

Corporate Governance and M&A in Australia: An Overview for Assessing Japan and the “Americanisation” Thesis¹

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Abstract: This paper sketches a roadmap of key features and directions in Australian corporate governance, generally (Part 1) and specifically regarding takeovers law and practice (Part 2). In particular, it introduces highlights from a growing corpus of empirical studies, and identifies points that may be of special interest to those familiar with major changes or debates underway in many parts of the Asia-Pacific, particularly in Japan. Part 1.A begins with the insight that Australian may not be so “Anglo-American” after all, because traditionally it has more blockholders (concentrated shareholdings) and less active institutional investors. This may help explain still limited changes to law and/or practice regarding derivative shareholder suits, as well as more arm’s-length market-based monitoring mechanisms such as disclosure, independent directors, and executive remuneration packages (Part 1.B). On the other hand, Australia is experiencing a new boom in M&A (Part 2.A), and its levels of hostile takeovers and success rates even in the 1990s appear close to those in the UK (2.B), although success rates in both countries are much higher than the US. This arm’s-length control mechanism may have become more prevalent due to broader economic changes, such as liberalisation of financial markets to allow easier financing of takeovers. But another factor seems to have been the historical legacy of following the law in England, despite the latter’s less concentrated shareholding patterns (2.C). The environment is likely to have become even more conducive to hostile takeovers from 2000, when disputes were largely diverted from the courts to a full-scale Takeovers Panel (2.D), similar to that introduced along with the UK City Code on Takeovers in 1968. However, Australia’s version is somewhat more formalised, and was recently challenged for unconstitutionally usurping “judicial power”. Overall (Part 3), this analysis suggests a more complex picture of corporate governance transformations. There do not necessarily pull all in the same direction (as the takeovers market shows), and there remain some important differences from developments in the UK and especially the US.

Keywords: Corporate law, takeovers, comparative law, Australian law, Commonwealth Law, Asian law, Japanese law.

Introduction

In 2001, law professors from Harvard and Yale teamed up to declare the “end of history” for comparative governance {Hansmann and Kraakman 2001}. They argued that systems of public companies centred on dispersed shareholders, “outsiders” who appointed directors as their agents to monitor managers operating the companies, were winning out world-wide over systems that formally or informally recognised a broader range of “insiders” or stakeholders (especially bank creditors and employees). Around the same time, “the Americanisation of Japanese Law” was proclaimed by two younger commentators, a US lawyer in Tokyo and a Berkeley-trained political

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scientist {Kelemen and Sibbitt 2002}. Taking securities law and practice as one case study, they argued that this transformation was driven by economic liberalisation, political fragmentation and the growth of legal services markets (see also now {Aronson 2007}) since Japan's "lost decade" of economic stagnation over the 1990s. Another Harvard law professor, Mark Ramseyer, has developed an even more extreme argument: Japanese law and the economy have always been "Americanised", even in the post-War era. On his view, rather than an "insider" system of corporate governance characterised by quite unique "main banks" and government-led industrial policy, Japan had long retained a free market economy driven by short-term rational self-interest of economic actors. This means an important role for the shareholder-manager relationships familiar to the US {Miwa and Ramseyer 2006}.

Then, in late 2001, came the largest corporate collapse in US history: the Enron debacle. Enron seemed to have voluntarily adopted all the main corporate governance features proposed by economists as "efficient" arrangements for shareholder-centred corporate governance. In particular, the company had many non-executive directors, and managers were remunerated with stock options to align their interests with shareholders. In 2002 – remarkably quickly and unusually, since corporate law in the US has been centred on the states (especially Delaware) – federal legislation combined with revised stock exchange listing rules to demand even stricter independence requirements for directors, and impose other duties on company officers and "gatekeepers" such as outside auditors {Coffee 2006; Hill 2007}. Somewhat belatedly, reformers have also turned their attention on perverse incentives that often can arise regarding executive remuneration {Hill 2006a}. While some argue that these reform initiatives remain consistent with a "shareholder primacy" model of corporate governance, they represent a sharp break with US corporate law tradition by setting mandatory requirements (rather than leaving "efficient" arrangements to emerge voluntarily through market forces) through federal intervention {Thompson 2002}.

Further, just as the traditional US approach came under growing stress, from 2002 the Japanese economy began to recover. A major subsequent reform remained consistent with the earlier "voluntarist" tradition in US corporate law, still arguably maintained in the UK (but see {Dignam 2007}), while perhaps also deferring to managerial discretion and a broader "stakeholder" model of corporate governance. Specifically, Japan's corporate law reforms that came into effect from 2004 did not force even large public companies to engage more non-executive directors (even in key committees charged with appointments, remuneration and audit) to monitor managers on behalf of shareholders. Instead, such companies were allowed the option of switching to such an "Anglo-American" committee-based corporate governance form. Only a small percentage has chosen to do so, and the reasons for doing so are diverse. Sometimes the switch has been to strengthen corporate groups (*keiretsu*, eg Hitachi), for example, rather than to signal to dispersed or large foreign shareholders (eg Sony) that they are adopting the supposed "global standard" in efficient corporate governance {Gilson and Milhaupt 2005; Lawley 2007/8}. Similarly, Japan has experienced another small round of hostile takeovers. The US model has long advocated these as another arms-length market-based mechanism to actually or potentially discipline managers, on the theory that they will work to maximise existing shareholder value or otherwise find their companies taken over and their jobs at risk from the new owners. Further, in the *Livedoor* litigation the Japanese courts

adopted elements of Delaware case law, to define the limits to which target company managers can adopt defensive measures to fend off bidders {Milhaupt 2005}. However, more recent case law suggests more power is being transferred to target company shareholders {Kamiya/Ito 2008}, the approach preferred in the UK law tradition. Further, the numbers of hostile takeovers in Japan remain small and none yet has succeeded for a large company, so their incentive effect arguably remains small {Puchniak 2008b}. Meanwhile, even over the 1990s there is evidence that “main banks” did remain potent actors in Japan’s corporate governance system {Puchniak 2007a/8a}, and some insist that core employment practices have not changed much at least in Japan’s large companies {Haley 2005; cf Wolff 2008}. On the other hand, some shareholder rights have been strengthened (eg derivative actions against directors) and corporate law has generally been liberalised since the 1990s (culminating in enactment of the 2005 Corporate Law), resulting in trimmed Boards of Directors and more attention to maximising shareholder value {Dore 2007}.

Thus, changes in Japan are occurring at different levels at different rates {Nottage and Wolff 2005}, and overall assessments continue to diverge quite significantly {Nottage 2006/8}. We do appear to be witnessing an ongoing *transformation* of corporate governance from an insider towards an outsider model, evident also in other post-industrial capitalist societies like Germany {Baum 2005}. However, as indeed in such countries, the shift is complex and *gradual* {Streeck and Thelen 2005; Nottage et al eds 2008}. Especially for those in Japan, but also in other parts of the Asia-Pacific including the US, it is therefore instructive to examine more closely developments in Australian corporate governance. This is particularly true given some ongoing confusion over the extent to which Australia’s listed market has more or less dispersed shareholdings, and the implications for its takeovers markets, as well as countries such as Malaysia that now has a very similar takeovers law regime {Khan 2007}.

Some Australian commentators certainly have proclaimed its own Americanisation {von Nessen 1999}. They point to the consolidation of more liberal corporate law rules since the 1990s, and the rise in individual shareholder ownership following privatisations and changes to Australia’s pension system. Yet, even leaving aside the complication that the US model itself is shifting towards more mandatory rules, as well as longer-standing tendencies to entrench managers vis-à-vis shareholders {Puchniak 2007b/8a}, Australia’s changes in law and practice appear considerably more complex {Hill 2007; 2008}. Arguably, as outlined in Part 1 below, this reflects a starting point that turns out to be a much more insider-based system than might be expected given Australia’s traditional links to the United Kingdom {Dignam and Galanis 2004}. The latter has traditionally had a system even more pro-shareholder than in the US, especially in the area of takeovers {Armour and Skeel 2007}. Australia remains an interesting hybrid, despite a renewed boom in M&A activity – including quite high levels of hostile takeovers – associated with its own more longstanding economic growth path, as outlined in Part 2.

Part 1. Implications of Some ‘Insider’ Features of Australian Listed Companies

At least until the late 1990s {Dignam and Galanis 2004}, the Australian market for listed public companies has been characterised by blockholders who extract considerable private benefits from their companies, weak institutional investors, and historically weak securities regulation (all discussed in Part 1.A below). Strong relationships between blockholders and management also weaken the market for hostile takeovers, although their levels and success rates were surprisingly high over the 1990s and may have increased subsequently (Part 2 below). These starting points also need to be appreciated when assessing and comparing some complex corporate governance reforms in recent years (Part 1.B).

A. BLOCKHOLDERS AND THEIR INFLUENCE

Those interested in corporate governance research in Australia are only just beginning to accumulate large-scale empirical data on topics of interest. From the late 1990s, however, it became clear that there was comparatively high shareholder concentration in the listed market (although most of Australia’s economic activity probably still occurs outside that market: {Cheffins 2002}). This has arisen despite many of the largest listed companies having quite dispersed shareholdings. Indeed, some evidence suggested that shareholder concentration had increased since the mid-20th century. By 1999, a small sample of Australia’s largest companies taken by La Porta et al found that 45% had a shareholder with more than 10% of the equity, compared to 20% such companies in the US and only 10% in the UK. A larger study in 1998 of all listed companies, by Lamda and Stapledon, found that 72% (and 46% of large companies) had a non-institutional investor holding at least 10%. Since Australian shareholders historically reveal low levels of participation in votes, such “blockholders” can probably have an input into control even with a 5% shareholding {Dignam and Galanis 2004: Part III}. Such blockholders mainly comprise founding families, entrepreneurs and overseas companies.²

However, further evidence is required as to whether blockholders transform this opportunity to control into reality. One measure is the extent and nature of institutional investors, who might oppose blockholders either directly, or indirectly by selling shares and thus open up even blockholder-dominated firms to takeovers. As in the US and especially the UK, financial markets deregulation (especially to the pension system) since the 1980s has led to rapid growth in institutional investments in Australia. However, their percentage relative to GDP (131% in 2000) remained about half, and relative to all listed shares remained significantly less:

Estimates for 1997	Local institutional investors	Foreign institutional investors	Total
UK	56%	32% (2002-3)	88%

² Cf eg {Khan 2007: 40, 50}. However, the author is careful to note that the premise for certain takeovers law reforms in the late 1970s was dispersed shareholdings, but without reference to any empirical research on the point, a belief that also informs current reform debates (outlined further in Part 2 below). An intriguing topic for further research is how, why and when these blockholdings have developed in Australia. Some factors suggested by Professor Chris Pokarier (Waseda University), in private correspondence on a first draft of this paper, include the traditionally strong role of unions and the government, as well as less competitive end-markets. Compare generally also {Dignam 2005} and {Fleming 2004}.

US	43%	10% (2002-3)	53%
Australia	35%	<16%	45-50%

(adapted from {Dignam and Galanis 2004: Part IV}).

Further, institutional investors have had significantly less success in actively intervening to undermine management of those companies in which they do hold major shareholdings, compared to the UK where Stapledon estimates this takes at least four investors holding 20-30% of the equity.³ An example is the limited scope and success of the high-profile attempts to intervene in the operations of Australia's largest retail group (established originally by the Myer family), Coles-Myer, over 1995-2002. One reason suggested for this difference is that many UK- or US-based investment companies have managed their Australian equities from Hong Kong or San Francisco, respectively. Even around 1997, moreover, UK institutional investors held twice as much stock in local listed companies than Australian investors held in Australian companies.

Ramsey and collaborators maintain that Australian institutional investors do not vote very consistently, especially openly against management {Ramsay et al 2000}, and have preferred longer-term or "relational" investing {O'Donnell 2005: 29}. This is particularly true of pension funds, which in 2001 held about 20% of listed Australian equities. They must also have equal representation of employers and employees, who are normally nominated by unions. Thus, even though labour market liberalisation since 1996 has accelerated a decline in union membership (23% of Australian workers compared to 50% 20 years ago), unions have often obtained pension funds' support in resolutions that they have increasingly put before shareholders' AGMs. Such resolutions can be put by collecting signatures of at least 100 company shareholders (usually also union members) under 249N of the Corporations Act. Unions have courted the votes of pension fund managers, who have duties to their own investors, by emphasising the shared long-term interests of shareholders and workers. In high-profile cases since 2000, almost all in the shadow of an industrial dispute, union-sponsored resolutions have addressed board independence, executive remuneration, and poor workplaces practices. Although all resolutions were defeated, some achieved significant support from institutional investors or their associations, and they largely succeeded in opening a public dialogue directly with the entire Board {Anderson et al 2007: 47-53; Rawling 2006}.

More directly, evidence is also emerging that Australian institutional investors often now aim to (and plausibly do) improve the employment practices of the companies they invest in. Although they do not voice concerns much regarding usual "management issues", they will actively engage regarding "corporate governance risks" likely to affect their investments, as with a serious industrial dispute. However,

³ {Cheffins 2000: 11} notes, however, that despite the high level of UK institutional investment overall (estimated at 70%), "an individual financial institution is unlikely to control more than 5 percent of the equity in any one firm". {Farrar 2005: 339} estimates overall UK institutional investor ownership at 80%. He goes on to contrast the more restricted role of Australian counterparts, although noting some counter-examples or potential especially in the context of takeovers, as well as pressure towards greater activism (reviewed further below, Part 3). However, compared to their influence in crafting and enforcing rules and expectations regarding takeovers (discussed in Part 2 below), institutional investors even in the UK seem to remain quite reluctant to exert their potential to control more directly the managers of the companies they invest in, such as pushing for removal of executive directors {Keay 2007: 664-9}.

despite their links to unions, the pension funds are not more likely to do so, reportedly because they tend more to engage external fund managers to develop their investment portfolios {Anderson et al 2007: 78-81}.

Thus, compared especially to the UK, institutional investors appear to exercise less vigorous and open control to promote more immediate capital gains for their own customers. That leaves blockholders with considerable power over company affairs. Unsurprisingly, therefore, survey evidence in 2003 found that Australia’s largest listed companies engaged in many more related party transactions than UK or US counterparts. Only half had a policy for the board to supervise such transactions, despite restrictions under the Corporations Act 2001 (eg directors’ duties: see B.1 below). The broader study by Lamda and Stapledon confirmed that they occurred especially in companies with a (family-based or corporate, not government) blockholder. Such transactions facilitate “private rent extraction” in favour of blockholders, suggesting that they actually exert control over the listed firms they invest heavily in {Dignam and Galanis 2004: Part IV}.

B. RECENT TRENDS AND REFORMS

Although these patterns may have started to change in more recent years, Australia therefore begins with more shareholder concentration in listed companies compared to the US and the UK, and with much less of a role played by active institutional investors. As well as explaining a more restrained market for hostile takeovers (described in Part 2.B below), this starting point also helps to understand key features of corporate law reform in Australia, which has only picked up pace over the last decade.

Australia first enacted uniform companies law in each state in 1961, but only achieved a true nation-wide regulator (ASIC) and consolidated Corporations Act in 2001 (as explained in Leon Wolff’s presentation). Corporate law has also been modernised since the mid-1990s, diverging more from its English law roots. This occurred under the Labor government’s Corporations Law Simplification Program directed within the Attorney-General’s Department (1993-6), and then the Liberal coalition’s Corporate Law Economic Reform Program (CLERP) directed by the Treasury.

Year	Legislation	Scope
1995	First Corporate Law Simplification Act	Simplified register requirements and share buybacks (provisions reduced by 85%); redefined proprietary (private) companies
1998	Company Law Review Act	“Constitution” and “replaceable rules” instead of Memorandum/Articles of Association and “Table A rules”; abolition of par value, share reductions without court approval
	Managed Investments Act	Regulation of collective investment schemes
1999	Corporate Law Economic Reform	Statutory directors’ duties, business

	Program Act [CLERP 1-4]	judgment rule and derivative action; liberalised corporate finance rules; much stronger Takeovers Panel
2001	Corporations Act	Reorganised/consolidated (no substantive changes): Key terms (Ch 1), core corporate law (Chs 2A-N), insolvency (Ch 5 – no Chs 3 or 4), takeovers etc (Chs 6-6C), corporate finance (Ch 6D), financial services (Ch 7)
	Financial Services Reform Act [CLERP 6, drawing on the Wallis Committee Report 1998]	Broadened scope to all “financial products” (eg derivatives), stricter regulation of financial advisers, more powers to ASIC
2003	Corporations Legislation Amendment Act [CLERP 7]	Simplified lodgement of corporate information
	ASX Principles of Corporate Governance	Encouraging listed companies to have more independent directors etc
2004	Company Law Economic Reform (Audit Reform and Corporate Disclosure) Act [CLERP 9 in 2002, drawing on the Ramsay Report 2001]	Stricter independence for auditors; more disclosure for listed companies’ directors’ remuneration; penalty notice for breaches of “continuous disclosure” requirement (introduced in 1994)
2007	Corporations Legislation Amendment (Simpler Regulatory System) Act	Liberalisation of requirements about advice from certain financial services providers, disclosure (due to higher thresholds for a ‘large proprietary company’), small related-party transactions, and fundraising (eg prospectus for rights issue); abolition of requirement to record calls to target shareholders in takeovers, and notice requirements for persons who become 85% shareholders; technical amendments regarding auditor independence.
2007	Corporations Amendment (Insolvency) Act	Strengthen protection of employee entitlements, improve insolvency practitioner disclosures to creditors (including on independence and remuneration), streamline procedures for liquidating corporate groups; extend ASIC’s investigative powers in monitoring liquidators and improve court processes regarding misconduct by company officers; stricter regulation of insolvency practitioners; fine tune

		voluntary administration process (introduced in 1993).
Introduced 20/9/07	Cross-border Insolvency Bill ⁴ [CLERP 8]	Based on the UNCITRAL Model Law

As in Japan, these reform initiatives have emphasised the need to liberalise and streamline procedures for Australian companies to compete more efficiently in increasingly globalised markets.⁵ However, compared to the earlier and more comprehensive reforms enacted in Canada and New Zealand, {Jordan 2008} highlights the protracted process that has generated a large and complex “statutory monster” in Australia. She speculates that this reflects a generalised suspicion of statute law, in an area traditionally developed through case law. That suspicion may also explain the rather limited amount and impact of statutory reform in contract law in Australia. Yet, in corporate law reform, delays and complex legislation may also be associated with a long history of blockholders, who have relatively less need for changes benefiting shareholders generally.

Focusing especially on the 2004 reforms based on CLERP 9, some emphasise Australia’s convergence on international developments, especially the Sarbanes-Oxley Act rules on auditors enacted in US federal law in 2002 {von Nessen 2003}. Other recent reforms have also focused on arms’ length market mechanisms that economists have tended to emphasise as effective in aligning professional managers’ interests with those of dispersed shareholders: effective disclosure (B.II below), independent directors (B.III), and performance-linked executive compensation (B.IV). Often, reforms in these areas have been promoted by the peak organisations of institutional investors in Australia, even though individually such investors appear less active in pursuing immediate financial gain compared to their UK counterparts {O’Donnell 2005}.

However, shareholder participative rights – offering potential for more direct control of managers – have also been strengthened {Hill 2007}. Non-binding shareholder resolutions regarding executive remuneration is one recent example, not found in the US {Hill 2006a}. Earlier, rules were simplified for derivative actions for breaches of duties owed by directors and officers, but the direct impact has not been large and the duties remain quite flexible (B.1 below). Australia has also retained the English approach in preferring broadly worded principles instead of detailed rules, and in encouraging (via the stock exchange) – but not requiring – greater director independence. In my view, because they can favour blockholders as well as dispersed shareholders, all these aspects make more sense for a corporate governance system with traditionally stronger “insider” features.

I. Statutory Directors’ Duties and Derivative Suits

The CLERP Act 1999 implemented from 2000 a statutory derivative action, now contained in Part 2F.1A of the Corporations Act 2001, whereby shareholders can

⁴ <http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/Bills/Linked/20090700.pdf>

⁵ See generally {Austin and Ramsay 2007: 2.170}, {Tomasic 2005}, and www.asic.gov.au/asic/asic.nsf/byheadline/CLERP?openDocument. Compare the quite similar driving principles and timeline in Japan: {Fujita 2004}.

bring suit on behalf of their company for wrongs done to it that directors refuse to pursue. Typically, such wrongs are alleged to be breaches by the directors of their duties. Those duties encompass:

- Equitable duties of loyalty and good faith as fiduciaries (to avoid conflicts of interest etc) and duties of care (including reasonable efforts to understand company affairs, and to realise when it is no longer appropriate to rely on others' opinions)⁶, both preserved by s 185;
- Often substantively similar statutory duties to take care (s 180(1)), act in good faith and for a proper purpose, avoid improper use of position or information (ss 182-3), and disclose certain related party transactions for shareholder approval (Ch 2E, added in 1993).

However, {Jordan 2008} highlights Australia's comparative delay in introducing statutory duties, and several other anomalies. The statutory restatement of directors' duties can only generate a civil penalty, enforced by the regulator (as discussed in Part B.II next). By contrast, shareholders must bring derivative suits based on the original common law and equitable duties. Nonetheless, in both situations, the duties to take care are limited by the business judgment rule, entrenched in s 180(2). No penalty or damages flow if directors have made a "business judgment" (excluding cases, therefore, where directors have neglected to make a decision, like introduction of a compliance program to avoid breaches of the law) and:

- (a) the judgment is made in good faith and for a proper purpose;
- (b) directors have no material personal interest in it;
- (c) they reasonably inform themselves about the subject-matter; and
- (d) they rationally believe that the judgment is in the company's best interests.

This statutory business judgment rule was intensely debated over the 1990s, and was only introduced from 2000. It draws on the American Law Institute's *Principles of Corporate Governance*, but differs in requirement (a), which probably constrains its application in takeover defence cases ({Farrar 2005: 140-3 and 380-2} and below Part 2).

The Act extends duties to directors (including de facto or shadow directors⁷) and "officers" (including anyone who makes decisions affecting a substantial part of the company's business or who may significantly affect its financial standing).⁸ In April 2006, the government's Corporations and Markets Advisory Committee (CAMAC) recommended that duties be extended beyond such senior managers to cover "any other person who takes part, or is concerned, in the management of the corporation". This followed some recommendations of a Royal Commission of Inquiry that reported in April 2003 on Australia's largest corporate collapse, of insurance company HIH from March 2001.⁹ Overall, however, even these statutory

⁶ Duties of care derive from both common law, and equity, but it remains uncertain whether the equitable duties are fiduciary (which may mean less onerous causation requirements): {Heath 2007}.

⁷ Some case law suggests, for example, that banks or secured creditors who work closely with financial distressed companies are at little risk of being held to be de facto directors, although the statutory definition is quite broad: {Markovic 2007: 112-3}.

⁸ For a recent judgment upholding breaches of statutory duties by the Chief Financial Officer of the GIO group, in making unqualified statements to management about profit forecasts and media releases arising from a hostile takeover bid by AMP in 1998, see *Vines v ASIC* [2007] NSWCA 75 (noted by Baxt in (2007) 35 ABLR 221).

⁹ See, respectively, *Corporate Duties Below Board Level* (Report available via www.camac.gov.au/) and <http://www.hihroyalcom.gov.au/>; and generally {Pasternak 2007} and {Farrar 2005: chs 10-13} (with a very useful Figure 10.2 at p104 showing how the general duties relate to the statutory duties).

restatements leave managers with considerable discretion. Some now argue that this can be used by environmentalists and others, as minority shareholders even in large listed companies, to encourage longer-term strategies by directors instead of a focus on immediate share price gains {Bielefeld 2004}.

Further, enforcing directors' duties remains quite difficult. From 2000 the Corporations Act also added a statutory derivative action aimed to address three primary difficulties perceived with the common law rule dating back to *Foss v Harbottle* (1843) 2 Hare 461: (a) the ability of majority shareholders later to ratify the impugned conduct, (b) strict criteria before courts would give leave to proceed, and (c) lack of access to company funds to finance proceedings. Under Part 2F.1A, (a) ratification does not bar leave applications but can be weighed by the Court. Case law has created more certainty regarding (b). However, (c) only 21% of cases expressly granted costs relating to the leave application to the plaintiffs (who were successful in 61% of cases), and in none did the Court order the company to fund the substantive hearing stage. There were also only 31 cases reported over 2000-5, compared to 30 over 1995-1999 under the old law. Moreover, of the 31 statutory derivative actions, half alleged breaches of directors' duties but a third *also* alleged oppression of minority shareholders (Part 2F.1). The oppression problem is more typical of closely held companies, since shareholders in public (especially listed) companies usually can find a market for their shares if they are being "squeezed out" or the like. Indeed, 87% of the 31 statutory derivative actions involved private – not public – companies {Ramsay and Saunders 2006}. Therefore the new legislation, which anyway was slow in coming compared to the UK and New Zealand, has probably not had much impact on corporate governance in Australian listed companies. If the latter remain quite dominated by blockholders, this situation becomes easier to understand.

II. Disclosure

A strict regime of disclosure rules and sanctions, considered essential particularly in outsider-based corporate governance systems, has also been slow to emerge. Even until the late 1960s, Australian companies often provided misleading information and failures due to fraud were not uncommon: {O'Donnell et al 2005: 20}. Improvements were made from the 1970s, and in 1987 the first nation-wide "Australian Stock Exchange" (ASX) was created, implementing electronic share trading on 19 October. However, that date soon became known as "Black Monday", as the market crashed by 50% over the ensuing seven weeks. This was partly driven by world-wide collapses, but also the uncovering of poor disclosure practices by many Australian companies during the boom years of the 1980s. To restore investor confidence in listed companies, in 1991 government reports urged the introduction of "continuous disclosure" of material information. The Corporations Law required this in 1994, via the ASX Listing Rules, but it has taken a decade to build up a complete regime of varying sanctions and a few cases:

- The original 1994 regime only provided for (a) criminal sanctions for intentional or reckless non-disclosure, (b) private damages for negligent non-disclosure, or (c) suspension or even delisting by the ASX for non-disclosure. The first two prosecutions (involving one company) under (a) were only brought in 2006, which was also the year of the first damages award under (b).

- From 1998, the regulator (ASIC) was allowed to negotiate (d) “enforceable undertakings” or other remedial action. Crown Casino agreed to quarterly reports and a compliance program that year, for example, and in 2006 Multiplex paid \$32 million into a compensation fund. However, there remain issues particularly regarding third parties. It seems unlikely, for example, that competitors or others have any special rights when ASIC negotiates or renegotiates an enforceable undertaking with a firm {Nehme 2008}.
- In 2002, the regulator (ASIC) was allowed to seek (e) civil penalties. However, on one count, only 5 proceedings against 3 companies were finalised over 2003-6.¹⁰
- Recently, (f) administrative penalties were added under the CLERP (Audit Reform and Corporate Disclosure) Act 2004, and such penalties and infringement notices were invoked against one company in 2005 and five in 2006 (see also {Welsh 2007: 329}).

On one view, this now creates a full “enforcement pyramid”, combining escalating private and public sanctions as advocated by the model of “responsive regulation” {Ayres and Braithwaite 1992}. The latter assumes that business actors are usually motivated by a commitment to social responsibility, so regulators should begin with lower-key enforcement strategies such as persuasion, yet be able to threaten increasingly severe strategies for firms who violate the law for economic gain. However, analysing all ASIC enforcement activities (not just for disclosure violations), {Welsh 2008} finds that the regulator still turns wherever possible to criminal prosecutions, rather than the less severe civil penalties.

Further, shareholders frustrated by ASIC’s decision in 2006 not to issue an infringement notice against Telstra have brought a class action for \$300 million {Coffey 2007}. Another class action is proceeding against Multiplex, by those unsatisfied with the compensation fund established by its enforceable undertaking to ASIC.¹¹ Misleading disclosures or omissions can breach s 1041H, and a US-style “opt-out” class action was provided for federal law and courts in 1992. Cases have increased in this field since the first was decided in *GPG v GIO* (2001) 117 FCR 23, unlike in the field of product liability where class actions have dropped off {Kellam and Nottage 2007}. This partly thanks to the High Court’s recent approval of “litigation funders”, who (like many US lawyers) take nothing if their clients lose but a percentage of damages awarded if they win (*Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41). But other procedural obstacles remain to class actions as private enforcement (see eg {Waters 2007}). It also remains unclear whether

¹⁰ This civil penalty regime was strengthened in 2004 {Welsh 2007: 320}. Civil penalties were also added in 1993 for breaches of statutory directors’ duties, but ASIC has only brought 14 applications regarding 10 companies. Some reasons included inflexibility; delays, uncertainties and adverse precedents in courts; attractive alternative sanctions (especially injunctions and prohibitions on acting as a director); and preferences within ASIC and outside prosecutors to proceed with criminal prosecutions, despite the higher burden of proof: {Gilligan et al 2006}. {Comino 2007: 207-8} also highlights problems arising from *Rich v ASIC* (2004) 220 CLR 129. The High Court limited ASIC’s rights to discovery in civil penalty cases if also seeking disqualification orders, which it deemed penal in nature. These proceedings arising out of the HIH collapse also experienced very substantial delays. See also further {Welsh 2008}.

¹¹ See recently eg ‘Court Tells Watchdog to Give Files to Shareholders’, *Sydney Morning Herald*, 3 November 2007, p42.

Australian courts will follow the US “fraud on the market” theory, or instead insist on plaintiffs proving individual reliance on the misleading disclosure {Cassidy and Chapple 2003}.¹²

Further complicating the picture, in proceedings brought in late 2007 against directors of the failed Westpoint collapse, ASIC has reactivated a broad power under s 50 the ASIC Act 2001 (Cth). If ASIC believes it is in the ‘public interest’ for someone to initiate or carry on a proceedings for damages for fraud etc, arising from its investigations, or for return of the person’s property, ASIC may proceed in that person’s name (after getting written consent, if that person is not a company). Although similar powers date back to 1958, and ASIC (or its direct predecessor) brought proceedings in 11 major matters before the Westpoint case, most occurred over the 1990s. ASIC appeared to be turning to civil penalty actions, and hoping for parties themselves to bring more class actions (as has occurred, indeed, in the Westpoint case); but may now be reminding the corporate world of this additional power.¹³

There have been growing calls for stricter enforcement of disclosure requirements. The collapse of HIH, then Australia’s second-largest insurers, was quickly followed in mid-2001 by the collapse of newer businesses like One.Tel {Dignam 2005b; Farrar 2005: 390-5; Comino 2007}. One problem in HIH was that executives did not pass on sufficient information {Lee 2006}. But another highlighted was lack of independence among the outside auditors (accountancy firm Andersen, which also provided other services to HIH), and in the company’s audit committee set up to appoint them (including former Anderson partners). The Ramsay Report in October 2001 recommended corporate law changes to address these problems, two months before the Enron debacle uncovered very similar problems in the US. The Sarbanes-Oxley Act of 2002 introduced similar but somewhat stricter requirements than those recommended in CLERP 9 in 2002 and enacted in 2004, when the UK also introduced similar requirements {Ladakis 2005; Brooks et al 2005; Chapple and Koh 2007}. Unlike the US and the UK, Australia’s (non-binding) ASX Corporate Governance Principles also do not directly require the audit committee to ensure that listed companies have an internal audit function. Recommendation 7 only requires, more broadly, that the committee or board ‘establish policies on risk oversight and management’ {Lee 2006}.

More recently, similar concern has arisen about conflicts of interests for investment banks. They too may be involved in assisting companies, eg in takeovers, yet increasingly they engage in their own (proprietary) trading in shares, including sometimes those of companies involved in the takeover {Tuch 2006}. In 2006 ASIC claimed that Citigroup had breached its fiduciary duties to its client (Toll) when trading in shares of Toll’s takeover target (Patrick). This case raises difficult ongoing

¹² These co-authors also argue that CLERP 9 should have adopted more prescriptive review guidelines, as in the US, as well as its mandatory narrative disclosure and more periodic reporting.

‘Fraud on the market’ applies the ‘efficient markets hypothesis’ to assume that shareholders rely on share prices to reflect all publically available information, including any misleading information, so that individual shareholders can prima facie claim damages amounting to any share price decline linked to revelations about the misleading information {Legg & Schaffer 2007; Legg 2008, pp. 11-12}.

¹³ However, in the Westpoint case, several challenges have now been brought against this power: The Financial Review, 11 February 2008.

questions for Australia's corporate governance landscape {O'Brien 2007}, even though the claim was ultimately unsuccessful (*ASIC v Citigroup* [2007] FCA 963).

III. Independent Directors

Ensuring the independence of directors themselves has been a more direct concern for reformers keen to promote shareholder interests without allowing them direct rights of supervision or intervention, despite an ongoing debate world-wide about whether independent directors in fact promote better corporate performance {Puchniak 2003}. A survey of 494 Australian listed companies in 2003 found they had (summarised in {Austin et al 2005: 13}):

- On average 7 directors (64% had 4-7);
- 8% women directors (but 14% for the largest 100 companies);
- 70% *non-executive* directors, earning on average around \$50,000 pa (76% in the largest 50, earning double), 30% executive directors;
- Average remuneration of non-executive chairpersons was around \$110,000 (\$267,000 for the largest 50);
- 90% had an audit committee (to appoint auditors; 100% in the largest 50 companies), 64% (90%) had a remuneration committee (to set fees), but only 6% (16%) had a risk management committee;
- Boards met 11 times per annum (according to a 2002 study).

A survey of the 100 largest companies, published in 2004, found that around half of directors were *independent*, with boards having on average 8 directors. There has been a shift away from the use of executive directors, prevalent for much of the 20th century. By 2000, most boards were chaired by non-executive chairpersons, whereas traditionally they had been the CEOs or previous executives {O'Donnell et al 2005: 23}. On the other hand, Australia has traditionally had quite high levels of interlocking directors (the same group of people serving on multiple boards) {Dignam 2005b}, which may restrict independence in practice.

The ASX, clearly aiming to pre-empt mandatory statutory amendments, introduced *Principles of Good Corporate Governance and Best Practice Recommendations* in March 2003.¹⁴ The substantive standards are closer to those of the UK Combined Code, revised in 2003 following the recommendations of the Higgs Committee Report, and both are less strict than the revised NYSE and NASDAQ listing rules implemented in conjunction with the Sarbanes-Oxley Act in 2002, although superficially they all seem similar:

Structural feature	US	UK	Australia
1. Directors overall	Majority independent	Majority independent	Majority independent
2. Chairperson	Not necessarily separate from CEO (but: best practice)	Separate	Separate (independent director)
3. Key committees	Only independent directors	Majority independent	Majority independent

¹⁴ At http://www.asx.com.au/supervision/governance/principles_good_corporate_governance.htm.

In practice in the US, the requirement that nomination, remuneration and audit committees have only independent directors encourages appointment of a super-majority of independent directors overall. Further, although the UK seems to define independence more strictly by emphasising not only freedom from certain substantial material relationships (eg owning or working for a company with a substantial shareholding) but also independence “in character and judgment”, the Report and Code envisage an “active dialogue” and other links between the board and institutional investors {Hill 2006: 21-8}.

The ASX Principles’ Recommendation 2.1 defines independence as not (actually or in perception) having judgment being subject to “material interference”, listing situations such as an association with a shareholder with a substantial shareholding (5% or more). Blockholder dialogue is not mentioned. But the ASX Principles themselves seem likely to be followed less strictly than the UK Combined Code, with its longer tradition of a “comply or explain” model (dating back to the Cadbury Committee report of 1992: {Dignam 2007: 287}) against the backdrop of more extensive and activist institutional investors. The ASX Principles were the first to adopt such a model, and official statements as well as subsequent practices suggest that old habits are dying hard {Hill 2007}. An earlier ASX Listing Rule (introduced in 1996) had merely required each listed company to explain in its annual report its “main corporate governance practices”, with a vigorous debate soon developing between the ASX and institutional investors as to whether even that was being complied with {du Plessis 2005: 131-2, cf now 181-36, and Adams 2008¹⁵}. The late development and ambivalent implementation of a UK-style “comply or explain” model, and certainly the rejection of more detailed rules underpinned by statute now in the US, appears consistent with a tradition still of blockholding in Australian corporate governance.

IV. Executive Remuneration

Remuneration of executives (directors and managers) is a third area where both practices and law are changing quite noticeably in Australia. Developments seem to indicate convergence on an “insider” model premised on more dispersed shareholdings, but the picture is again more complicated.

Payments have risen much faster than average earnings over the last 15 years, although this period had been an era of unprecedented prosperity for Australia. By 2003 the CEOs of the top 100 companies earned \$3.1 million on average, with a median of \$2.3 million, indicating that some earned much higher than this average.¹⁶ Further, between 1987 and 2002, the fixed pay proportion declined from 90% to 43%. Short-term incentive payments (usually an annual bonus in cash, based on reported corporate profits) rose to 23%, while long-term incentive payments (usually share options – not requirements – to purchase shares in the future) rose to 34%. The former

¹⁵ The latter focused on qualitative rather than quantitative changes. They found significant adoption and broader influence of the ASX Principles in recent years, and little major concern about costs involved. However, there is also some evidence of ‘ticking the box’ and compliance even when unlikely to add value, and Australian companies seem to be falling behind other countries regarding CSR.

¹⁶ Recently, see eg the packages being debated for Telstra executives: *Sydney Morning Herald*, 3 November 2007.

risk manipulation of profit reports, while the latter may encourage managers to make decisions to maximise share price appreciation around the time(s) they can exercise their options {O'Donnell 2005: 21-22}.¹⁷ These possibilities of incentives becoming misaligned, rather than bringing together more closely the interests of dispersed shareholders and professional managers, have become more salient in the aftermath of collapses like Enron and One.Tel {Hill and Yablon 2002}.

In 1993, amendments to the then Corporations Law introduced Chapter 2E on related party benefits, requiring shareholder approval but excepting “reasonable remuneration” for directors (s 211). This vague exception did not provide much of a check in practice, so the focus then switched to better disclosure {Chapple and Christensen 2005}. In 1998, amendments required listed companies to include in annual reports a “Remuneration Report” detailing packages for all directors as well as five most highly paid executives (see now Corporations Act 2001 s 300A). Stricter disclosure was added in 2004 amendments, extending coverage to corporate groups, board policy for determining remuneration, and explicit links between pay and corporate performance {Hill 2006a: 13}.

Amendments to stock exchange listing requirements, such as the 2003 ASX Principles (as well as the UK Code and NYSE rules), try to strengthen objective scrutiny of such packages by (all or majority) independent directors on Remuneration Committees, and directly by shareholders through stricter disclosure. Those listing requirements may be somewhat double-edged, however, as they also tend to emphasise that directors’ remuneration should be tied to transparent performance benchmarks. That may encourage, for example, even more use of annual bonuses. As mentioned above (B.III), moreover, the ASX Principles probably have less impact than UK and US counterparts.

The most interesting amendment, in 2004 in Australia following a 2002 change in the UK, moves away from strategies of disclosure or entrusting independent directors to preserve shareholders’ interests. Section 250R requires shareholders of listed companies actively to give a non-binding advisory vote at a listed company’s AGM, as to whether they adopt the remuneration report presented. The chair of the meeting must also give shareholders reasonable opportunities to ask questions or make comments (s 250SA). Drawing partly on practical experiences in the UK, some predicted that this would not directly add much to corporate governance controls in Australia {Chapple and Christensen 2005}. Indeed, in the 2005 AGM season, ASIC was critical that 43 listed companies failed to notify shareholders about this non-binding vote, and only one company received a majority “no” vote. However, one third of the largest companies received a protest “no” vote of more than 10%, supported by some institutional investors. Directors that approve unreasonably high remuneration packages despite strong opposition expressed by shareholders, even in the novel form (for Australia) of a non-binding vote, may find themselves disadvantaged if they are later sued for breach of fiduciary duties {Hill 2006a}.

¹⁷ Lower-level managers, as well as regular employees, are also being encouraged to enter into Employment Share Ownership Plans (ESOPs), for example through tax breaks recently {Sartori 2005}. This may create further alignment with the interests of other shareholders. However, other reasons for the rising (but still comparatively low) levels of ESOPs are perceived broader benefits to organisational culture and workplace relations {Landau et al 2007}. This remains an area where much empirical work remains to be done.

More generally, therefore, Australia has moved towards high executive remuneration packages, including features supposedly incentivising managers to advance the interests even of dispersed shareholders. But this transition towards an aspect of the “insider” model is experiencing quite a backlash, and one form of this is a reassertion of more direct voice from shareholders. This is very different especially to the US, where executive pay was largely ignored in the 2002 reforms, leaving the issue primarily to shareholders’ derivative suits (eg the *Disney* case: {Hill 2006a: 22-5}). Again, in my view, these differences in approach may reflect the legacy of a more “insider” model still in Australia.

Part 2. M&A in Australia

A. ANOTHER RECENT BOOM

The scope and growth in Australian financial markets are quite surprising:¹⁸

“Even though Australia’s population is less than 0.5% of the world’s total, its financial markets rank among the globe’s biggest. The national stock market is the world’s eighth largest, and it is the second largest after Japan in the Asia-Pacific by market capitalization. Australia has the third largest combined international and domestic debt securities market in the Asia-Pacific and the Australian foreign exchange market is the world’s seventh largest, measured on daily average turnover.

A sophisticated compulsory employer-funded pension scheme enacted in 1992 has helped make Australia’s investment funds pool the world’s fourth largest with consolidated assets under management of more than A\$1.03 trillion, about US\$764 billion (June 2006 quarter).”

In sharp contrast to Japan, moreover, since 1991 Australia has enjoyed 15 years of uninterrupted economic growth, and a 13% compound annual growth rate in corporate profits over the last decade. This has underpinned merger and takeover activity of much larger scope and sophistication than witnessed during the sharemarket boom before the “Black Monday” collapse in 1987:

“Investment banks in Australia earned 3% of the world’s underwriting and advisory fee income in 2005 but generated 20% of the total for the Asia-Pacific. ... Underwriting and advisory fees for all products have grown by almost 20% annually since 2001, higher growth than in all of Asia’s other economies. ... Investment banks have been advising on record levels of M&A, which at US\$101bn in the first half of 2006 made Australia the ninth largest M&A market in the world. Strong corporate profits have also produced record securities issuance: A\$42.5 billion in equity and A\$77 billion of debt in 2005-06. That’s come alongside an impressive stock market performance. ...

The upsurge in corporate activity coupled with new limits to the scope of capital gains taxes paid by overseas investors are encouraging international private equity firms to take a fresh look at Australia. More than A\$3 billion in private equity was raised in 2005-06 and total funds under management are expected to reach A\$14.5

¹⁸ Ben Thorley, “Scale and Sophistication”

<http://www.americaaustralianbusiness.net/articles/article.php?article=13,134#top>

billion by the end of 2006.”

Private equity activity (eg through debt-financed partnerships) continued into 2007, notably with the failed buyout of Qantas.¹⁹ It may be affected by growing concerns about conflicts of interest {Austin 2007} and broader issues {Armour and Cheffins 2007; Austin and Tuch eds 2007}, as well slowly rising interest rates, but so far Australia has not experienced a sub-prime mortgage market and associated credit crunch as in the US. Another trend has been the sustained interest in M&A involving large companies.²⁰

Australia also experienced major sharemarket booms in the mid-1980s and throughout the 1960s, underpinned (as now) by developments in the mining sector. Those were followed by large waves of corporate collapses, especially in the late 1980s and early 1990s, prompting large-scale reforms of financial markets law. Particularly spectacular was the demise of companies centred on Bond Corporation (1960-89) and Adelaide Steamship Corporation (1875-1991: described by one commentator as “the Australian *keiretsu*”). The rise and fall of HIH (1968-2001) is the latest debacle {Dignam 2005b}. Yet the Australian sharemarket weathered that storm and the slowdowns around that time in the US triggered by problems with Dotcom companies and Enron, as well as upheavals over 1997-8 in neighbouring countries due to the Asian financial crisis.

B. CONSIDERABLE HOSTILE TAKEOVERS & SUCCESS RATES

Despite this latest resurgence in M&A, and increasingly aggressive tactics by the likes of Bond Corporation from the 1970s, {Dignam and Galanis 2004: Part IV} argue that Australia traditionally has had quite low levels of hostile takeovers and success rates for them. However, Australia’s success rate seems quite high – close to the rate in the UK – although the time periods differ, as may the definitions of “hostile” takeovers in the US and the UK that are used by {Armour and Skeel 2007}:²¹

Target country	All M&A	Hostile takeovers (all attempts)	Hostile takeovers (successful)
US (1990-	54,849	312 (0.57% of	75 (24%)

¹⁹ See {Pasternak 2007} at para 6.2; and eg Tim Johnson, “Australia rethinks value of private-equity buyouts”, International Herald Tribune, 16 May 2007 at <http://www.ihf.com/articles/2007/05/16/business/equity.php>. Main features of ‘private equity’ are that (i) the purchaser is typically ‘an entity associated with a fund, the ownership interests in which will not be listed or traded on a public stock exchange’, and (ii) the ‘investment purpose will be to achieve a return within a fixed time frame, rather than to operate the business of the company on an ongoing basis’: {Tuch 2007: 9}.

²⁰ David Friedlander, “M&A Trends – Australia and the Global Market”, www.mallesons.com/publications/2006/Jul/8519027w.htm (July 2006).

²¹ Further, only about half of the 46 successful defences were outright successes, where the company did not change ownership. However, in the other half where the board conducted an “auction” resulting in ownership change, in almost all cases the second bid was friendly and successful. This suggests managers advanced their own (or blockholder) interests rather than those of all shareholders. Nonetheless, that is difficult to test, eg by whether the target directors recommended the highest bid, since many bids are not just for cash {Dignam 2005: 60}. Unpublished data from the Takeovers Panel kindly provided by Dr Martin Bugeja confirms similar levels of hostile takeover activity and success rates over 2002-6.

2005)		all M&A)	
UK (1990-2005)	22,014	187 (0.85%)	81 (43%)
Australia (1992-2001)		75 (out of 401 takeovers)	29 (39%)

(Grey parts added and adapted from { Armour and Skeel 2007: 1738 })

The significantly lower success rate in the US is more readily explicable. It reflects distinctive substantive law, allowing target company managers more flexibility in implementing defensive measures against bidders (cf Part 2.C below), as well as the greater costs and delays involved in litigating those and related issues through the regular court system (cf Part 2.D below). The UK developed rules and practices favouring target company shareholders, reinforced since the 1950s when institutional investors (siding with bidders) gained the upper hand over merchant bankers (advising target company managers) { Armour and Skeel 2007 }. Australia poses therefore somewhat of a puzzle, since blockholders have been stronger and institutional investors have traditionally been much weaker (Part 1.A above).

Part of the answer may be that Australia has a higher proportion of friendly takeovers (ie made to the target company managers, rather than directly to their shareholders).²² That can be inferred from data summarised by { Dignam and Galanis 2004: Part IV }. Of all 401 takeovers, only 29 or 7.2% succeeded. For the UK over 1988-98 (and the US over 1980-96) around 20% of *all takeovers* succeeded, even though the UK rate compared to the numbers of *hostile takeovers* was 43%. Thus, it seems that Australian bidders talk more frequently with target company managers, who talk more to (or, like good butlers who don't need to ask, just act in the interests of) their blockholders, and then a solution may be worked out that is more favourable to those blockholders (and perhaps their incumbent managers). To be sure, UK bidders may also approach the managers of targets, but they have more dispersed shareholders or institutional investors, and the latter generally prefer an active market for corporate control. US bidders may also approach the target's managers, but their legal system allows the latter to deploy more defensive measures, with their (traditionally powerful) investment banker advisers counterbalancing pressures from (even growing) institutional investors.

Nonetheless, the absolute numbers of hostile takeovers and their success rate seems comparatively high, given Australia's traditionally less dispersed shareholders and weaker institutional investors. Perhaps these levels over the 1990s are primarily due to broader economic factors such as financial markets liberalisation, making it easier to raise funds { O'Donnell et al 2005 }, and the ongoing growth in corporate profitability. This was also a decade of strong growth in Australia's big corporate law firms { Aronson 2007 }. But another major factor seems to be the largely pro-bidder substantive law (III.C below) that Australia largely inherited from the UK, on the assumption (without strong empirical justification: { Khan 2007: 40 }) that it had dispersed shareholdings as in the UK. Further, since 2000 this law is applied and

²² However, some seemingly friendly takeovers may be quite hostile: the target board may have accepted late in the bid period once they realised that effective control has passed or will pass under the takeover offer: { O'Donnell et al 2005: 25 }.

developed in the context of fairly informal and increasingly clear-cut rules set by the Takeovers Panel, rather than the courts (III.D).

C. SUBSTANTIVE LAW BACKGROUND

Australia's first takeovers legislation, enacted with uniform state corporate law over 1961-2, required bidders to notify targets of "offers" outside regular stock exchange dealings, and required target boards to then advise their shareholders. However, bidders often made announcements not clearly covered by this legislation, which stampeded shareholders into rushed sales. This problem continued despite reforms in 1971 (except in Tasmania), following recommendations of the Committee chaired by Sir Richard Eggleston (a former judge). More extensive reforms were introduced over 1979-81, substantively modelled on the 1968 UK City Code {Johnston 2007} but not relying on self-regulation, and largely reproduced in Ch 6 of the Corporations Law 1991. The latter was abolished by the CLERP Act 1999, so the Corporations Act 2001 now contains:

- a new Ch 6 dealing with takeovers and share acquisitions;
- compulsory acquisitions and buy-outs (Ch 6A, involving more than 90% shareholdings);
- liability provisions (Ch 6B); and
- definitions of substantial holdings, and tracing of share ownership (Ch 6C).

The CLERP Act 1999 simplified key concepts, and replaced detailed content requirements for statements by bidders and targets with a general disclosure test (and sanctions) like those for prospectuses (soliciting new capital). The general aim was to encourage efficient corporate governance and capital markets generally. More specifically, the Corporations Act 2001 re-emphasises that acquisition of control over a listed company (or unlisted company with more than 50 members), as well as a listed management investment scheme, must take place in an "efficient, competitive and informed market" (s 602(a)). The Act also restates the four principles derived from a 1969 report of the Eggleston Committee; shareholders (as well as directors) should:

- (1) Know the identity of any proposed bidder;
- (2) Have reasonable time to consider the bid;
- (3) Have enough information to assess its merits (s 602(b)); and
- (4) As the holders of a relevant class of voting shares and interests, and as far as practicable, have a reasonable and equal opportunity to participate in any benefits (s 602 (c)) {Austin et al 2007: 23.080}.

The general regulatory scheme is to prohibit acquisitions of a "relevant interest" in more than 20% of "voting power" in shares (s 606) {ibid: 23.090}. However, there are exemptions (s 611), in particular where there is (a) an off-market takeover bid, (b) a market bid (an innovation quite distinctive to Australia: see s 616), (c) a "creeping acquisition" of not more than 3% in any six-month period, or (d) an acquisition after shareholder approval. Sections 617-630 set out various rules for takeover bids. Target shareholders must be treated alike (s 619); collateral benefits are prohibited (but no longer pre-bid: ss 636 and 621(3)); and any "defeating conditions" set by the off-market bidder that are not fulfilled by the end of the bid period will void takeover contracts (s 650G).

The first three principles (s 602(b)) resonate with the Williams Act amendments to US securities law in 1968 (see generally {Ogowewo 2007: 604}. However, {Mannolini 2002: 339} suggests that the fourth “equality of opportunity” principle (s 602(c)) derived from Sir Richard Eggleston’s broader equity jurisprudence (concerned with unconscientious over-reaching behaviour), and more broadly that it epitomises “the Australian imperative of a ‘fair go for all’, or perhaps more accurately, a preference for the ‘battler’ over the ‘big end of town’”. He also highlights a tension with the “efficient market” principle (s 602(a)), added from 1991 (see also {Sheehy 2004}). The former favours minority shareholders, not (ironically) blockholders who may prefer to sell out ahead of them to bidders prepared to pay blockholders a “control premium” to take over the company. It therefore deters some bidders, and weakens the market for control and hence (arguably) better performance by incumbent managers. Nonetheless, in 1997 the CLERP reformers decided to keep the equality principle to promote “investor and market confidence” {Austin et al 2007: 23.070}.²³

On the other hand, as discussed next (C.I and C.II), incumbent managers in Australia (as in the UK) traditionally have had considerably less room to entrench themselves vis-à-vis their own shareholders, compared to their US counterparts (see generally {Thompson 2002}). This creates potential for a more attractive environment for takeovers in Australia. Indeed, after a large stockbroker devised the “Australia 2000 Club” scheme to help large companies deter hostile takeovers during an earlier stock market boom, in 1986 the regulator (NCSC) highlighted issues involved in various types of “defensive strategies” (long-term planning) and “defensive tactics” (in the face of an actual or impending bid) {Austin et al 2007: 23.540}.

I. Anti-Takeover Charter Amendments (ATCAs)

The ATCA is the only “defensive strategy” that is now specifically authorised under the Corporations Act (ss 648D-H {ibid: 23.550}). If approved by prior shareholder agreement (for three-year renewable terms), an ATCA typically allows directors to convene a shareholders’ meeting, excluding a company launching a partial takeover, and if those shareholders reject the bid then all takeover offers and contracts whereby shareholders accepted the offers are cancelled {Ramsay et al 2000}. This possibility was introduced in 1986, after a rapid increase in partial takeovers, along with another legislative change unfavourable to companies launching takeover bids.²⁴

²³ See <http://www.treasury.gov.au/documents/284/PDF/full.pdf>, and further arguments for and against the equality principle summarised in {Austin 2007: 23.070}. {Armour and Skeel 2007: 1737} states the US has an equal treatment rule similar to that in the UK, except that the UK goes further in requiring a mandatory bid once the bidder exceeds 30% of the target’s voting rights. However, the 1997 CLERP Paper (at p 13) pointed out that, in the US: “Unlike [Australia’s then] Corporations Law provisions, there is no underlying equality of opportunity principle. While equality of treatment is required where an offer is made to investors at large, control can pass in private transactions without such an offer being made. In practice, offers will often be made to investors at large for a variety of reasons, including obligations under State statutes and to avoid litigation from minority shareholders.”

²⁴ Partial takeovers had proceeded mostly by the bidder accepting pro-rata any shares from each shareholder who accepted the offer, if all did not accept. This avenue gave more certainty to the bidder than another, “proportional bids”, whereby the bidder could not accept pro rata and therefore needed to bid for a higher percentage of shares overall in order to likely achieve the required overall shareholding in the target company. The 1986 amendments (see now s618) abolished the first avenue and allowed only proportional bids, which give more certainty for target company shareholders.

Between 1986-1990, 37 of the largest 150 companies (listed *and* unlisted) introduced ACTAs. Compared to similarly large companies that did not, these 37 companies were less likely to adopt ATCAs when there were high shareholdings held collectively by their directors, or by the top 20 shareholders. The authors of this study argue that this occurs because in such situations there is more alignment of shareholder and director interests; there is less concern that managers will try to entrench themselves, at shareholders' expense, by adopting ATCAs. Another interpretation may be that blockholder companies don't need to worry about takeovers so much anyway, because they can block or accept bids less constrained by the interests of directors and other managers.

II. Other Limited Substantive Impediments to Takeovers

Otherwise, Australian law and practice tends to follow English rather than US law. In the UK, unlike the US, managers cannot take “frustrating action” against bidders without shareholder consent, *after* a takeover is launched. Directors cannot use “poison pills” (conventionally: stock issuance to dilute shareholdings when a takeover is launched), stock transfers to interfere with a bid, or agreements to a lock-up (eg exclusive negotiation) provision with a favoured bidder. The law in the UK, and especially practices supported by institutional investors, also prohibit or disfavour “embedded defences” *before* bids, as are commonly found in the US. Thus, for example:

- (1) Directors must get shareholder approval to issue new shares, usually only given if in accordance with institutional investor guidelines;
- (2) Dual-class voting shares are strongly opposed by institutional investors;
- (3) Directors must offer any new shares first pro rata to existing shareholders, unless shareholders agree otherwise – and institutional investors only agree exceptionally;
- (4) Entrenching management by staggering board appointments is difficult because shareholders can always vote to remove directors;
- (5) Entrenching management by “golden parachutes” in their employment contracts is constrained by company law requirements of disclosure and non-binding shareholder resolutions, as well as the City Code's general principle that notice periods for directors' service contracts should be no more than one year;

UK law may also be more pro-shareholder than the US, although perhaps less unequivocally so, in that anyone obtaining more than 30% control must make a “mandatory bid” for the remaining shares {Armour and Skeel 2007: 1736-7}.

A similar situation prevails in Australia regarding such pre-bid “embedded defences”. Shareholders in Australian public companies also have a non-derogable right to remove a director at any time (after notice) by ordinary resolution in a general meeting (s 203D).²⁵ “Golden parachutes” are limited by similar remuneration rules

²⁵ Unlike even the UK and (since 1993) New Zealand, shareholders cannot waive this right. Australia certainly does not permit cumulative voting, which allows minority shareholders to concentrate their voting power to elect at least one director of their choice, but which tends to entrench directors. That is found in the US (and Canada), which also allows staggered boards, commonly used as a further entrenchment device but not permitted in Australia. On the other hand, s 203E adds another prohibition

(above Part 2.B.IV), although not regarding notice period; and are certainly more constrained if entered into within a year *after* a bid is made or reasonably expected by directors, and on “unconscionable” terms (s 1325C).

The role of institutional investors may be more variable regarding (1)-(3). Nonetheless, following the English tradition and in sharp contrast to the US (as well as, recently, Japan: {Kamiya and Ito 2008}), contentious ‘poison pills are, for all intents and purposes, non-existent in Australia, although there appears little consensus on why this is so’ {Hill 2008: 51 et seq}. This became controversial when one of the largest media conglomerates in Australia (and the world), News Corp, transferred its listing to New York in 2004. A major reason was to make it easier for directors (especially founder Rupert Murdoch, whose family owned 30%) to themselves issue a poison pill to fend off a possible bid by John Malone (the next largest shareholder, owning around 18%). After relisting and implementation of a poison pill, Murdoch went back on an earlier promise to put renewal of the pill to a shareholder vote after 12 months. This drew strong objections especially from institutional investors and commentators in Australia and elsewhere, as well as ASIC.²⁶ Soon after a lawsuit was filed in Delaware, News Corp backed down and allowed a vote on 20 October 2006, when 57% of shareholders agreed to extend the poison pill for two years.²⁷

{Hill 2008: 51-5} suggests three possible sets of reasons for the lack of poison pills in Australia. One set encompasses directors’ fiduciary duties, especially the duty to act for a proper purpose (now also codified in s 181(1): their subjective belief is not determinative). Share transfers or issuance that might influence control can be challenged if the dominant purpose appears to entrench existing controllers, rather than a separate legitimate commercial objective {Austin et al 2007: 8.210 and 8.240}. Even shareholder-approved amendments to the corporate constitution are subject to principles concerning “fraud on the minority” and oppression or unfairness under Pt 2F.1 of the Corporations Act {ibid: 23.540 and ch 11}.

Another set of reasons, described by {Hill 2008: 54} as the ‘most likely’, derives from ASX Listing Rules (see also {Mannolini 2002: 349, von Nessen et al 2003b: 34}). For example, former Rule 3G(7) prohibited a company from “issuing an option which, in the opinion of the stock exchange, was designed to frustrate a takeover bid or frustrate a person from becoming entitled to more than 20 per cent of equity securities in a company, or a person already entitled to more than 20 per cent acquiring further equity securities in the company”. Now, Listing Rule 6.1 may be used to invalidate poison pills, by giving the ASX discretion to ensure the terms of equity securities are “appropriate and equitable”. Various other rules require shareholder approval for various transactions affecting control or capital. In particular, Rule 7.1 requires approval for issuance of more than 15 per cent of share capital,

on directors removing another from office, which is widely understood as preventing contractual “pre-nuptial agreements” among directors {Knight 2007}.

²⁶ See eg Alan Kohler, “Murdoch’s Poison Pill”, *The Age*, 13 August 2005 at <http://www.asiamedia.ucla.edu/article.asp?parentid=28497> (remarking that such poison pills “would be outlawed in Australia”).

²⁷ Stephen Foley, “Murdoch Agrees to Put NewsCorp Poison Pill Defence to Investor Vote”, *The Independent*, 7 April 2006 at http://findarticles.com/p/articles/mi_qn4158/is_20060407/ai_n16192585; “News Corporation Shareholders Back Murdoch’s Takeover Defense”, *New York Times*, 21 October 2006, at <http://www.nytimes.com/2006/10/21/business/media/21murdoch.html>. For further details, see {Hill 2008}.

unless pro rata. In 2003, the ASX decided not to relax this Rule, eg by allowing shareholders to delegate to management a general power to issue securities {Hill 2008: 55}.

A third explanation for Australia's lack of poison pills comes from the cautious approach of the Takeovers Panel (outlined further in Part II.D below) towards defensive conduct by target boards. Shareholder consent is generally required to prevent measures, including probably poison pills, amounting to "unacceptable circumstances" that contravene the (s 602) purposes or *spirit* of Australian takeovers law, creating adverse *effects* on the market for corporate control (even if directors' duties are not necessarily breached). Generally, the Panels have transferred more power to bidders, by requiring target shareholder consent for managerial action (eg grant of a licence to a rival bidder) when it breaches bid conditions imposed by the bidder (eg that the target would not enter into new material transactions outside ordinary business), or where the breach has the effect of substantially frustrating the bidder.²⁸ Such case law generated a Guidance Note on "Frustrating Action" (No 12) issued in 2003,²⁹ echoing principles developed in the UK. A Panel decision in 2003 against pre-bid measures taken by the AMP Shopping Centre Trust, challenged by Centro, also stressed the "principle of non-entrenchment", paralleling a recent leading case in England {Hill 2008: 52-3}.³⁰

Generally, there appears to be even more scope for *post-bid* behaviour to be constrained by such principles developed by the Takeovers Panel, as well as duties imposed on directors. There may even be limits on what shareholders may agree on, although the guiding principle is that they should have the opportunity to choose freely. Thus, Australia also adopts a position similar to the UK, constraining target managers' discretion regarding "deal protection" measures (see generally also {Mayanja 2002}). In the US, directors generally are able to offer potential bidders "break fees" or similar "lock up" devices amounting to 2-4% of transaction value, if specified events trigger failure of the offer. These serve partly to cover bidders costs in preparing bids but partly also to ward off hostile takeovers. They have become widespread in Australia, but only for around 1% and since 2001. The Panel's

²⁸ See, respectively, *Re Pinnacle VRB Ltd (No 5)* (2001) 39 ACSR and *Re Bigshop.com.au* (2001) 39 ACSR 525; and generally {Armson 2003} and {O'Donnell et al 2005: 24}.

²⁹ At <http://www.takeovers.gov.au/display.asp?ContentID=120>.

³⁰ Compare *Re AMP Shopping Centre Trust (No 1)* (2003) 45 ACSR 496 and *No (2)* (2003) 45 ACSR 524 with *Criterion Properties PLC v Stratford UK Properties LLC* [2002] EWCA 1883. However the latter was more a 'lock up agreement' than a 'poison pill' {Armour and Skeel 2007: 1727 n261}, and the former was more of a 'shark repellent' (pre-emptive rights to major properties given (upon listing) in 1997 to related company, AMP Life). Further, some commentators have suggested that only the outcome may differ if there is full disclosure and consent by owners. See Braddon Jolley et al, "Takeovers Panels Doesn't Swallow Poison Pill", at <http://www.findlaw.com.au/article/9240.htm>; and further {von Nesson et al 2003}. More generally, the Takeovers Panel has issued in 2006 a Guidance Note (No 17) on Rights Issues (<http://www.takeovers.gov.au/display.asp?ContentID=1019>). This also stresses the importance of opportunities for equal and informed consent of shareholders when shares are offered to all holders of that class, which may involve underwriting. Such actions avoid the takeover bid requirements (s 611 items 10 and 11 exceptions), and are presumed not to be "unacceptable circumstances"; but this presumption can be rebutted by evidence that the actions have the effect of subverting the market for corporate control. For a critique of Panel decisions in prior years, which had tended to focus on motivations behind capital raising and not so much on the effect of the structure on likely participation in the rights issue, see {Philip 2005}.

Guidance Note (No 7) issued in that year and revised in 2005 and 2007,³¹ building on some high-profile cases, suggests that it is good practice for target directors to negotiate a maximum fee, with 1% as the rule of thumb. This tries to balance the “interests of one body of shareholders – those who receive a takeover offer -- ... at odds with another: the successful competing bidder who indirectly funds the fee” {Mannolini 2002: 345}. The Panel’s Note indicates that a break fee generally will not generate “unacceptable circumstances” if reasonable and consistent with the Eggleston principles. An important issue is whether the fee puts pressure on shareholders to accept the bid. Thus, as well as fees exceeding the 1% rule of thumb, problems can arise where they are payable even if shareholders reject the bid in the absence of a competitive rival bid and of a material change in circumstances {Austin et al 2007: 23.615 p1228}. Similar constraints on managers dealing with bidders arise regarding “no-shop” agreements (where the target agrees not to solicit rival offers) and “no-talk” agreements (even when rival offers are unsolicited).

On the other hand, Australia does not have a UK-style mandatory bid {Mannolini 2002: 349}. That might allow bidders effectively to achieve control (by securing significant shareholdings) without taking the time and expense of declaring a takeover offer, provided those bidders then follow up with a formal offer to all for at least the same price agreed in the previous four months. In their 1997 CLERP paper, reformers proposed introducing such a scheme, arguing that it would encourage more takeovers. However, it was abandoned by the legislature “essentially on the ground that it was inconsistent with the Eggleston principles, because it would enable one or a few holders to negotiate and sell out early, while depriving the other holders of the potential benefits of a bidding auction” {Austin et al 2007: 23.080 p1228}.³²

A similar reform has been proposed recently by the Financial Services Institute of Australasia (formed in 2005 out of institutes for bankers and securities professionals, with around 20,000 members and 19,000 students). It recommends introducing a new “pre-bid commitment rule” allowing a bidder to enter an off-market irrevocable pre-bid acceptance agreement with one (only) major shareholder for the sale of all its shares, providing an identical public offer follows for outstanding shares. FINSIA also proposes raising the takeover threshold from 20% to 30% (as in the UK, and

³¹ At <http://www.takeovers.gov.au/display.asp?ContentID=917> . On the revisions in 2005, see {McKeon and Farrer 2005}.

³² Johnston {2007: 451} argues that the UK’s mandatory bid rule means that: “while the Code generally promotes the operation of a market for corporate control, the demands of minority shareholders to share in the control premium prevail over concerns about managerial accountability. These priorities reflect the fact that, historically, the primary concern of the drafters of the City Code was to maintain investor confidence in the City rather than to improve standards of corporate governance generally.” Nonetheless, {Hutson 2002: 37} argues that “In the British system, the mandatory bid rule makes takeovers relatively expensive but minimises risk to bidders, while the US system [no mandatory bid rule and the possibility of (cheaper) pro-rata partial bids, but with a lower takeover notification threshold] trades off additional risk [of an unsuccessful public bid] for lower cost. In Australia, however, the current regulations [no UK-style mandatory bid rule, limited popularity of the proportional partial bid allowed by s 618(1)(b), higher threshold] make takeovers both highly risky and relatively expensive. Target shareholders in Australia are very well protected once a takeover offer is under way. If inappropriate regulation is preventing takeover bids from being launched in the first place, however, the market for corporate control is not operating properly and all shareholders are the losers’. Note that once the bidder in Australia exceeds the 20% threshold, and is committed to the risk and expense of a takeover bid, s 621(3) requires the price offered to equal or exceed the maximum offered in the four months prior to the bid.

recently both Hong Kong and Singapore), and abolition of the 3% “creeping acquisition” exception (as in the UK since 1998). It argues that these and other proposals will provide greater certainty and takeover activity {Green 2006}, although so far they have achieved little traction. For example, the Law Council apparently considers that increasing the threshold would not be in the best interests of minority shareholders, and that the current threshold was set at 20% because shareholdings were dispersed in Australia so control would pass beyond that level {Khan 2007: 48-9}.

Yet, if there remain more blockholders and less active institutional investors than in the UK, then the threshold could be set even higher without much risk of control passing. The resistance to raising the threshold may indicate some residual power of blockholders in constraining the scope for takeover activity. On the other hand, it is possible that Australian blockholders (at least in some areas, such as mining) are more open to taking profits from hostile bids, compared to counterparts in countries like Japan where they tend to resist the development of a market for corporate control. Anyway, resisting the move to a more UK-style mandatory bid system seems a rearguard action; the statistics above indicate that Australia has already achieved similar levels of hostile takeover activity and success rates as in the UK.

D. PROCEDURE: THE RISE AND POSSIBLE FALL OF THE TAKEOVERS PANEL

Thus, overall, Australia has already inherited most features of English law that are decidedly less favourable to target managers than US law counterparts. This appears to be a major factor behind quite high levels of hostile takeover activity and success rates at least since the 1990s, despite more significant blockholdings and less powerful institutional investors compared to the UK. Those high levels are also quite surprising given another greater potential deterrent to hostile takeovers in Australia: until 2000, disputes could and often did end up in regular courts. In particular, many targets brought “tactical litigation” against bidders, usually complaining about inadequate disclosure in their statements. Tactical litigation is also common in the US, but has been almost unheard of in the UK particularly since disputes have been referred to its Takeovers Panel introduced with the City Code in 1968 {Ogowewo 2007}.

Australia did set up its own Panel, but only through the Corporations Law 1991, and that only heard four cases due to its limited jurisdiction. It was only from 2000 that:

- (a) all disputes during a pending takeover had to go before a new “Takeovers Panel” rather than the courts;
- (b) at the request of any person (not just the regulator), and
- (c) that the Panel was allowed to consider breaches of requirements under the takeovers legislation as well as its broader principles (although compliance with statutory requirements still had to be done through the courts).

By early 2005 the Panel had rendered 148 decisions (including 12.8% by a new internal Review Panel), although many involved related matters especially in the first two years. Most cases involved disclosure and procedural matters arising from takeovers of listed public companies {Armson 2005a; 2006}, albeit with small market capitalisation (\$50 million or less: Miller et al 2006). Initially, most applicants were

bidders yet they ended up giving up most undertakings; then targets began applying and giving undertakings more, but the Panel has also started to issue more orders (eg to sell shares). Although only 30 decisions declared “unacceptable circumstances”, only 20% relied on broad s 602 “policy” grounds; 37% referred also to the Act’s requirements and 30% referred solely to those. The Panel also increasingly referred to its own policies (eg Guidance Notes) and earlier decisions, rather than court judgments {Armson 2005a; 2006}. It most frequently relied on s 602(a) (efficient markets) or s 602 generally (21 cases). But it also relied quite often on s 602(b)(iii) (enough information: 19 cases). The other main Eggleston principle, equal opportunity to participate in the bid (s 602 (c)), was only relied upon on in 9 cases {Miller et al 2006: 20-1} – although that may be because it is taken to be quite obvious and followed, rather than being gradually displaced by the efficient markets principle (cf generally {Mannolini 2002}).

The new system was enacted to provide speed, informality and uniformity in decision-making, minimise tactical litigation, and free up court resources. The process seems to have remained quite informal and speedy. Written decisions averaged around 5000 words in length {Armson 2005a: 668, 676-8}. The median times for deciding applications and publishing written reasons were, respectively, 14 and 33 days {Miller et al 2007}. Tactical litigation seems to have decreased, and considerable uniformity achieved, now that some major case congregations and important issues have been dealt with and a significant body of Panel jurisprudence has built up (see also {Pasternak 2007}). This may reflect the fairly clear and longstanding corpus of takeovers law derived largely from English principles, generally favouring bidders and disfavouring target managers, as well as the appointment of part-time Panel members from the among corporate lawyers as well as businesspeople. Nonetheless, the UK City Code starts off with somewhat more detailed provisions, while its process remains considerably more informal {Armson 2004, 2005b; Baum 2005}. As well as lawyers serving as Panel members in Australia, solicitors (but hardly ever barristers) represent one or more parties in most cases, although oral hearings have only been held rarely – and in the first three years of the Panel {Armson 2005a: 665}. Perhaps this somewhat greater formality in procedure counterbalances the somewhat more flexible substantive law principles being developed. At the other extreme lies the US. Even the expert Delaware courts remain *courts* – with all their formalities – but apply even more flexible (and comparatively confusing) takeovers law, much more favourable to incumbent managers.

Further, trends such as increased use of orders, and Act contraventions with or instead of policy rationales, may indicate a resurgent overall re-formalisation of Australia’s Panel system. Developments in other fields of ADR (Alternative Dispute Resolution) and substantive fields like contract law reveal the continuous tension between informality (typically favoured by businesspeople, even in large companies) and formality (typically promoted by legal professionals) {Nottage 2003=6}. It should therefore come as little surprise that the courts have recently challenged Australia’s Panel system. The legislature promptly implemented the Corporations Amendment (Takeovers) Act 2007 to amend aspects of s657A to overturn the judgments of the Federal Court in *Glencore* ([2005] FCA 1290 and [2005] 274), which had identified problems in the drafting of the original s 657A(2)(a) (“unacceptable circumstances” due to the effect on company control) {Evans-Cullen 2007}.

However, a week after this reform came into effect, a majority of the (appellate) Full Federal Court ruled that the Panel's jurisdiction under s 657(2)(b) (now redrafted as s 657(2)(c): "unacceptable circumstances" due to Act contravention) was anyway constitutionally invalid because it involved conferring judicial power on an administrative body (*Australian Pipeline Ltd v Alinta Ltd* [2007] FCAFC 55). Noting that the Court had only made obiter (non-binding) remarks about the likely unconstitutionality also of the amended s 657(2)(a), the Panel promptly encouraged applicants to continue bringing disputes under that provision, and appealed to the High Court. {Armson 2007} argued that the Panel does not exercise "judicial power" due to: (a) its decisions' degree of authoritativeness, (b) its consideration of policy rather than merely existing legal rights, and (c) a process still more flexible than for courts (eg, members do not need legal qualifications, and the Panel is not bound by rules of evidence or precedent). On 31 January 2008, in separate judgments along these lines, the entire High Court upheld the constitutionality of the Panel: *Attorney-General (Cth) v. Alinta Limited* [2008] High Court of Australia 2. Nonetheless, there are concerns that even the UK Panel, traditionally much more informal and reliant on industry sanctions, may be open to judicial review now that it has stronger legislative backing following implementation of the European Takeovers Directive {Ogowewo 2007}.

Thus, although Australia's Takeovers Panel seems unlikely now to be itself "taken over" by the courts, it may continue to drift towards greater formalisation. Although the High Court emphasised the Panel's informal aspects in order to justify its constitutionality, as a practical matter the Panel must present itself – at least to the lawyers involved – as still committed to basic principles such as procedural justice refined by the courts themselves. A tendency towards formalisation arises in any process where lawyers remain heavily involved, as for example with commercial arbitration in Australia {Nottage, 2003}. Such drift within the Panel may dampen the country's level of hostile takeover activity. Yet, as explained above, that developed even over the 1990s (before takeovers challenges were streamlined through the Panel), underpinned by substantive law that seem set to remain quite favourable to bidders and more constraining for target managers.

Part 3. Conclusions

Overall, therefore, Australia presents an intriguing puzzle for comparative corporate governance. On the one hand (Part 1), unlike the US and especially the UK, even into the 1990s it had quite concentrated blockholdings in listed public companies and correspondingly less active institutional investors. This helps explain the rocky road to implementing nation-wide companies law and securities regulation. It has also proven quite difficult to enact and embed more recent corporate law reforms (notably in 2000 and 2004) aimed at protecting shareholders more generally (eg statutory derivative actions, independent directors), especially more arms-length mechanisms (disclosure, performance-linked executive remuneration). More generally, the blockholding tradition may explain quite ambivalent views still expressed by Australian managers regarding shareholders, as opposed to broader stakeholders

{Jones et al 2007}. Such views could also be correlated with the extent and nature of Australia's interest in Corporate Social Responsibility (CSR).³³

On the other hand (Part 2), Australia seems to have developed quite an active market for corporate control, another arms-length mechanism serving to monitor incumbent management especially on behalf of more dispersed shareholders. Hostile takeover activity levels and success rates even over the 1990s seem comparatively high, close to those in the UK. This may be due more to broader shifts in the economy (an accelerating boom) and related markets (deregulation of financial markets and the legal profession) especially over this period. But another factor seems to have been the historical legacy – almost, an accident – of inheriting from England substantive law principles that are quite favourable to bidders, at least compared to US law. Australians also have not been adverse to bringing hostile takeover disputes before the courts – largely disallowed in the UK since 1968 – and disincentives have probably been further reduced since its Takeovers Panel took over such dispute resolution from 2000. Indeed, some practitioners have suggested to me that a broader factor for considerable hostile takeover activity may be a more longstanding culture of “litigiousness” as well as sharp practice in the Australian business world. I am trained to be sceptical about such “culturalist” arguments when making cross-country comparisons, since they have been too readily deployed especially to “explain” law and the economy in Japan. However, they cannot be completely excluded there (eg {Kozuka and Nottage 2007}), and so also bear further exploration in the Australian context.

How, then, to reconcile this tension? First, the importance of blockholdings may have declined especially over the last decade, in aggregate terms, scale of each blockholding, and/or blockholders' propensity to resist hostile takeovers as opposed to taking profits from them. Researchers are just beginning to take up the challenge of more empirical research into Australia's corporate governance system {Cheffins 2002}, and this would be one priority area. One hypothesis is that there has not been much change, partly because the overall economy in Australia remains relatively small and less open to competitive forces {Dignam 2005b}.³⁴ Even so, secondly, more research is needed to check whether and how the role of institutional investors is growing vis-à-vis blockholders. {Farrar 2005: 344-5} suggests they are becoming more activist in Australia, evident from both case studies and initiatives from peak associations (eg the IFSA's Guidelines for Investment Managers). Main reasons are seen as (i) more foreign institutional investors, (ii) some evidence of a connection between activism and corporate performance, and (iii) strong political criticism of the sector's performance and behaviour. Especially if one or both of these shifts are taking place, it may likely be only a matter of years before other practices (eg on executive remuneration) and implementation of the “law on books” (generally now quite similar in Australia {von Nessen 2003}) do converge more closely on overseas

³³ Compare eg {Austin ed 2007; Hill 2007; Kinley et al 2007; and Lumsden and Fridman 2007}.

Further, of course, blockholders in fact may choose to disregard the interests of stakeholders and the broader community, even more so than dispersed shareholders or institutional investors.

³⁴ Australia may have deregulated and unleashed more competitive forces since the mid-1990s, than perceived by Dignam who adopts a longer historical time frame. See eg {Morgan 2003}; but see {Edwards 2007}. Nonetheless the main regulator is encountering broader difficulties in changing the mindset of business and political leaders. See {Parker 2006}, and the recent uncovering of Visy's massive and longstanding collusive practices in the packaging industry (highlighting the lack still of criminal sanctions).

developments. Even then, however, the main model is likely to be the UK rather than the US, unless the considerable divergences between those two countries (eg regarding takeovers) happen to dissipate too.³⁵

However, another real possibility is that the role of blockholdings and/or institutional investors is not changing much, and Australia's corporate governance system has therefore reached its own new equilibrium. High hostile takeover activity would remain a feature quite discordant with other aspects of the system (eg, still, problematic enforcement of disclosure requirements). Yet, for quite some time it appears to have been out of kilter with other aspects of Australia's system (notably, the presence of blockholders).

This alternative explanation is also richly suggestive for broader comparative corporate governance scholarship. Economists and political scientists, especially those embarking on extensive cross-country quantitative analysis of systems corporate governance (and capitalism more generally), tend to focus on extensive complementarities among different features. However, this does not exclude the possibilities of disjunctions within specific countries. For example, Charles Sabel observed how the US developed a much more arms-length shareholder-oriented model over the 1980s, yet moved to more trust-based dealings among firms at least in fields such as automobile production. From the 1990s Japan shifted towards more emphasis on shareholders, albeit through more control-oriented mechanisms (eg shareholder derivative suits), yet changes seemed less pronounced in employment relations and industrial production {Nottage and Wolff 2005} as well as the main bank system {Puchniak 2007a/8a}. Such disjunctures may also persist over quite long periods, if they achieve some socio-economic balance.³⁶ In particular, takeovers may prove to be a relatively unimportant area of an overall corporate governance system, despite its prominence in the financial press. As pointed out long ago by {Coffee 1984}, hostile takeovers really only serve as a monitoring mechanism for the very worst cases of managerial misperformance.

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³⁵ Dr Alan Dignam (King's College, London) further suggests that the UK's high levels of takeover activity and success rates highlighted by {Armour and Skeel 2007} may be an historical aberration. More research is needed into that point, examining a broader timescale, and that may also be an interesting comparison in Australia.

³⁶ For example, in private correspondence on a first draft of this paper, Professor Chris Pokarier speculates that Australia may have achieved "a good balance of block shareholders who attenuate the agency problem, while the inherited British protections for minority shareholders and active regulatory intervention guards against them being ripped off by the big insiders". This is another area for further empirical and theoretical study.

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