



No: 84/2006

Thursday, 7 September 2006

PROPOSED CORPORATIONS ACT AMENDMENTS

The Takeovers Panel welcomed the announcement today by the Treasurer, the Hon Peter Costello MP, releasing the draft Corporations Amendment (Takeovers) Bill 2006 for public exposure.

The Bill will amend provisions in Chapter 6 of the *Corporations Act 2001* relating to the operations of the Takeovers Panel.

The President of the Panel, Mr. Simon McKeon, welcomed the draft Bill. Mr McKeon said that the Bill will ensure that the Panel can continue to operate effectively, in the manner intended by Parliament, as the main forum for resolving takeover disputes during a bid.

The draft Bill and explanatory material is attached and can also be found at www.treasury.gov.au

<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1152>

Written comments on the draft bill may be submitted by mail, fax or email to the following address (to be received by 5 October 2006):

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The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

EXPOSURE DRAFT (08/08/2006)

**Corporations Amendment (Takeovers)
Bill 2006**

No. , 2006

(Treasury)

A Bill for an Act to amend the *Corporations Act 2001*, and for related purposes

EXPOSURE DRAFT (08/08/2006)

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A Bill for an Act to amend the *Corporations Act 2001*, and for related purposes

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Corporations Amendment (Takeovers) Act 2006*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Corporations Amendment (Takeovers) Bill 2006

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	
2. Schedule 1	The 28th day after the day on which this Act receives the Royal Assent.	

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments of the takeovers provisions

Corporations Act 2001

1 Section 9

Insert:

substantial interest: an interest in a company, listed body or listed managed investment scheme may be a **substantial interest** in the company, body or scheme even if it is not constituted by one or more of the following:

- (a) a relevant interest in securities in the company, body or scheme;
- (b) a legal or equitable interest in securities in the company, body or scheme;
- (c) a power or right in relation to:
 - (i) the company, body or scheme; or
 - (ii) securities in the company, body or scheme.

2 Paragraph 657A(2)(a)

Omit “of the circumstances”, substitute “that the Panel is satisfied the circumstances have had, are having, will have or are likely to have”.

3 Paragraph 657A(2)(b)

Repeal the paragraph, substitute:

- (b) are otherwise unacceptable (whether in relation to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have in relation to the company or another company or in relation to securities of the company or another company) having regard to the purposes of this Chapter set out in section 602; or
- (c) are unacceptable because they:
 - (i) constituted, constitute, will constitute or are likely to constitute a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C; or
 - (ii) gave or give rise to, or will or are likely to give rise to, a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C.

4 Paragraph 657D(1)(a)

Repeal the paragraph, substitute:

- (a) each person to whom the proposed order would be directed; and

5 Paragraph 657D(2)(a)

Repeal the paragraph, substitute:

- (a) if the Panel is satisfied that the rights or interests of any person, or group of persons, have been or are being affected, or will be or are likely to be affected, by the circumstances—protect those rights or interests, or any other rights or interests, of that person or group of persons; or

6 At the end of section 657EA

Add:

- (5) Despite section 657B, the Panel can only make a declaration under section 657A after conducting a review under this section if the declaration is made within:
- (a) 3 months after the circumstances in relation to which the declaration is made occur; or
 - (b) 1 month after the application for review was made;
- whichever ends last. The Court may extend the period on application by the Panel.

7 At the end of Chapter 10

Add:

Part 10.8—Transitional provisions relating to the Corporations Amendment (Takeovers) Act 2006

1478 Application of amendments of the takeovers provisions

- (1) The amendments made by Schedule 1 to the *Corporations Amendment (Takeovers) Act 2006* apply in relation to an application under section 657C (including any review under section 657EA of the decision made on the application) if:
- (a) the application under section 657C is made on or after the commencement of that Schedule; or
 - (b) the application under section 657C was made before the commencement of that Schedule but the Panel has not finally disposed of the application before the commencement of that Schedule.

For the purposes of paragraph (b), the Panel does not finally dispose of an application under section 657C until the Panel has disposed of any review under section 657EA of the decision made on the application.

- (2) To avoid doubt, the amendments apply in relation to the application even if the circumstances to which the application relates arose before the commencement of Schedule 1 to the *Corporations Amendment (Takeovers) Act 2006*.

Corporations Amendment (Takeovers) Bill 2006 — Explanation

Outline

The draft Bill amends the provisions of the Corporations Act which relate to the Takeovers Panel. It is designed to allow the Panel to continue to act:

- in an informal, effective, efficient and expeditious manner,
- as the primary forum for resolving disputes during takeover bid periods,
- relying on the specialist expertise of its members,

so that the outcome of any takeover bid can be resolved by the target shareholders on the basis of its commercial merits.

The fundamental objective underlying the takeovers law is to ensure that the purposes set out in section 602 of the *Corporations Act 2001* are achieved, and in particular that the acquisition of control over the voting shares or voting interests in companies ('companies' here includes listed bodies and listed managed investment schemes) takes place in an efficient, competitive and informed market. The Panel requires broad and flexible powers to perform the role envisaged for it, of being 'the main forum for resolving disputes about a takeover bid until the bid period has ended' in accordance with those principles.

Two recent decisions relating to the Takeovers Panel, *Glencore International AG v Takeovers Panel* [2005] FCA 1290 and *Glencore International AG v Takeovers Panel* [2006] FCA 274, have interpreted the limits of the jurisdiction of the Takeovers Panel, as set out in the current legislation. As a result of those cases, concerns have been raised that it may be open to read the Panel's powers and jurisdiction in the current legislation in a way that is too narrowly formulated to enable the Panel to perform effectively the role envisaged for it by Parliament.

In particular there were concerns that:

- the interpretation of the term '*substantial interest*' in the decisions, based on existing defined provisions, may prevent the Panel from being able to deal with new and developing interests and tactics in relation to takeovers;
- the Panel may not be able to act to prevent the effects of unacceptable circumstances (even if clearly apprehended), but rather, may need to wait until those effects, and the consequent harm, have actually occurred;
- the Panel may not be able to address all the circumstances which impair or affect the efficient, competitive and informed market for control of voting securities in companies or affect the control of companies; and
- under the interpretation set out in the *Glencore* decisions, the Panel's power to make orders to protect the rights or interests of persons affected by unacceptable circumstances may be too confined, with the result that the Panel may not be able to properly address the effects that the circumstances have on the interests of those persons.

The draft *Corporations Amendment (Takeovers) Bill 2006* responds to those concerns and also addresses concerns about the limits of the orders the Panel can make and the time-limit for concluding a review of a Panel decision.

Summary of the key amendments in the Bill

The draft Bill will, if passed, have the following principal effects:

- The proposed definition of ‘substantial interest’ will state that a ‘substantial interest’ is not confined to the defined term of ‘relevant interest’; legal or equitable interests in securities; or powers or rights in relation to a company, body or scheme or securities in it.
- Subsection 657A(2)(a) will allow the Panel to take account of what the Panel is satisfied to be the past, present or likely future effects of circumstances. This will allow the Panel to take action to prevent likely future effects of circumstances which are brought before it, rather than being required to wait for the effects, and their consequent harm, to have occurred.
- Subsection 657A(2)(b) will allow the Panel to declare circumstances to be unacceptable having regard to the purposes of the takeovers provisions, as set out in section 602 of the Act.
- Section 657D(1) will be amended so the Panel, before making an order, is required to give an opportunity to make submissions to each person to whom a proposed order is directed, rather than to each person to whom a proposed order relates (as at present). There could be tens of thousands of people in the latter category, including each current and potential shareholder in the relevant companies.
- Section 657D(2) will be amended so that, where the Panel is satisfied the rights or interests of any person have been, are being, will be or are likely to be affected by unacceptable circumstances, then the Panel may make the orders it thinks appropriate to protect any rights or interests of that person. This will allow the Panel to address the effects of the unacceptable circumstances and protect the interests of those persons more effectively. Section 657D(2) will also be amended to ensure that the Panel may make orders which protect the interests of a group of persons whose interests have been affected, rather than imposing any requirement to address the effects person by person.
- Section 657EA will be amended so the time limit for the Panel to make a declaration when reviewing the decision of another Panel runs from the time when the application for review is filed, not from the time when the original application is filed. Currently the legislation does not specifically address the time limits for review proceedings.