Unlocking Efficiency in Public M&A: Assessing Ways to Improve the Effectiveness of Australia's Market for Corporate Control Transactions

Word Count: 9,977

Submitted in fulfilment of the requirements for 76040 Research Thesis, Spring Semester 2023, at the University of Technology Sydney

PREFACE

Australia's regulatory framework for corporate control transactions (CCT's) aims to strike a balance between protecting shareholders and ensuring market efficiency. While both objectives are important in regulating CCT's, there is a tension between providing shareholders with an equal opportunity to benefit from control transactions and the need for such transactions to occur in an efficient market. Influenced by historical and cultural factors, the Corporations Act 2001 (Cth) currently prioritises shareholder interests over market efficiency. This approach discourages potential takeovers and reduces incentives for a company's management to operate efficiently. Therefore, this article proposes reforms to enhance the efficiency of Australia's CCT regime, drawing inspiration from the United Kingdom Takeovers Code, which has a reputation for promptly and efficiently resolving such matters.

STATEMENT ON ARTIFICIAL INTELLIGENCE

This work has been carried out by me without the aid of generative artificial intelligence tools.

CONTENTS

INTRODUCTION

Corporate control transactions ('CCT's') play a critical role in ensuring that Australia's economy remains efficient and competitive. In the public M&A market, these transactions handled $45.4 billion in 2022.[1] If regulated effectively, such transactions allow control of a company to shift to those who can manage corporate assets most profitably.[2] The threat of such transactions also provides a strong incentive for a company's management to ensure that it is operating efficiently.[3]

On one hand, the changes brought by the *Corporate Law Economic Reform Program Act 1999* (Cth) ('CLERP Reforms') have enhanced investor and market confidence in Australia.[4] In particular, the CLERP reforms introduced compulsory acquisition provisions which allowed persons who had acquired an overwhelming majority of a security class or all securities to benefit from the efficiency gains associated with one hundred percent control.[5] The reforms also placed greater emphasis on disclosure of material information, with civil liability being imposed for misleading or deceptive target and bidder statements and criminal liability where such information was material to target shareholders.[6]

The reconstitution of the Australian Takeover Panel (the **'**Panel') has also minimised tactical litigation and reduced legal costs for both regulators and private parties.[7] Having a body of industry experts hear takeover disputes has brought a commercial and pragmatic approach to decision making.[8] The *Corporations Amendment (Takeovers) Act 2007* (Cth) ('2007 amendments') has also significantly strengthened the Panel's position in the context of judicial review, by narrowing the grounds for appeals of the Panel's decision making.[9]

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[1] Gilbert & Tobin, *Takeovers + Schemes Review 2023* (Report, 2023).
[2] Emma Armson, 'Evolution of Australian Takeover Legislation' (2014) 39(3) *Monash University Law Review* 654.
[3] Jonathan Farrer, 'Reforming Australia's Takeover Defence Laws: What Role for Target Directors?' (1997) 8(1) *Australian Journal of Corporate Law*, 1.
[4] *Corporate Law Economic Reform Program Act 1999* (Cth) ('CLERP Reforms').
[5] Ibid ch 6A.
[6] Ibid s 670A, 670B.
[7] Jonathan Farrer, Simon McKeon and Ian Ramsay, 'Takeover dispute resolution in Australia and the United States - Takeovers panel or courts?' (2015) 33(5) *Company and Securities Law Journal,* 341.
[8] Emma Armson, 'Flexibility in decision-making: an assessment of the Australian Takeovers Panel' (2017) 40(2) *University of New South Wales Law Journal, 460.*
[9] *Corporations Amendment Act 2007* (Cth) ('2007 amendments').

However, there is currently no general requirement that a target company should provide rival bidders with equal access to information about the target. This empowers target boards to selectively provide information to certain bidders at the exclusion of others.[10] The procedure for conducting a takeover through a scheme of arrangement has also become encumbered with increasing complexity, time and expense. Consideration should be given to whether scheme court hearings, which are often quite costly, could be more streamlined.

Furthermore, the United Kingdom ('UK') has several features that Australian regulators could consider to better manage the interests of bidders and target shareholders. In particular, the UK Takeovers Panel (the 'UK Panel') can make binding rulings, which give certainty to applicants about how a decision-making body will apply the law.[11] Amendments to the UK Takeovers Code (the '2011 amendments') have also addressed the issue of prolonged virtual bids, which were seen to encourage shareholders to sell to merger arbitrageurs more interested in short-term gains rather than the longevity of target companies.[12]

Accordingly, the structure of this article is as follows. Part I provides an overview of Australia's current CCT regime. Part II discusses areas of effectiveness in Australia's CCT regime. Part III considers current unresolved issues within CCT in Australia. Part IV highlights major differences from the UK's model, and Part V offers a model for reform.

This article finds that Australia's takeover laws offer a high degree of protection for target shareholders. However, further measures are necessary to adequately address the policy objective of an efficient market for corporate control. In particular, this article recommends a put up or shut up rule, streamlined procedures for conducting members' schemes of arrangement and various changes to the application of the equal opportunity principle.

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[10] Jason Van Grieken, 'AusNet battle could see Takeovers Panel rewrite rules', *Australian Financial Review* (Sydney, 10 October 2021).
[11] *The City Code on Take-overs and Mergers 2013* (UK) ('UK Takeovers Code') A11.
[12] UK Panel, *Review of Certain Aspects of the Regulation of Takeover Bids: Response Statement By The Code Committee of the Panel Following the Consultation on PCP 2011/1* (21 July 2011).

I) AN OVERVIEW OF AUSTRALIA'S CURRENT CCT REGIME

A) *Takeover Bids*

Australia's takeover rules under chapter 6 of the *Corporations Act 2001* (Cth) ('the Act') regulate acquisitions of relevant interests in all Australian public companies, managed investment trusts and unlisted companies with more than 50 shareholders.[13] Pursuant to section 606 of the Act, a person cannot acquire a relevant interest in the voting power of a company, that would cause that person's, or any other person's, voting power in the company to exceed 20% (the '20% rule').[14] However, it is possible to move beyond the 20% rule through one of a number of specified exemptions.[15] In particular, takeover bids have become one of the key ways in which control of Australian companies has been acquired.[16]

A takeover bid involves a vendor (the 'bidder') approaching the shareholders of a target company seeking to purchase their shares, either directly or via the share market.[17] There are two types of takeover bids; off-market or on-market takeover bids. The benefit of an off-market takeover bid is flexibility due to the range of conditions that may be imposed.[18] In comparison, a market takeover bid must be an unconditional cash offer for all the securities in a bid class.[19]

In a takeover bid, the bidder must proceed within two months of publicly proposing to make an offer under section 631 of the Act.[20] The bidder must also prepare a statement that discloses their intentions regarding the continuation of the target and any future employment of the employees of the target.[21] Supplementary statements are required if the bidder becomes aware of a misleading or deceptive statement that is material from the point of view of a shareholder.[22]

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[13] *Corporations Act 2001* (Cth) ('the Act') s 602.
[14] Ibid s 606.
[15] Ibid s 611.
[16] Hudson Archer et al, 'Australian Public M&A Report 2022', *Herbert Smith Freehills* (Report, 21 September 2022) 17.
[17] Armson (n 2) 655.
[18] John Elliot, 'Takeovers in Australia', *Norton Rose Fulbright* (Report, 18 March 2019) 11.
[19] The Act (n 13) ss 617, 618.
[20] Ibid s 631.
[21] Ibid s 636.
[22] Ibid s 643.

The target must also offer its recommendations on the bid to shareholders in a document known as the target statement.[23] If there are common directors with the bidding firm or if the bidding firm holds 30% or more of the target, an independent expert's report must accompany the target statement.[24] Persons involved in the preparation of the bidder's and target's statements are subject to civil liability for any misleading or material omissions and criminal liability where such information was material to target shareholders.[25]

During the offer period, bidders are not permitted to confer any collateral benefits that induce a shareholder to accept the bid unless the same benefits are offered to all shareholders, which is known as the 'collateral benefits rule'. Furthermore, the minimum bid price rule provides that the consideration for a takeover bid cannot be less than the highest price at which target shares were acquired or agreed to be acquired by the bidder during the 4 months preceding the bid.[26] There is also a prohibition on escalator agreements that commit to pay shareholders an amount that is based on the offer price under a takeover bid.[27]

Acquisitions of 100% of the target shareholding are only assured after the bidder acquires at least 90% of the voting power, which allows it to compulsorily acquire the remaining shareholding.[28] This involves the bidder sending notices to all remaining target shareholders, and there is a specified period during which these shareholders can object to the acquisition in court on very narrow grounds.[29]

B) *Schemes of Arrangement*

A scheme of arrangement is a procedure under Part 5.1 of the Act that requires approval from shareholders and the court.[30] Schemes are commonly used to effect the same outcome as a friendly takeover bid, by transferring shares from the target to the bidder. Schemes of arrangement have become the preferred method for effecting a takeover in Australia as they offer an 'all or nothing outcome'.[31] If a scheme is approved, the bidder

[23] Ibid s 638.
[24] Ibid s 640.
[25] Ibid s 670A, 670B.
[26] Ibid s 621(3).
[27] Ibid s 622.
[28] Ibid pt 6A.1.
[29] Ibid s 661B.
[30] The Act (n 13) pt 5.1.
[31] Gilbert & Tobin (n 1).

has certainty that it will reach 100% ownership, whereas in a takeover bid, absolute ownership is only guaranteed when the bidder acquires a relevant interest in 90% of the share capital.

The procedure to implement a scheme of arrangement involves two stages of court approval. At the first hearing, the target seeks orders to convene the scheme meeting and approval to dispatch a scheme booklet.[32] Once the scheme meeting has been convened, a resolution must be passed by more than 50% of the shareholders of the target present or voting by proxy and at least 75% of the votes cast at the special resolution.[33] At the second hearing, the court either accepts or rejects the scheme having regard to the requirements of the Act. In particular, section 411(17) precludes the court from approving a scheme unless it is satisfied that the purpose of the scheme was not to avoid the takeover provisions and ASIC has issued a statement of no objections.[34]

C) *The Panel*

The Panel has been the main forum for resolving takeover disputes since the CLERP reforms. Its procedures are less formal than the courts.[35] The Panel adjudicates matters with a sitting panel which comprises three members from the current total of 52 part-time appointees from a range of fields, including law and investment banking.[36] There is also an internal review panel comprising another three members, which reviews declarations of unacceptable circumstances.[37]

An interested party can apply to the panel instead of the courts during a takeover attempt.[38] The Panel can declare circumstances unacceptable, having regard to the considerations under section 657A of the Act.[39] The Panel's task once a declaration has been made is to place the parties in a position, they would have been in had the circumstances not occurred.

[32] Elliot (n 18) 17.
[33] The Act (n 13) s 411(4).
[34] Ibid s 411(17).
[35] Emma Armson, 'Lessons for the Australian Takeovers Panel from the United Kingdom' 29(3) *Australian Journal of Corporate Law* 295.
[36] The Panel, *Annual Report 2021-2022* (Report, 12 August 2022).
[37] The Act (n 13) s 657EA.
[38] Ibid s 657C.
[39] Ibid s 657A.

The Panel is not able to order a person to comply with a requirement the Act for constitutional reasons.[40] However, it can make a broad range of orders, including restraining the exercise of voting rights and directing the disposal of shares.[41] The Panel also has jurisdiction to review certain ASIC decisions, namely those relating to the exercise of ASIC's exemption and modification powers.[42] Both types of decisions by the Panel are subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1997* (Cth).[43]

D) *The Role of ASIC*

The Australian Securities and Investment Commission (ASIC) has various powers with respect to takeovers, including the ability to grant relief from provisions in the takeover rules through legislative instruments ('class orders') and case-by-case relief.[44] ASIC can also apply to the Panel for declarations of unacceptable circumstances, seek penalties from the court and commence certain prosecutions.[45]

ASIC also monitors the conduct of market participants making public statements leading up to and during a takeover bid in accordance with its Truth in Takeovers Policy ('TTP').[46] This includes taking regulatory action for misleading and deceptive conduct against market participants that make a 'last and final statement' and depart from it.[47] ASIC also reviews scheme booklets before they are submitted to the court, makes submissions to the court and considers whether it is appropriate to issue a statement of no objections.[48]

E) *Competition* and *Consumer Act*

Section 50 of the *Competition and Consumer Act 2010* (Cth) ('CCA') prohibits takeovers and mergers that would "have the effect or be likely to have the effect of substantially

[40] *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83.
[41] The Act (n 13) s 657D.
[42] Ibid s 656A.
[43] *Administrative Decisions (Judicial Review) Act 1997* (Cth) s 5.
[44] The Act (n 13) s 655A.
[45] ASIC Regulatory Guide 6, *Takeovers: Exceptions to the General Prohibitions* (October 2020).
[46] Emma Armson, 'Truth in Takeovers for Substantial Holders' (2018) 36(6) *Company and Securities Law Journal* 464.
[47] ASIC Regulatory Guide 25, *Takeovers: False and Misleading Statements* (August 2002)
[48] ASIC Regulatory Guide 60, *Schemes of Arrangement* (September 2020).

lessening competition in a market".[49] The Australian Competition and Consumer Commission ('ACCC') has various actions at its disposal in case of a breach of section 50, including applying to the federal court for an injunction.[50]

Parties involved in a proposed transaction can seek either informal non-binding merger clearance, or formal merger authorisation, which provides legal protection. For authorisation to be granted, the ACCC must be convinced that the proposed acquisition either does not substantially reduce competition in a market or, conversely, results in a net public benefit.[51]

F) *Foreign Acquisition and Takeovers Act*

Under the *Foreign Acquisition and Takeovers Act 1975* (Cth), a foreign person must obtain approval before undertaking an action that constitutes a 'notifiable action', 'significant action' or 'notifiable national security action'.[52] This process is overseen by the Treasurer based on recommendations from the Foreign Investment Review Board ('FIRB').[53] Additionally, FIRB has various compliance mechanisms, including monitoring and investigatory capabilities, the authority to issue infringement notices, and penalties for non-compliance.[54] Accordingly, the next section of this article considers specific areas of efficiency within this regime.

[49] *Competition and Consumer Act 2010* (Cth) ('CCA') s 50.
[50] Ibid s 80(1A).
[51] Ibid s 90(7).
[52] *Foreign Acquisition and Takeovers Act 1975* (Cth) ss 39-49.
[53] Ibid pt 3.
[54] Ibid pt 5.

II) AREAS OF EFFECTIVENESS IN AUSTRALIA'S CCT REGIME

A) *The Legacy of the Eggleston Principles*

Australia has traditionally demonstrated a strong commitment towards protecting investors in takeovers, particularly minority shareholders. In 1967, the Standing Committee of Attorney Generals appointed an advisory committee on public companies, which was chaired by Sir Richard Eggleston. At that time, mining booms were growing the Australian stock market and simultaneously, issues such as insider trading and market manipulation were widespread.[55] In this context, the Committee released its Second Interim Report, which identified four principles related to acceptable conduct in takeovers of public companies.[56] They were:

(1) shareholders and directors know the identity of any person who proposes to acquire a substantial interest ('identity principle');
(2) shareholders and directors have a reasonable time to consider a proposal ('reasonable time principle');
(3) shareholders and directors are given enough information to enable them to assess the merits of a proposal ('disclosure principle'); and
(4) all shareholders have a reasonable and equal opportunity to participate in any benefits ('equal opportunity principle').

These four principles are considered to be the drivers of Australia's takeover legislation and are embodied in section 602 of the Act. The Act also contains a number of mechanisms that have been built around Sir Richard Eggleston's 'equitable jurisprudence'. The identity principle has been reflected through a requirement that shareholders must supply the Australian Securities Exchange (ASX) with particulars on their identity when acquiring or divesting a substantial holding (equivalent to a relevant interest of 5% in a listed company or MIS), when there is a change of 1% or more, or when making a takeover bid involving securities.[57]

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[55] Benedict Sheehy, 'Australia's Eggleston principles in takeover law: Social and economic sense?' (2004) 17(2) *Australian Journal of Corporate Law* 218.
[56] Company Law Advisory Committee, Parliament of Australia, *Second Interim Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and Takeovers* (Parliamentary Paper no 43, February 1969).
[57] The Act (n 13) s 671B.

Furthermore, the reasonable time principle has been addressed through a legislative requirement that a takeover offer must be open for a minimum of one month.[58] In relation to schemes, target shareholders must also be given at least twenty seven days notice before a scheme meeting can be held.[59] The disclosure principle is also reflected in the range of disclosures that must be made through bidder and target statements to shareholders.[60]

Finally, there are several iterations of the equal opportunity principle in Australia's current takeover laws. For example, compulsory acquisition rules prevent investors from becoming stranded as minority shareholders post takeover. Takeover bids must also offer the same terms to all target shareholders. The collateral benefits rule, minimum bid price rule and the prohibition on escalator agreements are additional safeguards intended to secure a fair distribution of property rights among target shareholders.[61]

Australia's preference for protecting investors in takeover regulation is unique amongst developed nations. As Mannolini argues, it is perhaps symbolic of Australia's cultural ethos of "a fair go for all".[62] Furthermore, Kardi argues that this emphasis has supported widespread participation in securities markets and increased the liquidity of Australia's M&A market.[63] It is also argued that the ongoing retention of the equal opportunity principle has been necessary to provide 'mum and dad' investors with a level of 'buy in', which they would simply not have in an unregulated market for corporate control.[64]

B) *The Panel*

Since 1991, there has been a move towards resolving takeover disputes by non-judicial bodies.[65] Initially, regulators were able to seek a declaration of unacceptable circumstances from the Corporations and Securities Panel (CSP).[66] However, the CLERP reforms transformed the role of the CSP by allowing any interested party to apply for a

[58] Ibid s 624.
[59] Ibid s 249HA.
[60] Ibid s 638.
[61] Justin Kardi, 'Placing the Eggleston Principles in Australia's Takeovers Legislation: Flexible Guide Or Uncompromising Goal?' (2018) 18(6) *UNSW Law Journal Student Series* 6.
[62] Justin Mannolini, 'Convergence or Divergence: Is There a Role for the Eggleston Principles in a Global M&A Environment' (2002) 24(3) *Sydney Law Review* 336, 339.
[63] Kardi (n 61).
[64] Mannolini (n 62) 339.
[65] *Corporations Act 1989* (Cth) s 733.
[66] Ibid.

declaration.[67] Consequently, the Panel, as the CSP was later renamed, became the primary forum for resolving takeover disputes.

Empirical studies on the Panel's operation after the CLERP reforms suggest that the Panel initially found it difficult to ensure timely decision-making, particularly in handling related party applications.[68] However, a study of panel decisions over the past decade of reporting history (shown in Annexure A), indicates that the Panel has transitioned to an active participant. On average, it took the Panel a little over two weeks (18.36 days) to reach decisions on applications and a little over three weeks (22.78 days) after a decision to publish its reasons.

Compared to the relative efficiency of takeover decisions, other civil and commercial matters in Australian tribunals and courts take much longer. The Administrative Appeal Tribunal took a median of 214 days to resolve commercial dispute matters in the 2021-2022 calendar year.[69] Indeed, according to the Productivity Commission, the average resolution time for all tribunal cases in Australia is three months.[70] It is also relevant to note that roughly 40% of civil matters heard in the courts extended beyond 12 months in the 2022 calendar year.[71]

At the same time, there are also studies which point to a reasonable balance between certainty and flexibility in the Panel's decision making.[72] As noted by Armson, the Panel initially clarified in *Taipan 06* that it would not automatically adhere to ASIC's TTP in situations where it might be inappropriate to do so.[73] Subsequently, the Panel has maintained a consistent approach in implementing this policy, as illustrated in cases where parties were not held to their last and final statements due to factors such as mistake and misleading information, Panel interventions, impracticability, or ambiguity regarding

[67] CLERP Reforms (n 4) ss 657C, 659AA–659C.
[68] Emma Armson, 'An Empirical Study of the First Five Years of the Takeovers Panel' (2005) 27(4) *Sydney Law Review* 35.
[69] Administrative Appeals Tribunal, *Annual Report 2021-2022* (Report, 23 September 2022) 71.
[70] Productivity Commission, *Access to Justice Arrangements Inquiry Report* (Report No 72, 5 September 2014).
[71] Productivity Commission, *Report on Government Services 2023* (Report, 31 January 2023).
[72] Armson (n 8).
[73] *Taipan Resources NL 06* (2000) ATP 15.

responsibility.[74] In such scenarios, expecting the TTP to be strictly implemented would not have been reasonable.

What risks undermining the efficiency of the Panel is judicial review. Indeed, the first two judicial review applications ('the Glencore cases') concerning decisions made by the panel raised concerns about the possibility of a continuing pattern of parties seeking judicial review.[75] Notably, in the first Glencore case, Emmet J held that the Panel had erred in making orders pursuant to sections 657A(2) and 657D(2)(a) of the Act.[76] As argued by Professor Emma Armson, these cases generated "substantial concerns that the Panel's jurisdiction had been interpreted too narrowly for it to perform its role effectively".[77]

However, the 2007 amendments clarified the Panel's responsibility to assess the impact of relevant circumstances under section 657A(2)(a) and expanded its authority to protect the rights of all affected parties under section 657D(2)(a), not just those influenced by the relevant circumstances.[78] Subsequently, courts have upheld the constitutional validity of the Panel, dismissing applications in the only two subsequent judicial reviews cases in *CEMEX* and *Alinta*.[79] These developments demonstrate that the 2007 amendments to the Act have strengthened the position of the Panel in the context of judicial review. Accordingly, it is observed that the Panel is another effective aspect of Australia's CCT regime.

C) *Merger Authorisations*

Prior to 2017, there were substantial concerns about the timeliness and transparency of the merger authorisation process in Australia.[80] Parties had two ways to seek an exemption, either through authorisation from the ACCC that a merger did not substantially lessen competition (the 'competition test') or by authorisation from the

[74] *Consolidated Minerals Limited 03* (2007) ATP 25; *Consolidated Minerals Limited 03R* (2007) ATP 28; *Australian Leisure and Hospitality Group Limited 03* (2004) ATP 25; *Warrnambool Cheese and Butter Factory Company Holdings Limited* (2013) ATP 16.
[75] John Durie, 'Takeover Panel Taken to Task', *Australian Financial Review* (Sydney, 15 September 2005).
[76] *Glencore International AG v Takeovers Panel* (2005) 220 ALR 495, 498 (Emmett J).
[77] Armson (n 8).
[78] 2007 amendments (n 9).
[79] *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542; *Cemex Australia Pty Ltd v Takeovers Panel* (2009) 177 FCR 98.
[80] Australian Treasury, *Competition Policy Review* (Final Report, March 2015) 65.

Competition and Consumer Tribunal that a merger resulted in a net public benefit (the 'net public benefit test').

However, the Harper Review made several recommendations, including that these processes be combined in a single formal process, with the ACCC's decision being subject to limited merits review by the Tribunal. Importantly, the Harper Review also recommended that the ACCC be able to authorise a merger if it met either the competition test or the net public benefit test.[81] The Harper Review's recommendations were adopted by the Federal Government, and relevant amendments to the CCA came into effect in November 2017.[82]

Australia now has a transparent and timely process for granting merger authorisations. There is a statutory deadline of 90 days for the ACCC to make a decision (unless otherwise extended), which ensures timely decision making.[83] Applicant submissions and third-party submissions are all made public and available on the public register. This transparent process helps parties understand what has contributed to the ACCC's preliminary views and to rebut submissions made against a merger in a more effective manner.

The Australian merger authorisation process is also one of the few processes in the world to expressly consider the broad concept of 'public benefit' in a merger context.[84] Poddar suggests that adding in broad concepts of public benefit may be less desirable because of questions of weight and predictability as to outcomes.[85] However, as Kotwal argues, the concept of making a decision on authorisation based on commercial reality helps focus attention on the relevant competition issues in the context of the actual market, as opposed to focusing on competition issues in the context of economic theory, which may be disconnected with what is actually taking place in the market.[86] Thus, merger authorisation is another effective aspect of Australia's CCT regieme.

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[81] Ibid 67.
[82] *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) sch 9.
[83] CCA (n 49) s 90.
[84] Dave Poddar, 'Merger Authorisation Processes in Australia in Light of the Tabcorp Decision (It's Hip to Be Square – Hipster Economics and Antitrust)' (2019) 7 *Australian Journal of Competition and Consumer Law.*
[85] Ibid 24.
[86] Ketki Kotwal, 'Commercial reality: Its place in the authorisation of mergers' (2019) 27(1) *Australian Journal of Competition and Consumer Law* 25.

D) *Foreign Acquisitions*

FIRB's most recent performance review of foreign acquisitions estimates that the average application processing time is 48 days, which is slightly above the 30 day statutory target for the Treasurer to make a decision.[87] However, Australia's FIRB screening regime also captures 50 times more than the United States (US) equivalent system.[88] Furthermore, Australia has one of the highest success rates among developed nations, with fewer than 0.1% of FIRB applications being rejected each year.[89] These factors indicate that Australia has an effective regime for review of foreign investments.

Despite the foregoing evidence of the overall effectiveness of many aspects of Australia's CCT regime, there are still areas where its efficiency could be improved, as the following section demonstrates.

[87] Australian Treasury, *Regulator Performance Framework: Administration of Australia's Foreign Investment Framework* (Report, 2021).
[88] Property Council of Australia, Submission to Australian Treasury, *Evaluation of the 2021 foreign investment reforms* (10 September 2021).
[89] FIRB, *Annual Report 2020-2021*, (Report, 4 April 2020).

III) UNRESOLVED ISSUES IN AUSTRALIA'S CCT REGIME

A) *The Masel Principle and Tension With the Equal Opportunity Principle*

The Eggleston principles were later supplemented by a fifth principle, which holds that acquisitions should take place in an 'efficient, competitive, and informed' market. This principle, often referred to as the Masel principle, was formally introduced through the *Companies (Acquisition of Shares) Act 1980* (Cth).[90] As Mannolini argues, the Masel principle signalled a significant shift in takeovers policy from the 'pure equity lawyers' approach' of the Eggleston principles to a focus on the economic objectives of resource allocation and efficiency.[91]

Both adequate competition and information are to some extent prerequisites to an efficient market and theoretically add little as separate requirements. However, the principle that acquisitions should take place in an efficient market for corporate control has a sound basis. As Murphy argues, an efficient market for acquisitions of control puts pressure on senior management of potential target companies to maintain returns.[92] Additionally, efficiency in control transactions ensures that shareholders can make a proper assessment of trading prices.[93]

A subtle form of 'fusion fallacy' has been observed between the Masel principle and the Eggleston principles, under which the Masel Principle is seen as a convenient summary of the Eggleston Principles.[94] However, as Mannolini argues, the better view is that the two principles are 'diametrically opposed'.[95] There is an inherent tension because measures providing equal treatment to shareholders, burden the operation of the free market and increase the cost of takeover activity. Currently, as argued below, the balance between these two principles is distorted, as the equal opportunity principle is prioritised over an efficient market for corporate control.

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[90] *Companies (Acquisition of Shares) Act 1980* (Cth) s 59.
[91] Mannolini (n 62) 338.
[92] Vanessa Murphy, 'Competition and Efficiency at the Mercy of Equality: Balancing the Equal Opportunity Principle and Maintaining a Competitive and Efficient Market' (2020) 37(5) *Company and Securities Law Journal* 341.
[93] Ibid 343.
[94] Mannolini (n 62) 338.
[95] Ibid.

1 *Minimum Bid Price Rule*

There is a strong case that the minimum bid price rule unnecessarily promotes the equal opportunity principle, which hinders the efficiency of Australia's market for CCT's. As Murphy argues, the minimum bid price rule can increase the total consideration paid by the bidder under the bid, which can easily render transactions unprofitable.[96] In particular, the minimum bid price rule may discourage takeovers where there the anticipated business synergies or deployment of the target's resources are uncertain.

Furthermore, as Roger argues, the minimum bid price rule discourages potential bidders from acquiring a pre-bid stake due to the requirement that any consideration for additional share purchases must match or exceed that offered for the pre-bid stake.[97] Empirical evidence suggests that a pre-bid stake increases the chances that an original bidder will follow through with a bid and that the takeover attempt will ultimately be successful.[98] Studies also suggest that bidders with a larger pre bid stake achieve completion in a shorter period of time.[99]

In the event that the minimum bid price rule was abolished, target shareholders would still be able to make an informed decision due to the disclosure requirements in bidders' statements and the commercial pressure that bidders face to make offers that are attractive to target shareholders.[100] As Murphy argues, repealing the minimum bid price rule would also mean that bidders could offer a more appropriate price where market conditions have changed in the four months preceding a takeover bid.[101] Accordingly, the retention of the minimum bid price rule appears an unnecessary application of the equal opportunity principle.

2 *Prohibition on Escalator Agreements*

Another articulation of the equal opportunity principle is the prohibition on escalator agreements, which intends to prevent pre-bid vendors from receiving better acquisition

[96] Murphy (n 92) 347.
[97] Jolyon Rogers, 'Minimum price rule in takeovers: does the minimum price rule promote the equal opportunity principle at the expense of a more efficient market for corporate control?' (2004) 22(2) *Company and Securities Law Journal* 87.
[98] Ibid 96.
[99] Gilbert & Tobin (n 1).
[100] Rogers (n 97) 102.
[101] Murphy (n 92) 359.

terms that other shareholders by 'topping up' their consideration.[102] However, it is noted that courts and the Panel have been reluctant to find that a genuine escalator agreement breaches section 622 in circumstances where there has not been a contravention of the principles in section 602 of the Act.[103]

Furthermore, bidders have developed several alternatives to escalator agreement, which have the same net effect. One such method involves entering into pre-bid sale agreements, where the increased price is technically contingent on the vendor's acceptance into the bid rather than directly tied to the bid price itself.[104] These pre-bid arrangements achieve a similar outcome to escalator agreements but are considered acceptable within the regulatory framework.

The prohibition also unnecessarily applies to circumstances where the result of an escalator agreement is that selling shareholders receive the same consideration as other shareholders in a bid.[105] In such circumstances, all parties are disadvantaged, because a bidder cannot acquire a pre-bid stake in the target, reducing the likelihood of a takeover bid proceeding. In cases of this nature, there is a valid argument that due to their size, substantial shareholders should be allowed to guarantee receipt of the same consideration as other shareholders, especially when the only tangible benefit is early payment for their shares.

B) *Unequal Access to Information*

The latitude that target company boards have with respect to access to information in hostile takeovers falls short of the policy goals of an efficient, competitive and informed market for corporate control. Currently, the Act does not impose any direct duty on directors of target companies to provide equal access to confidential company information amongst rival bidders. Consequently, bidders with limited information may be reluctant to make offers, fearing that they might overpay compared to bidders with more

[102] David Selig and Nathan Greenfield, 'Escalation Agreements – An Escalator To Nowhere?' *Addisons* (Online, 29 July 2009).
[103] *GoldLink IncomePlus Limited 02* [2008] ATP 19.
[104] *Re Advance Property Fund* [2000] ATP 7, [42]– [43].
[105] *GoldLink* (n 103).

information. This dynamic can reduce the likelihood of hostile takeover bids taking place.[106]

There are some safeguards in place to prevent targets from providing unequal access to information without considering the potential effect on shareholders.[107] For example, the Panel has expressed the view that it will be less likely to declare unacceptable circumstances where target shareholders solicit competing proposals for the target, allowing shareholders to select from these options.[108] The Panel has also insisted on equal information access in situations where the senior management of a target company participates in the bidding group.[109]

However, as Langley argues, the protection afforded to rival bidders is somewhat superficial as it puts the onus on rival bidders to show that target directors decisions are lacking in commercial justification.[110] In contrast, US target companies that operate under Delaware's General Corporations Law have a duty to achieve the best value offering available to shareholders during a sale.[111] The so called 'Revlon principle' places the responsibility on target directors to prove that they were adequately informed, and that any decision to restrict access to information was reasonable in the circumstances.[112] It also means that shareholders can challenge target directors' decisions not to grant equal access to information by filing a derivative suit.

C) *Transaction Timings in Schemes*

As shown in Annexure B, a study covering the past five years of corporate control transactions demonstrates that a scheme of arrangement typically takes approximately four months to complete, while a takeover bid requires around three months. The decision of Jackman J in *Re Vita Group Ltd* and the subsequent reissue of the Practice Note SC

[106] Tony Damian and Liam Higgins, 'Cause I'm T.N.T., I'm Dynamite: Nitro Board Navigates the Australian Takeovers Panel', *Herbert Smith Freehills* (Website, 20 February 2023).
[107] Andrew Lumsden and Saul Fridman, 'The Duty to Auction: Real or Imagined' (2012) 30(8) *Company and Securities Law Journal* 493.
[108] The Panel, *Guidance Note 12: Frustrating Action* (16 June 2003) [12.22].
[109] The Panel, *Guidance Note 19: Insider Participation in Control Transactions* (7 June 2007) [25].
[110] Rebecca Langley, 'Information access denied ... Is the Australian takeovers market really efficient, competitive and informed?' (2009) 27(6) *Company and Securities Law Journal* 344, 366.
[111] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* 506 A.2d 173 (Del. 1986).
[112] Langley (n 110) 355.

EQ 4 should be expected to significantly streamline the efficiency of the scheme approval process.[113]

The changes include that it is no longer necessary for parties to provide evidence on how scheme meeting documents will be dispatched, or evidence as to the negotiation of break fees or separate affidavits of consent from the proposed chair and alternate chair of the scheme meetings.[114] These practices had caused the court approval process to become encumbered with increasing complexity, time, and expense. Although there has been a slight decrease in transaction times during 2023 (5 days compared to 2022), as indicated in Annexure B, these changes have not yet had a significant impact on reducing the average length of schemes.

Furthermore, mandatory court approval for all schemes has added an estimated $100 million in additional costs over the past decade, which these costs ultimately being borne by shareholders.[115] Thus, there is merit in removing or reducing the role of the courts in schemes of arrangement. It is worth noting that in the US, which has the largest and most liquid public stock markets globally, mergers can proceed with a 50% shareholder approval vote without any court supervision.

D) *Virtual Bids*

Another issue in takeovers of Australian public companies is the increasing use of bear hugs, also referred to as virtual bids. A virtual bid involves a bidder initiating an unsolicited approach to a target board, before any transaction is actually announced. This strategy aims to draw the proposal to the attention of target shareholders and pressure the board into negotiations.

Research indicates that around 45% of all scheme transactions start with a virtual bid approach.[116] The increasing use of virtual bids has been attributed to the growth of private equity firms in Australia. These firms generally require access to due diligence before financiers can commit to a deal and do not have the ability to bypass the target board and

[113] *Re Vita Group Ltd* (2023) 165 ACSR 576; Supreme Court of NSW, *Practice Note SC EQ 4: Corporations List*.
[114] Ibid [22] - [27].
[115] Rodd Levy and Robert Nicholson, 'Making M&A More Efficient', *Herbert Smith Freehills* (Online, 04 April 2022).
[116] Karen Evans-Cullen, 'Will the bear hug replace the hostile takeover?', *Clayton UTZ* (Online, 29 March 2012).

attempt a hostile takeover attempt. However, the problem with virtual bids is that they can result in a standoff, with a target board rejecting due diligence at the offered price, some shareholders advocating for negotiations, and the target company experiencing prolonged uncertainty and instability.[117]

Accordingly, the following section will compare how the UK takeovers regime has dealt with many of these unresolved issues in ways that might assist Australian regulators to further improve the efficiency of the current system.

[117] Ibid.

IV) FEATURES OF THE UK'S CCT REGIME

A) *The UK Code*

The City Code on Mergers and Acquisitions (the 'UK Code') applies to public companies that have their registered office in the UK, Channel Islands or Isle of Man.[118] It also applies to certain private companies, in particular, when the securities of the company have been traded on a UK regulated market in the ten years prior to the date of a proposed or possible offer.[119]

The UK Code is made up of six general principles and 38 rules. The first three general principles of the UK Code are similar in effect to the operation of the Eggleston Principles in section 602 of the Act. The obvious point of difference is that Australia's statutory regime aims to promote an efficient market for control transactions. This is partially covered by the UK's General principles, which have a much more specific focus on avoiding a false market in relation to securities and ensuring bidders fulfil their obligations under a takeover bid.[120]

B) *The UK Panel*

The UK Panel has an executive, which currently comprises 19 members from "accountancy firms, corporate brokers, investment banks and other organisations".[121] The executive is available for consultation and can give binding rulings on the Code before, during and after relevant transactions.[122]

Reviews of decisions made by the executive are conducted by the Hearings Committee at first instance and the Takeover Appeal Board on appeal.[123] These internal review processes have had minimal impact on the Panel's efficiency, with very few decisions contested, an even smaller number successfully contested, and only a handful of rulings appealed to the Appeal Board.[124]

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[118] UK Code (n 11) r A3.
[119] Ibid.
[120] Ibid r B1(4)-(5).
[121] UK Panel, 'executive' (Online).
[122] UK Code (n 11) r A8.
[123] Ibid r A10.
[124] Selina Sagayam, 'Learnings from Some Recent Contested Cases Before the UK Takeover Panel' (Harvard Law School Forum on Corporate Governance, 17 October 2023).

Notably, the UK Panel has not been significantly affected by applications for judicial review. As Armson notes, the Court of Appeal in *Datafin* made it clear that the role of the Courts was limited, and that judicial review would only be successful in exceptional circumstances.[125] The only two subsequent applications for judicial review following *Datafin* have both been unsuccessful.[126]

The UK Panel can also waive compliance and grant dispensations from the code. This includes the power to attach different conditions to takeover offers and to stipulate an adjusted price to be used as the minimum consideration for the purposes of the UK's minimum bid price rule.[127]

C) *Mandatory Bid Rule*

Rule 9 of the UK Code prevents bidders acquiring an interest in shares which result in the bidder holding 30% or more of the total voting rights in the target.[128] Unlike Australia, the UK Code also has a follow-on or mandatory bid rule which allows bidders to acquire shares above the 30% limit by making a general offer to all other shareholders in the target company.[129]

The mandatory bid rule aims to dissuade acquisitions motivated by private gains and protect minority shareholders, by requiring bidders to pay a premium to gain control over minority shareholders. It also aims to reduce the significant financial costs of takeovers by allowing a bidder to acquire control of a company before rivals can advance a competing bid.

D) *Equal Access to Information*

Rule 21.3 of the UK Code ensures that information shared with one offeror or potential offeror, whether their identity is publicly disclosed or not, must be promptly and equally provided to another offeror, regardless of their level of favourability.[130] Furthermore,

[125] Armson (n 35), discussing *R v Panel on Take-overs and Mergers; Ex parte Datafin plc* [1987] QB 815.
[126] *R. v Panel on Take-overs and Mergers Ex p. Guinness Plc* [1990] 1 QB 146; *R v Panel on Take-overs and Mergers; Ex parte Fayed* [1992] BCC 524.
[127] UK Code (n 11) r 9.3,11.3.
[128] Ibid r 9.
[129] Ibid r 9.1.
[130] Ibid r 21.3.

Note 3 of Rule 21.3 establishes an objective test that if the current management of the target company is considering a buyout, the target company must provide rival bidders with the same information that has been shared with external parties, such as fund managers or investment analysts.[131]

E) *Put Up or Shut Up Rule*

In 2010, Kraft Foods' hostile takeover of British icon 'Cadbury' was met with outcry from unions, politicians and the public.[132] This takeover gained a high profile primarily because of Kraft's initial commitment to keep Cadbury's Somerdale factory open, which it later reversed after its offer commenced. This action resulted in the loss of 400 British jobs.[133] However, the Kraft/Cadbury takeover also raised concerns that hostile bidders were gaining a tactical advantage over their targets due to the influence of 'short-term investors', such as hedge funds. Prior to the offer period, hedge funds increased their share in Cadbury, which drove up share prices and encouraged shareholders to sell their stakes.[134]

In 2011, the Code Committee made amendments to the UK Code that sought to tip the balance of power back to a more reasonable level for the shareholders of target companies.[135] The first problem that the Code Committee sought to address was 'virtual bids', which were believed to encourage shareholders to sell to merger arbitrageurs, such as hedge funds and private equity firms. [136]

The Panel sought to remedy this issue through a 'put up or shut up' deadline under rule 2.6(a) of the UK Code. This deadline requires potential bidders to clarify their intentions within 28 days after the announcement of a firm intention to make an offer.[137] If the bidder withdraws its interest before the put up or shut up deadline, it is prevented from making

[131] Ibid r 21.3(3).
[132] Brad Dorfman and David Jones, 'Kraft snares Cadbury for $19.6 billion', *Reuters* (Online, 19 January 2020).
[133] Jill Treanor, 'Kraft rebuked for broken pledge on Cadbury factor', *The Guardian* (Online, 27 May 2020).
[134] Chris Rees and Michael Gold, 'Re-connecting capitalism: prospects for the regulatory reform of the employee interest in UK takeovers' (2020) 51(6) *Industrial Relations Journal* 502, 508.
[135] PCP 2011/1 (n 12) 7.
[136] Ibid 10.
[137] UK Code (n 11) r 2.6(a).

an offer for the target company for six months, unless the UK Panel grants an extension of time for the offer.[138]

F) *Deal Protection Mechanisms*

The 2011 amendments also included a ban on deal protection devices and termination fees, with limited exceptions.[139] Deal protection devices restrict the entry of third-party bidders after a merger agreement is signed and prevent the seller from soliciting other offers. Buyers often request these mechanisms due to the costs associated with conducting due diligence and the potential embarrassment of having their offer surpassed by a third party. [140]

In imposing the ban, the UK Panel argued that deal protection devices were being presented as non-negotiable packages to target boards, limiting their ability to engage with potential competing offerors.[141] This ban was also believed to align with General Principle 3, which requires that "the board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid".[142] The effectiveness of these changes is demonstrated by the Panel's review of the 2011 amendments, which found "no evidence of offeree companies having been put under siege for protracted periods" and suggested that the general prohibition on deal protection measures successfully reduced tactical advantages previously given to offerors.[143] The next section considers whether Australia should adopt similar changes to enhance of the effectiveness of its CCT regime.

[138] Ibid r 2.8.
[139] PCP 2011/1 (n 12) 37.
[140] Albert Saulsbury, 'The availability of takeover defences and deal protection devices for Anglo-American target companies' (2012) 37(1) *The Delaware Journal of Corporate Law* 115, 147.
[141] PCP 2011/1 (n 12) 39.
[142] UK Code (n 11) B1.
[143] UK Panel, *Review of the 2011 Amendments to the Takeover Code* (26 November 2012) [4].

V) WHAT CHANGES SHOULD BE MADE TO AUSTRALIA'S CCT REGIME?

A) *The Equal Opportunity Principle*

Both the equal opportunity principle and the Masel principle should be reflected in the regulation of CCTs, but a more appropriate balance between these objectives can be achieved through various legislative reforms. As Murphy argues, the equal opportunity principle should only be operational during the offer period.[144] Applying this principle outside the bid period burdens bidders with onerous and costly requirements that can distort the commercial viability of an offer and discourage pre-bid stakes crucial for a bid's success.

As Murphy argues, trusting informed shareholders to make decisions in their best interests is reasonable, considering that a bid proceeds only with target shareholders' approval.[145] Therefore, repealing the minimum bid price rule and strengthening disclosure requirements in bidder statements is recommended. In particular, the minimum bid price rule should be replaced by a requirement that if a bidder acquires shares within the four months preceding a bid, they must supply an independent expert report assessing the fairness and reasonableness of the proposed consideration.

In addition, as bidders are finding ways to achieve the same outcomes without classical escalator agreements, the prohibition in section 622 of the Act offers little benefit in preventing pre-bid vendors from being 'topped up'. The prohibition on escalator agreements also adds unnecessary complexity to transactions and deters bidders from acquiring a pre-bid stake due to concerns about missing out on a higher bid price if the bid proceeds.[146] These issues can be resolved by repealing the prohibition on escalator agreements.

B) *The Threshold of Control*

While some commentators are concerned that raising the threshold for control could impact the premiums paid to minority shareholders, a modest increase in the control threshold is necessary to align Australia with international standards, as observed in

[144] Murphy (n 92) 358.
[145] Ibid 359.
[146] Ibid.

countries like the UK, Hong Kong, and Singapore.[147] This adjustment would enable bidders to acquire a more substantial pre-bid stake in a target, which would be likely to increase takeover activity.[148]

Moreover, a higher threshold could lead to larger premiums through 'greenmailing', a situation where a significant shareholder threatens a hostile takeover, prompting the target company to buy back its shares at a premium to prevent the takeover.[149] Therefore, it is recommended that Australia raises the current threshold for control in section 606 of the Act from 20% to 30%.

C) *Mandatory Bid Rule*

Another suggested argument in favour of the introduction of a mandatory bid rule is that it addresses the issue of 'free riding'.[150] The idea is that an announcement of a takeover bid offers a significant 'tip off' of information to rival bidders. Bidders may be encouraged to use this information to bid for potential targets, rather than investing in information producing activities.

However, there is no empirical research undertaken in Australia to confirm whether free riding is prevalent. Furthermore, as Khan notes, if free riding constitutes a problem in Australia, one general solution would simply be to ban it.[151] Accordingly, the 'free riding' argument does not offer convincing support for the introduction of a mandatory bid rule in Australia.

Furthermore, a mandatory bid rule also denies shareholders the benefits of an auction for the control over their shares. Competition between prospective buyers may be important to discover the highest price that a buyer will pay for the controlling stake in a target company. Competing bidders may also be able to offer more than the initial bidder due to the search costs that they save.[152]

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[147] Farrer (n 3) 23.
[148] Ibid.
[149] Ibid.
[150] James Mayanja, 'A Mandatory Bid Rule for Australia: an Idea Whose Time Has Come' (2004) 16 *Australian Journal of Corporate Law* 205.
[151] Mushera Khan, 'An Analysis of Mandatory Bid Rule in Malaysia and the Proposed Mandatory Bid Rule in Australia' (2007) *Law Asia* 33.42.
[152] Ibid 45.

Accordingly, an appropriate compromise would be the introduction of a 'undertaking mandatory bid rule'.[153] This alternative is essentially similar to the mandatory bid rule proposal but would provide that the pre-bid acceptance must be conditional upon no superior proposal being made for the target company. If a superior proposal was presented to a target, then directors would have a duty to solicit competing bids and facilitate an auction for control.

D) *Put Up or Shut Up Rule*

There are several compelling arguments that support a put up or shut up rule in Australia. Firstly, the put up or shut up rule discourages 'virtual bids', as should a bid be withdrawn, the bidder then must wait six months before making another bid.[154] Second, the put up or shut up rule discourages short-term speculators from buying shares from long-term shareholders. It prevents the target from being under a prolonged siege from a bidder, which can lead shareholders to sell at lower prices.

Thus, it is recommended that section 632 of the Act, which currently requires bidders proposing a takeover bid to follow through within 2 months, should be amended. When a bidder makes a proposal, even if it is unsolicited, they should be required to disclose their intentions on the ASX. Subsequently, the bidder should have a 28-day window to confirm or retract the proposal. If the bidder opts not to proceed with the takeover, they should be prevented from bidding for the target for six months.

E) *Advanced Takeover Rulings*

In 2022, the Australian government held a consultation paper which considered the introduction of an advanced rulings mechanisms for the regulation of CCT's.[155] Respondents argued that there were already substantial existing mechanisms through which market participants can seek clarity in advance of control transactions. For example, it was noted that ASIC already employs a process similar to advanced rulings for its modification and exemption powers under chapter 6.[156]

[153] Ibid 46.
[154] Karen Evans-Cullen (n 116).
[155] Australian Treasury, *Corporate control transactions in Australia: options to improve schemes of arrangement, takeover bids, and the role of the Takeovers Panel* (1 April 2022).
[156] Clayton UTZ, Submission to Australian Treasury (n 156) 16.

However, respondents to the consultation paper were generally in favour of some form of advanced rulings in relation to takeovers and schemes of arrangement. These advanced rulings have already proven effective in other aspects of Australian law, such as the Australian Taxation Office providing various forms of advance rulings and the ACCC providing merger authorisations. Accordingly, this article advocates that market participants should be able to seek advanced takeover rulings from the Panel executive, with a standing right for ASIC to be consulted and make submissions where fit. Aggrieved parties should have the same rights of review as if the order was made by the Panel itself (i.e to the Review Panel).

As Clayton UTZ noted in its submissions to the Consultation Paper, there may be circumstances where the Panel is not able to hear submissions from all persons that might be affected by an advanced ruling.[157] Accordingly, Australia should adopt a sub-classification of ruling similar to that employed by the UK Panel. If the Panel is unable to consider the views of other parties, only conditional rulings should be granted. The Panel should also reserve the right to withdraw rulings in instances of inaccurate disclosure, or significant alterations in circumstances. Furthermore, a publicly available register of all advance rulings should be maintained on the Panel's website to ensure transparency.

F) *Schemes of Arrangement*

An appropriate model of reform for takeovers effected through a scheme of arrangement would be to abolish the requirement for a first and second court hearing, which add excessive costs and delays.[158] In this revised approach, target directors could independently convene a scheme meeting. The scheme process would still involve submitting a scheme booklet to ASIC for a prescribed 14-day review period, ensuring regulatory oversight.

Furthermore, target shareholders would still have protection through the requirements relating to independent expert reports, which are invariably included in most scheme booklets. Under this model, interested parties that wish to object to a scheme due to inadequate disclosure or unfairness could apply to the Panel for corrective action, such as

[157] Ibid 20.
[158] Ibid.

an order preventing the scheme from proceeding in its current form. While this process has the potential to delay some scheme meetings, the Panel's track record of timely decision-making and the informal nature of its proceedings suggest that these delays are likely to be minimal.

G) *Equal Access to Information*

There is a reasonable argument that a presumption giving rival bidders equal access to information on a target would not be appropriate. Target companies may have valid concerns about disclosing commercially sensitive information to trade competitors. As Langley argues, target directors could also run afoul of section 1043A(2) of the Act if they communicate insider information to a bidder with the intent of aiding that bidder in preparing a bid.[159]

Furthermore, Langley has observed that the prescriptive 'all or nothing' approach taken by the UK has adverse outcomes. Langley suggests that target boards are more cautious about disclosing information to rival bidders, fearing that providing information to the first bidder might trigger a requirement to share it with less-welcome potential offerors.[160]

However, it is in the best interests of shareholders to mandate equal access to company information in three scenarios. Firstly, when a friendly bidder is involved, and a new rival bidder emerges. Secondly, when a bidder presents an offer, and the target actively seeks to include a 'white knight' in the bidding group. In both cases, a competitive auction for control is ongoing, and the Act should establish a statutory duty on directors to provide equal access to information, aiming to secure the best possible offer price for shareholders. In a manner similar to the US, it is recommended that the onus be placed on target directors to show they were adequately informed and that their decision to provide unequal access to company information was reasonable considering the circumstances.

The final scenario is when members of senior management of the target company participate in the bidding group. This protection is necessary to promote competition for

[159] Langley (n 110) 356.
[160] Ibid 363.

the target and to level the playing field for all bidders by eliminating any unfair advantages enjoyed by insiders.

H) *Deal Protection Mechanisms*

Some commentators argue that the ability to negotiate deal protection mechanisms in Australia stifles competition in takeover bids.[161] The basic argument against deal protection mechanisms is that they deny shareholders the potential advantages of an auction for control.

However, without deal protection mechanisms, directors of UK target companies are left in a position with little bargaining power.[162] In many situations, the announcement of a merger agreement with deal protection mechanisms could also signal to the market that a company is an attractive target, adducing additional bidders wishing to acquire the company. [163]

Indeed, several empirical studies indicate that deal protection mechanisms actually motivate bidders to submit their best offers and empower target boards to negotiate higher deal prices.[164] It is also argued that deal protection mechanisms can be used to eliminate the disruptive effects to corporations and the economy in general caused by uncertainty in M&A activity.[165] For these reasons, deal protection devices should not be removed from Australia's takeover laws.

[161] Elliot (n 18) 13.
[162] Saulsbury (n 140).
[163] Ibid 159.
[164] Ibid 117.
[165] Ibid 144.

CONCLUSION

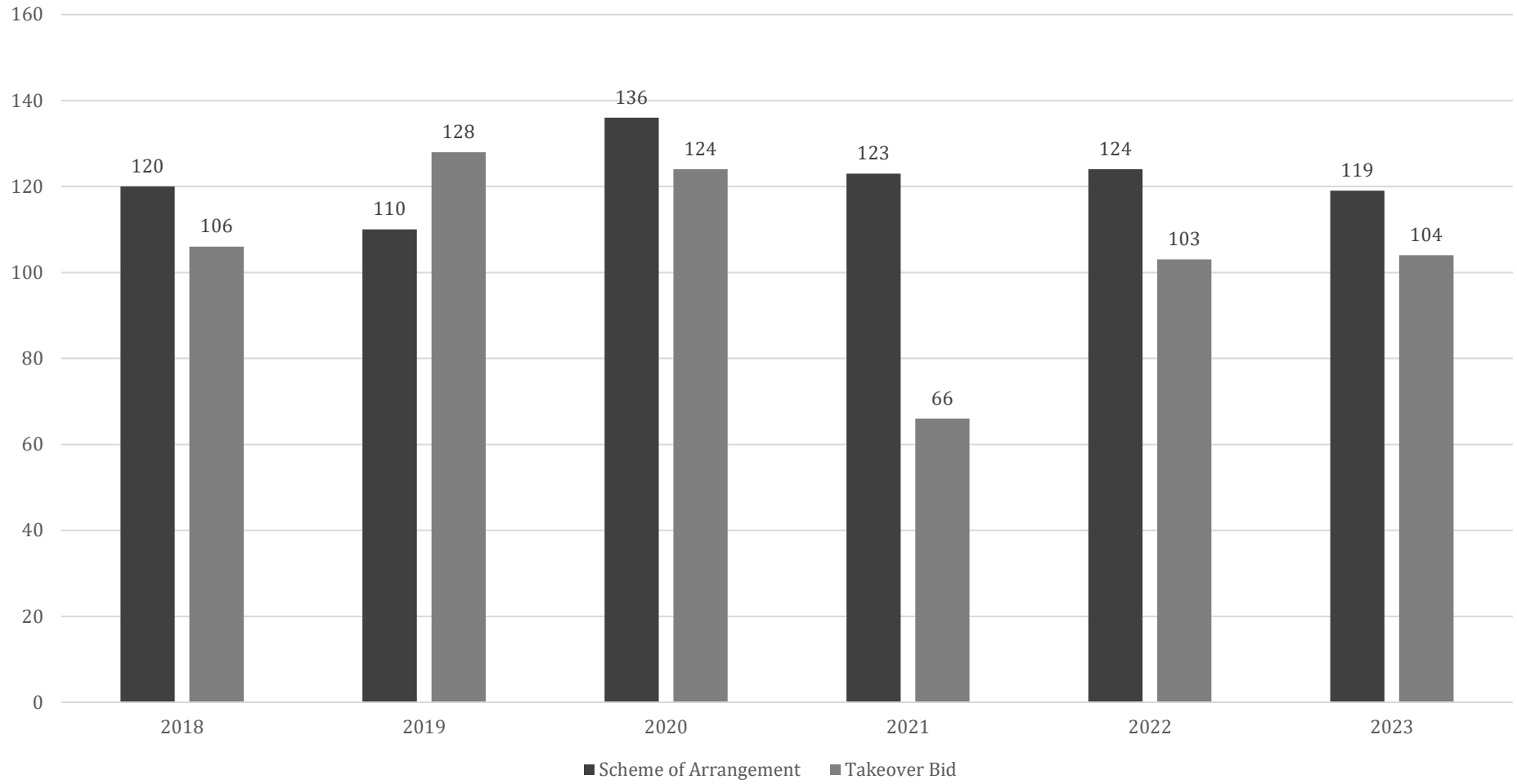
As takeover activity enhances the productivity of Australia's economy, regulation must not unnecessarily impede change of control transactions. Currently, the Act prioritises shareholders protections at the expense of an efficient market for corporate control. Greater efficiency could be achieved by repealing specific iterations of the equal opportunity principle, including the minimum bid price rule and the prohibition on escalator agreements, which offer unnecessarily impediments to a free market. Furthermore, the process for effecting a takeover by way of a scheme of arrangement could be simplified through allowing targets to convene scheme meetings without court intervention and using the Panel to hear objections from interested parties. Other measures that would increase market efficiency include an 'undertaking mandatory bid rule', the put up or shut up rule, advanced takeover rulings, and increasing the threshold of control under section 606 of the Act. These are appropriate and necessary changes to ensure that the Australian market facilitates beneficial change of control transactions.

APPENDIX

Annexure A: Timing of Panel decisions and reasons from 30 June 2013 to 30 June 2023[166]			
Year	Number of Applications	Application to Decision (average days)	Decision to reasons (average days)
2013	20	15.8	7.7
2014	26	19.2	12.1
2015	20	11.3	11.8
2016	20	19.2	17.1
2017	23	16.3	22.2
2018	29	14.8	19
2019	30	18.5	23.3
2020	35	21.3	33.4
2021	29	21.5	34.2
2022	30	25.7	47
Average	26.2	18.36	22.78

[166] Based on Annual Reports of the Panel, 2013-2022.

Annexure B: Number of Days to End a Takeover Bid v Scheme of Arrangement
Searches Conducted on Thomson Reuters 'Connect 4'



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