLR 542, 599–600 [176]–[178].

287 *Ibid* 562 [45].

288 See above n 28 and accompanying text.

289 See above n 28 and accompanying text.

290 See above n 39 and accompanying text.

291 See above n 42 and accompanying text.

and the market for corporate control has been given an increasing emphasis in the legislation and related materials over time. This process started in 1974, with the *Rae Report* recognising improving capital market performance as a counterpart to investor protection in its twin policy objectives for companies and securities regulation.<sup>292</sup> Similarly, the Second Reading Speech for *CASA* in 1980 considered that the new takeover code would provide appropriate shareholder protection, while facilitating investor confidence and an informed and efficient securities market.<sup>293</sup> *CASA* introduced the first takeover provisions that included statements of the principles underlying the law. Of these, the Eggleston principles were given greater emphasis, as they formed the sole basis upon which the NCSC could exercise its new power to declare acquisitions or conduct to be unacceptable.<sup>294</sup> *CASA* also introduced the Masel principle, which set out the legislative aim of ‘ensuring that the acquisition of shares in companies takes place in an efficient, competitive and informed market’.<sup>295</sup> However, this was only included as a factor that the NCSC needed to take into account, in addition to the Eggleston principles, when making its exemption and modification decisions.<sup>296</sup> The rewriting of the takeover legislation in 2000 with the CLERP reforms finally placed the Masel principle on an equal footing with the Eggleston principles.<sup>297</sup>

Given the importance of the Masel principle, it is unfortunate that the intended meaning of this phrase was not clearly set out in the materials accompanying the legislation when it was introduced in 1981.<sup>298</sup> Instead, the Explanatory Memorandum only restated the Masel and Eggleston principles that the NCSC was required to take into account in exercising its exemption and modification powers, and noted at the end that the provision was ‘based on the general principles set out in the report of the Eggleston Committee’.<sup>299</sup> Although discussing the equal opportunity principle, the CSLRC commented in 1985 that ‘in the light of the frequent calls for takeover legislation to be observed in accordance with its spirit and intent as well as detailed rules, it would be highly desirable for the fundamental purposes of the legislation to be specified clearly as a guide

292 See above n 92 and accompanying text.

293 See above n 114 and accompanying text. See also the Formal Agreement between the Commonwealth, the states and the Northern Territory made on 22 December 1978 underpinning the regulatory regime: *National Companies and Securities Commission Act 1979* (Cth) s 3(1) (definition of ‘agreement’), sch 1 recital A. This is also consistent with the explanatory material accompanying the legislation implementing the *Corporations Law*: see above n 170 and accompanying text.

294 See above nn 135–6 and accompanying text.

295 See above n 113 and accompanying text.

296 See above n 139 and accompanying text.

297 See above nn 263–4 and accompanying text.

298 On the other hand, this gives both ASIC and the Panel flexibility in applying s 602 in the exercise of their discretionary powers: see *Corporations Act 2001* (Cth) ss 655A(2), 657A(3)(a)(i). See also Part III(B) below.

299 Explanatory Memorandum, Companies (Acquisition of Shares) Bill 1980 (Cth) 84–5 [167]–[168]. This would appear to be an early example of what Mannolini refers to as a ‘fusion fallacy’: Justin Mannolini, ‘Convergence or Divergence: Is there a Role for the Eggleston Principles in a Global M&A Environment?’ (2002) 24 *Sydney Law Review* 336, 338.

to interpretation'.<sup>300</sup> However, there is little commentary on the meaning of an 'efficient, competitive and informed market' in the context of acquisitions of control.<sup>301</sup> One of the inaugural Commissioners of the NCSC has noted that the introduction of the Masel principle signalled a 'change from the purely equity lawyers' approach' that characterised the Eggleston principles,<sup>302</sup> to the 'economic analysis of law which has since become fashionable'.<sup>303</sup>

Based on economic principles, an efficient market is one in which prices 'fully reflect' all available information.<sup>304</sup> This can be applied to the market for corporate control, which involves the buying and selling of shares in the context of a takeover.<sup>305</sup> The *CLERP 4* paper concluded that an efficient market relies on the interconnected elements of competition and information.<sup>306</sup> In a takeover, competition is considered to promote 'the efficient allocation of capital by providing an opportunity for the bidder offering the highest price for the company's shares to acquire its assets'.<sup>307</sup> Similarly, it was concluded that an efficient market relies on the ability of investors to make informed decisions.<sup>308</sup> Of the three limbs of the Masel principle, the requirement to have an 'informed market' is the easiest to apply and is consistent with the disclosure elements of the Eggleston principles.<sup>309</sup> The *CLERP 4* paper indicates that a 'competitive market' is intended to involve an auction to allow the bidder paying the best price to succeed, although this principle would not appear to be immutable given the proposal to remove an auction in certain circumstances for the purposes of

300 See Companies and Securities Law Review Committee, Parliament of Australia, *Partial Takeover Bids*, Discussion Paper No 2 (March 1985) [5], reproduced in Companies and Securities Law Review Committee, Parliament of Australia, *Report to the Ministerial Council on Partial Takeover Bids* (March 1985) app 1 [5].

301 For commentary on the meaning of 'an efficient, competitive and informed market', see, eg, Rebecca Langley, 'Information Access Denied ... Is the Australian Takeovers Market Really "Efficient, Competitive and Informed"?' (2009) 27 *Company and Securities Law Journal* 344, 353–4; Alan Dignam, 'The Takeovers Panel, the Market Efficiency Principle and the Market for Corporate Control — An Empirical Study' (2005) 23 *Company and Securities Law Journal* 58, 58. Given this, it is remarkable that the CSLRC observed in 1985 in the context of its review of the 20 per cent takeover threshold that '[t]he efficiency of the market and the legitimate expectations of shareholders seem, for the time being, to be sufficiently and properly protected': Companies and Securities Law Review Committee, *The Takeover Threshold*, above n 155, [111].

302 Greenwood, above n 37, 311.

303 Ibid 310.

304 See above n 9 and accompanying text. This is consistent with the Takeovers Panel's conclusion that '[a]n efficient market is one which uses information effectively to set prices': *Re Austral Coal [No 2]* (2005) 55 ACSR 60, 87 [162].

305 See above nn 10–11 and accompanying text.

306 For the purposes of this analysis, it was assumed that information was 'freely available and costless': *CLERP 4*, above n 6, 8. However, tensions exist between these principles as the costs of information can also be viewed as impeding a competitive market: see, eg, Langley, above n 301, 352.

307 *CLERP 4*, above n 6, 8.

308 Ibid. See also above nn 225–6 and accompanying text.

309 For examples of the application of this limb, see Takeovers Panel, *Guidance Note 1 — Unacceptable Circumstances* (21 September 2010) 9–10 [32(a)] (Examples 1–2, 4–5, 7, 9–10) <[http://www.takeovers.gov.au/content/Guidance\\_Notes/Current/downloads/GN01\\_2010.pdf](http://www.takeovers.gov.au/content/Guidance_Notes/Current/downloads/GN01_2010.pdf)> ('*Guidance Note 1*').

the (subsequently abandoned) mandatory bid rule.<sup>310</sup> Although it is referred to in many Panel decisions,<sup>311</sup> there is little guidance on how the ‘efficient market’ limb might be applied on its own in the takeover context.<sup>312</sup> Instead, general reference is often made to the ‘efficient, competitive and informed market’ without analysing its separate limbs.<sup>313</sup> As a result, some commentators have argued that the Masel principle has not been applied correctly in certain Panel decisions.<sup>314</sup>

While the meaning of the Eggleston principles was made clearer at the outset given their greater level of specificity, the reach of some of those principles has changed over time. The first three Eggleston principles relate to disclosure and require the proposed acquirer of a substantial interest to disclose their identity, give reasonable time for consideration of the proposal and provide enough information for its merits to be assessed (‘disclosure principles’).<sup>315</sup> Although the last two of these disclosure principles were implicit in the takeover provisions that were originally enacted in the UCA,<sup>316</sup> the first disclosure principle was implemented later in the 1971 amendments responding to the *Eggleston Report*.<sup>317</sup> Since then, the disclosure principles have essentially remained the same,<sup>318</sup> and the important role that they play in takeover regulation has not been called in question. In contrast, the remaining Eggleston principle requiring target shareholders to have a reasonable and equal opportunity to participate in the benefits arising from a proposed acquisition of a substantial interest (‘the equal opportunity principle’) has had an increasing impact since its inception. It has also withstood numerous calls for its removal,<sup>319</sup> and survived review in both the *Lavarch Report* and CLERP reforms.<sup>320</sup> However, a proposal to add to the

310 See above nn 240, 252, 307 and accompanying text. For examples of the application of this limb, see *Guidance Note 1*, above n 309, 9–10 [32(a)] (Examples 3, 12); Takeovers Panel, *Guidance Note 7 — Lock-up Devices* (11 February 2010), 3 [6]–[8], 7 [28] <[http://www.takeovers.gov.au/content/Guidance\\_Notes/Current/downloads/GN07\\_2010.pdf](http://www.takeovers.gov.au/content/Guidance_Notes/Current/downloads/GN07_2010.pdf)>.

311 See, eg, *Leighton Holdings Ltd 01, 02 and 03* [2010] ATP 13 (5 November 2010); *Leighton Holdings Ltd 02R* [2010] ATP 14 (29 November 2010).

312 Of the examples of possible unacceptable conduct based on the Masel principle in *Guidance Note 1*, above n 309, 9–10 [32(a)], the only example that could perhaps be attributed to an ‘efficient market’ is the ‘failure to issue consideration securities’: at 10 [32(a)] (Example 6). However, the Panel decision cited in relation to this issue only refers once to an ‘efficient, competitive and informed market’: *Colonial First State Property Trusts Group 03* [2002] ATP 17 (11 December 2002) [25], cited in *Guidance Note 1*, above n 309, 10.

313 See, eg, above n 312 and accompanying text; Takeovers Panel, *Guidance Note 13 — Broker Handling Fees* (6 May 2011) 2 [6] <[http://www.takeovers.gov.au/content/Guidance\\_Notes/Current/downloads/GN13\\_2011.pdf](http://www.takeovers.gov.au/content/Guidance_Notes/Current/downloads/GN13_2011.pdf)>.

314 See, eg, Mannolini, above n 299, 338; George Durbridge, ‘The Writ of Middlesex Revived’ (2009) 27 *Company and Securities Law Journal* 45, 47, 49–50.

315 *Corporations Act 2001* (Cth) s 602(b).

316 See above n 32 and accompanying text.

317 See above nn 49–51, 75 and accompanying text.

318 Cf above n 215 and accompanying text.

319 See, eg, Mannolini, above n 299, 336–40, 360; James Mayanja, ‘The Equal Opportunity Principle in Australian Takeover Law and Practice: Time for Review?’ (2000) 12 *Australian Journal of Corporate Law* 1, 16, 18. See also the critique of the Eggleston Principles in Benedict Sheehy, ‘Australia’s Eggleston Principles in Takeover Law: Social and Economic Sense?’ (2004) 17 *Australian Journal of Corporate Law* 218.

320 See above nn 169, 172–6, 231–3 and accompanying text.

principle by vesting a proportion of the control premium in each voting share did not receive sufficient support.<sup>321</sup>

At the outset in 1969, the Eggleston principles were prefaced with the statement that these limitations should apply if a person ‘*wishes to acquire control* of a company *by making a general offer*’ to acquire all of a company’s shares or a proportion sufficient to exercise voting control.<sup>322</sup> This is consistent with the Eggleston Committee’s view that on-market transactions should remain outside the reach of the takeover provisions given the importance of market freedom, which was reflected in a specific exclusion for on-market transactions in the 1971 amendments following the *Eggleston Report*.<sup>323</sup> These demonstrate the Eggleston Committee’s conception of the equal opportunity principle did not extend to requiring all target shareholders to receive a takeover offer at the same price. As a result, the key requirement at that time was to comply with the UCA disclosure requirements. These disclosure requirements applied when making offers for either a full bid, or a partial bid if it would result in the bidder and any related corporations being able to control the exercise of at least one-third of the voting power of the target.<sup>324</sup> *CASA* transformed the takeover provisions in 1981 by prohibiting all acquisitions beyond a 20 per cent threshold, and requiring takeover offers to be made to all shareholders unless another exemption was available.<sup>325</sup> This entrenched the position of the equal opportunity principle in the takeover regulatory regime, and was supplemented by provisions requiring target shareholders to receive equivalent consideration compared both to each other and transactions within a four month period beforehand.<sup>326</sup> In 1995, the application of the equal opportunity principle was expanded to allow the CSP to make declarations relating to unacceptable circumstances based on target directors’ actions that contributed to a takeover offer not proceeding.<sup>327</sup> This reinforced the modern interpretation of the principle as providing an opportunity for all shareholders to participate in the benefits under a proposed takeover offer.

One of the significant challenges for takeover regulation is the ‘sometimes conflicting’ nature of the objectives of market efficiency and shareholder protection.<sup>328</sup> The tension underlying these two aims was explicitly recognised in an introductory CLERP document. This document included the following in the action plan for takeovers: ‘determining how regulation can best achieve an appropriate balance between facilitating efficient management and control of organisations while ensuring that shareholders are adequately protected’.<sup>329</sup> Similarly, the *CLERP 4* paper stated that the proposed reforms sought ‘to remove regulatory impediments to an efficient market for corporate control subject to

321 See above nn 162–3 and accompanying text.

322 *Eggleston Report*, above n 40, 8 [16] (emphasis added).

323 See above nn 85–9 and accompanying text.

324 See above nn 30–1 and accompanying text.

325 See above nn 115–22 and accompanying text.

326 See, eg, *CASA* ss 16(2)(b), (g), 17(2), (6).

327 See text accompanying above nn 216–7.

328 See above n 92 and accompanying text.

329 Treasury, Australian Government, *Corporate Law Economic Reform Program* (1997) 4.

ensuring a sound investor protection regime'.<sup>330</sup> On the one hand, both objectives are satisfied by disclosure requirements that result in both an 'informed market' from a market efficiency perspective and provide investor protection by allowing target shareholders to make informed decisions.<sup>331</sup> The *CLERP 4* paper also argued that providing shareholder protection improved investor confidence,<sup>332</sup> with the latter 'attracting the capital necessary for ensuring the liquidity required for an efficient capital market'.<sup>333</sup>

On the other hand, there is a fundamental concern that the costs imposed by the regulatory regime provide disincentives for takeovers, and consequently affect the market for corporate control by undermining the incentives for management to improve their performance.<sup>334</sup> This particularly applies to the costs of making a takeover offer to all shareholders arising from the equal opportunity principle. However, the above historical analysis suggests that, although the equal opportunity principle would appear to be on less secure foundations, the Eggleston principles are now embedded in the Australian takeover regulatory framework. As a result, the focus of recent suggestions for reform has been to reduce transaction costs flowing from the operation of the legislation, rather than implementing wholesale reform of the provisions.<sup>335</sup> Given this outcome, it could be argued that the CSLRC was prescient in its observation in 1985 that '[u]ltimately considerations of equity or fairness must have priority over those of mere price efficiency if there were an irreconcilable conflict between the two'.<sup>336</sup>

The apparent primacy of the principles of shareholder protection over those relating to market efficiency is reflected in the development of the takeover provisions. In light of their concern to avoid significant shareholder losses, legislators have continued to add layers of regulation to ensure that investors are properly protected.<sup>337</sup> Reviews of the legislation by Parliamentary Committees and other bodies have similarly focused on whether the law achieves this purpose.<sup>338</sup> This is evident even in the context of the most recent proposals under *CLERP*, which was specifically designed to focus on economic principles.<sup>339</sup> However, the legislature has also elevated the market efficiency goals in the Masel principle so that they are now on equal footing with the investor protection aims of the Eggleston principles. It remains for ASIC and the Panel to reconcile any conflict

330 *CLERP 4*, above n 6, 5.

331 *Corporations Act 2001* (Cth) ss 602(a)–(b).

332 See, eg, above nn 227–9 and accompanying text.

333 *CLERP 4*, above n 6, 10.

334 See text accompanying above nn 6–11.

335 See, eg, above n 224 and accompanying text; Treasury, Australian Government, *Takeovers Issues — Treasury Scoping Paper* (2012) <<http://www.treasury.gov.au/PublicationsAndMedia/Publications/2012/Takeovers-issues>>.

336 Companies and Securities Law Review Committee, *Partial Takeover Bids: Discussion Paper No 2*, above n 300, app 1 [21]. The Committee observed that in that case 'the economic argument for price efficiency seems primarily an argument in favour of potential cost savings for bidders'.

337 See, eg, above n 68 and accompanying text.

338 See, eg, above nn 38–9, 171 and accompanying text.

339 See, eg, *CLERP 4*, above n 6, 5.



in the application of these purposes underlying the takeover provisions in their decision-making.<sup>340</sup>

## **B Regulatory Approach**

In the first 20 years following the introduction of takeover legislation in Australia, there was exponential growth in the size and complexity of the provisions. Initially starting at 15 pages of New South Wales legislation in 1961, the takeover provisions grew to 58 pages following the 1971 amendments resulting from the *Eggleston Report*.<sup>341</sup> Although it is difficult to draw exact comparisons given differences in pagination with the federal legislation in *CASA*, the new code was roughly three times the size of the state legislation that came before it. At each stage of amendment, the materials accompanying the legislation recognised its increasing complexity, but considered this necessary to combat the use of loopholes that continued to emerge following each amendment.<sup>342</sup> Indeed, the inevitability of new loopholes arising was emphasised in the *Eggleston Report*.<sup>343</sup> The *CASA* provisions implemented a number of significant changes that could be viewed as an attempt to break the previous cycle of successive legislative amendments following the creation of loopholes. First, *CASA* strengthened the regulatory position by applying a general prohibition on acquisitions beyond the 20 per cent threshold, and placing the onus on parties to come within the exceptions.<sup>344</sup> Second, the legislation relied on two new regulatory discretions, namely the NCSC's powers to exempt persons from the legislation and/or modify its operation, and to declare acquisitions or conduct to be unacceptable.<sup>345</sup> Importantly, the discretions were founded upon ensuring compliance with the purposes of the legislation, namely the Eggleston and Masel principles.<sup>346</sup> Although these discretionary powers are now split between ASIC and the Panel respectively, each of these essential features originating from *CASA* are replicated in the current legislation.<sup>347</sup>

There are a number of explanations for the complexity in our corporate law regulation, including the desire to ensure that target shareholders are protected in takeovers and parliamentary responses to restrictive judicial interpretations.<sup>348</sup> However, legislation that is 'too detailed and complex' can also create

340 See, eg, text accompanying above n 328 and following.

341 See above nn 29, 64 and accompanying text.

342 See above nn 62, 66, 114 and accompanying text.

343 See above n 62.

344 See text accompanying above n 115 and following.

345 *CASA* ss 59–60.

346 However, the market efficiency principle only applied in the context of the NCSC's exemption and modification powers: see above nn 136, 139 and accompanying text.

347 See *Corporations Act 2001* (Cth) ss 606, 655A, 657A. See also above nn 112–13 and accompanying text.

348 See, eg, Ian Ramsay, 'Corporate Law in the Age of Statutes' (1992) 14 *Sydney Law Review* 474, 478–9; Hutson, above n 141, 104.

uncertainty.<sup>349</sup> A commentator in the early 1990s suggested that ‘fuzzy law’ be used instead of black letter law to provide ‘imprecise, but binding’ legislation that would ‘encourage our courts to keep moving away from technicalities and towards substance’ and ‘discourage loopholing’.<sup>350</sup> Although this approach has received support,<sup>351</sup> ‘fuzzy law’ cannot provide a complete solution to the problem.<sup>352</sup> This is because it is not possible for the Parliament to enact ‘legislation which comprehensively regulates corporate activity’.<sup>353</sup> As a result, it is necessary to establish mechanisms that allow conflicts to be resolved by other decision-makers.<sup>354</sup>

ASIC and the Panel currently have significant discretion over the way that the takeover legislation operates in practice. In particular, ASIC’s ability to rewrite the legislation, typically done for classes of persons (in ‘class orders’), gives it an unusual legislative role.<sup>355</sup> For example, ASIC has made numerous class orders responding to anomalies in the legislation arising since it was rewritten in the *CLERP Act*, which have been addressed by ASIC instead of the Parliament.<sup>356</sup> Both ASIC and the Panel make their decisions in the context of the tension between the Mase and Eggleston principles.<sup>357</sup> There is also uncertainty concerning the meaning of the key concept of a ‘substantial interest’.<sup>358</sup> This term determines both when the Eggleston principles apply and the Panel’s jurisdiction to make a declaration of unacceptable circumstances applies based on the effect of certain acquisitions.<sup>359</sup> A definition of ‘substantial interest’ was first inserted into the legislation in s 602A by the 2007 amendments resulting from the *Glencore* cases.<sup>360</sup> However, s 602A merely refutes the court’s interpretation of this term,

349 Ramsay, above n 348, 475. See also Farrar, above n 19, 2.

350 John M Green, ‘Corporate Crooks’ (1990) 8 *Company and Securities Law Journal* 414, 419. However, the author also recognised that if law is ‘too fuzzy, there will be no certainty’: see John M Green, “‘Fuzzy Law’ — A Better Way to Stop “Snouts in the Trough”?’ (1991) 9 *Company and Securities Law Journal* 144, 148. He also supported the move to decision-making by a ‘properly constituted Panel’: John M Green, ‘An Australian Takeover Panel — What Do We Want? A Panel Poll and Critique’ (1989) 7 *Company and Securities Law Journal* 6, 15.

351 See, eg, Bruce Dyer, ‘A Revitalised Panel?’ (1998) 16 *Company and Securities Law Journal* 261, 276.

352 See, eg, Justice M H McHugh, ‘The Growth of Legislation and Litigation’ (1995) 69 *Australian Law Journal* 37, 46; Ramsay, above n 348, 477–80; Michael J Whincop, ‘Rules, Standards and Intransitive Statutes: What the Economic Reform of Corporate Law Might Have Looked Like’ (1999) 17 *Company and Securities Law Journal* 11, 19.

353 Ramsay, above n 348, 493.

354 Ibid 484. See also Gunther Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17 *Law & Society Review* 239, 275.

355 However, these instruments are subject to disallowance by the Federal Parliament: see *Legislative Instruments Act 2003* (Cth) ss 5, 24, 31, 38, 42. See generally Stephen Bottomley, ‘The Notional Legislator: The Australian Securities and Investments Commission’s Role as a Law-Maker’ (2011) 39 *Federal Law Review* 1.

356 See, eg, Australian Securities and Investments Commission, *Regulatory Guide 9: Takeover Bids* (21 June 2013) 8 [9.19], 9 [9.25(c)], 16 [9.45] <[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg9-published-21-June-2013.pdf/\\$file/rg9-published-21-June-2013.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg9-published-21-June-2013.pdf/$file/rg9-published-21-June-2013.pdf)>; Bottomley, above n 355, 29–30.

357 See, eg, text accompanying above n 328 and following.

358 *Corporations Act 2001* (Cth) s 602A.

359 Ibid ss 602(b), 657A(2)(a)(ii).

360 Ibid s 602A. See also above nn 275–6 and accompanying text.

which had required it to involve a ‘relevant interest’ under the legislation, or an interest in or right in relation to voting shares.<sup>361</sup> As a result, the provision does not provide any guidance as to what would be sufficient to establish a substantial interest, but instead provides the Panel with the flexibility to determine if an interest meets this threshold. The Explanatory Memorandum accompanying the 2007 amendments emphasised that the new definition was intended to ‘ensure that the term “substantial interest” is broad enough to encompass new and evolving instruments and developments in takeovers and to deter avoidance of the purposes of the takeovers law’.<sup>362</sup>

The increasing use of regulatory discretions in takeover regulation over time raises tensions between allowing flexibility in the operation of the provisions and providing certainty for business. Consistent with the above analysis, general principles and propositions can be used to avoid the difficulty that regulation can become too complex if it needs to account for every situation.<sup>363</sup> However, the effective use of such principles relies on a clear statement of the purpose of the legislation.<sup>364</sup> In addition, the uncertainty arising from the use of such discretions can itself create problems. This is reflected in the following concerns raised by Ron Brierley about the system introduced in *CASA*: ‘We’ve got 150 pages of the most complex legislation to work with, but whatever we come up with out of that, the NCSC can still say it is unacceptable. You might as well have a one-line Act saying that whatever the NCSC thinks is right is what applies’.<sup>365</sup>

These concerns reflect the increasing complexity of the takeover legislation as a result of the amendments since it was first introduced in 1961. This has resulted primarily from the legislators’ attempts to close up loopholes in order to provide shareholder protection.<sup>366</sup> Although it could be argued that the introduction of the regulatory discretions in *CASA* has arrested the expansion of the takeover legislation, this has also led to the need for the regulators to issue numerous regulatory guides and guidance notes.<sup>367</sup> However, it is important that ASIC and the Panel provide guidance on how they will exercise their discretions in order to minimise uncertainty.<sup>368</sup> The rewriting of the takeover legislation with the implementation of the CLERP reforms similarly removed many of the difficulties with the drafting of the provisions, but also led to a new set of anomalies.<sup>369</sup> This history demonstrates that Parliament cannot legislate effectively to deal with all situations, particularly in light of market innovations, and that other mechanisms

361 *Glencore International AG v Takeovers Panel* (2006) 151 FCR 77, 97–8 [72] (Emmett J).

362 Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 5 [3.4].

363 See above nn 147, 152 and accompanying text. This can also lead to ‘over-regulation’ and further amendments in light of litigation on technical points: see above nn 153, 342 and accompanying text.

364 McHugh, above n 352, 44. Cf above nn 298–314 and accompanying text.

365 *Australian Financial Review*, 4 August 1981, 60, quoted in Digby, above n 105, 216 n 3.

366 See, eg, text accompanying above nn 337, 342–3, 348.

367 See, eg, Australian Securities and Investments Commission, *Roadmap — Takeovers and Reconstructions* (14 August 2013) <<http://www.asic.gov.au/asic/asic.nsf/byheadline/Road+map+-+takeovers+and+reconstructions?openDocument>>; Takeovers Panel, *Guidance Notes* <<http://www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=GN>>.

368 See Ramsay, above n 348, 480, 482–3.

369 See above n 356 and accompanying text.

are needed. The challenge will continue to be to achieve an appropriate balance between flexibility and clarity in the application of the regulatory discretions under the takeover provisions.<sup>370</sup>

### **C Dispute Resolution**

Understandably, legislators did not start debating the appropriate body to decide takeover disputes until after many years' experience with the operation of the takeover provisions. The question whether Australia should have a body modelled on the UK Panel was first considered by federal parliamentary members in the *Rae Report* in 1974.<sup>371</sup> This was rejected primarily on the basis that such a body was not appropriate to be the general securities market regulator, although it was recognised that such self-regulatory bodies could play a useful complementary role to a government regulator.<sup>372</sup> The Ministerial Council for Companies and Securities, comprising the responsible federal and state Ministers, also decided against the introduction of a takeovers panel in meetings in 1979.<sup>373</sup> There was further debate on this issue in the Federal Parliament in response to the 1983 amendments to *CASA*, where an Opposition Member pointed out a number of deficiencies with the court based system compared to the UK Panel and suggested that a non-judicial body be used in the area of takeovers.<sup>374</sup> Despite acknowledging merit in these comments, the Government instead relied upon the *Rae Report's* conclusion on the UK Panel and highlighted the introduction of a provision allowing the courts to interpret *CASA* having regard to its purpose.<sup>375</sup> The establishment of the CSP in 1991 to decide matters involving unacceptable circumstances (in addition to court enforcement of the *Corporations Law*) provided an important first step, as it transferred the power to decide such matters from the government regulator to a peer-review body.<sup>376</sup> This provided the foundation upon which the jurisdiction of the Panel was expanded to replace the role of the courts under the *CLERP Act* in 2000.<sup>377</sup>

To a large extent, the arguments set out in the *CLERP 4* paper for having the Panel decide takeover matters instead of the courts echo earlier concerns raised in relation to the previous court based system. The key rationales given for the CLERP Panel reforms can be distilled into two overarching themes, which relate to the advantages of its approach to decision-making (namely 'speed, informality and uniformity') and minimising tactical litigation.<sup>378</sup> Speed has been used consistently as a justification for decision-making by a panel instead of a court,

370 See, eg, McHugh, above n 352, 48; Ramsay, above n 348, 482, 493–4.

371 See above n 93 and accompanying text.

372 See above nn 94–100 and accompanying text.

373 Greenwood, above n 37, 311.

374 See above nn 148–52 and accompanying text.

375 See above n 153 and accompanying text.

376 See above nn 181–4 and accompanying text.

377 See above nn 244–51 and accompanying text.

378 See above 246 and accompanying text.

being referred to both prior to the existence of the CSP and as one of the main reasons for legislative amendments to its processes in 1995.<sup>379</sup> While the meaning of ‘informality’ in decision-making is not explained in the *CLERP 4* paper, it could be argued that this is used in contrast to the formality of decision-making by a court. There are a number of features of the Panel that relate to this criterion, each of which could be viewed as reflecting its ability to adopt a ‘commercial approach’.<sup>380</sup> It is clear that the informality criterion relates to the Panel’s use of informal procedures.<sup>381</sup> However, there are three other key features that may be drawn from the *CLERP 4* paper and the earlier debate on this issue. First, it could be expected that a commercial approach would flow from the specialist expertise of Panel members, given their professional experience in fields such as business, the administration of companies and law.<sup>382</sup> Secondly, the Panel makes its decisions based on the ‘spirit’ as well as the letter of the law, with the application of the principles underlying the takeover provisions allowing greater flexibility in outcomes.<sup>383</sup> Thirdly, as a result, it could be argued that the Panel should adopt an approach that is less technical,<sup>384</sup> and avoids ‘excessive’ legalism in proceedings.<sup>385</sup> This is in contrast to concerns raised in the *CLERP 4* paper that court decisions had set disclosure standards ‘at an unrealistically high level’.<sup>386</sup> High Court judges have also observed that courts are ‘ill-adapted’ to making decisions based on policy considerations.<sup>387</sup> The concepts of speed and informality discussed above form the essence of the characteristics of the Panel identified by Kirby J in the High Court’s 2008 decision in *Alinta*.<sup>388</sup>

In contrast, the issue of uniformity in takeover decision-making did not feature explicitly in the debate prior to the CLERP reforms. It was considered in the *CLERP 4* paper that ‘the different approaches taken by different judges can encourage tactical litigation which might not be profitable before a tribunal applying a single standard’.<sup>389</sup> On the other hand, it was proposed that an appeal division of the Panel would ‘provide appropriate protection against erroneous decisions and

379 See above nn 148, 151–2, 205–211 and accompanying text.

380 Cf above n 153 and accompanying text.

381 The *CLERP 4* paper notes the desirability of Panel proceedings being conducted ‘as informally as is consistent with providing parties with a fair hearing and the expeditious resolution of the matter’: *CLERP 4*, above n 6, 39–40. This is consistent with the Panel adopting an ‘inquisitorial’ role based on written submissions rather than the cross-examination of witnesses: see above n 207 and accompanying text.

382 See *CLERP 4*, above n 6, 32; *Australian Securities and Investments Commission Act 2001* (Cth) s 172(4).

383 *CLERP 4*, above n 6, 37–8, 41. Cf above n 149 and accompanying text.

384 See also text accompanying above n 150.

385 *CLERP 4*, above n 6, 40.

386 *Ibid* 36.

387 See, eg, *Alinta* (2008) 233 CLR 542, 550 [2] (Gleeson CJ); Emma Armson, ‘Judicial Power and Administrative Tribunals: The Constitutional Challenge to the Takeovers Panel’ (2008) 19 *Public Law Review* 91, 96; Ramsay, above n 348, 487, quoting *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617, 633 (Mason J).

388 See above n 287 and accompanying text.

389 *CLERP 4*, above n 6, 36.

facilitate uniform standards'.<sup>390</sup> This recognises the possibility of some degree of non-uniformity in Panel decision-making. Finally, the minimisation of 'tactical litigation' has also become more of a legislative focus since the implementation of the CSP. This is explicable perhaps on the basis that, prior to that time, it was expected that litigation was a necessary part of ensuring that both takeovers and the regulators proceeded in a way that was consistent with the takeover provisions.<sup>391</sup> Consequently, it was not until 'time wasting litigation' started to undermine the operation of the CSP that it became a concern for the legislature.<sup>392</sup> The concern at that time, echoed in the CLERP reforms, was to allow the Panel to come to quick decisions to allow the target shareholders to decide on whether to accept the takeover on an informed basis.<sup>393</sup> This was expanded upon in the *CLERP 4* paper to include the ability to free up courts for other matters.<sup>394</sup>

Takeover dispute resolution has evolved significantly since the introduction of the legislation in 1961. The key motivations for change have been the desire to improve the speed of decision-making and to adopt a more 'commercial approach'.<sup>395</sup> In this respect, the UK Panel that was established in 1968 has been considered to be an effective role model.<sup>396</sup> However, a non-judicial decision maker was considered but rejected in the 1970s, partly based on concerns that the UK approach would not operate successfully in the Australian context.<sup>397</sup> The difficulties encountered by the NCSC in exercising its powers over unacceptable circumstances provided an opening for a peer review body to be introduced to make these decisions.<sup>398</sup> However, the fact that only the regulator could apply to the CSP led to further calls for a model similar to the UK Panel to be adopted.<sup>399</sup> This was finally implemented with the CLERP reforms in 2000. The transformation from a court based system to the Takeovers Panel has consequently been slow and cautious. This is understandable given the differences between the Australian and UK systems.<sup>400</sup> The question whether the Australian adaption of the Panel has been effective is a continuing issue for consideration.

390 Ibid 40. The concept of an appeal division was replaced with a review panel comprising three different members to the Panel originally making the decision, with the review panel undertaking administrative review by remaking the decision: see *Corporations Act 2001* (Cth) s 657EA; *Australian Securities and Investments Commission Act 2001* (Cth) s 184.

391 However, the Minister for Trade noted in 1983 that 'over-regulation' had led to 'a great deal of litigation': see above n 153 and accompanying text.

392 See above n 206 and accompanying text.

393 See above nn 205, 251 and accompanying text.

394 See above n 246 and accompanying text.

395 See, eg, text accompanying above n 380 and following.

396 See, eg, above n 245 and accompanying text.

397 See, eg, text accompanying above nn 372–3.

398 See, eg, above n 182 and accompanying text.

399 See generally Justice G F K Santow and George Williams, 'Taking the Legalism out of Takeovers' (1997) 71 *Australian Law Journal* 749.

400 See generally Emma Armonson, 'Models for Takeover Dispute Resolution: Australia and the UK' (2005) 5 *Journal of Corporate Law Studies* 401.

## IV CONCLUSION

Since takeover legislation was introduced in Australia in 1961, there have been important legislative changes around the beginning of each subsequent decade leading up to the most recent significant package of reforms in 2000. Complexity in the legislation increased particularly in the first half of this time period, with a cycle of amendments responding to loopholes leading to further amendments. In 1983, the Government recognised that this had led to ‘over-regulation’ and much litigation, in contrast to the ‘commercial approach’ that it sought.<sup>401</sup> Of the legislative reforms since then, some of the most significant changes involved the introduction of the CSP in 1991 and its transformation in the CLERP reforms in 2000 to replace the courts in resolving takeover disputes. Although the drafting of the takeover provisions was simplified at the same time as the latter reforms, the basic framework of the provisions is otherwise similar to the takeover code introduced by *CASA* in 1981.

Consistent with the UCA’s key aims of disclosure and investor protection in 1961, the primary focus of the takeover provisions has been on ensuring that shareholders in the target company are properly protected. This was reinforced in the review of the UCA in the *Eggleston Report* in 1969. The *Eggleston Report* has had an enduring impact on the takeover provisions, with the resulting Eggleston principles designed to provide appropriate disclosure, time and equality between shareholders becoming its key touchstone. Although the equal opportunity principle arguably now operates more broadly than the Eggleston committee had originally intended, its crucial importance in the takeover regulatory framework was confirmed in 1997 in the context of the CLERP reform proposals. In contrast, the Masel principle aim of ensuring an ‘efficient, competitive and informed market’ has become more prominent in legislative developments over time. Initially only taken into account in the context of the regulator’s decisions on takeover exemptions and modifications, the Masel principle was given equal status to the Eggleston principles as a key purpose of the takeover provisions under the CLERP reforms in 2000. While the Eggleston principles form the basis of many of the substantive requirements in the current legislation,<sup>402</sup> the Masel principle is relied on frequently in Panel decisions.<sup>403</sup> Accordingly, notwithstanding the tension between these two principles and their development over time, they both continue to play a fundamental role in the operation of Australian takeover regulation.

Over the same time period, takeover law has transformed from relying solely on black letter law to becoming a hybrid system based on detailed legislation and regulatory discretions. It has been argued that such a hybrid approach is ‘possibly the best system’.<sup>404</sup> This has corresponded with a shift away from takeover dispute resolution by the courts to the Takeovers Panel. Both of these

401 See above n 153 and accompanying text.

402 See, eg, *Corporations Act 2001* (Cth) ss 621(3), 623(1), 633(1), 636(1), 638(1)–(3).

403 See above nn 309–14 and accompanying text.

404 Farrar, above n 19, 9.

changes have provided greater flexibility in administering the legislation. In particular, this allows ASIC to provide exemptions from and modifications to the takeover provisions where the application of the law is not appropriate in particular circumstances, taking into account the purposes underlying the takeover provisions.<sup>405</sup> Similarly, the Panel applies the same purposes in making declarations of unacceptable circumstances to ensure that the ‘spirit’ of the takeover provisions is complied with. This allows the Panel to adopt a less technical approach, consistent with the broad aim of it adopting a ‘commercial’ approach in its decision-making. However, this flexibility also has the potential to create uncertainty for market participants, particularly when the Panel first applies new policies. Other difficulties arise from the potential conflict between the operation of the Masel and Eggleston principles, and the possibility of challenges to Panel decisions through the judicial review process. Whether it is an ‘effective’ panel for dispute resolution as proposed in the CLERP reforms warrants further study.

405 However, this also reduces the pressure on the Parliament to rectify difficulties with the legislation: see above n 356 and accompanying text.