Takeovers: A stronger panel

A strong submission by the Securities Institute has influenced the government’s revision of the role of the Corporations and Securities Panel, ensuring a more effective mechanism for the regulation of takeovers.

The Securities Institute has long advocated reconstitution of the Corporations and Securities Panel and enhancement of its powers to make it the primary forum for the resolution of takeover disputes in this country.

This is because the panel has proved to be ineffective in its current form, having dealt with very few disputes since its establishment in 1991. The panel’s failure has been attributed to its inadequate powers and its dependence on the Australian Securities and Investments Commission (ASIC) for referrals.

Australia’s experience contrasts markedly with that of the United Kingdom where, from the time of its inception in 1968, the industry-based Takeovers Panel has regulated more than 6,000 announced bids, as well as half as many again where no bid was announced. The UK panel’s reputation for speed and flexibility has meant that very few takeover disputes go to court.

The UK panel is independent of the Securities and Investments Board and the Department of Trade and Industry, operating on the basis of self-regulation and consent. It ensures compliance with its rulings through:

- companies and their advisers knowing that, if necessary, it will issue critical public statements during the course of a takeover bid;
- financial institutions being required to “cold-shoulder” any company considered not likely to comply with its rulings;
- in the event of a breach of its rulings, the risk of those dealing in the securities markets being considered no longer fit and proper to be authorised to carry on investment business.

In Australia, it is widely accepted that cultural differences and a propensity to litigate make self-regulation impossible and that compliance with panel rulings must be enforced by statute. However, there has been general support for proposals to expand the role of the panel to make it, rather than the courts, the primary forum for resolving takeover disputes, and therefore preventing litigation being used as a tactical measure in takeovers.

Under the Corporate Law Economic Reform Program (CLERP), the government initially proposed limited expansion of the panel’s powers to enable it to deal with cases where unacceptable conduct was alleged or where a ruling was sought in relation to ASIC’s exemption or modification policy. However, the panel would not have had the power to step into the void created by ousting the courts’ jurisdiction to hear a dispute during a bid.

The Institute supported the general thrust of making the panel the primary forum for takeover disputes. However, we argued strongly for the panel’s powers to be expanded even further if it was to be effective in this role.

In our initial submission to the government, we suggested that the panel should comprise a president and a number of other persons, including market participants with takeover experience, drawn from public companies, corporate advisory firms and legal firms, much along the lines of the UK Takeovers Panel. We submitted that the panel should also have its own core staff, augmented by secondees from various disciplines for periods of up to 12 months, rather than using ASIC personnel.

We submitted that for the panel to operate effectively, it should be empowered to:

- initiate its own inquiries;
- make its own rules;
- determine market conduct to be acceptable as well as unacceptable;
- hear applications from a wider range of persons; and
- make a wide range of orders.

These proposals were widely supported and led to the government moving significant amendments to the panel provisions in CLERP during debate in the Senate.

The amendments satisfy most of our concerns by:

- empowering the panel to make appropriate declarations and orders where a person has contravened the takeover provisions in Chapter 6 during the bid period;
- enabling the panel make or decline to make a declaration where it considers it is not against the public interest after taking into account relevant policy considerations;
- providing the panel with rule-making powers;
- enabling the court to refer a matter to the panel for review; and
- providing a mechanism for the internal review of panel decisions.

The Institute believes that an appropriately empowered and reconstituted panel will be able to deal with takeover disputes quickly and efficiently on the basis of commercial merit. This will lead to increased market confidence and a reduction in tactical litigation and associated costs.