7. Streamlining the market for corporate control: a takeovers panel for Japan?

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Japan Inc. has been shaken, its foundations jolted. The person primarily responsible is Takafumi Horie. In 1996 Horie dropped out of Japan's prestigious University of Tokyo and founded Livin' on the Edge, a website design consultancy company, with just US$52 000. Employing an unheralded mergers and acquisitions (M&A) strategy the brash entrepreneur engineered the purchase of more than 50 companies. Such raw capitalism and entrepreneurial vitality has rarely been seen in post-war Japan. By December 2005 the company, now known as 'Livedoor', had a market value of US$7 billion (based on annual sales of just US$661 million for 2005). Horie had acquired celebrity status. Spurred on by Horie's aggressive manoeuvres and abrupt success, the unthinkable has occurred: takeover activity is on the rise in Japan – a country famous for the illiquidity of its stock exchange and tightly held companies.

Unintended consequences have occurred. Japanese corporate conventions such as relationship-based business decisions and the veneration of organic growth have been challenged. Corporate Japan, some say intent on preserving the status quo, has used Horie's challenge as a pretext for implementing management-preserving corporate rules, including versions of the notorious US-style 'poison pill' defences (Milhaupt, 2005a, p. 2171). The poison pill defence – especially in the Anglo-Commonwealth tradition – is often regarded as a pro-management device capable of locking-in insular boards, prone to inhibit the market for corporate control. Undeterred, Japanese lawmakers have partially endorsed the poison pill. As outlined in this volume's Chapter 8 by Kamiya and Ito, a key development was the joint release of the 'Guidelines Regarding Takeover Defences for the Purpose of Protection and Enhancement of Corporate Value and Shareholder's Common Interests' ('Guidelines') by the Ministry of Justice (MoJ) and the Ministry of Economy, Trade and Industry (METI) on 27 May 2005. Aware of the reputation the poison pill holds, however, the Guidelines emphasise the importance of the surrounding corporate infrastructure – namely shareholders, independent directors and the courts – to act as counterbalancing mechanisms to managers who engage in

self-protection tactics and stifle market activity. Yet, some argue that in Japan such infrastructure has not developed to the level required to fulfil this role (Gilson, 2004, p. 21).

In Australia the Takeovers Panel has recently become the primary forum for resolving takeover disputes (Corporations Act 2001 (Cth) s. 657A(1)). It aims to bring speed, specialist expertise and commercial pragmatism to the dispute resolution process, supplanting the courts during takeover battles and permitted to base its decisions on the broader 'spirit of takeover rules' (Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1999 (Cth), p. 38). Its effectiveness in facilitating negotiated outcomes to disputes is indicative of this approach (Calleja, 2001, p. 328). The Takeovers Panel also has a significant policy-making role. This is reflected in its publication of decisions, the release of Guidance Notes, the provision of consultations, the holding of 'Panel Days' and the providing of Panel post-mortems, all of which provides direction for market participants. Since its introduction in 2000 there have been encouraging results for the Panel (Armson, 2005, p. 665). Generally, the Australian business community, the courts and its numerous advocates have openly praised the Takeovers Panel for achieving what it set out to do: creating a healthier takeover market, even in a country with a significant tradition of 'blockholders' and less active institutional investors compared with the UK (Nottage, 2008b).

The Japanese corporate environment seems ripe for an innovation such as a takeovers panel based on the Australian model. Japan's takeover market is still in its infancy. The Guidelines endorsing the poison pill defence are the first major regulatory change to the market in response to the rise in takeover activity. Based on those guidelines it is evident that policymakers are emphasising the surrounding corporate infrastructure, an infrastructure that some argue is insufficient at present to ensure that a healthy takeover market comes to fruition. This chapter suggests that a takeovers panel, through undertaking a nurturing role, can be a positive influence on poison pill implementation and more generally on Japan's takeover market. The specialist panel, as in Australia, might act as the main forum for complex issues such as the legality of 'poison pill' defence strategies; it may also encourage shareholders and company directors to fulfil their required functions through its policy-making role.

This chapter is largely motivated by the recently released Guidelines. There has already been discussion as to whether the Guidelines are the right choice. Milhaupt (2005a, p. 2171) and Gilson (2004, p. 21) have speculated that the Guidelines may impact negatively upon the Japanese M&A market. Yet there has been little comment on how Japanese lawmakers and market participants might be assisted in ensuring the Guidelines have the impact that the lawmakers intended, to positively influence the M&A market.

Before proceeding, a normative admission is in order. This chapter adopts the view of the Corporate Law Economic Reform Program (1997), Proposals for Reform: Paper No. 4, *Takeovers – Corporate Control: A Better Environment for Productive Investment* (CLERP paper), that takeovers are beneficial as a tool to generate 'improved corporate efficiency and enhance management discipline leading ultimately to greater wealth creation'. There are arguments both for and against the CLERP paper's position and the validity of those views is beyond the scope of this chapter. It is therefore not proposed that takeovers in Japan be openly encouraged; however, at the very least they should not be unnecessarily inhibited. Separately, it should be noted Takeovers Panels are also in place in New Zealand, Ireland and most notably the United Kingdom since 1968.

This chapter is organised as follows. Section 1 briefly outlines Japan's takeover market (elaborated further in Chapter 9 by Pokarier) and its evolving regime regarding takeover defences (elaborated further by Kamiya and Ito in Chapter 9). An analysis of the Guidelines suggests a flawed reliance on surrounding corporate infrastructure. Section 2 focuses on the Takeovers Panel in Australia. A brief overview of the Panel's aims, roles and procedure elucidates why the Panel has been widely heralded a success in Australia. Section 3 attempts a Panel 'transplant', explaining how a takeovers panel might function in Japan to alleviate the flaws illustrated in Section 1. This chapter tentatively concludes that the Australian model has potential for Japan, as it provides a mechanism through which an expert body can facilitate takeover dispute resolution processes and better inform market participants of the regulatory system in which they operate.

1. TAKEOVERS IN JAPAN

1.1 The Livedoor Shock

In 2001, one commentator remarked: 'There is no market for corporate control in Japan and there is not likely to be one' (Fligstein, 2001, p. 187). The comment seemed well founded. In the 1990s there were on average only 500 M&A cases per year. During 2001, despite Japan being the world's second largest economy, the Japanese M&A market accounted for only 3.5 per cent of M&A cases worldwide. However, by 2004, there had been a 400 per cent increase in the number of M&A cases, to 2211, from a decade earlier. On the other hand, hostile takeovers remained exceedingly rare (Corporate Value Study Group, 2005, pp. 14–15).

On 8 February 2005 the hostile M&A market was awoken. Livedoor announced that it had purchased a 29.6 per cent interest in Nippon

Broadcasting System Inc (NBS). NBS was a radio broadcasting company, an integral part of the Fujisankei Group and one of the largest media conglomerates in Japan. Combining this with existing shares held in NBS, Livedoor Co. at this point had a 38 per cent interest in the company. It was further announced that Livedoor planned to purchase all outstanding shares in NBS. Already in motion, though, since 18 January 2005 was a friendly takeover bid for NBS by Fuji Television Network Inc. (Fuji), the virtual head of the Fujisankei Group, which had already been approved by NBS directors. Enter Horie and Livedoor. The fact that NBS owned 22.5 per cent of Fuji added to the unexpected. If Livedoor could successfully acquire control of NBS it would become the largest single shareholder of Fuji and acquire management control over the media conglomerate.

The NBS board immediately decided to issue warrants to Fuji to block Livedoor from acquiring a majority of NBS's shares. Livedoor responded by seeking a preliminary injunction from the Tokyo District Court to stop NBS from issuing the warrants to Fuji (immediately seeking an injunction from the courts might be seen as a 'typical' Japanese business response). The Tokyo District Court granted the preliminary injunction, deeming the warrants 'grossly unfair'. The Court found that its main purpose was to maintain the company's current business framework policy, including control by the incumbent management (16 March 2003, 1173 Hanrei Times, p. 140). The Tokyo High Court affirmed the decision (23 March 2005, 1173 Hanrei Times, p. 125). Ultimately Livedoor acquired the majority only to relinquish it in a settlement agreement on 18 April 2005. Livedoor agreed to sell its NBS shares to Fuji at 6,300 yen per share, about the average price it paid for the shares. In return, Fuji obtained a 12.5 per cent stake in Livedoor for a capital infusion of approximately US$440 million and the three companies established a joint committee to explore related ventures.

Livedoor's hostile bid was a watershed case. Horie had thrust hostile M&A into mainstream Japan. As the battle between Livedoor Co. and NBS played out in the courts, its effects overflowed into the Japanese psyche. Livedoor 'struck a deep chord in the Japanese consciousness – not only on a corporate level, but politically and socially as well' (Milhaupt, 2005a, p. 2181). Japan was reeling from the challenges Livedoor Co. offered. Foremost, Livedoor Co. represented the shock of the new, personified by the brash Horie himself. He debunked corporate stereotypes, a college dropout who often wore just a T-shirt and jeans and was entirely disconnected from the suited gerontocracy that dominates Japan's corporate elite. Livedoor's business methodology was profoundly unorthodox (Milhaupt, 2005a, p. 2181). It included share splits to boost share prices, off-market share purchases to avoid disclosure requirements and the use of tactical litigation. All were an abrasive departure from the tranquil norms that had previously governed.

The challenge was also acutely evident to Japan's corporate managers. A survey conducted after the Livedoor case revealed that 70 per cent of large firms in Japan were concerned about the threat of hostile takeovers (*Asahi Shimbun*, 30 April 2005, p. 1). Shortly after, more than a hundred companies, including Japanese multinationals such as NEC, Sony and Toyota, sought to implement some form of takeover defence measures in response to the Livedoor case.

Aware that many firms were undervalued, yet heavily asset laden, the media soon began to exploit corporate Japan's anxiety. Focusing on the role that US investment bank Lehman Brothers played in financing Livedoor's bid, the *Keidanren* (Japan Business Federation) even mooted that Lehman Brothers was not dissimilar to US Commodore Perry's 'Black Ships' of 1853, and that a new wave of 'foreign predators' was coming to Japan. Although this comparison was largely political propaganda, it successfully captured the hysteria sweeping the boardrooms of Japanese corporations.

1.2 Why are Takeovers in Japan now a Reality?

In reality, the Livedoor shock was the result of the environment in which it occurred. A series of legal and non-legal factors, set in motion by the bursting of Japan's 'bubble economy' in 1990, essentially combined to facilitate the dramatic events of 2005.

A major impetus was the rapid dissolution of cross-shareholding *keiretsu*, the pattern of majority reciprocal share ownership by Japanese corporations (Tsuru, 2005). The motivation for such shareholding patterns is corporate cooperation and mutual support between companies. It also effectively nullifies any possibility of a takeover bid by withdrawing a large percentage of the stock from active trading, thus making it more difficult for a potential acquirer to gain the necessary shares to form a majority ownership (Henderson, 1991, p. 283). Over the period 1996–2005 the percentage of cross-shareholdings fell by more than 10 per cent. Conversely foreign ownership rose from 6 per cent in 1993 to almost 23.5 per cent in 2005. The net result has been greater fluidity in Japanese share markets.

Changes in social norms have also played a significant role. Traditionally, the company has held a unique place in the Japanese psyche. It was regarded by many management boards and employees as an extension of their families (as critiqued in this volume's Chapter 3 by Wolff). A corollary was that, for many, M&A constituted an attack on the 'company's family-like composition' (Milhaupt, 2001, p. 2090). However, the recession that plagued Japan throughout the 1990s brought considerable change. Part of that change has been the gradual erosion, among other things, of social norms such as company loyalty. Japanese companies, after continued rapid growth for three decades, were at

last exposed as mortal structures. As a result, the company's aura has now somewhat receded and has been replaced by a more realistic view of market forces and subsequent company vulnerability. Part of that realism is the mechanism of takeovers, including hostile bids (Goldman, 1990, p. 392).

Moreover, there have been important changes to Japan's corporate law. As outlined in this volume's introductory chapter, key reforms were made to areas such as board structure (elaborated in Lawley's Chapter 6), directorial duties and personal liability, executive compensation and organisational flexibility. These changes have contributed significantly towards the increased levels of M&A activity. Legal reforms 'have altered the incentive environment for transfers of corporate control, facilitating deals motivated by Japan's new economic realities' (Milhaupt, 2005a, p. 2189).

In summary, although Horie can be credited as the catalyst for the dramatic events of 2005, a markedly changed business climate provided the ideal setting for his bold plans to be carried out. Fundamental changes to the corporate environment and the laws that govern it created conditions where hostile M&A are not only a possibility but have become a reality, even though no hostile takeover of a major Japanese company has yet been successfully completed (Puchniak, 2008).

1.3 The Guidelines: the Government's Response

Amid the rash of legislative reforms since the mid-1990s, the regulatory regime governing takeover activity received relatively little specific attention. However, METI and MoJ jointly released their Guidelines on 27 May 2005, and are now embarking on revisions.[1] The Guidelines fall within the ubiquitous system of *gyosei shido* (government administrative guidance). Administrative guidance is the informal enforcement of regulatory objectives. It covers a variety of actions by which the administrators influence relevant parties through extra-legal means premised on voluntary compliance (Nakagawa, 2000). The Guidelines are closely based on a METI-sponsored Corporate Value Study Group Report ('Corporate Value Report'), also released in May 2005.[2] The Corporate Value Report's aim was to construct an

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[1] In late 2007 METI announced that the Guidelines will be amended, with the revision process to commence in Spring 2008. See 'Guidelines on takeover defenses to be reworked', Bloomberg, 14 September 2007.

[2] The Corporate Value Group, composed of legal experts and business representatives, was established in September 2004. The report was based on extensive research and consultations with experts regarding Anglo-American takeover defences and legal precedents. See also Chapter 8, by Kamiya and Ito, in this volume.

appropriate government policy response to hostile takeover activity in Japan (Corporate Value Study Group, 2005, p. 6).

Together the Guidelines and the Corporate Value Report represent the government's first response to the increasing trend of takeovers in Japan. The Corporate Value Report recognises that, whilst M&A can be a catalyst for managerial innovation and improved corporate efficiency, there is sometimes a need to curb takeover activity, such as unsolicited bids, which can negatively skew the market and managerial behaviour (Corporate Value Study Group, 2005, p. 33). The government's response therefore endorses US-style defensive measures as a vehicle to avoid raw and potentially market-damaging M&A activity (Corporate Value Study Group, 2005, p. 68). Furthermore, there seemed to be an implicit approval of Delaware takeover jurisprudence, home of the poison pill defence (Milhaupt, 2005a, p. 2196). While the Guidelines are not legally binding, it was also expected that the enunciated principles would be highly persuasive in the evolving case law on the legality of takeover defence measures (Corporate Value Study Group, 2005, p. 24).

Importantly, the Corporate Value Report suggests that such defensive measures are legal in Japan and do not violate the engrained principle of shareholder equality (*Kaishaho*, Company Law, art. 109). One 2001 Commercial Code amendment seems to reinforce the Corporate Value Report's view on the legality of the defence measures (Company Law, art. 236(1)(7)). The amendment permits the issuance by the board of directors, in most cases without shareholder approval, of an option-like financial instrument called a stock acquisition right. This amendment appears to allow corporations in Japan to replicate a US-style poison pill defence (Corporate Value Study Group, 2005, p. 79).

The Guidelines state that companies implementing defensive measures should observe the following three principles. First, companies should adopt, use or redeem takeover defence measures for the purposes of protecting or enhancing 'corporate value' as well as the common interests of all shareholders as a whole (METI and MoJ, 2005, p. 5). The Corporate Value Report (2005, p. 87) explains that as a general rule this is a decision for shareholders to make at a general shareholders' meeting. However the Report also recognises that in many cases there will be a need for prompt company decisions and a shareholders' meeting may not always be possible. The Report, therefore, envisages company management as being the body primarily responsible for these decisions. To assist management in the decision-making process, the Report sets out a 'corporate value standard' as a means to determine when a defence measure is reasonable. Company management would examine: (i) whether there is an existing threat to corporate value; (ii) whether the defensive measures are proportionate to the threat; and (iii) whether its own actions are prudent and appropriate. The Report sets out examples that it expects will satisfy each of the three points in the corporate value standard.

Second, the Guidelines recommend that it is prudent for corporations to disclose the specific details of takeover defensive measures at the time they adopt them to allow shareholders to make appropriate investment decisions. Further, the Guidelines suggest the takeover defensive measures should reflect the reasonable will of the shareholders (METI and MoJ, 2005, p. 5). In other words, the Guidelines require the takeover defensive measures to be adopted at a general meeting of shareholders or, if adopted by board resolution, to include a mechanism such as a proxy context that will allow the shareholders to redeem such measures.

Third, the Guidelines propose that takeover defensive measures should conform to the requirements of Japanese corporate law, including the principles of shareholder equality and the protection of property rights (METI and MoJ, 2005, p. 6). In addition the Guidelines propose management should put in place mechanisms to prevent possible company board entrenchment (METI and MoJ, 2005, p. 6). The Corporate Value Report outlines three devices that would be appropriate for fulfilling the final requirement: (i) evaluation by independent parties such as independent directors; (ii) inclusion of a 'chewable pill' clause or 'permitted offer exception clause', which would provide that defensive measures be redeemed if an acquisition proposal meets certain objective requirements established by the board in advance; or (iii) approval by the shareholders (Corporate Value Study Group, 2005, p. 96).

1.4 Reliance on Missing Infrastructure

In this way, the government began to clarify how takeover defences could be acceptable, yet corporate Japan still had to decide when and how it might adopt protective measures. Rightfully so, the Guidelines do not themselves address the obligations of a company board when a hostile bid is actually made. Unsolicited bids are fact-dependent, requiring them to be approached in a case-by-case manner (a view evidenced in the fact-intensive nature of Delaware takeover jurisprudence: Milhaupt, 2005a, p. 2209). However, as Gilson (2004, p. 30) has found in relation to US corporations, it is possible to analyse the motives that will be present when a company becomes a target. Generally three will be evident. The first is that target management may be acting out of self-interest. The poison pill is capable of locking-in insular boards to allow the current managers to maintain the status quo even though the bid may benefit target shareholders. The second is that the target board may use the poison pill as a bargaining tool to probe for a higher bid. And the third – closely related to the second motive – is that target management may attempt to stall a bid in the belief that an offer at a later period will be more advantageous to shareholders.

A corollary of this is that, while administrative guidance on the structure

that a poison pill should take is important, a more pressing issue comes to the fore. Who monitors corporate management to ensure the correct motivation is evident when a poison pill defence is implemented? As Gilson (2004, p. 31) points out, '[t]he critical operational question is the identity of the policeman'. Gilson, basing his findings on the operation of the poison pill in the US, concludes that three different institutions can and largely do ensure that management acts in a bona fide manner: independent directors, shareholders and courts (Gilson, 2004, p. 33).

Gilson's analysis is a useful starting point when considering the Japanese government's response. Just as lawmakers have essentially transplanted the poison pill structure from US jurisprudence, it appears they also envisaged a transferal of surrounding infrastructure to Japan. The Guidelines and the Corporate Value Report both make numerous references to the policing role expected by lawmakers of shareholders and independent directors (see for example Corporate Value Study Group**,** 2005**,** pp. 87, 96; and METI and MoJ, 2005, p. 5). Additionally the vague and highly fact-specific nature of the Guidelines indicates that lawmakers contemplated Japanese courts also playing a key monitoring role in the pill's implementation (METI and MoJ, 2005, p. 5). Subsequent Japanese case law, outlined in this volume's Chapter 8 by Kamiya and Ito, shows that this is proving to be true. In guiding further developments, this chapter questions, in sequence, the level of development of Japan's institutional structure relied upon in the Guidelines.

1.4.1 Shareholders

In the past decade shareholders in Japan have taken on a new presence in the share market (Nottage and Wolff, 2005). To begin with, the face of the Japanese shareholder has changed. Cross-shareholdings have fallen, while foreign investments have risen. Shareholders have also found more voice. Shareholder activism is on the rise, spurred on by recent legislative amendments permitting shareholders a greater corporate monitoring role. Between 1991 and 2000 approximately 490 derivative suits were filed. By comparison, in the 40 years prior to 1991 a mere 20 derivative suits were brought (Milhaupt, 2003, p. 12). Independent groups like ISS, an investor information service firm that advises foreign institutional investors, have also contributed to a more activist shareholder environment. During the 2005 round of Japanese company general shareholder meetings ISS opposed the proposal of takeover defence measures in seven companies.[3]

[3] Koyano, Taro, 'Poison pill defense not liked by all', *Daily Yomiuri*, 8 July 2005, p. 8.

These marked changes are reasons for optimism that Japanese shareholders have strengthened their position in corporate Japan. However, there are still grounds for concern. Despite decreases in cross-shareholdings, financial institutions and business corporations still hold 54.8 per cent of all shares on the Tokyo Stock Exchange. Commentators argue that these investors still prioritise business relationship reciprocity over the maximisation of shareholder value (Milhaupt, 2003, p. 19). Additionally, some firms remain management-centred. In 2005, seven major Japanese companies, including the electronic giant Panasonic, decided to introduce defensive measures without submitting proposals at their shareholders' meetings (*Daily Yomiuri*, 8 January 2005). Under this structure the board alone is the sovereign decision-maker regarding poison pill implementation in the case of an unsolicited bid. Although the conduct of seven companies is far from reflective of the attitude of all of corporate Japan, it illustrates that at least some firms are still willing to ignore the views of shareholders. More recently, in the shadow of case law diverging again from US law, companies are taking shareholders' resolutions more seriously. However, as noted in Chapter 8, this too may be expecting too much from shareholders in the current Japanese context.

1.4.2 Independent directors

The independent director system, even more so, remains in its infancy in Japan. Traditionally lifetime employment and loyalty-based company promotions ensured that a company's management remained insular, with minimal intervention from outsiders (Gilson and Milhaupt, 2004). It was only after a 2002 Commercial Code amendment that a clear role for independent directors in Japanese companies was defined (*Tokubetsu Reigai Ho*, Special Exception Law, art. 21(5)). The 2002 amendment, part of the wave of corporate governance reform since the early 1990s, was aimed at increasing the international competitiveness of Japanese companies through an improved structure for corporate monitoring (Takahashi and Shimizu, 2005, p. 39). Now incorporated in the new Company Law, major companies have the option of adopting a US-style 'committee system' structure (Company Law, arts 326–8). Companies adopting the new system must establish three committees – nomination, audit and compensation – under the board of directors, with each committee comprising a majority of outside directors.

As elaborated also in Lawley's Chapter 6 in this volume, however, several factors are likely to limit the amendment's potential impact on improving corporate monitoring amongst Japanese corporations. First, the definition of an 'independent' director in the 2002 amendment seems to lend itself to a broad and quite possibly detrimental interpretation. The Company Law uses the term 'outside' director. An outside director is defined as 'a director who is not involved in the management of the company, nor is currently, or at any

time has been, an executive director, manager or employee of the firm or of any of its subsidiaries' (Company Law, art. 15). This definition is, for example, broad enough to include a director from parent companies, business partners or major shareholders. Thus, in attempting to bring openness to board management, this amendment paradoxically allows Japanese management to reinforce its traditionally closed nature.

Furthermore, the optional nature of the amendment means that Japanese companies are under no obligation to adopt the 'committee system' structure and grant independent directors a greater role in company management. Initial results show that between 2002 and 2004 only 71, or 3 per cent of eligible firms, adopted the committee system (Gilson and Milhaupt, 2004). Commentators, though, have been quick to qualify these figures and remain hopeful of increases in the coming years (Gilson and Milhaupt, 2004, p. 7).

1.4.3 Courts

The challenge for Japanese courts is significant. The Guidelines provide little instruction on when a poison pill is deemed legally reasonable. Traditionally, the Japanese judiciary, strongly influenced by the Continental legal system, has sought to apply the facts to formally enacted statutes in judging specific cases (Tsuru, 2005). The courts are now confronted with an unfamiliar task: to build a new body of law from the ground up. Commentators have been quick to remark that creating a body of law on takeover rules was no easy task for the Delaware courts, the commercial court system with the most takeover experience of any in the world. On this view, those commentators have concluded that this role may simply be beyond that of the Japanese courts, a system with virtually no experience in takeover litigation (Gilson, 2004, p. 42).

In summary, despite the positive signs for shareholders and outside directors, uncertainties still surround each institution's capacity to monitor the operation of the poison pill in Japan. Thus, on the evidence above, this chapter concludes that arguably Japanese lawmakers are relying on an infrastructure that does not seem to have developed to the level required to ensure poison pill defences are not used by Japanese companies as a pro-management protection device.

2. THE TAKEOVERS PANEL IN AUSTRALIA

2.1 Takeover Activity and Regulation in Australia

Australia's M&A landscape is governed primarily by the Corporations Act 2001 (Cth). The relevant section is Chapter 6, which regulates the acquisition

of shares and takeovers. This is the most recent of a series of attempts by Australian lawmakers to find a suitable approach to the regulation of the M&A market. Indeed, three earlier waves of reform from 1961 suggest that Australia has struggled to find the right regulatory approach. Moreover, various groups have called recently for yet further changes, and the Takeovers Panel itself has been subjected to constitutional challenge (Armson, 2007).

Australia's first attempt at regulating the actions of corporate raiders, the Uniform Companies Act, was enacted in 1961 (Tomasic et al., 1996, p. 788). It dealt sparingly with takeovers, with only two sections directly addressing this area of market activity (Redmond, 2005, p. 887). Regulatory shortfalls (interpretative loopholes allowed unregulated stock acquisition announcements: see Austin and Ramsay, 2005, p. 1088) combined with a sharp increase of significant market activity led to a significant review of the M&A laws in subsequent years. The significant market activity included a mining boom as well as a number of major corporate collapses in the 1960s (Tomasic et al., 2002, p. 641). The government established the Eggleston Committee in 1967 and later the Rae Committee from 1970 to 1974 to add much needed detail to M&A provisions (Tomasic et al., 1996, p. 788). Indeed, findings of the Eggleston Committee, now known as the Eggleston Principles, have been the foundation of Australia's modern M&A regulations and continue to influence current legislation.[4] The result of the various committees was the so-called *Takeover Code* in 1971 and the insertion of 25 new sections (Redmond, 2005, p. 887). Despite the major reforms in 1971, updates and changes to takeover legislation have been frequent in the last three decades.

The most recent major change arose out of the Corporate Law Economic Reform Program (CLERP), established in 1996. CLERP's objectives were to improve the efficiency of corporate regulation and reduce regulatory burdens on business (Austin and Ramsay, 2005, p. 1089). In March 2000, the resulting legislation introduced a new Chapter 6 into the Corporations Act. Chapter 6 is an attempt to strike a balance in M&A between two competing market considerations. From a competitive business environment perspective, the new regulations encourage takeovers as a means to achieve an efficient allocation of capital. At the other end of the spectrum, it supports the notions of investor confidence and market integrity through retaining the fundamental Eggleston principle of equal opportunity for all shareholders (CLERP, 1997, p. 7).

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[4] See Corporations Act 2001 (Cth) s. 602, which sets out the purpose of Chapter 6, can be directly referenced to findings taken from the Eggleston Committee. In summary, it requires that the identity of the offeror be known, there be sufficient information to assess the merits of the offer, there be reasonable time to consider the offer and a reasonable and equal opportunity be given for all shareholders to participate in the offer.

Observing takeover activity in Australia throughout this period mirrors well the narrative of regulatory fluidity depicted above. From the time of the Uniform Companies Act in 1961 until the mid-1980s, there was a progressive increase in the number of takeover bids. A takeovers boom in the late 1980s saw the number spike to a record high of almost 300 in 1988. However since then there have been year-by-year fluctuations with numbers ranging from the mid-50s to mid-90s between 1990 and 2005. In the 2004–5 financial year there were 68 takeovers. Since 1990 about 40 per cent of hostile takeovers have been successful, a rate comparable with that of the UK and significantly higher than in the US, where poison pills and other defensive measures are more widely permitted (Nottage, 2008b).

2.2 The Takeovers Panel[5]

The Takeovers Panel is the primary forum for resolving disputes about a takeover bid until the bid period has ended. Thus, during a takeover bid, the court's jurisdiction is ousted for private litigants until the bid period ends. Only the Australian Securities and Investments Commission (ASIC) or another public authority of the Commonwealth or a state can commence court proceedings in relation to a takeover bid before the end of the bid period. Standing may extend to the bidder, the target, a rival bidder or a shareholder in the context of a bid. Beyond takeover bids, the Panel has powers to declare circumstances in relation to a takeover or control of an Australian company unacceptable (Corporations Act 2001 (Cth) s. 657A(1)). The Panel may exercise these powers at any time and applications are permitted by any persons whose interests are affected by the relevant circumstances (ASIC is also permitted to make an application, Corporations Act 2001 (Cth) s. 657C(2)).

The Panel, unlike courts, is a commercially pragmatic peer review body. At present, there are 46 part-time members drawn from business, investment banking and the legal and accounting professions. This panel composition is recognition that industry participants rather than legal generalists are best placed to address the highly technical and rapidly changing nature of takeovers. When a matter is referred to the Panel by those with standing, as seen above, and the Panel decides to commence proceedings, the President

[5] Information discussed in this section regarding the roles and procedures of the Takeovers Panel is guided by numerous commentaries on the Panel. See Redmond (2005, Ch. 12), Levy (2002, Ch. 17) Lipton and Herzberg (2006, Ch. 18), Tomasic et al. (2002, Ch. 21), Austin and Ramsay (2005, Ch. 2), and Takeovers Panel Homepage (2006), at <http://www.takeovers.gov.au/display.asp?ContentID=6http://www.takeovers.gov.au/display.asp?ContentID=560>.

of the entire Panel appoints three members to be a 'sitting Panel' (ASIC Act 2001 (Cth) s. 184). As the Panel is a national body, few restrictions apply as to where a matter may be heard. Legislation requires the Panel to conduct proceedings in a timely manner with as little formality as possible (ASIC Regulations 2001 (Cth) reg. 13).

The Takeovers Panel resulted from the CLERP Act 1999. It replaced the 1991 Corporations and Securities Panel. From the very outset, the Corporations and Securities Panel was handicapped by its own structure and procedure (Santow and Williams, 1997, p. 749). The Panel was not the main forum for disputes and, as a result, tactical litigation remained rampant in the courts. Exacerbating this, the Panel was entirely dependent on regulatory authorities for funding, administration and applications (Walsh, 2002, p. 435). The result was a virtual shunning of the Corporations and Securities Panel by takeover market participants. It was used only four times in almost ten years (Redmond, 2005, p. 891). Recognising these limitations and the Corporations and Securities Panel's stagnant existence, the CLERP Act 1999 sought to revive the almost defunct administrative body. Renamed the Takeovers Panel, initial results appear to show that the new Panel is a marked improvement on its predecessor.

At the end of 2005, five years after its introduction, the revitalised Takeovers Panel had made 148 decisions, a significantly greater number than its predecessor in half the time. Applications have been widespread, reflecting utilisation of the Panel by all market participants (Armson, 2005, pp. 669–70). Overall, bidders made the highest number of applications to the Panel (46 per cent), followed by target companies (35.1 per cent), target shareholders (10.8 per cent), other interested persons (4.7 per cent) and ASIC (3.4 per cent). Importantly the Panel has achieved timely dispute resolution. In the five-year period it took the Panel, on average, just over two weeks (17.3 days) after the application was made to announce a decision (Armson, 2005, p. 676). As a result of these figures, the Panel has been widely praised by the Australian business community and courts. Its numerous advocates claim the Takeovers Panel has helped foster a healthier takeover market in Australia by bringing 'timeliness and commercial expertise' to the resolution process as well as encouraging key market participants like company directors and shareholders to become more active and accountable.

The rest of the section examines the Panel's roles and procedures. It does not seek to be a comprehensive review of all elements of the Panel. Rather it aims to describe the Panel's main roles and procedures to further elucidate why its advocates have been so forthright in their praise since the Takeovers Panel's inception in 2000.

2.3 Roles of the Takeovers Panel

2.3.1 Primary dispute resolution forum and unacceptable circumstances

As mentioned above, disputes in relation to a takeover, while the takeover is current, are now resolved by the Panel. Additionally the Panel's jurisdiction is further expanded through its statutory power to declare circumstances, independent of a takeover bid, unacceptable even if the circumstances themselves do not contravene the Corporations Act (Corporations Act 2001 (Cth) s. 657A(1)). There is no definition of unacceptable circumstances in the Corporations Act. Much depends on how the circumstances affect persons involved and on the market with regard to policy set out in section 602 of the Corporations Act (see Corporations Act 2001 (Cth) s. 602). In deliberating, the Panel considers any underlying policy issues before making their declaration (Corporations Act 2001 (Cth) s. 657A(2)). The Panel has a wide discretion as to what issues it may consider (Corporations Act 2001 (Cth) s. 657A(3)(b)).

If the Panel declares circumstances unacceptable, the Panel may make any orders to protect the rights or interests of persons affected and ensure the takeover bid proceeds in the way it would have had the circumstances not occurred (Corporations Act 2001 (Cth) s. 657D(2)). However, the Panel has the added flexibility courts lack to be more conciliatory through accepting undertakings from the parties (ASIC Act 2001 (Cth) s. 201A(1)). Such undertakings can be initiated by either the Panel or the parties involved (Panel Rules 2004 (Cth) r. 13.1). One way the Panel can initiate is by the distribution of draft reasons for its decisions to the parties before making a final decision (Matters Procedure Guidance Note, G.N. 21). Changes to the Panel Rules in June 2004 now actually encourage the Panel to avoid formal decisions and orders (Panel Rules 2004 (Cth) r. 12). Market participants appear also to have embraced the Panel's more conciliatory role. At the end of 2005, 38 per cent of unacceptable circumstances matters had been resolved by undertakings from at least one of the parties to the dispute (Armson, 2005, p. 678).

2.3.2 Policy creation

The Panel's other main function is that of policy creation. This is made possible through several avenues. First, the Panel can develop policy though its rule-making power that allows the Panel to clarify or supplement the provisions of Chapter 6 from the Corporations Act (Corporations Act 2001 (Cth) s. 658C(1)). This allows a 'hands on' approach for the Panel and ensures that policy implementation remains malleable and time efficient.

Indirectly, the Panel maintains an influence over policy through the publication of its decisions and the release of Guidance Notes (Walsh, 2002, p. 437). Interestingly the rule of precedent does not technically apply to Panel decisions. Despite this, it is evident that the Panel does consider prior decisions with

similar circumstances to provide a degree of consistency in decision-making and a clear regulatory framework (Armson, 2005, p. 582). The Panel also held Panel Days and consultations in its early stages (Cross, 2003, p. 379). These workshops served as an opportunity to discuss policy and current proceedings and to induct new Panel members into their role and the legislative and policy framework within which they would be working.

While these initiatives reflect inward policy development, outward development continues through the use of so-called ‘post-mortems’. The Panel will conduct a post-mortem with parties to each matter once the application has been settled and usually once the takeover has finished. The Panel’s aims are two-fold: to gain raw feedback on the process and importantly to build and maintain relationships with market participants. Overall the goal is the instillation of confidence in the respective parties for possible future proceedings (Takeovers Panel, 2001, p. 14).

2.4 Takeovers Panel’s Procedures

The Panel’s rules of procedure emphasise timeliness and informality. In so doing, they remain congruent to the fast-moving takeovers market over which the Panel presides. Consequently, the Panel rules, made by the Panel itself, are brief, especially in comparison with court rules (the Panel’s rule-making power comes from s. 195 of the ASIC Act 2001 (Cth)). The rules of evidence do not apply (reg. 16 of the ASIC Regulations 2001 (Cth)). However, the rules of procedural fairness do apply, to the extent that they are not inconsistent with the Panel’s legislation (ASIC Act 2001 (Cth) s. 195(4)).

Once the Panel has decided to hear a matter, it issues to the parties a ‘brief’ detailing the matters to be examined (ASIC Regulations 2001 (Cth) reg. 22. Like the courts, the Panel can dismiss matters as frivolous or vexatious (see Corporations Act 2001 (Cth) s. 658A). The Panel will then rely mostly on written submissions from the parties, which can be made by electronic mail to avoid time delays. Generally, the Panel permits a period of between one and three days for party submissions, depending on the nature of the application. Conferences are available; however, they are used only when absolutely necessary.[6] In this situation, the Panel requires a party to obtain leave before it can be legally represented and generally leave will only be granted to those lawyers working on the transaction (ASIC Act 2001 (Cth) s. 194; Panel Rules 2004

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[6] A conference will be permitted if there is a need to clarify matters arising from the application, submissions or other documents, to resolve inconsistencies or otherwise to inform the Panel. In a conference the Panel has coercive powers such as requiring a witness to attend, production of documents and provision of evidence under oath. See ASIC Regulations 2001 (Cth) reg. 35.

(Cth) rr. 11.1,11.3). In fact, leave for Senior Counsel to appear has only been granted once. This last practice is consistent with the Panel's objectives of resolving disputes quickly and cost-effectively (Panel Rules 2004 (Cth) r. 1.2).

Throughout proceedings, restrictions apply on publicity to encourage parties to provide complete information quickly and to avoid unnecessary publicity for the market or the interested parties (ASIC Act 2001 (Cth) ss 127, 186). The Panel remains accountable to the parties and the public through the giving of its reasons. Furthermore, all decisions are also subject to possible review by a Review Panel or the courts (Corporations Act 2001 (Cth) ss 657EA, 657C).

The rejuvenated Panel signifies a new approach to the resolution of takeover disputes in Australia. Excessive legalism has been replaced by a policy-driven approach focused on speedy and commercially oriented outcomes. Although the Panel is still young, analysis of its structure and procedure, as well as encouraging initial results and market feedback, suggests that in the Panel the government has found the right regulatory balance for ensuring a healthy takeovers market.

3. A TAKEOVERS PANEL IN JAPAN – A LEGAL TRANSPLANT

Against the backdrop to the Livedoor shock and the government's response through the Guidelines, corporate Japan appears ripe for implementing a mechanism such as an Australian-style takeovers panel. Given that the Japanese M&A market is in its infancy and current infrastructure may not be adequately geared to cope with likely complexities, it is an opportune juncture for the implementation of such a mechanism. The panel would be compatible with Japan's present corporate and regulatory environment, and might even facilitate the introduction of the poison pill defence into corporate Japan and more broadly attempt to positively influence the continued development of the domestic M&A market. Section 3.1 firstly considers the viability of a panel transplant from a number of perspectives: historical, legal and governance perspectives. Section 3.2 then examines how a takeovers panel based on the Australian model might function in Japan.

3.1 Is a Takeovers Panel Viable in Japan?

Historically, the transplantation of legal rules from one jurisdiction to another is a commonly observed form of legal development around the world.[7] In fact,

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[7] A legal transplant can be defined as a body of law or an individual legal rule

a review of Japanese legal development over the last century reveals that Japan has been a frequent exponent of the transplant process, particularly in relation to corporate law and corporate governance regulation. Japan's original Commercial Code was imported from Germany in 1898. In the 1950s the Illinois Business Corporation Act of 1933 served as the basis for major amendments to Japanese corporate law (Kanda and Milhaupt, 2003, p. 887). The Guidelines themselves rely heavily on a takeover jurisprudence developed in the small US state of Delaware. These examples confirm that Japan has to date embraced foreign laws as a means of regulatory revision and enhancement. Importantly these examples also suggest that from a historical perspective a transplant such as a takeovers panel may be viable.

From a legal perspective, an Australian-style takeovers panel has a degree of commonality with the traditional Japanese regulatory approach for corporations. Under Japan's administrative guidance approach to market regulation, the Japanese business method is a hybrid of 'free market' and government involvement. In the context of M&A disputes, the administrative guidance system focuses on consultation between the parties and ministry officials, with an emphasis placed on informality through negotiation (MacAneney, 1991, p. 455). Also within this regulatory environment, commercial litigation is minimal in Japan, resulting in the courts normally having only a minor role in the dispute resolution process. The panel, as Section 2 demonstrates, is premised on similar methodologies for dispute resolution. Additionally, casting a public organisation such as a takeovers panel, not judicial authority, as the primary dispute forum for takeover bids is in keeping with the traditional Japanese way of implementing economic regulations.

Finally, M&A viewed normally as a disciplinary mechanism, also have the capability to be a market driven corporate governance tool (Milhaupt, 2003, p. 296). As Milhaupt and West note, takeovers have the potential to broaden the managerial outlook, expand strategic options, match governance technology with production processes and contribute to a more robust market for legal innovation (Milhaupt, 2003, p. 296). Such influence, though, requires a healthy and functioning M&A market (Milhaupt, 2003, p. 296). At present, as seen above, the M&A market in Japan is still in its infancy. This chapter suggests then that a takeovers panel, a mechanism designed to facilitate an active takeovers market, might present Japanese lawmakers with an opportunity: to harness M&A activity and gear its influence towards continued corporate governance enhancement.

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that was modelled from a law or rule already in force in another country, rather than developed by the local community. See Kanda and Milhaupt (2003).

3.2 How Would a Takeovers Panel Function?

Japanese lawmakers, through the Guidelines, are relying on an infrastructure that is not ideally placed at present to ensure poison pill defences are implemented appropriately by corporate management. This section addresses that infrastructure, area by area, to elucidate how a takeovers panel might better function. In doing so, it considers each institution's shortcomings and posits suggestions as to how the poison pill could be more smoothly implemented in corporate Japan.

Before proceeding another caveat is warranted. Legal transplants are an experiment and the outcome is usually unpredictable.[8] In this case, the unpredictability seems to be compounded. The Guidelines themselves are largely borrowed from Delaware takeover jurisprudence. The outcome of that initial transplant is still far from certain. In recognition of the possible unpredictability that surrounds the Guidelines and their implications, the following is intended only as a guide to how a panel might function in Japan.

3.2.1 Courts

The takeovers panel might act as the primary body in Japan for ensuring market participants adhere to the Guidelines' principles and resolving any disputes between participants about the legality of takeover defences. Takeovers panels are generally composed of individuals experienced in takeover matters. A small specialist body, such as a takeovers panel, is therefore inherently suited to interpreting and implementing the vague principles upon which the Guidelines are based. Since hostile takeovers are a relatively new phenomenon in Japan, such a panel could be especially beneficial for the Japanese M&A market. The advantage in introducing a panel is that, given the Australian example, this kind of body would be able to skilfully navigate the practical difficulties of M&A issues in Japan. In this role, the panel might base its approach on similar principles to those that have so far had encouraging results for its Australian counterpart, namely bringing informality, speed and a commercial focus to the resolution process. As in the Australian model, these broad-based principles might best be promoted through the panel's structure and procedure in relation to dispute resolution.

Like the Australian Panel, then, the Japanese model might have the power to make rules in relation to its procedures. This would allow the panel a 'hands-on approach' in attempting to bring informality to the resolution process. To aid initially in rule creation, a mechanism such as an objects clause

[8] The amount of conflicting literature on legal transplants is reflective of this. For an example of conflicting views compare Watson (1993) with Kahn-Freund (1974).

might encourage panel members to take a purposive approach when interpreting the Guidelines and to consider the broader commercial consequences a rule may have on proceedings.

The Japanese takeovers panel might also have considerable flexibility regarding the dispute resolution process. Once the panel has made a finding, it might have the power to make orders to protect the rights or interests of persons affected and ensure the takeover bid proceeds in the way it would have if not for the implementation of the illegal defence measure. Additionally, a more conciliatory approach, such as undertakings, might also be available.

This chapter proposes that panel members might be encouraged initially to rely more on the conciliatory approach. This approach might create a market environment more conducive to corporate acquisitions, given Japan's current corporate situation. Japan's hostile M&A market is in its infancy and the mechanics of a poison pill defence are still largely foreign to Japanese company boards. In fact, some commentators have questioned whether takeover defences implemented by company boards in wake of the Livedoor shock in early 2005 might actually be defective and fail to properly protect companies if required (*Nihon Keizai Shimbun*, 2005). The next few years will be a trial period for the pill in Japan. In this period, a perception of encouraging compliance through conciliatory outcomes rather than punishing non-compliance through more formal orders might better serve M&A market development in Japan.

Due to the nature of takeovers disputes, a takeovers panel benefits from not only legal and regulatory but also commercial expertise in its members. Panel member recruitment can encourage a commercial focus for the panel. The Australian panel model suggests this. A panel consisting of members with a business background and significant experience in takeovers and individuals with legal and regulatory expertise, as is the case with the Australian panel, would be an advantageous model for Japan because it would provide a developing market with expert decision-makers to guide dispute resolution. The latter appears to be of particular significance when one considers that Japanese decision-makers are now required to apply the Guidelines' vague principles to the usually complex and fact- intensive matrix of takeover disputes.

As the Guidelines are still fairly new, selected members might benefit from holding panel days, as is done in Australia, to serve as an opportunity to induct members into their new roles. Critics of the Guidelines argue that they are malleable enough to accommodate strategic use by both managers and shareholders and can be given different interpretations, depending on the interests of the interpreter (Milhaupt, 2005a, p. 2211). This chapter suggests, then, that during the induction process it may be advantageous for panel members to receive instruction on policy directives underlying the Guidelines to ensure consistent application of the Guidelines' principles to takeover defence disputes.

3.2.2 Shareholders

As Section 1 notes, general shareholder awareness and shareholder activism is on the rise in Japan. Despite this trend, keeping abreast of the changing M&A market and comprehending the new Guidelines could prove difficult for lay investors. The panel's role in relation to Japanese shareholders, therefore, might largely revolve around educating shareholders about these changes. This would assist shareholders in two ways: keeping them informed of market changes and better preparing them for the specific role lawmakers envisage for them in relation to the Guidelines.

The panel might take on its educational role in several ways. At the outset, it might issue panel practice instructions as to when shareholders would have standing in a takeover defence dispute. During the dispute resolution process, the panel might also seek submissions from shareholders, if they express interest in the proceedings, as a way of involving shareholders directly in the decision process.[9] Once the panel has made a decision the publication of the decision and subsequent media publicity might also serve as useful educational outlets to shareholders. Additionally, after the panel has resolved a dispute, the use of the post-mortem process might be a way to directly liaise with the parties and verbalise policy directives regarding shareholders in a one-on-one setting.

3.2.3 Independent directors

The independent director system is a relatively new concept in corporate Japan and so far has been largely ignored by Japanese companies. Compounding this, the recent legislative definition of an independent director arguably lacks clarity and is potentially open to manipulation by corporations. However, a panel could provide market participants with a different perspective on independent directors, by emphasising the importance of active independent directors to the hostile M&A market. The potential benefit of this is that companies would be better informed about independent director systems when implementing the takeover defences.

The panel might release guidance notes which set out a clear explanation of the role it expects independent directors to fulfil under the Guidelines when a company adopts takeover defences. In particular, the guidance notes might set about outlining what constitutes an 'independent evaluation' of a takeover defence measure by independent directors as required in the Guidelines.

[9] This suggestion was mooted in Australia in *Re Pasminco Ltd* (2002) 41 Australian Corporations and Securities Reports 511. However currently it is not available to Australian shareholders. The Panel decided not to take such steps because it considered directors could represent shareholder interests and also because of the administrative difficulty in receiving potentially thousands of responses.

Alternatively, a more direct approach might involve inviting independent directors to any panel days held. These workshops might serve then as an opportunity not only for the panel members to familiarise themselves with legislative and policy framework but also for independent directors to do the same. This chapter envisages that this might bring to independent directors a greater awareness of the responsibilities they hold in the poison pill implementation process.

Again, as suggested above with shareholders, the publication of panel decisions and the use of post-mortem sessions might be useful in continuing the education process. Importantly these mechanisms are a way of ensuring that independent directors become aware of any changes in what the panel expects their role to be when a company implements takeover defences.

4. CONCLUSIONS

The Livedoor shock has awoken the hostile M&A market and subsequently placed Japan Inc. at an important developmental juncture. Horie's bold and pugnacious business strategy along with the recent surge in hostile M&A activity, has created an atmosphere of uncertainty and anxiety amongst market participants, particularly in the company boardrooms across Japan. Corporate Japan, however, has responded decisively. Following Livedoor, many companies have implemented management-preserving takeover defence measures, including the US-style poison pill.

Through the Guidelines, the Japanese government implicitly endorsed corporate Japan's reaction. The Guidelines rely on an infrastructure – shareholders, independent directors and courts – to police the implementation of the poison pill defence measures. However, lawmakers are depending on institutions that despite some indicators to the contrary, particularly in relation to shareholders, are at present incapable of adequately policing the poison pill's introduction into the Japanese corporate environment. Potentially this undermines the implementation process and the effectiveness of the poison pill defence.

What the Australian example offers is a model that may facilitate the implementation process. Close examination of the Australian Takeovers Panel reveals a panel model that, according to current statistics and industry participants, is finding success. Admittedly this success is in a takeovers market that is different from the Japanese market. However, the reason this model is a viable option for transplantation to Japan is that the Australian-style panel can provide the Japanese market with an expert body geared specifically towards takeovers and resolution of takeover disputes. An examination of the Australian Takeovers Panel supports this proposition.

The Takeovers Panel is the main dispute resolution body for resolving takeover disputes. In taking on this role the Panel endeavours to be speedy and commercially focused. These aims are reflected in the Panel's structure and procedure. Key indicators include the commercially oriented panel make-up, flexible approach to dispute resolution, brevity of rules and policy creation powers. So far results are encouraging. Statistical evidence and market feedback suggest the Panel is functioning pursuant to its policy goals and is contributing to a healthier takeover market in Australia.

This chapter has kept all comments and suggestions on how a takeovers panel might function in Japan at an overview level. This is in recognition of the fact that the outcome of this experiment in foreign law transplantation is uncertain, as all legal transplants are. Ultimately, a takeovers panel in Japan, if considered as a reform model for Japanese corporate law, may bear only passing resemblance to the Australian model on which it might be based. Regardless of the further changes that may occur in Japan's M&A market and the precise path of future corporate regulatory change, it is hoped this chapter can be regarded as a possible alternative point of view for corporate regulation in Japan and might offer a point of departure for any reconsideration of the status quo.

Finally, let me end with this postscript: Takafumi Horie was sentenced to two years and six months' jail on 16 March 2007, having been found guilty of financial fraud and securities law violations in relation to Livedoor activities. The lasting impact that Horie's case will have on corporate Japan is still unknown. Is Horie's case an anomaly or a sign of the future for corporate Japan? Time will be the judge. Perhaps Livedoor's immediate impact will be more significant by providing the opportunity to reconsider the state of play in the Japanese M&A market.