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**TAKEOVERS:  
ACCEPTANCE FACILITIES REVISITED IN THE PATRICK  
CASE**

**LARELLE CHAPPLE\* & CATHERINE MCCORMACK\*\***

Takeovers undertaken in Australia are highly regulated transactions. Once shareholders in the target accept an offer they have a limited opportunity, if any at all, to reconsider or revoke their acceptance in the light of new circumstances. Arguably, this explains target shareholders reluctance to accept an offer made for their shares under a takeover. The problem of shareholder inertia in takeovers has been identified by bidders, who have sought to induce bid acceptance through the use of innovative mechanisms. The efficacy of the Acceptance Facility mechanism was recently revisited in the Panel decision in Patrick Corporation Ltd's takeover by Toll Holdings Ltd.

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## I INTRODUCTION

Takeovers undertaken in Australia are highly regulated transactions under Chapter 6 of the *Corporations Act*.<sup>1</sup> Therefore, when making a bid there are a number of provisions and prohibitions that a bidder must comply with. Additionally, the strict regulation environment surrounding takeovers limits shareholders ability to deal with their shares. Once shareholders accept an offer they have a limited opportunity, if any at all, to reconsider or revoke their acceptance in the light of new circumstances. Arguably, this explains to a certain extent target shareholders reluctance to accept an offer made for their shares under a takeover.

The problem of shareholder inertia in takeovers has been identified by bidders, who have sought to induce bid acceptance through the use of innovative mechanisms. Levy<sup>2</sup> and Bosmans<sup>3</sup> provide anecdotal evidence of the mechanisms being implemented by professionals and bidders in an attempt to overcome this problem. Therefore, in the context of this strict regulatory environment it is of interest to determine in what circumstances target shareholders, once they have accepted an offer, have a right to reassess the offer and withdraw their acceptance. The provision of withdrawal rights to target shareholders could offer one solution to overcoming shareholder inertia.

This paper looks at mechanisms to facilitate shareholder acceptance, in the context of the Australian regulatory environment. The problem of shareholder acceptances has been noted by the Panel, notably in the recent Patrick/Toll bid. The paper looks at withdrawal rights and the Panel decisions.

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<sup>1</sup> *Corporations Act 2001* (Cth) ('*Corporations Act*').

<sup>2</sup> Rodd Levy, 'Australian bidders sharpen takeovers tactics' (2005) 24 *International Financial Law Review* 39.

<sup>3</sup> Greg Bosmans, 'Overcoming shareholder inertia in takeovers' (2005) 12 *CCH Corporate News* 1.

## **II WITHDRAWAL RIGHTS**

The reluctance of target shareholders to accept an offer for their shares under a takeover has caused professionals advising bidders and bidders alike to reassess means by which they can secure target shareholder bid acceptance. One potential solution to the problem of shareholder inertia is to offer withdrawal of acceptance rights to target shareholders. These rights would provide target shareholders with the opportunity to revoke their acceptance of the bid (essentially reassess their acceptance of the offer), at any time prior to the announcement of the bid as unconditional or the closure of the bid. However, under current Australian takeover regulations withdrawal rights are provided to target shareholders in limited circumstances under s 650E of the *Corporations Act*.

The Takeovers Panel (the Panel) has recently ordered the provision of withdrawal rights in an attempt to remedy the occurrence of unacceptable circumstances during a takeover. Additionally, Xstrata Capital Holdings Pty Ltd voluntarily provided for withdrawal of acceptance rights to WMC Ltd shareholders in a recent takeover bid. In contrast to the Australian position, US federal securities law, the *Securities and Exchange Act*<sup>4</sup>, requires withdrawal rights are provided to target shareholders under all tender offers. The requirement of mandatory withdrawal rights, at certain times during the bid may alleviate, to a certain extent, the problem of shareholder inertia.

### **A Section 650E Corporations Act 2001 (Cth)**

Under Chapter 6 of the *Corporations Act* s 650E requires withdrawal rights to be provided to target shareholders in certain limited circumstances.<sup>5</sup> Section 650E provides that target shareholders should be allowed to withdraw their acceptance of an offer:

where the bid is subject to defeating conditions and the bidder varies the bid in a way that postpones for more than one month the time when the bidder has to meet their

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<sup>4</sup> *Securities and Exchange Act of 1934*, ch 404, 48 Stat 881 (USC).

<sup>5</sup> Bosmans, above n 3.

obligations under the bid and, the person is entitled to be given notice of the variation under s 650D.

The full provision is set out in the appendix, including Regulation 6.6.01 that specifies the form and register of withdrawals.

Therefore this provision operates in the event the bidder has failed to discharge their obligations under the offer within one month of the time agreed for them to do so. It is expected that bidders are generally eager to see the bid proceed quickly to its conclusion and therefore it is unlikely that this situation will occur frequently.

### ***B Overcoming Shareholder Inertia***

Anecdotal evidence provided by Levy<sup>6</sup> suggests that target shareholders fear having their shares 'locked up' for an extended period of time. Additionally, the mandate of institutional investors may preclude them from accepting before the bid is announced as unconditional. This demonstrates the reluctance of target shareholders to accept an offer made for their shares and reinforces the extent of the problem of shareholder inertia. This reluctance may inhibit the bidder's ability to meet the 90 per cent compulsory acquisition threshold, precluding bidders from completing the takeover successfully. It would appear that there is an incentive for bidders to seek ways of overcoming shareholder inertia.

Shareholder inertia, the reluctance of target shareholders to accept an offer made for their shares under a takeover, has forced practitioners advising bidders and bidders themselves seek alternate means of ensuring bid success. Practitioners and bidders have responded to the issue of shareholder inertia by identifying and implementing innovative bid inducement strategies. These 'bid inducement strategies' are designed to operate within the confines of the rigid takeover regulations and address the shareholder inertia issue. Share acceptance facilities and conditions precedent operate to induce conditional acceptances from target shareholders.

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<sup>6</sup> Levy, above n 2.

### **1 *Share Acceptance Facilities***

Bosmans<sup>7</sup> describes share acceptance facilities as a means for ‘overcoming shareholder inertia in takeovers’. These acceptance facilities operate as bare trusts accepting the conditional acceptances of target shareholders, specifically institutional investors.

The Mayne Health takeover of FH Faulding in 2001 is one of the earliest known uses of a share acceptance facility. Since then, these acceptance facilities have appeared, for example, in the following bids:<sup>8</sup>

- PBL’s bid for Burswood,
- Healthscope’s bid for Gribbles,
- BHP Billiton’s takeover of WMC Resources Ltd and
- San Miguel’s bid for National Foods.

The use of a mechanism of this nature may enable the bidder to prevent a stalemate between the bidder and target shareholders and allow for minimum acceptance conditions contained in the offer to be satisfied, leading to the bid being declared as unconditional.

A facility of this nature allows target shareholders, specifically institutional investors, to indicate their intention to accept the offer conditionally, with true acceptance delivered once the ‘trigger event’ has occurred. Conditions of acceptance may be individual to shareholders or dictated by the bidder. Generally a trigger event is the revision of the bid, a minimum acceptance condition being met, the bid becoming unconditional or the bidder acquiring a holding in the target that is equal to or greater than 90 per cent, this would enable the bidder to proceed with compulsory acquisition.

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<sup>7</sup> Bosmans, above n 3.

<sup>8</sup> Although *In the matter of Patrick 03* (*Patrick*) [2006] ATP 12, [23], Toll Holdings, the bidder, identified ten occasions since 2001 in which bids used share acceptance facilities.

The Panel in *Patrick*<sup>9</sup> has accepted share acceptance facilities as a valid and legitimate takeover tool.<sup>10</sup> The Panel stated that an acceptance facility is an open and accountable method for co-ordinating acceptances. Bosmans<sup>11</sup> identifies the advantage of share acceptance facilities as being tied to their inbuilt flexibility; they can be introduced at any time during the bid, they can generally be extended to whichever shareholders the bidder selects and the bidder has broad discretions as to what trigger event applies.

### ***2 Conditions Precedent***

Conditions precedents have been identified by Bosmans<sup>12</sup> as a means of securing conditional acceptances from all target shareholders rather than solely from institutional investors. This mechanism operates through ‘defeating conditions’ that take the form of conditions precedent. The contract is not completed until such time as all the conditions are satisfied. Under this mechanism, the bidder could extend the right to conditionally accept an offer voluntarily to all shareholders, with the result being that their acceptance is not binding until the relevant conditions are waived or satisfied. Similar to share acceptance facilities there are a number of conditions that may defeat the bid.

### ***3 Broker Inducement Fees***

Broker inducement fees are fees paid by the bidder to brokers to encourage them to initiate acceptances of the bid by target shareholders. The Panel has considered the operation of broker inducement fees as a bid inducement mechanism in *Guidance Note 13: Broker Handling Fees*.<sup>13</sup> The Panel stated that ‘to the extent that a broker handling fee encourages brokers to inform their clients about the existence of the bid and discuss the merits of the bid, the fee may indicate the acquisition of shares taking place in an efficient, competitive and informed market’. However, the Panel has

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<sup>9</sup> [2006] ATP 12.

<sup>10</sup> Ibid [28].

<sup>11</sup> Bosmans, above n 3.

<sup>12</sup> Ibid.

<sup>13</sup> Takeovers Panel, *Guidance Note 13: Broker Handling Fees* (2003) Takeovers Panel.

warned that the fee offered to brokers should not be excessively high<sup>14</sup> or only available for a limited period of time.<sup>15</sup> Therefore, within these guidelines the Panel appears to have accepted broker inducement fees as a legitimate means of acquiring bid acceptance.

### **III WITHDRAWAL RIGHTS, ACCEPTANCES AND THE TAKEOVERS PANEL**

In this section, we will mention some of the Panel decisions that focus on share acceptance facilities.

#### *A Withdrawal as Remedial Order*

- **Pinnacle VRB (Vantech Technology)**

In 2001, the Panel made a ruling when Vantech Technology (VRB) Corp made an offer for Pinnacle VRB Ltd.<sup>16</sup> The Panel declared unacceptable circumstances in relation to some of the bidder's assertions in its bidder's statement (relating to the announcement to list 'in the near future' and the failure to follow through). As part of the remedial orders, the Panel decided that the bidder had to allow shareholders to withdraw their acceptance.

- **Goodman Fielder (Burns Philp)**

In 2003, the Panel declared unacceptable circumstances in Burns Philp & Co Ltd's takeover of Goodman Fielder Ltd.<sup>17</sup> Burns Philp & Co Ltd had unusual financing arrangements in place at the time the bid was announced which had the effect of exposing target shareholders to unnecessary financial risk. The Panel declared unacceptable circumstances and ordered that withdrawal rights be provided to all target shareholders for a period up to and including the 10 days after the financing arrangements had been settled.

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<sup>14</sup> Ibid s 13.12.

<sup>15</sup> Ibid s 13.22.

<sup>16</sup> *In the matter of Pinnacle VRB Ltd No. 9 & No. 9B* [2001] ATP 25, [2001] ATP 26.

<sup>17</sup> *In the matter of Goodman Fielder Ltd 01* [2003] ATP 1.

- **ALHG (Bruandwo)**

A share acceptance facility was mentioned in the Panel for the first time during this bid, although it was not a matter of substantial comment.<sup>18</sup> In 2004, Australian Leisure and Hospitality group was subject to rival bids by Bruandwo Pty Ltd (off market bid) and a Coles Myer consortium (CMM) under a proposed scheme of arrangement. This matter, decided 22 October 2004, resulted from an application by CMM to its rival's bidder's statement and disclosures. One of the issues regarding the disclosed level of acceptances was whether Bruandwo had established an acceptance facility that had not been disclosed. Bruandwo satisfied the Panel that it had not done so, and undertook to disclose the existence and terms of such a facility, if subsequently established.

The Panel, at para 59, simply defined an acceptance facility ('a facility under which certain target shareholders can lodge acceptances or instructions to accept a bid with a third party on a provisional basis'). This could be seen to be an implicit endorsement of the tactic, and perhaps raised some future potential issues about the efficacy of such facilities, given the acknowledgement that they could be used by 'certain' shareholders. This paves the way for the issue to be visited in the *Patrick*<sup>19</sup> matter.

- **National Foods Ltd (Fonterra)**

In 2005, in the attempted takeover of National Foods by Fonterra Foods Pty Ltd, the bidder failed to correctly disclose all circumstances surrounding the takeover.<sup>20</sup> Unacceptable circumstances were declared by the Panel and National Food shareholders were provided with withdrawal rights.

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<sup>18</sup> *In the matter of Australian Leisure and Hospitality Group Ltd 03 ('ALHG')* [2004] ATP 25.

<sup>19</sup> Above n 9.

<sup>20</sup> *In the matter of National Foods Ltd* [2005] ATP 8.

### ***B Voluntary Withdrawal Rights***

The examples above show that withdrawal rights have been provided to target shareholders in instances of unacceptable circumstances as part of a remedial order. In *ALHG*,<sup>21</sup> the Panel recognised that share acceptance facilities were part of the bid landscape, but there was no substantial comment. However, more recently in *Patrick*,<sup>22</sup> the bidder supplied share acceptance facility was the subject of the unacceptable circumstances claim.

- **WMC Resources Ltd (Xstrata)**

The matter was not substantially litigated in the Panel, but it is worth noting the bidder Xstrata voluntarily included withdrawal of acceptance rights in their 2004 takeover attempt of WMC Resources Ltd (WMC). The rights offered by Xstrata provided that target shareholders could withdraw at any time prior to Xstrata achieving 90 per cent of acceptances. Bosmans<sup>23</sup> stated that Xstrata included the rights in the offer with the express intention of inducing bid acceptance at an earlier stage in the bid process, such that some momentum might build and pressure on the reluctant WMC board would increase. It is difficult to judge the success of this mechanism in overcoming shareholder inertia, as Xstrata's bid for WMC was trumped two months later by BHP Billiton. Bosmans<sup>24</sup> argued that withdrawal rights of this nature limited the bidders' flexibility in conducting the bid. Specifically, the bidder was required to comply with stringent notice requirements imposed by the Australian Securities and Investment Commission (ASIC), in the event that Xstrata intended on unilaterally terminating the withdrawal rights. The success of this mechanism could have been affected by the competitive nature of the bid environment surrounding WMC. Additionally, target shareholders may have not been educated on the operation of the withdrawal rights and how these rights could benefit them. These arguments appear

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<sup>21</sup> [2004] ATP 25.

<sup>22</sup> Above n 9.

<sup>23</sup> Bosmans, above n 3.

<sup>24</sup> *Ibid.*

reasonable in the context of Xstrata being the first bidder to voluntarily offer withdrawal rights to target shareholders

- **Patrick Holding (Toll)**

In March 2006, the target, Patrick Corporation Limited applied to the Panel to examine Toll's disclosures in its supplementary bidder's statement.<sup>25</sup> Patrick also claimed that the acceptance facility that had been established for institutional holders constituted an 'unacceptable circumstance', as a breach of the equal opportunity principle.

Toll identified in its submission at least 10 prior bids that had used a share acceptance facility. In its discussion, the Panel recognised that institutional investor decision-making was assisted by a share acceptance facility, and it helped the bidder to declare the bid unconditional sooner, by counting the facility acceptances as acceptances. This had a flow on benefit to all shareholders in the sense that the bid becomes more certain in less time.

The Panel essentially agreed on two points, particularly bearing in mind that this facility was potentially 'discriminatory' in nature:

1. the share acceptance facility was not a collateral benefit
2. the share acceptance facility, in discriminating 'against' non institutional holders, did not offend the equal opportunity principle.

These main theoretical objections are discussed below under the heading 'the equality principle'.

#### **IV THE EQUALITY PRINCIPLE**

In addition to complying with the general bid structure issues regulated by the provisions of Chapter 6, the bidder is also required to comply with the provisions

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<sup>25</sup> *Patrick*, above n 9.

concerned with the promotion of the equality principle. The Eggleston Report released in February 1969 cited four principles regarding the takeovers of public companies. These principles, currently set out in s 602 of the *Corporations Act*, are considered to be the foundation of takeover regulation in Australia. Sheehy<sup>26</sup> opined that s 602 reflects the Australian ethos of 'a fair go for all'. Section 602(c) highlights the predominance of the equality principle, by ensuring that target shareholders have an equal opportunity to share in benefits derived under a takeover. Several Chapter 6 provisions can be identified as the embodiment of the equality principle: the prohibition against collateral benefits and escalator clauses, in addition to the minimum price rule.

### ***A Prohibition Against Escalator Clauses and Collateral Benefits***

In order to ensure that each offer is identical the legislature has prohibited the use of escalation clauses and the provision of collateral benefits to target shareholders. These measures allowed the bidder to deal individually with different classes of target shareholders and arguably to offer inducements to individual classes of shareholders, in an attempt to secure bid acceptance.

#### ***1 Escalation Clauses***

Escalator clauses are described by McKeon and Craig<sup>27</sup> as a mechanism utilised by bidders, pre-bid, to convince institutional investors to dispose of their shareholdings in a publicly listed target. Under an escalator clause, institutions were assured of receiving the difference between any higher price paid to all other shareholders during the bid and the price they received pre-bid. McKeon and Craig<sup>28</sup> argued that without the use of escalator clauses, many bidders would have struggled to get their bid 'in play'. Additionally, they argued that these clauses did not provide any benefit over and above the consideration ultimately paid to other shareholders during the bid. Notwithstanding, the legislature decided to ban the use of these clauses.

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<sup>26</sup> Benedict Sheehy, 'Australia's Eggleston principles in takeover law: Social and economic sense?' (2004) 17 *Australian Journal of Corporate Law* 218.

<sup>27</sup> Simon McKeon and John Craig, 'Takeovers and Public Securities' (1998) 16 *Company Law and Securities Journal* 389.

<sup>28</sup> *Ibid.*

Section 622 of the *Corporations Act* prohibits the giving of, receiving of, the offer to give, or an agreement to give or receive a benefit referable to a takeover proposed within six months of the share acquisition. Ding<sup>29</sup> identifies circumstances when an escalator clause could offend the equality principle. Prior to the introduction of s 622, unfairness existed to persons, other than institutions who had sold their shares pre-bid, because they did not have the benefit of an escalator. It is because of this inequality that the use of escalator clauses was prohibited, in order to stem the advantage that 'beneficiaries of these clauses obtained vis-à-vis other shareholders'.<sup>30</sup>

## ***2 Collateral Benefits***

Section 623 prohibits the bidder from offering collateral benefits to selected shareholders, during the offer period, that are likely to induce target shareholder bid acceptance. Collateral benefits arise when the bidder approaches certain classes of target shareholders or individual shareholders and offers benefits that are additional to those offered under the bid, with the intention of inducing bid acceptances. Section 623 essentially ensures that bidders do not deal individually with target shareholders. The collateral benefit provision was amended by the *Corporate Law Economic Reform Act*.<sup>31</sup> Prior to the introduction of *CLERP 1999*, the prohibition against collateral benefits applied in the four months prior to and during the bid.<sup>32</sup> Currently the prohibition is restricted to operation during the bid.

Milne and Carr<sup>33</sup> cited the Joint Parliamentary Committee Report on *CLERP 1999*, when discussing the justification for a pull back of the prohibition on collateral benefits and an extension of the minimum price rule. The Committee asserted that the extension of the minimum price rule to all bids, rather than solely cash or cash alternative bids, would compensate for the restrictions on the period during which the

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<sup>29</sup> Alex Ding, 'An Interpretation of the Equality of Opportunity Principle in the Context of Benefits Prohibited under the Corporations Law' (2000) 18 *Company and Securities Law Journal* 6.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Corporate Law Economic Reform Act 1999* (Cth) (*CLERP 1999*).

<sup>32</sup> Collateral benefits was dealt with by s 698(2) and (4) of the then *Corporations Act*.

<sup>33</sup> Simon Milne and Felicity Carr, 'Collateral Benefits – Do the CLERP Amendments resolve the Dilemmas Faced by Bidders?' (2002) 20 *Company and Securities Law Journal* 477.

collateral benefits prohibition applies, and thus prevent the equality principle from being undermined. There is also commentary to the effect that the operation of the minimum price rule under s 623(1) implicitly prevents a bidder from offering collateral benefits in the four month period before the bid.<sup>34</sup>

Additionally, there is an obligation on the bidder under s 636(1)(i) to disclose in the bidder's statement details of any collateral benefits given during the four month period leading up to the announcement of the bid. The extended operation of the minimum price rule in addition to disclosures required by the bidder's statement will capture collateral benefits provided in the four months prior to the bid being made, such that the reduced application of the prohibition against collateral benefits will have no immediate detriment to the operation of the equality principle.

### ***3 Minimum Price Rule***

The minimum price rule is another application of the principle of equality in takeovers and is concerned with the consideration offered by the bidder for target shares. Rogers<sup>35</sup> asserts that the minimum price rule is the primary provision in the promotion of the equality principle by ensuring that target shareholders have a reasonable and equal opportunity to participate in the benefits derived from a takeover. Section 621(3) requires that the consideration offered for a bid class of securities is equal to or exceeds the maximum consideration the bidder or an associate has provided or agreed to provide in the four months prior to the announcement of the bid. There are two exceptions to the operation of the minimum price rule, provided for under s 611 when the transaction takes place on-market or the bidder makes a 'creeping takeover' bid.

The introduction of *CLERP 1999* extended the scope of the minimum price rule to apply to all types of offers rather than just cash or cash alternative offers. The extension of the rule to all forms of consideration was recommended to Parliament by the Companies and Securities Advisory Committee (CASAC). CASAC argued that

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<sup>34</sup> CCH, *Australian Corporations Commentary*, vol 2 (25 August 2006) ¶ 190-435.

<sup>35</sup> Jolyon Rogers, 'Minimum price rule in takeovers: Does the minimum price rule promote the equal opportunity principle at the expense of a more efficient market for corporate control?' (2004) 22 *Company and Securities Law Journal* 87.

‘some shareholders could obtain considerable premiums for selling their target company shares in the pre-bid period, compared with the price offered to offeree shareholders ...which might create a perception of inequitable treatment among shareholders’.<sup>36</sup> Parliament accepted this view and extended the minimum price rule to all forms of consideration (eg. cash or otherwise). Rogers<sup>37</sup> cites three instances<sup>38</sup> where the Panel has recently considered the application of the minimum price rule. These decisions confirm the Panel’s view, as set out in their guidance note<sup>39</sup>, that the minimum price rule is intrinsic to the operation of Chapter 6.

### ***B Policy Barriers to Withdrawal of Acceptances***

The equality principle is entrenched in Australian takeover law, and as shown above, manifests itself in direct regulation against certain practices that may otherwise induce bid take up. For the reasons of equality:

- a prohibition on escalator clauses
- a prohibition of collateral benefits; and
- a minimum price guarantee

have been enacted. This raises the question though whether other inducement type strategies, such as condition acceptances and share withdrawal, also may offend the policy of equal opportunity. The panel’s acceptance of this type pf strategy may be encouraging in this regard.

The equality principle and the manifestations of it in Chapter 6, have not been without critical comment. For example, Rogers<sup>40</sup> questions the relevance of the equality principle in regulating Australian takeovers, particularly critical of the minimum price

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<sup>36</sup> Companies and Securities Advisory Committee, Parliament of Australia, Recommendations for reform of s 621(4) and s 623(2) & (3) of the Corporate Law Economic Reform Program Bill 1998 (1998) [4].

<sup>37</sup> Rogers, above n 35.

<sup>38</sup> *In the matter of Email Ltd* [2000] ATP 3; *In the matter of Taipan Resources NL (No. 10)* [2001] ATP 5; *In the matter of Normandy Mining Limited (No 4)* [2001] ATP 31.

<sup>39</sup> Takeovers Panel, *Guidance Note 6: Minimum Price Requirement* [s 621 (3) & (4)].

<sup>40</sup> Rogers, above n 35.

rule. Citing Mannolini,<sup>41</sup> Rogers prefers a voluntary/consensual approach to mandatory rules, favouring default provisions capable of contractual modification between the parties.

The overall advantage of the share acceptance facility arrangements as a bid inducement strategy are that they are available to all shareholders and accessed consensually. This is one reason we can use to argue in favour of their continued use, consistent with takeover principles.

#### **V A DIFFERENT APPROACH - WITHDRAWAL RIGHTS IN THE USA**

One potential solution to the problem of shareholder inertia could be the implementation of a mandatory withdrawal right system, similar to that imposed in the US. Under federal US law, s 14(d)(5) of the *Securities Exchange Act*<sup>42</sup> requires that all tender offers (takeovers) include withdrawal rights in the bid from the outset. This mandatory withdrawal right is provided for under the *Williams Act*.<sup>43</sup> The *Williams Act* introduced public disclosure requirements and procedural rules governing tender offers, in addition to inserting withdrawal right provisions in the *Securities Exchange Act*<sup>44</sup>. Section 14(d)(5) provides target shareholders with the opportunity to revoke their bid acceptance within the seven day period following the receipt of offer documents. In the event that additional circumstances come to light during this time, shareholders that have accepted early have the right to reconsider and revoke their acceptance. Additionally, s 14(d)(5) provides shareholders with the right to withdraw at any time after the offer has been open for a period of 60 days. This results in target shareholders shares being tied up for a maximum period of 60 days. It is this right to withdrawal that may alleviate some of the flexibility issues that Bosmans<sup>45</sup> believed hindered the success of Xstrata's inclusion of these rights.

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<sup>41</sup> Justin Mannolini, 'The reform of takeovers law: Beyond simplification' (1996) 14 *Company and Securities Law Journal* 471.

<sup>42</sup> *Securities Exchange Act*, s 14(d)(5).

<sup>43</sup> *Williams Act of 1968*, Pub L No 90-439, 82 Stat 454 (USC).

<sup>44</sup> Edward B Rock, 'Antitrust and Market for Corporate Control' (1989) 77 *California Law Review* 1367.

<sup>45</sup> Bosmans, above n 3.

The implementation of mandatory withdrawal rights, in a manner consistent with the US approach under s 14(d)(5) of the *Securities Exchange Act* might go some way to overcoming shareholder inertia. Australian target shareholders withhold acceptance of the bid, specifically because they fear having their shares 'locked up' for an extended period of time. The provision of mandatory withdrawal rights in the event the bid has been open for a period equal to or greater than 60 days could address the issue of shareholder inertia, by providing shareholders with an opportunity to reassess the offer and their acceptance of the offer, after this period of time.

There has been some criticism of the US provision for mandatory withdrawal rights. Booth<sup>46</sup> argues that withdrawal rights unduly encourage target shareholders to tender their shares, by making some bids more attractive than they would otherwise be and therefore more likely to succeed. Bosmans<sup>47</sup> also noted that despite the provision for mandatory withdrawal rights in the US, significant acceptances still only flow at the end of the bid process. If this is in fact the case, flexibility of the operation of withdrawal rights might be required, if withdrawal rights are to be successful in Australia.

## VI CONCLUSION

Shareholder inertia is a barrier to bid success that has been identified by bidders in their pursuit of successful corporate acquisitions. In response to the stringent Australian takeovers law, which is considered to contribute to the shareholder inertia problem, bidders have identified and implemented several innovative bid inducement strategies. The success of these strategies has not been considered here, but comment has been made on the Panel's apparent acceptance of the share acceptance facility (or at least in the format implemented in the *Patrick*<sup>48</sup> case).

We have argued that the voluntary use of such facility by target shareholders does not offend one of the basic tenants of takeover law, the equal opportunity principle. It has

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<sup>46</sup> Richard A Booth, 'The Problem with Federal Tender Offer Law' (1989) 77 *California Law Review* 707.

<sup>47</sup> Bosmans, above n 3.

<sup>48</sup> Above n 9.

been interesting to note that in Australian literature, direct regulation invoking the equal opportunity rule has been the subject of some critical commentary, so the suggestion of a consensual solution provides the market with some flexibility in addressing bid inertia, whilst at the same time not offending equality.

Alternatively, potential solutions to the problem of shareholder inertia may need to be addressed by considering a change in regulation, such as the example of the US rules, allowing more flexible withdrawal of acceptances. In the US, mandatory withdrawal rights have been required since the 1960s, providing target shareholders with several opportunities to withdraw their bid acceptance during the bid process. Other cognate jurisdictions, such as UK/EU, could also provide guidance or alternatives.

**APPENDIX I**

**SECTION 650E RIGHT TO WITHDRAW ACCEPTANCE**

**650E (1) [Right to withdraw]**

A person who accepts an offer made under an off-market bid may withdraw their acceptance of the offer if:

- (a) the bid is subject to a defeating condition; and
- (b) the bidder varies the offers under the bid in a way that postpones for more than 1 month the time when the bidder has to meet their obligations under the bid; and
- (c) the person is entitled to be given a notice of the variation under ss 650D(1).

**650E (2) [Method of withdrawal]**

To withdraw their acceptance, the person must:

- (a) give the bidder notice within 1 month beginning on the day after the day on which the copy of the notice of the variation was received; and
- (b) return any consideration received by the person for accepting the offer.

**650E (3) [Requirements of withdrawal notice]**

A notice under paragraph (2)(a) must:

- (a) comply with the conditions specified in regulations made for the purposes of this paragraph; or
- (b) if no such regulations are made — be in writing.

{S 650E(4) amended by No 122 of 2001, s 3, Sch 1, Pt 2[391] (effective 11 March 2002)}

**650E (4) [Return of securities consideration]**

To return consideration that includes securities, the person must:

- (a) take any actions that are specified in regulations made for the purposes of this paragraph in relation to the return of those securities; or
- (b) if no such regulations are made — give the bidder any transfer documents needed to effect the return of the securities.

{S 650E(4) amended by No 122 of 2001, s 3, Sch 1, Pt 2[391] (effective 11 March 2002)}

**650E (5) [Consequences of withdrawal]**

If the person withdraws their acceptance, the bidder must:

(a) take any actions that are specified in regulations made for the purposes of this paragraph in relation to the withdrawal of acceptance; and

(b) return any documents that the person sent the bidder with the acceptance of the offer;

within 14 days after:

(c) if the person does the things referred to in ss (2) on the same day — that day; or

(d) if the person does those things on different days — the last of those days.

{S 650E(5) amended by No 122 of 2001, s 3, Sch 1, Pt 2[392] (effective 11 March 2002)}

**650E (6) [Cancellation of securities]**

If under this section a person returns to a company any certificates (together with any necessary transfer documents) in respect of the securities issued by the company, the company must cancel those securities as soon as possible. Any reduction in share capital is authorised by this subsection.

**650E (7) [Strict liability offence]**

An offence based on ss (5) or (6) is an offence of strict liability.

**REGULATION 6.6.01 RIGHT TO WITHDRAW ACCEPTANCE**

**6.6.01(1) [Form of notice in accordance with operating rules]**

For paragraph 650E(3)(a) of the Act, a notice under paragraph 650E(2)(a) of the Act relating to securities entered on a register or subregister of a prescribed CS facility must be in a form approved by the operating rules of that prescribed CS facility for Part 6.6 of the Act (which may include an electronic form).

**6.6.01(2) [Return of securities]**

For paragraph **650E(4)(a)** of the Act, if securities are entered on a register or subregister of a prescribed CS facility, a person to whom [s 650E](#) of the Act applies must take the action that the operating rules of the prescribed CS facility require in relation to the return of the securities.

**6.6.01(3) [Withdrawal of acceptance of offer]**

For paragraph **650E(5)(a)** of the Act, if a person withdraws an acceptance of an offer, the bidder must take any action that the operating rules of the prescribed CS facility require in relation to any of the securities:

- (a) to which the acceptance relates; and
- (b) that are entered on a register or subregister of the prescribed CS facility.