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AUSTRALIA

Keeping good companies

Background Paper:
The Need for a Corporations Panel

September 2002

Role of Chartered Secretaries Australia

Chartered Secretaries Australia Ltd (CSA) is Australia's peak membership body representing company secretaries and other officers responsible for best practice in good corporate governance. Members are entitled to use the designation **Chartered Secretary** as well as internationally recognised post-nominals.

With more than 8,000 Members and Affiliates, CSA is setting the standard for entry to the profession. CSA membership spans the broad spectrum of Australian corporate and public life. Members include company secretaries and those performing the functions of a company secretary, directors, lawyers, accountants and other professionals.

Members of CSA deal on a day-to-day basis with regulatory bodies and the government and have a working knowledge of the Corporations Act. Given the diverse roles our members play in the business community, Chartered Secretaries Australia sees this initiative as fulfilling its mission of the promotion and advancement of effective governance and administration.

Acknowledgment

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- Michael Adams FCIS (University of Technology, Sydney)
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The views contained within this Paper are solely those of Chartered Secretaries Australia and the above-listed individuals. In no way do the views expressed in this Paper represent those of their employers or the organisations they represent.

Request for submissions

This Background Paper outlines various issues identified by Chartered Secretaries Australia regarding the need for the establishment of a Corporations Panel. These issues so identified are the provisional views of Chartered Secretaries Australia. However, these views are by no means settled.

Chartered Secretaries Australia invites submissions on all of the matters raised in this paper. Likewise, respondents are invited to raise any further issues related to the need for a Corporations Panel that are not canvassed in this Paper.

Alternatively, or in addition, respondents are invited to complete the questionnaire contained in Appendix B of this Paper, which contains discussion questions on specific issues that Chartered Secretaries Australia has identified as being central to the debate. Chartered Secretaries Australia will carefully consider all submissions received before releasing a final discussion paper.

All respondents should be aware that all submissions received will be treated as being in the public domain, unless an express indication to the contrary is communicated to Chartered Secretaries Australia.

Please send submissions either by email to **tim.sheehy@CSAust.com** or in hardcopy to:

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If sending a hardcopy, please also include, if possible, a computer disk containing your submission in Microsoft Word 2000 format or a lower version of Microsoft Word.

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Closing date for submissions
Please forward submissions by **Friday 8 November 2002**.

Further copies

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Abbreviations

APRA	Australian Prudential Regulation Authority
ASC	Australian Securities Commission
ASIC	Australian Securities and Investments Commission
ASIC Act	Australian Securities and Investments Commission Act 2001 (Cth)
C&S Panel	Corporations and Securities Panel
CLERP	Corporate Law Economic Reform Program
Corporations Act	Corporations Act 2001 (Cth)
CSA	Chartered Secretaries Australia
DPP	Director of Public Prosecutions
FSR Act	Financial Services Reform Act 2001 (Cth)
RBA	Reserve Bank of Australia



Executive Summary

Purpose of the Corporations Panel

- [0.01] There are no fewer than 1.2 million companies in Australia, with the majority of these coming under the jurisdiction of the Commonwealth *Corporations Act*. However, with the governing legislation growing in size and complexity and the cases before the courts growing in number, attempts at controlling and regulating the corporate juggernaut are presenting significant problems of their own.
- [0.02] Debate has waged for some time over the need to reform various parts of the *Corporations Act* and the ways in which that law is enforced and offenders thereunder penalised. 2001 will undoubtedly be remembered as the year of the corporate collapse. Harris Scarfe, One.Tel Ltd, Ansett Airlines, Pasminco and HIH Insurance Ltd were all involved in insolvency proceedings of one kind or another, thrusting corporate governance practices back into the glare of the public and media spotlights. The success of ASIC in the New South Wales Supreme Court in its case against former directors of HIH Insurance, the collapse of Enron and WorldCom in the United States and the demise of Arthur Anderson have only cemented the need for accountability at all levels of management.
- [0.03] However, the behaviour of upper level management and directors of companies is only one facet of the corporate governance paradigm. The regulatory regime must also be up to the task of supervising, implementing and enforcing compliance procedures in a manner that effectively balances the interests of all players in the corporate world.
- [0.04] In April 2002, the Australian Law Reform Commission released its Discussion Paper on the use of civil and administrative penalties in the Federal sphere and ASIC has been making known its desire for greater powers to impose fines upon companies who breach continuous disclosure requirements.
- [0.05] The need for a uniform set of penalties across all corporate sectors is indisputable and a discussion thereof is beyond the scope and object of this paper. What is in need of attention, however, is the current inability of the regulatory and judicial framework to provide a cost-efficient, timely and alternative method of resolving disputes over breaches of the *Corporations Act*.
- [0.06] Chartered Secretaries Australia submits that a viable option to rectify this shortcoming would be a Corporations Panel, modelled primarily around the very successful Takeovers Panel. Hence, the release of this Background Paper.

Advantages of a Corporations Panel

- [0.07] By simply adapting the highly successful model of the Takeovers Panel to establish the Corporations Panel, the need for radical legislative reform would be avoided. In fact, the introduction of a Corporations Panel will amount solely to a transfer in venue and process for bringing allegations of breach of the *Corporations Act*. The immediate benefit of this to Australian business (both big and small) would be that it will carry no compliance costs for business. It is proposed that the filing or application fee be approximately \$500, which would represent a significant cost saving from the Supreme Court filing fee of \$2,616.
- [0.08] The Corporations Panel would be a form of Alternative Dispute Resolution (ADR), which would have the advantage of being responsive, rapid, fair, informal, and relatively inexpensive. In making an application to the Corporations Panel, it is proposed that an applicant would forego their right to take the matter before the courts. Thus, making the Corporations Panel the main forum for resolving alleged contraventions of the *Corporations Act*.

- [0.09] Such an approach would aid in removing some of the current barriers to the legal system and encourage those who do not currently make claims to do so. For example, legal representation in proceedings before the Corporations Panel will only be permitted with the Panel's express consent. In turn, this should result in a higher level of compliance with the law.
- [0.10] In order to ensure the Corporations Panel remains a swift and efficient form of justice, the Corporations Panel will have the discretion to both dismiss trivial applications and to refer more involved cases directly to the court system.
- [0.11] Lastly, it should be noted that the Corporations Panel would enjoy a very short period of jurisdiction. It is proposed that the process of dealing with and resolving an application before the Corporations Panel would last no more than five months. Once this window of opportunity closed, jurisdiction over the matter would automatically vest in the court system. The Corporations Panel's position as the main forum for hearing disputes over breaches of the *Corporations Act* would not remove a party's right to have their case heard before a court.
- [0.12] In summary, it is anticipated that the Corporations Panel would offer advantages analogous to those offered by the Takeovers Panel. Namely, but not necessarily limited to:
- ♦ faster resolution of alleged breaches of the *Corporations Act*;
 - ♦ panel members chosen from a large pool of corporate specialists, allowing for greater understanding of complex matters;
 - ♦ practical, commercially viable and efficient solutions;
 - ♦ greater level of informality, promoting ease of access to the system and swift resolution of complaints;
 - ♦ peer judgment;
 - ♦ inquisitorial powers;
 - ♦ reduced burden on ASIC and the court system;
 - ♦ reduced expense for all participants;
 - ♦ rapid implementation of remedies allowing for greater continuity and certainty in the market;
 - ♦ with largely part-time members, the operating costs would be kept to a minimum.

Scope of the Corporations Panel

- [0.13] In seeking to define the scope of the proposed Corporations Panel it is perhaps prudent to start by outlining what is beyond its scope. This Background Paper does not propose a wholesale review of the *Corporations Act*, the regulatory framework, or the judiciary. Nor is it an assault on the Regulators themselves or a plea for a mammoth overhaul of regulatory and enforcement procedures.
- [0.14] The Corporations Panel proffers a workable solution to some of the current deficiencies in the regulatory, legislative and judicial infrastructure, with particular heed paid to the need to quickly, cheaply and efficiently settle disputes over breaches of the *Corporations Act*. Australia has already adopted such a solution in relation to the laws governing takeovers and has experienced substantial success as a result. It is hoped that the lessons learned from more than a decade of review of the Takeovers Panel can be both cathartic and stimulating in moving the corporate regulatory regime forward.



- [0.15] Finally, this Background Paper represents the beginning of a process of debate on the issues outlined above. To underscore the importance of this measure the proposed legislation has been included with this paper.
- [0.16] Chartered Secretaries Australia intends to incorporate the views received in submissions on this Background Paper into a more formal Discussion Paper, to include a full proposal on the consequential legislative requirements of implementing the proposed scheme.

Chapter 1

Background

Corporate Regulation and Administration in Australia

- [1.01] Following High Court decisions such as *Gould v Brown*,¹ *Re Wakim; Ex parte McNally*,² and *R v Hughes*,³ which called into question the constitutional validity of the old *Corporations Law*, corporate regulation and administration has largely been governed by the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth). The passing of both Acts on 15 July 2001 was the culmination of a long process of negotiation between the Commonwealth and the States, which involved all the States conferring their corporate regulatory powers to the Commonwealth.
- [1.02] General administration of the *Corporations Act* is formally bestowed upon ASIC by way of s 5B. In cooperation therewith, the *ASIC Act*, as its long title would suggest, provides for the establishment of ASIC and outlines its powers and responsibilities.
- [1.03] It is important to note from that outset that CSA recognises the significant reforms that have been implemented by CLERP and the subsequent compliance costs incurred by business. The establishment of a Corporations Panel would not be reform merely for the sake of reform; indeed, it ought not to be viewed as a major reform at all.
- [1.04] Rather, the establishment of the Corporations Panel would entail a reallocation of responsibility and jurisdiction. There is no major reform to the *Corporations Act* (or any other law) required nor changes to companies' operations and, as a result, there should be no compliance costs to individual companies.
- [1.05] Thus, it is suggested that the Corporations Panel would ease the current compliance burden experienced by business and in fact offer significant cost savings. Therefore, the Corporations Panel is directly aligned with the Commonwealth Treasurer's desire to cut costs and reduce the compliance burden faced by Australian companies.⁴

The role of the Australian Securities and Investments Commission

- [1.06] ASIC is an independent Commonwealth Government body that regulates the financial system in conjunction with the Australian Prudential Regulation Authority and the Reserve Bank of Australia. It administers primarily the *Corporations Act* and has consumer protection responsibilities. In short, it has been suggested, that ASIC is substantially concerned with ensuring the market is adequately informed.⁵
- [1.07] The *Corporations Act* has no objects sections for the Act as a whole, from which ASIC is to draw guidance. Indeed, it may well be that the legislature may have deliberately avoided setting down precise objectives in order to ensure ASIC has the freedom to cope with problems as they arise in the future.⁶ Regardless, certain Chapters, such as the new Chapter 7 ('Financial Services and Markets') inserted by the *Financial*

¹ (1998) 193 CLR 346.

² (1999) 198 CLR 511.

³ (2000) 202 CLR 535.

⁴ The Treasurer, Commonwealth of Australia, *Corporate Law Reforms to Abolish Annual Returns for One Million Companies for the Year 2000/2001*, Press Release, No. 095 (17 September 1998).

⁵ Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper No 65 (2002) [4.7].

⁶ *Ibid* [4.12].

Services Reform Act 2001 (Cth), do contain an object section. Section 760A suggests that the object of Chapter 7 is to promote:

- (a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and
- (b) fairness, honesty and professionalism by those who provide financial services; and
- (c) fair, orderly and transparent markets for financial products; and
- (d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities.

[1.08] The objects of Chapter 7 can be closely correlated with those conditions which ASIC proffers as a global indicator of its success:

- [when] investors and consumers act prudently and rely on the integrity of the market because we enforce their rights, warn them of risks, and take action to improve standards of behaviour across the financial sector;
- [when] companies and market participants behave honestly and fairly because we actively enforce the law with strength, judgment and consistency;
- [when] our staff are highly motivated, professional and effective because we support, develop and challenge them;
- [when] government and our other stakeholders acknowledge that we deliver on our mandate and use our resources and administer Commonwealth revenue effectively and efficiently.⁷

[1.09] Finally, ASIC's true mandate is outlined in s 1(2) of the *ASIC Act*.

In performing its functions and exercising its powers, ASIC must strive to:

- (a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and
- (b) promote the confident and informed participation of investors and consumers in the financial system; and
- (c) administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements; and
- (d) receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it; and
- (e) ensure that information is available as soon as practicable for access by the public; and
- (f) take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.

[1.10] It can be seen that as the corporate watchdog, ASIC both enjoys and is burdened by a wide ambit of responsibility. Thus, whilst the roles played by the RBA and APRA in the financial system are substantial and cannot be ignored, it is not unreasonable to suggest that ASIC is charged with being, to all intents and purposes the sole bastion of sound corporate governance. The question may rightly be posed: 'Is it unrealistic to expect one body to achieve this alone?'

⁷ Australian Securities and Investments Commission, *Annual Report 1999-2000*, p 1.

The former Corporations and Securities Panel

- [1.11] The Corporations and Securities Panel was established on 3 July 1991 under s 171 of the *Australian Securities Commission Act 1989* (Cth) to intervene at the request of the ASC (as it was then) where parties to any acquisition of a 'substantial interest' in a company engage in conduct which may be strictly within the specific takeover provisions of the *Corporations Law*, but not within the spirit of the *Law*.⁸
- [1.12] The C&S Panel had the power to make declarations and appropriate orders where it was satisfied that 'unacceptable circumstances' had occurred in relation to an acquisition of shares and that it was in the public interest to make the declaration. Those circumstances which were deemed to be unacceptable were originally laid down as four takeover principles known as the 'Eggleston Principles'.
- [1.13] The C&S Panel was mirrored on a similar takeovers panel in London, which had enjoyed tremendous success in hearing over 6,000 disputes in 31 years, and solving them in a less formal and less legalistic fashion than the courts.⁹
- [1.14] Regrettably, the Australian panel experienced no such success in its original form; instead, it generated more tactical litigation and legalism in the only four cases in nearly a decade that actually went to the panel.¹⁰ Indeed, the first takeover inquiry heard by the panel on 29 July 1991 was halted after 2½ hours by a High Court challenge to its constitutional powers.
- [1.15] The C&S Panel's powers were reviewed by the *Corporations Legislation Amendment Act 1993* (Cth), however the panel remained largely dormant until it was given a major overhaul during 1999 and 2000 as part of the Corporate Law Economic Reform Program. The result of that overhaul was a significant increase in both funding and power in order to make the panel the principal forum to resolve takeover disputes, rather than the courts.
- [1.16] The reconstituted panel came into effect on 13 March 2000 with the commencement of the *Corporate Law Economic Reform Program Act 1999* (Cth). In its first week of operation, the C&S Panel dealt successfully with two applications, which proffered evidence to the suggestion that it could offer a viable commercial alternative to a court appearance.
- [1.17] In August 2001, the C&S Panel signed a memorandum of understanding with ASIC cementing its role as the main forum for resolving takeovers matters during the bid period. Under the memorandum, it was agreed that the Panel had the power to review particular ASIC decisions, make declarations of unacceptable circumstances, and make orders, interim orders and rulings under the relevant sections of the *Corporations Act*.

The new Takeovers Panel

- [1.18] The Corporations and Securities Panel was colloquially known as 'The Takeovers Panel' since its inception in 1991. On 11 March 2002, the *FSR Act* commenced and contained an amendment to Part 10 of the *ASIC Act*, which resulted in the Corporations and Securities Panel becoming formally known as the Takeovers Panel.

⁸ Commonwealth Department of the Treasury, *Takeovers: Corporate control: a better environment for productive investment*, Corporate Law Economic Reform Program Proposals for Reform: Paper No. 4 (1997) p 33.

⁹ Lucinda Schmidt, 'Takeover Makeover', *Business Review Weekly* (Sydney), 21 May 1999, p 37.

¹⁰ G F K Santow and G Williams, 'Takeover Panel Fails to Deliver', *The Australian Financial Review* (Sydney), 7 October 1997, p 19.



[1.19] Since the Takeovers Panel's reconstitution in 2000, its success has been undisputed. The Panel has dealt with 57 applications under the takeovers provisions in 20 sitting months.

Chapter 2

The Need for a Corporations Panel

Why do we need a Corporations Panel?

- [2.01] Recent corporate collapses both in Australia and around the world have seen a heightened level of public interest in regulatory practice. There are daily news features on the role, successes and failings of regulation, which highlight the difficulties faced by bodies charged with enforcing the law of companies:

Regulators, under unprecedented pressure, face a range of demands, often contradictory in nature: be less intrusive — but more effective; be kindlier and gentler — but don't let the bastards get away with anything; focus your efforts — but be consistent; process things quicker — and be more careful next time; deal with important issues — but don't stray outside your statutory authority; be more responsive to the regulated community — but do not get captured by industry.¹¹

- [2.02] However, this Background Paper and the Corporations Panel that it proposes are not so much a corollary of recent media attention on corporate governance, but rather a product of the apparent difficulty experienced by ASIC in its efforts to regulate the 1.2 million companies in Australia and the high costs of litigation which often stymie many actions. Both these factors result either in long delays in cases being brought or, more relevantly, many cases and investigations never being brought because of the prohibitive costs and delays.
- [2.03] Neither of these suggestions are intended to be critical of either ASIC or the court system, rather as a practical observation that some assistance is required in the best interests of promoting and enforcing sound principles of corporate governance, business efficacy and compliance.
- [2.04] The Corporations Panel would give access to the legal system to those traditionally barred by costs and delays, such as small businesses. The acceptance and efficacy of the Takeovers Panel as the primary forum for settling disputes in takeover situations undeniably lends strength to this proposal.
- [2.05] The Australian Law Reform Commission issued Discussion Paper 65, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation* in April 2002. It canvasses, among other things, the role of ASIC as a regulator and outlines the fact that ASIC has a wide range of investigative and information-gathering powers where it suspects that the law has been contravened.¹² Such powers include the ability to undertake formal investigations, conduct oral examinations, inspect and seize records, hold hearings and conduct examinations.
- [2.06] In addition, ASIC enjoys the full gamut of the enforcement arsenal, which range from civil penalties to criminal charges (pursued in conjunction with the DPP) and from banning orders to enforceable undertakings.¹³ Interestingly, it would appear that the enforceable undertaking regime introduced on 1 July 1998 has been well utilised by ASIC. Since ss 93AA and 93A *ASIC Act 2001* commenced, ASIC has accepted 169 enforceable undertakings, the majority of which have come from the responsible entity of a registered scheme.¹⁴

¹¹ Malcolm K Sparrow, *The Regulatory Craft* (2000) p 17.

¹² Australian Law Reform Commission, above n 5, [5.21].

¹³ ASIC's power to prosecute indictable offences as well as summary offences independent of the DPP under s 49 *ASIC Act 2001* was confirmed recently by the NSW Supreme Court in *ASIC v Sweeney (No.3)* [2001] NSWSC 616; (2001) 39 ACSR 40.

¹⁴ ASIC, *Enforceable Undertakings Register*, as at 18 July 2002, <<http://www.asic.gov.au>>.

[2.07] The enthusiasm with which enforceable undertakings have been embraced may be due to the fact that ASIC views such a remedy to be

more versatile than ... [other] remedies, and may be used to achieve outcomes which might not be available by those [other] means, and which are more focused (eg adoption of a compliance regime, restriction of a person's securities business or practice as an auditor).¹⁵

[2.08] Indeed, enforceable undertakings can also offer ASIC a viable alternative to commencing court proceedings. The nature, structure, and philosophy of the Corporations Panel would offer similar advantages to all parties (including ASIC), as the declarations of the Corporations Panel will not be dissimilar to enforceable undertakings.

[2.09] However, there would appear to be a certain disparity between the powers available to ASIC and the powers currently utilised by ASIC, as **Table 1** (below) suggests.

Table 1: Enforcement Levels and Resources: ASIC

	1999/2000	2000/2001	Change
Total Budget	\$140 million	\$143 million	+2.14%
Enforcement Budget ¹⁶	\$73 million	\$85 million	+16.44%
Total Staff	1,234	1,221	-1.05%
Enforcement Staff	662	555 ¹⁷	-16.16%
Complaints received from the Public ¹⁸	4,960	6,342	+27.86%
Action taken on complaint			
Investigation	1.7%	2.6%	+0.9%
Surveillance	19.4%	9%	-10.4%
Resolved by information provided/negotiation	20.8%	37.2%	+16.4%
Analysed, assessed and recorded only	55.9%	51.1%	-4.8%
Reports/complaints received from External Administrators	2,850	2,775	-2.63%
No action taken	93.7%	93.7%	
Enforcement Generally			
Major investigations commenced	200	214	+7.0%
Criminal litigation completed	101 ¹⁹	78	-22.77%
Summary prosecutions completed	336	22	-93.45%
Civil enforcement actions completed	80	72	-10.0%
Banning orders	50	29	-42.0%

Source: ASIC, Annual Reports 1999-2000 and 2000-2001

¹⁵ ASIC, *Enforceable Undertakings*, Practice Note 69 (7 April 1999), [PN 69.5].

¹⁶ It is acknowledged that between the two reporting periods 1990/2000 and 2000/2001 ASIC engaged in a significant restructuring. One of the outcomes of the restructuring saw the separation of enforcement

- [2.10] In discovering possible contraventions of the law, complaints made by members of the public (including companies) and the reports of auditors to ASIC have been highlighted as being crucial sources of information.²⁰ Is it not therefore somewhat anomalous that ASIC should take no action on the vast majority of these *crucial* sources of information?
- [2.11] More than 50 per cent of the complaints ASIC received from the public resulted in no action being taken other than merely being recorded. That is, in 2001/2001, 3,240 complaints of breaches of the law were merely recorded with no action being taken. Furthermore, enforcement staff numbers fell by 16 per cent and surveillance following a complaint from the public fell 10 per cent. Yet over the same period, complaints from the public rose by 28 per cent and ASIC's enforcement budget was increased by 16 per cent.
- [2.12] Anomalously, however, the proportion of complaints resolved (as a result of either information provided or negotiation) nearly doubled from 20.8 per cent to 37.2 per cent of all complaints. Such a dramatic increase may suggest that some adjustment of the method of categorisation has occurred between the two reporting periods and certainly that some clarification is required. In addition, there is an absence of definition or explanation as to what 'resolved' actually means.
- [2.13] The statistics contained in **Table 1** and the inferences drawn above beg the question 'Why are the majority of complaints received by ASIC not being followed up?' Whilst there must be a certain number of complaints received that provide no basis for ASIC to take further action, the figures appear to lend weight to the argument that ASIC is under-resourced and attempting to handle a greater workload with fewer staff. Where the majority of complaints received by ASIC from the public are not being followed up, contraventions of the law must also remain undiscovered, and the law unenforced.
- [2.14] ASIC appears to have had some difficulty in responding to statutory reports of contraventions of the *Corporations Act* received from external administrators; notwithstanding that the complaints came from the professional community (auditors, liquidators, and receivers) who possess a sound working knowledge of the law. Whilst the number of complaints fell slightly during the period examined, ASIC consistently took no further action in 94 per cent of cases. Put simply, ASIC received 5,625 complaints from external administrators, which contained alleged offences against the *Corporations Act*, yet 5,287 of these alleged offences received no attention other than being recorded. ASIC took no further action because of the age of the matter, lack of sufficient evidence or scarce resources.²¹ Whilst these reasons have been identified as being important factors that dictate all regulatory agencies' approach to enforcement,²² when trying to engender confidence in the business community, it is

from regulation. Thus, in 1999/2000 enforcement and regulation were reported as one division within ASIC, whereas in 2000/2001 enforcement and regulation were divisions independent of one another. As a result, the figures here stated under 'enforcement budget' may not be as pure as is desirable. Regardless, the increase in budgetary allowance for enforcement is supported by the output costs of enforcement, which report a rise of approximately 6 per cent over the period.

¹⁷ For the same reasons given in n 16 above, this staffing figure represents an estimation in order to offer a valid comparison. Thus, in so calculating, the staff numbers for enforcement were added to those of the various newly formed regulatory divisions.

¹⁸ The number of complaints received net of those outside ASIC's jurisdiction.

¹⁹ This figure is taken from the ASIC *Annual Report 1999/2000*. However, it must be acknowledged that in the ASIC *Annual Report 2000/2001* the figure for 1999/2000 completed criminal litigation is reported as being only 93. Therefore, it may be argued that completed criminal litigation fell by 16.13 per cent over the period and not 22.77 per cent as stated in Table 1.

²⁰ Australian Law Reform Commission, above n 5, [5.21].

²¹ ASIC, above n 7, p 33.

²² Australian Law Reform Commission, above, n 5, [5.5].

unacceptable for a regulator to be placed in a position where it is unable to appropriately act upon the complaints it receives.

- [2.15] It is clear, therefore, that each year (on average) there are no fewer than 2,800 members of the public (leaving to one side external administrators) whose complaints about breaches of the *Corporations Act* result in ASIC taking no action at all. It should be remembered that references made to ‘members of the public’ should not be viewed as references only to individuals. Rather, it includes companies, officers of companies, institutional shareholders, and the like who have complaints about breaches of the *Corporations Act* by others with whom they have a financial involvement. Their complaints are not being addressed.
- [2.16] There is no doubt that there would be a very large number of members of the public who may be aware of breaches of the *Corporations Act* but who fail to even make a complaint to ASIC,²³ for a number of reasons. On the strength of the figures in **Table 1** alone, it is reasonable to conclude that among those reasons would be the belief that it would be futile to make such a complaint to ASIC because no action would be taken.
- [2.17] This belief is consistent with further statistical analysis of ASIC’s enforcement performance. Whilst posting a seven per cent rise in the number of major investigations commenced, it can be seen from **Table 1** that ASIC recorded significant falls in virtually all enforcement actions: criminal litigation, summary prosecutions, civil enforcement actions, and banning orders.
- [2.18] These statistics might suggest at first glance that, in the 2000–2001 financial year, corporate Australia was generally more compliant than in previous years. However, quite the opposite is in fact the case — complaints of breaches of the *Corporations Act* rose by a little under 28 per cent. Furthermore, this view appears a little utopian, when considering the collapses of Harris Scarfe, One.Tel Ltd and HIH Insurance Ltd occurred in that period.
- [2.19] A second, more credible conclusion is that compliance has not increased, rather the statistics point to an increasing lack of enforcement; due to ASIC being under-resourced, unable to fully cover the corporate regulatory field and in need of having its burden lightened.²⁴
- [2.20] In addition to the problems faced by ASIC, the weight of cases clogging the Australian court system is a critical consideration. **Table 2**, below, indicates a general increase in the number of actions involving breaches of corporate law in the last 12 years. Where such a rise is accompanied by a 67 per cent increase the total workload of the Australian court system, delays and the resultant costs are reasonable expectations.
- [2.21] Equally significant is the suggestion volunteered by **Table 2** that since the constitutional problems of the old *Corporations Law* were ironed out in 2000, the number of corporate law actions brought before the courts has increased at a greater rate than the growth in the number of companies.

²³ ASIC has estimated that only six per cent of consumers complain when ‘something goes wrong’ — see ‘You can complain’, *ASIC News*, Issue 50, July 2002.

²⁴ ASIC (at p 20 of the *Annual Report 2000/2001*) explains ‘the substantial reduction in summary prosecutions and also, to a lesser extent, criminal and civil litigation reflects the diversion of enforcement resources from relatively minor offences to the more complex cases’.

Table 2: Summary of Corporate Law Cases 1991 – 2002

Calendar Year	No. Companies	All Cases	Total Corporate Cases	High Court of Australia	Federal Court of Australia	State Supreme Courts of Australia
1991	892,749	4,797	275	1	47	227
1992	859,678	5,019	260	3	51	206
1993	839,593	5,604	260	3	67	190
1994	885,118	5,939	290	3	72	215
1995	933,652	7,835	238	6	68	164
1996	965,869	6,918	286	1	92	193
1997	1,026,206	7,544	239	1	93	145
1998	1,088,922	7,510	295	4	87	204
1999	1,149,297	6,718	312	4	69	239
2000	1,173,709	7,397	250	5	10	235
2001	1,208,484	8,002	341	4	21	316
2002	1,246,449	n/a	156	0	24	132

Source: Professor Michael A Adams²⁵

[2.22] Lastly, the option of a member of the public taking legal action themselves in relation to a breach of the *Corporations Act* is, in nearly all situations, not viable. The costs of lawyers looking into the matter and entering into correspondence with the company or person which has breached the *Corporations Act*, and the time and trouble involved for the complainant, is a great deterrent. Even if those steps are undertaken, the company or person which has breached the *Corporations Act* may consistently deny the breach or refuse to take any corrective action satisfactory to the complainant. This leaves the complainant in the position of deciding whether to go the next step of commencing litigation. Inevitably, the cost of conducting any such litigation is prohibitive. Further, if the litigation fails the unsuccessful complainant will usually have to pay the costs of the other side as well.

The advantages of a Corporations Panel

[2.23] One of the greatest advantages of the Corporations Panel model is that it is intended to mirror that of the Takeovers Panel – it is not a radical reform. Simply, the Corporations Panel would become the primary forum in which breaches of the *Corporations Act* that fall within the Corporations Panel's jurisdiction (see [3.13]) would be resolved. The Corporations Panel would replace the court system as the initial point of contact for aggrieved parties and avoid its inherent weaknesses.

[2.24] Thus, the introduction of a Corporations Panel amounts solely to a transfer in venue and process for bringing allegations of breach of the *Corporations Act*. It requires little legislative reform and would carry no compliance costs for business. In fact, it is suggested that the Corporations Panel will reduce the costs of bringing an action for breach of the *Corporations Act* (see [3.39]), thereby making the justice system available and accessible to those who are usually excluded. Furthermore, the establishment of such a Panel would in no way contribute to the reform fatigue currently suffered by companies under CLERP.

[2.25] The Corporations Panel would be a form of Alternative Dispute Resolution (ADR), which research appears to suggest has some advantages. Namely, that 'it is

²⁵ Michael A Adams, 'The convergence of international corporate governance systems — where is Australia heading?' (Pt 2) (2002) 54 (2) *Keeping Good Companies* 66, 81. (Note: updated and reproduced with permission of Professor Adams to reflect statistics as at June 2002.)

responsive, quick, fair and informal, and that it is cheaper than litigation.²⁶ This view is supported by the International Chamber of Commerce, which suggests that ADR proceedings 'are intended to be rapid and therefore relatively inexpensive.'²⁷

- [2.26] Such rapidity and informality of proceedings should not be confused with 'rough justice' or a slipshod approach. Rather, the benefit of such proceedings is that it will aid in removing some of the current barriers to the legal system. All parties with a valid claim will be heard, so that all of the 6,000 complaints from the public received by ASIC will receive due attention. It will also encourage the silent minority (or perhaps majority) who do not currently make claims for the reasons mentioned in **Chapter 2** to do so, which in turn will result in a higher level of enforcement of the law.
- [2.27] In addition, the Corporations Panel would have the discretion to refer cases directly to the court system if it feels they are too complex, beyond its scope, or the interests of the parties will be best served by a court hearing. Conversely, this discretion extends to the Corporations Panel being able to reject any applications that appear trivial or baseless.
- [2.28] Finally, it should be remembered that the Corporations Panel would enjoy a very small jurisdictional window. That is, generally, claimants would be required to make their application to the Corporations Panel within two months of the circumstances having occurred (see [3.25]). However, this general rule would not exclude the Corporations Panel's discretion to accept applications beyond this period where it sees fit (see [3.25]).
- [2.29] Within one month of having received an application, the Corporations Panel would be required to make a decision whether to hear the matter, and if so, to set a date for such a hearing (see [3.26]). In addition, the date set for the hearing by the Corporations Panel would be required to be no longer than one month after the setting of that date.
- [2.30] Further, the Corporations Panel would only have one month from the hearing date of an application in which to make a declaration (see [3.27]). Once this window closes, jurisdiction over the matter would automatically vest in the court system. The Corporations Panel's position as the main forum for hearing disputes over breaches of the *Corporations Act* does not remove a party's right to have their case heard before a court (see [3.07]).
- [2.31] Thus, CSA estimates that, in practice, the duration of the Corporations Panel's jurisdictional window may last up to, but should not exceed, five months. The timeline in **Figure 1** below may best illustrate the conceptual framework behind this estimate.

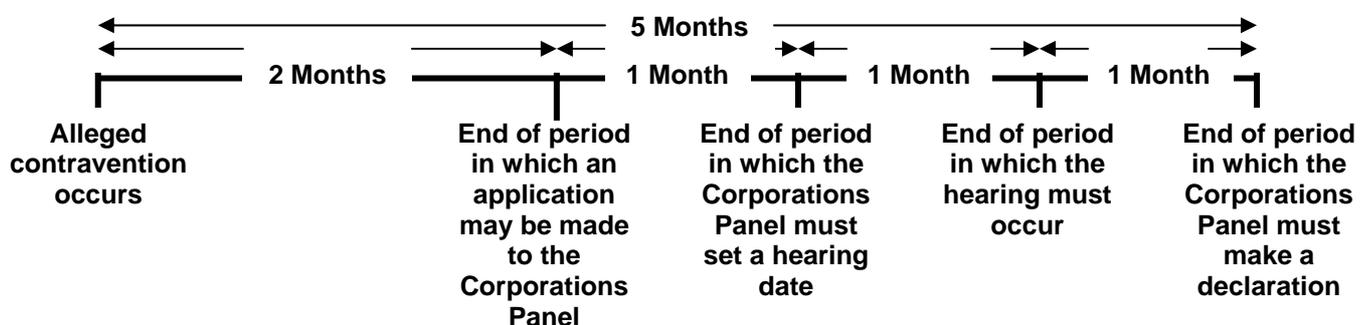


Figure 1: Corporations Panel Jurisdictional Timeline

²⁶ National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards*, Report to the Commonwealth Attorney-General, April 2001, [2.85].

²⁷ International Chamber of Commerce Dispute Resolution Services, *Guide to ICC ADR*, June 2001, p 3.



- [2.32] The time periods allocated to each stage in the Corporations Panel application process are suggested as maximums. It may be that, and indeed it would be desirable if, the time taken by the Corporations Panel to deal with each application were considerably shorter.
- [2.33] The application process is dealt with more fully at [3.24]–[3.29].
- [2.34] In summary, it is anticipated that the Corporations Panel would offer advantages analogous to those offered by the Takeovers Panel. Namely, but not necessarily limited to:
- faster resolution of alleged breaches of the *Corporations Act*;
 - panel members chosen from a large pool of corporate specialists, allowing for greater understanding of complex matters;
 - practical, commercially viable and efficient solutions;
 - greater levels of informality, promoting ease of access to the system and swift resolution of complaints;
 - peer judgment;
 - inquisitorial powers;
 - reduced burden on ASIC and the court system;
 - reduced expense for all participants;
 - rapid imposition of remedies allowing for greater continuity and certainty in the market;
 - with largely part-time members, the operating costs are kept to a minimum.
- [2.35] This list of advantages is a wholly reasonable expectation of the proposed system. If implemented, all users of the Corporations Panel would stand to benefit from its specialist nature and lower levels of legalism and expense. Indeed, to the best of CSA's knowledge, the establishment of such a Corporations Panel would be a world first, placing Australia at the leading edge of corporate regulation and dispute resolution.

Chapter 3

The Corporations Panel²⁸

Where does the Corporations Panel fit into the regulatory framework?

- [3.01] The Corporations Panel would be designed around the model adopted in developing the Takeovers Panel. In fact, the Corporations Panel would virtually mirror the operations of the Takeovers Panel, albeit with a different jurisdictional focus. This does not propose a merger of the two jurisdictional areas to make one 'Super Panel' overseeing all of the *Corporations Act*. Rather, the Corporations Panel would be a separate entity that would merely adopt the Takeovers Panel model in order to achieve the same successes and synergies with regard to those areas within its own jurisdiction.
- [3.02] The advantage of adopting an already accepted and successful model is that little change or reform is required in its implementation a second or third time. Thus, by way of analogy, implementing the Corporations Panel would not require reinvention of the wheel, rather a mere realignment.²⁹
- [3.03] The Corporations Panel would be established by inserting a new Part 10A into the *ASIC Act*. Within this new Part 10A, the role and jurisdiction of the Corporations Panel would be outlined. The Corporations Panel would have the power to hear applications vis-à-vis alleged breaches of those provisions of the *Corporations Act* over which it has jurisdiction.
- [3.04] The Corporations Panel would become the primary forum for resolving disputes about breaches of those provisions of the *Corporations Act* over which the Corporations Panel has jurisdiction. It would be an independent body, with no direct ties to ASIC or the judiciary. However, at all times the Corporations Panel would seek to work within the established regulatory and judicial framework, notwithstanding that the Corporations Panel would be directly controlled by neither.
- [3.05] It should be noted that the Corporations Panel would not usurp the role of ASIC in relation to the exercise of any of the powers or discretions that ASIC currently has under the *Corporations Act*. Furthermore, unlike the jurisdiction enjoyed by the Takeovers Panel under s 656A *Corporations Act* to review decisions of ASIC, the Corporations Panel would enjoy no such analogous jurisdiction.

Court proceedings in lieu of the Corporations Panel

- [3.06] No person other than a Minister of the Commonwealth or ASIC would be permitted to commence court proceedings before the end of the Corporations Panel's jurisdictional period (as defined in [3.27]) in relation to a provision of the *Corporations Act* over which the Corporations Panel has jurisdiction.
- [3.07] Further, were an applicant to seek to commence proceedings outside the Corporations Panel's jurisdictional period, the matter would be transferred to a court. The Corporations Panel would also have a limited period in which to make any declarations relating to a valid application (see [3.27]), beyond which jurisdiction would automatically vest in the courts.

²⁸ What follows is not a full recital of the proposed legislative framework for the Corporations Panel. Rather, please consult Appendix A for full details of the proposed legislative framework.

²⁹ See Anthony J. D'Angelo, *The College Blue Book*.

- [3.08] However, once the Corporations Panel has made a declaration of unacceptable circumstances, an applicant will be limited in their options should the determination not be to their liking. An applicant in receipt of a declaration from the Corporations Panel would not be able to appeal the decision to any court for a review of the merits of the application. This will in no way limit the rights of an applicant to seek judicial review of a determination of the Corporations Panel based on an error of law (see proposed **s 202WC**).
- [3.09] For the purposes of **[3.08]**, a declaration of unacceptable circumstances from the Corporations Panel should be differentiated from a refusal by the Corporations Panel to hear an applicant. The Corporations Panel would be able to refuse to hear an applicant where it determined the application to be trivial or frivolous, or where an application before it goes beyond the scope or capabilities of the Corporations Panel, or where the parties' interests may be better served by the matter being referred to the court. Thus, by refusing to hear an application, the Corporations Panel would effectively be declining jurisdiction over the matter — the occurrence of which would see jurisdiction automatically vest in the court system. A refused applicant thereby retains the right to have their complaint addressed by a court immediately, and need not wait out the Corporations Panel's jurisdictional period (see proposed **s 202Y**).
- [3.10] However, where the Corporations Panel has heard a matter and refused to make a declaration of unacceptable circumstances, a court may (following the conclusion of the Corporations Panel's jurisdictional period) still find that the conduct complained of in the application to the Corporations Panel contravened a provision of the *Corporations Act* over which the Corporations Panel had jurisdiction. In such circumstances, the court will, however, have only a limited role in dealing with the subject matter of the complaint. Therefore, a court may only:
- determine a person's innocence or guilt in relation to an offence against, or contravention of a civil provision of, the *Corporations Act*; and
 - impose a penalty or an appropriate civil remedy if a person is found guilty or order the person to pay an amount of money to another person; or, alternatively,
 - make an order under s 1318 or s 1322 in relation to the conduct.
- [3.11] Such limitations of the court's role would not apply where the Corporations Panel declined jurisdiction over a matter as described in **[3.09]**, rather only where an applicant sought redress from the courts following a matter already having been determined by the Corporations Panel. This is intended to maintain the Corporations Panel as the primary forum for resolving complaints regarding breaches of the *Corporations Act*.
- [3.12] Additionally, the Corporations Panel may, of its own motion, refer a question of law arising in a proceeding before the Corporations Panel to the court for a decision.

The declaratory powers of the Corporations Panel

- [3.13] Similarly to the Takeovers Panel, the Corporations Panel would have the power to make declarations of unacceptable circumstances. However, the Corporations Panel's power to make such declarations is not limited to those situations where there has been a breach of a provision of the *Corporations Act* over which the Corporations Panel has jurisdiction.
- [3.14] This stems from the ideology behind the Corporations Panel that its scope should include those who comply with the letter of the law but fail to comply with the spirit of the law. It is prudent to note that this ideology should not be construed as giving the Corporations Panel carte blanche to make declarations of unacceptable circumstances merely whenever it suits it to do so. Rather, just as similar ideology

underpinned the Takeovers Panel in order to prevent defensive or delaying tactical litigation during takeovers (which was not illegal per se but was outside the spirit of the law), so too the Corporations Panel would enjoy an analogous degree of flexibility.

- [3.15] There are two sets of circumstances the arising of which will grant power to the Corporations Panel to make a declaration of unacceptable circumstances. Firstly, and most obviously, is where the circumstances are unacceptable because they constitute, or give rise to, a breach of one or more of the provisions of the *Corporations Act* over which the Corporations Panel has jurisdiction. Secondly, where the circumstances are unacceptable due to their effect on the company or another company, or any officer or member of either of the companies.
- [3.16] Further, the Corporations Panel may only make a declaration or refuse to make a declaration where it considers that such action will not be against the public interest. In determining whether the granting of a declaration, or refusal thereto, is against the public interest, the Corporations Panel may take into account any policy considerations that the Corporations Panel deems relevant.

The jurisdiction of the Corporations Panel

- [3.17] It is submitted that the Corporations Panel would have exclusive original jurisdiction over the following areas of the *Corporations Act*:
- A. in **Chapter 2A** – Registering a Company:
 - a. sub-ss 112(3) or (4) (no liability companies);
 - b. s 113 (proprietary companies);
 - c. s 114 (minimum of one member);
 - d. s 120(2) (issue of shares);
 - e. s 122 (expenses incurred in promoting and setting up company)
 - f. s 123 (company may have common seal);
 - B. all provisions in **Chapter 2B** – Basic features of a company, with the exception of:
 - a. Part 2B.6 (names);
 - b. Part 2B.7 (changing company type);
 - C. **Chapter 2C** – Registers;
 - D. all provisions of **Chapter 2D** – Officers and employees, with the exception of:
 - c. Part 2D.6 (disqualification from managing corporations);
 - E. **Chapter 2E** – Related party transactions;
 - F. **Chapter 2F** – Members' rights and remedies;
 - G. **Chapter 2G** – Meetings;
 - H. **Chapter 2H** – Shares;
 - I. **Chapter 2J** – Transactions affecting share capital;
 - J. **Chapter 2M** – Financial reports and audit;
 - K. **Chapter 2N** – Annual return and lodgements with ASIC;
 - L. **Chapter 6CA** – Continuous disclosure;
 - M. in **Chapter 6D** – Fundraising:
 - a. Part 6D.3 (prohibitions, liabilities and remedies);
 - N. in **Chapter 7** – Financial services and markets:
 - a. s 793C (enforcement of operating rules);
 - O. in **Chapter 9** – Miscellaneous:
 - a. Part 9.3 (books);
- [3.18] The Corporations Panel would replace the courts as the principal forum for resolving disputes concerning breaches of all provisions listed in [3.17]. It therefore follows that, subject to [3.13–3.16], the Corporations Panel would have no jurisdiction over any provisions of the *Corporations Act* omitted from [3.17]. Further to this, the Corporations Panel would not hear criminal prosecutions for breaches of any provision of the *Corporations Act*; the handling of these disputes would remain with the courts. Nor would the Corporations Panel enjoy similar jurisdiction as that bestowed upon the

Takeovers Panel by s 656A *Corporations Act* to review decisions made by ASIC under s 655A.

- [3.19] It must be remembered that the Corporations Panel has jurisdiction over the areas listed above for a very limited period (see [3.27]). Once the jurisdictional period has lapsed, the Corporations Panel's erstwhile jurisdiction automatically vests in the court system.

The makeup and members of the Corporations Panel

- [3.20] Members of the Corporations Panel would be appointed on either a full-time or part-time basis by the Governor-General on the nomination of the Minister, for a period no greater than five years. Further to this, the Governor-General would appoint a President to the Corporations Panel, who would also become a member if not one already. All members would be eligible for reappointment at the end of their term.
- [3.21] It is anticipated that there would be a large pool of part-time members from which the President would appoint a panel of three members in relation to each particular application received by the Corporations Panel.
- [3.22] Similarly to the Takeovers Panel, the Corporations Panel is intended to have an appropriate mix of professions, business expertise, geographical and gender representation.
- [3.23] All persons would only be eligible for appointment as members of the Corporations Panel where the Minister is satisfied that the person is qualified for appointment. A member could be deemed qualified for appointment by virtue of their knowledge of, or experience in any or all of the following fields:
- business;
 - the administration or management of companies;
 - financial markets;
 - law;
 - economics; or
 - accounting.

Applications and submissions to the Corporations Panel

- [3.24] Applications to the Corporations Panel would be made either by ASIC or any other person whose interests were affected by the relevant circumstances. Thus, applicants would not need to approach ASIC prior to lodging an application with the Corporations Panel. However, in practice, ASIC would remain the first point of contact for all parties who suspect a breach of the *Corporations Act*.
- [3.25] Such applications would be required to be made within two months of the circumstances occurring. However, the Corporations Panel would retain the discretion to accept applications after the two month period had lapsed (see proposed s 202L).
- [3.26] As soon as practicable after receiving an application, and in any case within one month, the Corporations Panel would be required to:
- decide whether to conduct proceedings in relation to the application; and
 - if the Corporations Panel decides to conduct proceedings — prepare a brief, setting out:
 - a general description of the matters to be examined in the Corporations Panel proceedings; and
 - the issues to be addressed in submissions for the proceedings; and

- if the Corporations Panel decides to conduct proceedings — determine a date for the hearing, which must be no longer than one month after the date of making the decision to conduct proceedings in relation to the application (see proposed **s 202Y**).

It should be noted that it is implicit in the first bullet point above that the Corporations Panel at all times reserves the right to decline any application on any grounds it sees fit (eg triviality). However, the Corporations Panel must outline its reasons for declining an application when notifying the parties of its decision (see proposed **s 202Y**).

- [3.27] Any declarations of the Corporations Panel arising from such an application must be made within five months of the circumstances occurring or within one month from the date of the matter being heard, whichever is the longer period (see proposed **s 202N**).
- [3.28] By way of clarification, **Figure 1** (located in **[2.31]**) offers a proposed timeline in diagrammatical format of the Corporations Panel application process.
- [3.29] Lastly, the Corporations Panel, before making any such declaration, would also be required to give an opportunity to make submissions in relation to the matter to:
- each person to whom a proposed declaration relates; and
 - each party to the proceedings; and
 - ASIC.

The order-making powers of the Corporations Panel

- [3.30] Following the making of a declaration of unacceptable circumstances, the Corporations Panel would also have power to make an order (including a remedial order³⁰) to:
- protect the rights or interests of any person affected by the circumstances; or
 - specify in greater detail the requirements of an order made; or
 - determine who is to bear the costs of the parties to the proceedings before the Corporations Panel.
- [3.31] Before making an order of the kind mentioned in **[3.30]**, the Corporations Panel would be required to give:
- each person to whom a proposed order relates; and
 - each party to the proceedings; and
 - ASIC;

an opportunity to make submissions to the Corporations Panel about the matter.

- [3.32] The Corporations Panel would not, however, have the power to make an order:
- compelling a person to comply with a requirement of the *Corporations Act*, or
 - if it is satisfied that such an order would unfairly prejudice any person.
- [3.33] If a person contravened, or proposed to engage in conduct that would contravene, an order of the kind mentioned in **[3.30]** made by the Corporations Panel, the court would have the power to make any orders it considers appropriate to secure compliance with the Corporations Panel's order.

³⁰ As defined in s 9 of the *Corporations Act 2001* (Cth).

[3.34] An application for an order of the kind mentioned in [3.30] could be made to the court by:

- ASIC; or
- the President of the Corporations Panel; or
- a person to whom the Corporations Panel's order relates; or
- a person who was a party to the proceedings in which the Corporations Panel's order was made.

Procedural requirements and compliance with procedural fairness

[3.35] In implementing its procedures, the Corporations Panel would be required to strike a balance between:

- completing proceedings as quickly and as cost effectively as the nature of the matter, the requirements of procedural fairness and the time limits imposed by legislation allow;
- deciding any matter before it on sufficient and reliable information;
- the avoidance of unnecessarily delaying commercial transactions; and
- without losing an opportunity for taking effective action, giving any person liable to be affected by an order or declaration a fair opportunity to make submissions on the relevant facts, law and discretionary considerations (see proposed **s 202Z**).

In order to strike such a balance, the procedures of the Corporations Panel would be modelled so as to ensure, *inter alia*, that:

- wherever possible, decisions would be made on written submissions and written evidence;
- proceedings would be held in private, with all parties given access to all information which is put before the Corporations Panel, and would be obliged to treat that information as confidential;
- procedural matters in relation to a conference may be dealt with by the sitting President or the executive staff of the Panel, without the need to convene the sitting Panel or formal directions hearing;
- the time available to make an order or declaration and the time of the sitting Corporations Panel would be used as efficiently as possible; and
- costs orders would be used to sanction failure to comply with the procedural rules of the Corporations Panel and with directions of the sitting President, which would lead to delay or expense (see proposed **s 202Z**).

Funding the Corporations Panel

[3.36] The Takeovers Panel is funded each year by a specific appropriation in the Federal Budget. For the 2000-2001 financial year, the Takeovers Panel received appropriated revenues of \$1,761,000, which included \$1,355,000 classified as revenue and \$406,000 classified as capital funds in the underlying books and records of the Treasury.³¹ Further to this, under the *Corporations (Fees) Regulations 2001* (Cth),³² a fee of \$500 is payable upon application to the Takeovers Panel. Such fees are payable to the Commonwealth of Australia, and as such do not form part of the direct revenue of the Takeovers Panel.

³¹ Takeovers Panel, *Annual Report 2000-01*, pp 15-16.

³² As amended by *Corporations (Fees) Amendment Regulations 2002 (No.2)* (Cth).

- [3.37] It is anticipated that the Corporations Panel would enjoy a similar revenue structure. The funding of the Corporations Panel must not come at the expense of the respective Government appropriations to ASIC or the court system.
- [3.38] In the alternative, a user-pays system may be introduced, whereby the application fees form part of the revenue stream for the Corporations Panel. However, this would raise issues of uncertainty as to the funding levels of the Corporations Panel, which would be undesirable.
- [3.39] As to the application fee, the amount would need to be sufficiently sizeable so as to minimise the number of trivial applications lodged with the Corporations Panel. Equally, the amount must not be so large as to detract from the central tenets underlying the Corporations Panel — economic viability and accessibility. It is proposed that an application fee be arrived at by way of a viable midpoint between the Takeovers Panel application fee of \$500 and the NSW Supreme Court Commercial filing fee of \$2,616.
- [3.40] A second alternative may be to introduce a mandatory funding levy. However, if this is to be made payable by all businesses, it would defeat the purpose of minimising the compliance costs to business.

Conclusion

- [3.41] In conclusion, it is inevitable that the establishment of a Corporations Panel would entail some expense. However, CSA submits that it would be a small cost to bear in return for such a large benefit to be enjoyed by all parties that come under the jurisdiction of the *Corporations Act*.
- [3.42] The Corporations Panel would offer accessibility to the legal system at a fraction of the current costs involved in taking a matter to the courts. Thus, those parties who are currently excluded from the legal system, such as small business and individual shareholders, will gain access to a method of having their concerns heard and resolved. Furthermore, with little legislative reform required, implementation and establishment of the Corporations Panel could be swift and compliance costs to business would be kept to a minimum.
- [3.43] The structure and procedure of the Corporations Panel would offer a sound, viable, and efficient commercial alternative to the present system, which sees under-enforcement of the *Corporations Act* and many complaints left unanswered.
- [3.44] Lastly, the Corporations Panel would essentially be in keeping with the timeless principle of administrative law proclaimed by Lord Hewart CJ, viz, that 'it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'³³

³³ *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259.

Appendix A

The legislative framework for the Corporations Panel

A Corporations Panel will be established by a provision in a new Part 10A of the *ASIC Act 2001* (Cth). The legislative framework for the Corporations Panel is to be contained partly within the *ASIC Act* and partly within the *Corporations Act 2001* (Cth). However, for convenience and ease of understanding, the proposed sections below are numbered consecutively and formatted as though they are all contained within the proposed Part 10A *ASIC Act*.

Note: the proposed legislative framework below is largely based upon the Takeovers Panel legislation contained within Part 10 *ASIC Act 2001*, Part 6.10 Division 2 *Corporations Act 2001*, and Part 3 *ASIC Regulations 2001*. However, in compiling the proposed legislative framework for the Corporations Panel, many purely procedural provisions contained within the aforementioned legislation have been omitted in the interests of focussing upon the more contentious or substantive provisions that will underpin the Corporations Panel. It is proposed that those omissions would be included, where necessary, in any final legislative framework. CSA welcomes any comments on these omissions or on any other provisions of the proposed legislative framework contained herein.

Part 10A—The Corporations Panel

Division 1—General

202 Establishment of Panel

A Corporations Panel is established.

202A Membership

- (1) The Panel consists of such members as are appointed by the Governor-General on the nomination of the Minister. Each of the members of the Panel may be appointed as a full-time member or as a part-time member.

Note 1: Based on sub-ss 172(1)–(3) *ASIC Act 2001*.

Note 2: In practice there would be 30 to 50 part-time members of the Panel from which a Panel of 3 members (in accordance with s 202J below) can be formed to deal with a particular matter.

- (2) The Minister must nominate a person as a member of the Panel only if the Minister is satisfied that the person is qualified for appointment by virtue of his or her knowledge of, or experience in, one or more of the following fields, namely:

- (a) business;
- (b) administration or management of companies;
- (c) financial markets;
- (d) law;
- (e) economics; or
- (f) accounting.

Note: based on s 172(4) *ASIC Act 2001*.



202B President

The Governor-General is to appoint as President of the Panel a person who is, or is to be, a member of the Panel.

Note: Based on s 173 *ASIC Act 2001*.

202C Term of office

Subject to this Act, a person appointed as a member of the Panel holds office for such term of at most 5 years as is specified in the instrument of appointment, but is eligible for reappointment.

Note: Based on s 175(1) *ASIC Act 2001*.

Division 2 — Aims

202D Aims

- (1) In performing its functions and exercising its powers, the Panel must strive to:
- (a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and
 - (b) promote the confident and informed participation of investors and consumers in the financial system; and
 - (c) administer the laws that confer functions and powers on the Panel effectively and with a minimum of procedural requirements; and
 - (d) take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer powers on the Panel.

Note 1: Based on paragraphs (a), (b), (d) and (g) of s 1(2) *ASIC Act 2001*.

Note 2: This would make the aims of the Panel identical to those of ASIC (with ASIC having two additional aims concerned with information).

Division 3—Declaration of unacceptable circumstances

202E Power to make a declaration

The Panel may declare circumstances in relation to the affairs of a company to be unacceptable circumstances. Without limiting this, the Panel may declare circumstances to be unacceptable circumstances whether or not the circumstances constitute a contravention of a provision of the *Corporations Act 2001* over which the Panel has jurisdiction.

Note: Based on s 657A(1) *Corporations Act 2001*.

202F Circumstances under which declaration made

- (1) The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that:
- (a) the circumstances relate to one or more of the provisions of the *Corporations Act 2001* over which the Panel has jurisdiction and those circumstances are unacceptable having regard to the effect of the circumstances on the company or another company, or any officer or member of the company or another company; or



- (b) the circumstances are unacceptable because they constitute, or give rise to, a contravention of one or more of the provisions of the *Corporations Act 2001* over which the Panel has jurisdiction.

Note: Based on s 657A(2) *Corporations Act 2001*.

202G Provisions over which the Panel has jurisdiction

(1) The Panel has jurisdiction over the following provisions of the *Corporations Act 2001*:

- (a) in Chapter 2A — Registering a Company:
 - (i) sub-ss 112(3) or (4) (no liability companies);
 - (ii) s 113 (proprietary companies);
 - (iii) s 114 (minimum of one member);
 - (iv) s 120(2) (issue of shares);
 - (v) s 120(2) (issue of shares);
 - (vi) s 122 (expenses incurred in promoting and setting up company);
 - (vii) s 123 (company may have common seal);
- (b) all provisions in Chapter 2B — Basic features of a company, with the exception of:
 - (i) Part 2B.6 (names);
 - (ii) Part 2B.7 (changing company type);
- (c) Chapter 2C — Registers;
- (d) all provisions of Chapter 2D — Officers and employees, with the exception of:
 - (i) Part 2D.6 (disqualification from managing corporations);
- (e) Chapter 2E — Related party transactions;
- (f) Chapter 2F — Members' rights and remedies;
- (g) Chapter 2G — Meetings;
- (h) Chapter 2H — Shares;
- (i) Chapter 2J — Transactions affecting share capital;

Note: Each of Chapter 2K (charges) and Chapter 2L (debentures) is excluded.

- (j) Chapter 2M — Financial reports and audit;
- (k) Chapter 2N — Annual return and lodgements with ASIC;

Note: There are no Chapters 3 or 4. Each of Chapter 5 (external administration), Chapter 5A (deregistration etc.), Chapter 5B (bodies corporate etc.), Chapter 5C (managed investment schemes), Chapters 6, 6A, 6B and 6C (re takeovers) is excluded.

- (l) Chapter 6CA — Continuous disclosure;
- (m) in Chapter 6D — Fundraising:
 - (i) Part 6D.3 (prohibitions, liabilities and remedies);
- (n) in Chapter 7 — Financial services and markets:
 - (i) s 793C (enforcement of operating rules);
- (o) in Chapter 9 — Miscellaneous:
 - (i) Part 9.3 (books);

Note: The Panel replaces the courts as the principal forum for resolving disputes about breaches of the *Corporations Act 2001*, with the exception of first, takeover disputes (handled by the Takeovers Panel), second, external administration issues (handled by the courts), third, criminal prosecutions for breach of any provision of the *Corporations Act* (handled by the courts).

202H Policy considerations

The Panel may only make a declaration under s 202E above, or only decline to make a declaration under that paragraph, if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant.

Note 1: Based on s 657A(2) *Corporations Act 2001*.

Note 2: The reference to the public interest and policy consideration tends to reinforce the unanimous conclusion of the High Court with respect to the Takeovers Panel (in the 1991 Precision Data case) to the effect that decisions by the Takeovers Panel were not binding declarations of right of a kind which would cause the Takeovers Panel to exercise the judicial power of the Commonwealth.

202I Relevant factors

(1) In exercising its powers under s 202E above, the Panel:

- (a) must have regard to:
 - (i) the promotion of the purpose or object underlying the *Corporations Act 2001* (whether that purpose or object is expressly stated in the Act or not); and
 - (ii) the aims of the Panel as set out in s 202D above; and
- (b) may have regard to any other matters it considers relevant.

Note 1: Based on s 657A(3) *Corporations Act 2001* and s 15AA *Acts Interpretation Act 1901*.

Note 2: Because the *Corporations Act 2001* has no objects sections, consideration may be given to extrinsic material (such as the relevant Parliamentary Explanatory Memorandum, law reform reports, and so on) in ascertaining the meaning of its provisions — s 15AB *Acts Interpretation Act 1901*.

Division 4—Conduct of Panel’s business

202J Constitution of Panel in relation to particular matters

The Panel must, for the purposes of the performance or exercise of its functions or powers in relation to a particular matter, be constituted by 3 members appointed for that purpose by the President in relation to that matter.

Note: Based on s 184(1) *ASIC Act 2001*.

202K Who may apply (for declarations and orders)

- (1) The Panel may make a declaration under s 202E above or an order under ss 202P or 202Q below, only on an application made by:
 - (a) any person whose interests are affected by the relevant circumstances; or
 - (b) ASIC.

Note: Based on sub-ss 657C(1) and(2) *Corporations Act 2001*.

202L Time for application

- (1) An application for a declaration under s 202E above can be made only within:
 - (a) 2 months after the circumstances have occurred; or
 - (b) a longer period determined by the Panel.

Note: Based on s 657C(3) *Corporations Act 2001*.



202M Submissions

- (1) The Panel must give an opportunity to make submissions in relation to the matter to:
 - (a) each person to whom a proposed declaration relates; and
 - (b) each party to the proceedings; and
 - (c) ASIC.

Note 1: Based on s 657A(4) *Corporations Act 2001*.

Note 2: The procedures of the Panel are outlined in Division 6 below.

202N When Panel may make a declaration

- (1) The Panel can only make a declaration under s 202E above within:
 - (a) 5 months after the circumstances occur; or
 - (b) 1 month after the date on which the application for the declaration under s 202L above was heard;

whichever ends last. The Court may extend the period on application by the Panel.

Note: Based on s 657B *Corporations Act 2001*.

202P Power to make orders (following declaration)

- (1) The Panel may make an order under s 202Q below if it has declared circumstances to be unacceptable under s 202E above. It must not make an order if it is satisfied that the order would unfairly prejudice any person. Before making the order, the Panel must give:
 - (a) each person to whom a proposed order relates; and
 - (b) each party to the proceedings; and
 - (c) ASIC;

an opportunity to make submissions to the Panel about the matter.

Note: Based on s 657D(1) *Corporations Act 2001*.

202Q Types of orders

- (1) The Panel may make any order (including a remedial order but not including an order directing a person to comply with a provision of the *Corporations Act 2001* over which the Panel has jurisdiction) that it thinks appropriate to:
 - (a) protect the rights or interests of any person affected by the circumstances; or
 - (b) specify in greater detail the requirements of an order made; or
 - (c) determine who is to bear the costs of the parties to the proceedings before the Panel.

Note 1: Based on s 657D(2) *Corporations Act 2001*.

Note 2: The Panel cannot order a person to comply with a requirement of the *Corporations Act 2001*. This limitation is designed to preserve the Panel's status as an administrative body for constitutional purposes (see note 2 to s 202H above).

Note 3: However, the Panel can make a 'remedial order', which is defined in s 9 of the *Corporations Act 2001*.



202R Offence to contravene Panel order

A person who contravenes an order of the Panel commits an offence.

Note: Based on s 657F *Corporations Act 2001*.

202S Orders by a court

If a person contravenes, or proposes to engage in conduct that would contravene, an order made by the Panel under s 202Q above, the Court may make any orders it considers appropriate to secure compliance with the Panel's order.

Note: Based on s 657G(1) *Corporations Act 2001*.

202T Who may apply to the court

(1) An application to the Court for an order under s 202S above may only be made by:

- (a) ASIC; or
- (b) the President of the Panel; or
- (c) a person to whom the Panel's order relates; or
- (d) a person who was a party to the proceedings in which the Panel's order was made.

Note: Based on s 657G(2) *Corporations Act 2001*.

202U Evidentiary value of findings of fact

A finding of fact recorded in an order by the Panel, or a written statement of the reasons for an order of the Panel, is proof of the fact in the absence of evidence to the contrary.

Note: Based on s 658B(1) *Corporations Act 2001*.

Division 5—Court Powers

202V Panel may refer questions of law to the Court

The Panel may, of its own motion, refer a question of law arising in a proceeding before the Panel to the Court for a decision.

Note: Based on s 659A *Corporations Act 2001*.

202W Panel is main forum for resolving disputes

The object of sections 202WA, 202WB and 202WC is to make the Panel the main forum for resolving disputes in relation to provisions of the *Corporations Act 2001* over which the Panel has jurisdiction.

Note: Based on s 659AA *Corporations Act 2001*.

202WA Delay in commencing court proceedings (until end of Panel's jurisdictional period)

Only ASIC or a Minister of the Commonwealth may commence court proceedings in relation to a provision of the *Corporations Act 2001* over which the Panel has jurisdiction before the end of the Panel's jurisdictional period.



Note: Based on s 659B(1) *Corporations Act 2001*.

202WB Court proceedings after end of Panel's jurisdictional period

- (1) If:
- (a) an application is made to the Panel for a declaration under s 202E above, that particular conduct amounts to, or leads to, circumstances that are unacceptable; and
 - (b) the Panel refuses to make the declaration; and
 - (c) a Court finds after the end of the Panel's jurisdictional period that the conduct contravenes a provision of the *Corporations Act 2001* over which the Panel has jurisdiction;

the Court's powers under the *Corporations Act 2001* in relation to the conduct are limited to the following:

- (d) the Court may:
 - (i) determine whether a person is guilty of an offence against the *Corporations Act 2001* because they engaged in or were involved in the conduct; and
 - (ii) impose a penalty if a person is found guilty;
 - (e) the Court may:
 - (i) determine whether a person who engaged in, or was involved in, the conduct contravened a provision of the *Corporations Act 2001*; and
 - (ii) order the person to pay an amount of money to another person (whether by way of damages, account of profits, pecuniary penalty or otherwise);
 - (f) the Court may make an order under s 1318 or s 1322 *Corporations Act 2001* in relation to the conduct.
- (2) Sub-s (1) does not apply to a decision of the Panel under s 202Y not to conduct proceedings in relation to an application.

Note 1: Under s 1318 *Corporations Act 2001* the court has the power to relieve certain persons from liability. Under s 1322 *Corporations Act 2001* procedural irregularities can be validated.

Note 2: Based on s 659C(1) *Corporations Act 2001*.

202WC No review on the merits

- (1) A declaration of unacceptable circumstances by the Panel is final, conclusive and without appeal. No party in receipt of a declaration of unacceptable circumstances from the Panel can seek court review of the merits of the application.
- (2) Sub-section (1) above in no way removes a party's right to seek judicial review of a declaration of the Panel under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

202X Panel's jurisdictional period

- (1) The Panel's jurisdictional period ends:
- (a) when the time limit for making an application, as referred to in s 202L above, has expired without an application under s 202E above being made;
 - (b) an application under s 202E above having been made, when the time limit for the Panel to make a declaration, as referred to in s 202N above, has expired;

whichever ends last.



Division 6—Procedures of the Panel

202Y Consideration of applications

- (1) As soon as practicable after receiving application, and in any case, within one month, the Panel must:
 - (a) decide whether to conduct proceedings in relation to the application; and
 - (b) notify of the decision all parties to which, or to whom the application relates; and
 - (c) if the Panel decides to conduct proceedings — determine a date for the proceedings, which must lie no more than one month from the date of making the decision to conduct proceedings in relation to the application; and
 - (d) if the Panel decides to conduct proceedings — notify of the date of the proceedings all parties to which, or to whom the application relates; and
 - (e) if the Panel decides to conduct proceedings — prepare and distribute a brief to all parties to which, or to whom the application relates, setting out:
 - (i) a general description of the matters to be examined in the Panel proceedings; and
 - (ii) the issues to be addressed in submissions for the proceedings; or
 - (f) if the Panel decides not to conduct proceedings — include reasons for the decision in each notice given under (b).
- (2) If the Panel decides not to conduct proceedings in relation to an application, jurisdiction over the matter contained within the application will be deemed to automatically and immediately vest in the Court.
- (3) If the Panel decides not to conduct proceedings in relation to an application, parties to which the application relates need not wait until the expiration of the Panel's jurisdictional period (as prescribed in s 202X) before bringing proceedings in the Court.
- (4) Sub-s (3) above applies notwithstanding s 202WA.

Note: Based on r 20 and r 21 *ASIC Regulations 2001*.

202Z Objectives of procedures

- (1) The object of the procedures of a Panel is to strike a balance between the following objectives:
 - (a) a proceeding before the Panel is completed as quickly and as cost effectively as the nature of the matter, the requirements of procedural fairness and the time limits imposed by legislation allow;
 - (b) the Panel decides any matter before it on sufficient and reliable information;
 - (c) Panel proceedings do not unnecessarily delay commercial transactions; and
 - (d) without losing an opportunity for effective action, the Panel gives any person liable to be affected by an order or declaration a fair opportunity to make submissions on the relevant facts, law and discretionary considerations.
- (2) To that end, the procedures of the Panel are designed to ensure that:
 - (a) wherever possible, decisions are made on written submissions and evidence;
 - (b) proceedings are held in private, with (as far as possible) all parties having access to all information which is put before the Panel, and being obliged to treat that information as confidential;
 - (c) the conduct of a proceeding is controlled by the sitting President;

Note: Based on r 13 and r 16(2)(c) *ASIC Regulations 2001* and s 195(4) *ASIC Act 2001*.



- (d) procedural matters in relation to a conference may be dealt with by the sitting President or the executive staff of the Panel, without the need to convene the sitting Panel or formal directions hearing;
- (e) the time available to make an order or declaration and the time of the sitting Panel is used as efficiently as possible; and
- (f) costs orders are used to sanction failure to comply with the procedural rules of the Panel and with directions of the sitting President, which lead to delay or expense.

Note: Based on r 13 and r 16 *ASIC Regulations 2001* and s 195(4) *ASIC Act 2001*.

202ZA Legal representation in proceedings before the Panel

A party to Panel proceedings may be legally represented in the proceedings only with the leave of the Panel.

Note: Based on s 194 *ASIC Act 2001*.

202ZB Procedural fairness

The rules of procedural fairness, to the extent that they are not inconsistent with the provisions of the corporations legislation, apply to Panel proceedings.

Note: Based on s 195(4) *ASIC Act 2001*.

Appendix B

Questionnaire

The following questions are in no way intended to limit the scope of any submission in relation to this Background Paper. Chartered Secretaries Australia welcomes all submissions on all relevant issues arising from this Background Paper; the inclusion of this questionnaire is intended to stimulate thought, ideas and debate. The questionnaire highlights some of the areas recognised by Chartered Secretaries Australia as being central to the debate of this very important issue. Submissions debating topics not covered by the questionnaire are most welcome.

- [Q.01] Do you agree, in principle, with the need for an alternative to the current system of dealing with alleged contraventions of the *Corporations Act*?
- [Q.02] Do you feel that the proposed Corporations Panel (or one not dissimilar from that proposed herein) would satisfy the need mentioned in [Q.01]?
- [Q.03] Is the suggested timeframe in which an applicant can make an application to the Corporations Panel realistic both as to costs and timing?
- [Q.04] Is the suggested time frame in which the Corporations Panel must process, hear and resolve an application for a declaration of unacceptable circumstances reasonable?
- [Q.05] It is proposed that an integral part of the Corporations Panel's power will be the ability to make declarations of unacceptable circumstances where there has been a breach of the spirit of the law (notwithstanding that it may be arguable that no breach of the letter of the law has occurred). Do you feel that such a power is too wide ranging? If so, what limitations should be placed upon this power?
- [Q.06] The provisions of the *Corporations Act* over which it is proposed the Corporations Panel will have jurisdiction are listed at [3.17] and in proposed s 202G. Do you feel that any of the provisions of the *Corporations Act* that are proposed as being included within the jurisdiction of the Corporations Panel should be excluded? Conversely, have provisions been omitted over which you feel the Corporations Panel should have jurisdiction?
- [Q.07] It is proposed that the Corporations Panel would have jurisdiction over Chapter 6CA — Continuous Disclosure — of the *Corporations Act*. Is the Corporations Panel a preferable vehicle for hearing matters involving breaches of the Continuous Disclosure provisions relating to market listing rules, or should jurisdiction over these provisions remain with the courts?
- [Q.08] Section 194 *ASIC Act* prohibits legal representation at proceedings involving the Takeovers Panel without the Panel's consent. It is proposed that a similar prohibition be applied to proceedings before the Corporations Panel in the interests of reducing costs, delays and formality. Do you feel such a prohibition would serve to impose any injustice upon any party to proceedings involving the Corporations Panel?
- [Q.09] Where the Corporations Panel convenes an oral hearing or conference to clarify issues arising from written submissions it has received, it is proposed that such proceedings are to be held in private. Do you feel that such a proposal would impose any injustice upon any party to proceedings involving the Corporations Panel?
- [Q.10] A crucial issue relating to the establishment of the Corporations Panel is that of funding, which is discussed at [3.37] – [3.41]. Do you feel the suggestions made as to funding by this Background Paper are reasonable, realistic and viable? Further, are there any alternative funding solutions that have not been canvassed in this Background Paper?