

# WORKING WITH JUDICIAL REVIEW: THE NEW OPERATION OF THE TAKEOVERS PANEL

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*[This article examines the position of the Takeovers Panel in light of the scope for judicial review of its decisions. In 2000, the role of the Panel was transformed to make it the primary forum for resolving disputes during a takeover bid. However, opportunities for judicial review have the potential to compromise this role. The first judicial review cases reinforced these concerns in invalidating two Panel decisions. Following this, the Panel's jurisdiction was amended significantly and the High Court subsequently upheld its constitutional validity. The recent decision of the Full Court of the Federal Court in CEMEX Australia Pty Ltd v Takeovers Panel further strengthens the Panel's position in regard to judicial review of its decisions.]*

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## I INTRODUCTION

As an administrative body, the Takeovers Panel ('Panel') is subject to judicial review of its decisions under the *Commonwealth Constitution* and the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*').<sup>1</sup> Consistent with the rule of law, this is necessary to ensure that the Panel does not act outside the law in exercising its powers to resolve disputes arising during a takeover bid.<sup>2</sup> However, it also creates a tension due to the potential for conflict with the rationale for the Panel. In 2000, the Panel (instead of the courts) was

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<sup>1</sup> *Constitution* s 75(v); *ADJR Act* s 5. See below nn 34–8 and accompanying text.

<sup>2</sup> On the powers of the Panel, see *Corporations Act 2001* (Cth) ss 657A, 657D; see also s 9 (definition of 'remedial order').

given the role of deciding takeover disputes during a takeover.<sup>3</sup> This was done because it was considered that '[r]emoving tactical litigation and disputes from the courts would lead to a more timely resolution of those matters reducing costs for the parties involved.'<sup>4</sup> The overarching goal was to allow takeover disputes to be resolved efficiently so that shareholders can decide on the merits of the takeover.<sup>5</sup> This raises the crucial question of whether the *Corporations Act 2001* (Cth) ('*Corporations Act*') strikes an appropriate balance between the role of the Panel and the courts in achieving these aims.

The Panel comprises legal and commercial experts in the area of takeovers.<sup>6</sup> Its primary role is to decide whether there are unacceptable circumstances in relation to a takeover based upon the policy underlying the takeover provisions in chapter 6 of the *Corporations Act*.<sup>7</sup> This policy is reflected in the purposes of chapter 6, which are principally to ensure that acquisitions of shares 'take place in an efficient, competitive and informed market'<sup>8</sup> and that members of the target company or listed managed investment scheme each have sufficient information and time to make a decision<sup>9</sup> and 'a reasonable and equal opportunity to participate in any benefits' under the takeover bid.<sup>10</sup> The policy underpinnings of

<sup>3</sup> This change was implemented by *Corporate Law Economic Reform Program Act 1999* (Cth) sch 1 item 5 ('*CLERP Act*'), repealing and substituting *Corporations Act 1989* (Cth) s 82 ch 6 ('*Corporations Law*'). See especially *Corporations Act* s 659AA. For examples of commentary on the changes to the Panel, including their effect on the courts, see Nicole E Calleja, *The New Takeovers Panel — A Better Way?* (2002); Barbara Mescher, 'Powers of the Takeovers Panel and Their Effect upon ASIC and the Court' (2002) 76 *Australian Law Journal* 119; Emmanuel Hadjidakis, 'The Takeovers Panel from Toothless Tiger to Sleeping Tiger? Will the Courts Now Advance?' (2002) 20 *Company and Securities Law Journal* 59; Michael Hoyle, 'Some Observations on the Takeovers Panel' (2002) 20 *Company and Securities Law Journal* 183.

<sup>4</sup> Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 6. See also Corporate Law Economic Reform Program, *Takeovers — Corporate Control: A Better Environment for Productive Investment*, Paper No 4 (1997) 32 ('*CLERP 4*').

<sup>5</sup> Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 38; *CLERP 4*, above n 4, 36–7.

<sup>6</sup> The Panel's current 54 part-time members include solicitors, company directors, investment or other bankers, investment or corporate advisors, barristers and an academic: see Takeovers Panel, *About the Panel: Panel Members* (2009) <[http://www.takeovers.gov.au/about.aspx#panel\\_members](http://www.takeovers.gov.au/about.aspx#panel_members)>. They are appointed by the federal government based upon their knowledge or experience in at least one of the fields of business, administration of companies, financial markets, financial products and services, law, economics, and accounting: *Australian Securities and Investments Commission Act 2001* (Cth) ss 172(2), (4)–(4A) ('*ASIC Act*'). For a study of the backgrounds of Panel members, see Emma Armson, 'The Australian Takeovers Panel: Commercial Body or Quasi-Court?' (2004) 28 *Melbourne University Law Review* 565, 573–7.

<sup>7</sup> See *Corporations Act* s 657A.

<sup>8</sup> *Corporations Act* s 602(a). In relation to this purpose, recent studies suggest that there are inefficiencies in the market for corporate control in Australia: see Alan Dignam, 'The Takeovers Panel, the Market Efficiency Principle and the Market for Corporate Control — An Empirical Study' (2005) 23 *Company and Securities Law Journal* 58; Darren Henry, 'Directors' Recommendations in Takeovers: An Agency and Governance Analysis' (2005) 32 *Journal of Business Finance and Accounting* 129. It has also been argued that the purpose has not been achieved, for example, in relation to rival bidders' access to information about a target company: see Rebecca Langley, 'Information Access Denied ... Is the Australian Takeovers Market Really "Efficient, Competitive and Informed"?' (2009) 27 *Company and Securities Law Journal* 344.

<sup>9</sup> *Corporations Act* s 602(b).

<sup>10</sup> *Corporations Act* s 602(c); see also s 604(1). These purposes are known as the 'Eggleston principles' and originate from Company Law Advisory Committee, *Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and Takeovers*

the Panel's powers were one of the key reasons why the High Court of Australia upheld the constitutional validity of the Panel in *Attorney-General (Cth) v Alinta Ltd* ('*Alinta*').<sup>11</sup> In *Alinta*, the High Court held that the Panel does not exercise judicial power in declaring that circumstances are unacceptable because they constitute a contravention of the *Corporations Act*.<sup>12</sup> As pointed out by Kirby J in that case:

it was open to the Federal Parliament to conclude that the nature of takeovers disputes was such that they required, ordinarily, prompt resolution by decision-makers who enjoyed substantial commercial experience and could look not only at the letter of the Act but also at its spirit, and reach outcomes according to considerations of practicality, policy, economic impact, commercial and market factors and the public interest.<sup>13</sup>

To achieve these policy objectives, chapter 6 of the *Corporations Act* contains detailed legislative requirements for the conduct of takeovers. These provisions are based upon a central prohibition against a person acquiring a 'relevant interest' that increases their 'voting power' in a company to more than 20 per cent,<sup>14</sup> unless one of the exceptions applies.<sup>15</sup> This central prohibition operates using a series of defined terms designed to capture influence over the voting of shares. The meaning of the key term 'voting power' is defined by reference to the proportion of the total votes attached to the company's voting shares in which a person and their 'associates' hold a 'relevant interest'.<sup>16</sup> As a general rule, a person has a 'relevant interest' in shares if they hold them, can exercise or control the right to vote attaching to them, or can dispose of or control the power to dispose of them.<sup>17</sup> A person's 'associate' is defined to include a second person with whom the primary person is proposing to act in concert in relation to the company's affairs.<sup>18</sup>

(1969) 8. For a critique of these principles, see, eg, Justin Mannolini, 'Convergence or Divergence: Is There a Role for the Eggleston Principles in a Global M&A Environment?' (2002) 24 *Sydney Law Review* 336, 336–40, 360; James Mayanja, 'The Equal Opportunity Principle in Australian Takeover Law and Practice: Time for Review?' (2000) 12 *Australian Journal of Corporate Law* 1, 16, 18; Benedict Sheehy, 'Australia's Eggleston Principles in Takeover Law: Social and Economic Sense?' (2004) 17 *Australian Journal of Corporate Law* 218.

<sup>11</sup> (2008) 233 CLR 542. The High Court had confirmed the constitutionality of the previous incarnation of the Panel, the Corporations and Securities Panel, in *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 190–2 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

<sup>12</sup> (2008) 233 CLR 542, 550, 552 (Gleeson CJ), 552 (Gummow J), 563 (Kirby J), 578–80 (Hayne J), 580 (Heydon J), 599 (Crennan and Kiefel JJ). See also Emma Armson, 'Judicial Power and Administrative Tribunals: The Constitutional Challenge to the Takeovers Panel' (2008) 19 *Public Law Review* 91, 93.

<sup>13</sup> *Alinta* (2008) 233 CLR 542, 562.

<sup>14</sup> See *Corporations Act* s 606(1)(c). The prohibition does not apply where a company is unlisted and has 50 or fewer members: s 606(1)(a). However, it also extends to certain indirect forms of investments that are so traded: see s 604.

<sup>15</sup> *Corporations Act* s 611.

<sup>16</sup> *Corporations Act* s 610.

<sup>17</sup> *Corporations Act* s 608(1).

<sup>18</sup> See *Corporations Act* pt 1.2 div 2; see especially ss 12(2)(c), 15.

One of the key exceptions to the central prohibition enables the purchaser ('bidder') to make an offer to buy the shares of all the shareholders in the company that it is seeking to control ('target company').<sup>19</sup> Chapter 6 sets out detailed requirements in relation to the terms of the takeover offers and information to be disclosed, including a structured system of time limits for the provision of information and payment in respect of the offers.<sup>20</sup> Disclosure to target shareholders in relation to the takeover is chiefly provided in the bidder's statement and target company's statement, which are frequently updated with supplementary statements by the bidder or target company respectively.<sup>21</sup> There is a separate liability regime prohibiting misleading or deceptive statements in takeover disclosure documents<sup>22</sup> and there are general market misconduct provisions applying to misleading or deceptive conduct in relation to takeover announcements.<sup>23</sup> In addition, a person is required to disclose whether they have acquired or disposed of a 'substantial holding' in a company (which is satisfied where the person and their associates have relevant interests in five per cent or more of the voting shares in the company)<sup>24</sup> or, if they have a substantial holding, that there is a movement of at least one per cent in relation to this holding.<sup>25</sup> This disclosure must be made within two business days after the person becomes aware of the information or, if it is during a takeover bid, by 9:30 am on the next trading day.<sup>26</sup>

These detailed legislative requirements create significant opportunities for litigation to be used as a strategy to affect the outcome of a takeover bid. There are considerable incentives for this given the conflicting interests of the chief protagonists in a takeover bid, namely, the bidder and the directors of the target company. These arise chiefly from the likelihood that the directors of the target company will lose their positions if the takeover is successful.<sup>27</sup> To minimise the opportunity for the tactical use of litigation, the *Corporations Act* places significant restrictions on the courts' role in order 'to make the Panel the main forum for resolving disputes about a takeover bid until the bid period has ended.'<sup>28</sup> First, s 659B(1) contains a limitation clause that restricts access to a 'Court' (principally the Federal Court of Australia and state or territory Supreme

<sup>19</sup> *Corporations Act* s 611 item 1.

<sup>20</sup> See *Corporations Act* pts 6.4–6.6; see especially ss 633, 635.

<sup>21</sup> See *Corporations Act* pt 6.5 divs 2–4; see especially ss 636, 638, 643–4.

<sup>22</sup> See *Corporations Act* ch 6B; see especially s 670A.

<sup>23</sup> See *Corporations Act* s 1041H; see especially ss 1041H(2)(b)(ii)–(iii).

<sup>24</sup> *Corporations Act* s 9 (definition of 'substantial holding').

<sup>25</sup> *Corporations Act* s 671B.

<sup>26</sup> *Corporations Act* s 671B(6).

<sup>27</sup> This also creates a conflict of interest between the directors of the target company and the company itself: see, eg, *Corporations Act* s 181; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 ('Howard Smith'); *Darvall v North Sydney Brick & Tile Co Ltd* (1989) 16 NSWLR 260; Emma Armson, 'The Frustrating Action Policy: Shifting Power in the Takeover Context' (2003) 21 *Company and Securities Law Journal* 487, 498–500. For a discussion of the effect of *Howard Smith* on target company directors' duties, see Nicolette Rogers, 'When Can Target Directors Legitimately Frustrate a Takeover Bid?' (1994) 12 *Company and Securities Law Journal* 207, 217–18.

<sup>28</sup> *Corporations Act* s 659AA.

Courts)<sup>29</sup> during the takeover bid period, only allowing governmental authorities to commence court proceedings in relation to the takeover bid at that time.<sup>30</sup> Secondly, where it is found that there has been a breach of the *Corporations Act* and the Panel has refused to make a declaration of unacceptable circumstances, s 659C limits the orders that a court can make following the end of a bid period.<sup>31</sup> In such a case, the court cannot exercise its powers under the *Corporations Act* to unwind a transaction and can only use those powers to make remedial orders involving the payment of money.<sup>32</sup>

Notwithstanding these limitations, there are significant opportunities for review of Panel decisions. Under the Panel's system of internal review, parties can seek review of a Panel decision by a Review Panel.<sup>33</sup> Panel decisions are also subject to judicial review through a number of different avenues. Significantly, the limits on court proceedings in relation to the takeover bid discussed above do not affect the ability to challenge Panel decisions which is mandated under s 75(v) of the *Constitution*.<sup>34</sup> Section 75(v) empowers the High Court to grant three specified remedies against Panel members,<sup>35</sup> namely, mandamus (compelling them to perform a duty), prohibition (a restraining order) or an injunction (which could be used to prevent Panel members acting outside their power).<sup>36</sup> Panel decisions are consequently subject to judicial review under s 75(v) during the takeover bid period,<sup>37</sup> as well as following the bid in the Federal Court under s 5 of the *ADJR Act*.<sup>38</sup>

<sup>29</sup> *Corporations Act* s 58AA(1).

<sup>30</sup> *Corporations Act* s 659B(1).

<sup>31</sup> *Corporations Act* s 659C(1).

<sup>32</sup> *Corporations Act* s 659C(2). Under s 659C(1), the court's jurisdiction is limited to determining whether there has been an offence or contravention, ordering a person to pay a penalty or compensation to another, providing relief from liability or removing any procedural irregularity. See also ss 1318, 1322.

<sup>33</sup> *Corporations Act* s 657EA. In order to limit review applications to appropriate cases, the President of the Panel must consent to an application if the initial Panel did not make a declaration of unacceptable circumstances under s 657A or an order under ss 657D or 657E: s 657EA(2). For a discussion of the procedures relating to a Review Panel, see *CEMEX Australia Pty Ltd v Takeovers Panel* (2008) 106 ALD 5, 10 (Stone J) ('*CEMEX (First Instance)*').

<sup>34</sup> *Corporations Act* s 659B(5).

<sup>35</sup> Panel members are clearly 'officer[s] of the Commonwealth' as s 75(v) of the *Constitution* was used in order to bring the first judicial review proceedings against a Panel decision: see *Glencore International AG v Takeovers Panel* (2005) 220 ALR 495, 498 (Emmett J) ('*Glencore (First Application)*'); *Glencore International AG v O'Bryan* [2005] HCATrans 458 (29 July 2005) 158–60, 255–71 (Heydon J).

<sup>36</sup> These remedies are referred to in this context as the 'constitutional writs': see *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 92–3 (Gaudron and Gummow JJ), 133–4 (Kirby J), 142 (Hayne J). There is also an ancillary power to grant certiorari (to quash a decision): see, eg, *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 403–4 (Gaudron and Gummow JJ); see especially at 461–73 (Hayne J).

<sup>37</sup> *Glencore (First Application)* (2005) 220 ALR 495 is the only one of the three judicial review cases to date in relation to the Panel's expanded jurisdiction that has involved an application under s 75(v) of the *Constitution*: see above n 35; Emma Armson, 'The Australian Takeovers Panel and Judicial Review of Its Decisions' (2005) 26 *Adelaide Law Review* 327, 336–7.

<sup>38</sup> For a detailed overview of the Australian system of judicial review, see Armson, 'The Australian Takeovers Panel and Judicial Review of Its Decisions', above n 37, 334–40.

An open-ended process of judicial review has the potential to disrupt the takeover process. This could thwart a takeover bid given the significant financial stakes for the bidder in making an offer to purchase all of the remaining target shares in light of the associated risks and timing pressures of litigation. Consequently, speed and certainty in takeover decisions are crucial to the effective operation of the regime. This is particularly important given that the threat of a takeover provides a strong incentive for directors to ensure that the company is operating efficiently.<sup>39</sup> Given this, one of the key aims of the Corporate Law Economic Reform Program reforms of the Takeovers Panel was to allow the target company's shareholders to decide the merits of a takeover bid.<sup>40</sup> It was intended that this would be achieved by removing the opportunity for parties to bring court proceedings in order to delay or stymie the bid and instead by placing takeover disputes before a commercial body set up to hear matters quickly and informally.<sup>41</sup> Applications for judicial review of Panel decisions consequently have the potential to undermine the purpose of the current system of takeover dispute resolution.

The first two judicial review proceedings in the *Glencore* cases resulted in the Panel's declarations and orders being invalidated.<sup>42</sup> Following these cases, there were two significant developments in relation to the Panel's powers. First, the Panel's jurisdiction was amended substantially in the *Corporations Amendment (Takeovers) Act 2007* (Cth) ('2007 amendments').<sup>43</sup> Secondly, the High Court subsequently upheld the constitutional validity of the Panel in *Alinta*.<sup>44</sup> The recent decision of the Full Court of the Federal Court of Australia in *CEMEX Australia Pty Ltd v Takeovers Panel* ('*CEMEX (Full Court)*') built upon these two developments in further strengthening the Panel's position in the context of judicial review challenges.<sup>45</sup> However, the question remains whether the situation in the *Glencore* cases could be repeated in the future.

This article analyses whether an appropriate balance is being achieved between allowing judicial review of Panel decisions and preventing strategic litigation. Part II provides a detailed background on the judicial review proceedings that have occurred since the Panel was given its expanded powers in 2000. In Part III, the article discusses the implications of the recent Full Federal Court case, *CEMEX (Full Court)*, for both the Panel's powers and the application of judicial review to its decisions. Part III starts with a focus on the Panel's

<sup>39</sup> See, eg, CLERP 4, above n 4, 7–8; Jonathan Farrer, 'Reforming Australia's Takeover Defence Laws: What Role for Target Directors?' (1997) 8 *Australian Journal of Corporate Law* 1, 2–6, 9–10; James Mayanja, 'Reforming Australia's Takeover Defence Laws: What Role for Target Directors? A Reply and Extension' (1999) 10 *Australian Journal of Corporate Law* 162.

<sup>40</sup> See CLERP 4, above n 4, 37; Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 38.

<sup>41</sup> See CLERP 4, above n 4, 36–7; Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 38.

<sup>42</sup> *Glencore (First Application)* (2005) 220 ALR 495, 512 (Emmett J); *Glencore International AG v Takeovers Panel* (2006) 151 FCR 77, 108 (Emmett J) ('*Glencore (Second Application)*').

<sup>43</sup> See below Part II(B).

<sup>44</sup> See above nn 11–13 and accompanying text.

<sup>45</sup> (2009) 177 FCR 98.

powers, particularly the role of contraventions of the *Corporations Act*, the Panel's jurisdiction to make orders and its ability to delegate certain tasks to the Australian Securities and Investments Commission ('ASIC') under those orders. It then examines the approach adopted by the Full Federal Court in relation to two key judicial review grounds under the *ADJR Act*, namely, errors of law and the 'no evidence' ground. Part IV analyses the earlier decisions in the *Glencore* cases in light of subsequent developments to consider whether similar difficulties could still arise. The article concludes in Part V with a discussion of the impact of each of these matters upon the role of the courts in future judicial review cases.

## II THE *GLENCORE* CASES AND REMEDIAL LEGISLATION

### A *The Glencore Cases*

The first judicial review proceedings in relation to the Panel's expanded powers arose from decisions to make a declaration of unacceptable circumstances and orders against Glencore International AG ('Glencore') in relation to the non-disclosure of certain transactions.<sup>46</sup> The transactions involved the shares of Austral Coal Ltd ('Austral'), which were subject to a takeover bid by Centennial Coal Company Ltd ('Centennial'). At a time when Glencore had an interest in nearly 5 per cent of Austral's shares, it entered into cash-settled equity swap transactions ('equity derivative transactions') relating to another 7.4 per cent with two investment banks ('banks').<sup>47</sup> Under these transactions, Glencore did not acquire any interest in the Austral shares or have the right to require the banks to undertake any action involving their acquisition, holding or disposal.<sup>48</sup> Instead, the transactions involved an arrangement where the banks agreed to pay to Glencore 'an amount equal to the difference between the value of [the] given number of [Austral shares] at the time of the closing out of the swap and the value of those equity securities at the time when the arrangement was entered into.'<sup>49</sup> However, consistent with their internal policies and commercial practice,

<sup>46</sup> *Glencore (First Application)* (2005) 220 ALR 495; *Glencore (Second Application)* (2006) 151 FCR 77. See also *Re Austral Coal [No 2]* (2005) 55 ACSR 60, 65–6, 110–14 (Hellicar P, Members G Alexander and H Douglass) ('*Austral 02 (Panel)*'); *Re Austral Coal [No 2R]* (2005) 55 ACSR 114, 132–5 (Ramsay P, Members D Gonski and N O'Bryan) ('*Austral 02R (First Review)*'); *Re Austral Coal Ltd 02(RR)* (2005) 23 ACLC 1797, 1800–1, 1842–5, 1849–50 (Farrell P, Scott DP and Member D Byrne) ('*Austral 02RR (Second Review)*').

<sup>47</sup> See *Austral 02 (Panel)* (2005) 55 ACSR 60, 85 (Hellicar P, Members G Alexander and H Douglass); *Austral 02R (First Review)* (2005) 55 ACSR 114, 122 (Ramsay P, Members D Gonski and N O'Bryan). See also *Glencore (First Application)* (2005) 220 ALR 495, 499–501 (Emmett J); *Glencore (Second Application)* (2006) 151 FCR 77, 80–2 (Emmett J). The transactions were entered into by a Glencore subsidiary, Fornax Investments Ltd: see *Austral 02 (Panel)* (2005) 55 ACSR 60, 73–7 (Hellicar P, Members G Alexander and H Douglass). A person is required to disclose their holdings if they and associated persons have a relevant interest in five per cent or more of the shares in a listed company and following any subsequent movements in their holdings of at least one per cent: see *Corporations Act* s 671B; see also ss 9 (definition of 'substantial holding'), 10–16, 608, 610.

<sup>48</sup> *Glencore (First Application)* (2005) 220 ALR 495, 498 (Emmett J).

<sup>49</sup> *Ibid.*

the banks acquired an equivalent number of Austral shares in order to hedge their risk exposure.<sup>50</sup> The equity derivative transactions were not disclosed to the market until 14 days after the first transactions took place.<sup>51</sup>

Notwithstanding that Glencore was not legally required to disclose the equity derivative transactions,<sup>52</sup> the initial Panel and Review Panel made a declaration of unacceptable circumstances and orders. Although the Panels differed as to the exact time at which unacceptable circumstances existed and in relation to the detail of the orders, both made a declaration and orders based upon the deficiency in information available to the market as a result of the non-disclosure of the transactions.<sup>53</sup> The Review Panel ordered Glencore to offer to sell shares in Austral to any shareholder who had sold their shares during the period of non-disclosure and indicated that it might order the banks to sell shares to Glencore if it received more acceptances than it could satisfy.<sup>54</sup>

Glencore then sought judicial review of this decision. In *Glencore International AG v Takeovers Panel* (2005) 220 ALR 495 (*'Glencore (First Application)'*), a single judge of the Federal Court recognised that the 'court should be slow to interfere with a decision of the panel, in circumstances where the market is significantly volatile by reason of the currency of takeover offers.'<sup>55</sup> However, Emmett J found that these circumstances did not apply and ordered that the Review Panel's declaration and orders be quashed due to jurisdictional error.<sup>56</sup> Emmett J held that the Review Panel had not made a determination as to the effect of the circumstances that it had found to be unacceptable and that such a finding was required to make a declaration under s 657A(2) of the *Corporations Act*.<sup>57</sup> At that time, s 657A(2) provided that:

The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:

- (a) are unacceptable having regard to the effect of the circumstances on:
  - (i) the control, or potential control, of the company or another company; or
  - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company ...

<sup>50</sup> See *Austral 02 (Panel)* (2005) 55 ACSR 60, 92–3 (Hellicar P, Members G Alexander and H Douglass). It was concluded that the banks had a strong economic incentive to purchase the Austral shares: at 89; *Austral 02R (First Review)* (2005) 55 ACSR 114, 122–3 (Ramsay P, Members D Gonski and N O'Bryan); *ibid* 503.

<sup>51</sup> *Glencore (First Application)* (2005) 220 ALR 495, 500–1 (Emmett J).

<sup>52</sup> *Ibid* 500.

<sup>53</sup> See *Austral 02 (Panel)* (2005) 55 ACSR 60, 65–6 (Hellicar P, Members G Alexander and H Douglass); *Austral 02R (First Review)* (2005) 55 ACSR 114, 114 (Ramsay P, Members D Gonski and N O'Bryan); *Austral 02RR (Second Review)* (2005) 23 ACLC 1797, 1800–1 (Farrell P, Scott DP and Member D Byrne).

<sup>54</sup> *Austral 02R (First Review)* (2005) 55 ACSR 114, 130–1 (Ramsay P, Members D Gonski and N O'Bryan); *Austral 02RR (Second Review)* (2005) 23 ACLC 1797, 1801 (Farrell P, Scott DP and Member D Byrne).

<sup>55</sup> (2005) 220 ALR 495, 506 (Emmett J).

<sup>56</sup> *Ibid* 511–12.

<sup>57</sup> *Ibid* 507.



In addition, Emmett J found that the Panel had erred by not identifying the particular interests affected by the relevant circumstances when it exercised its power to make orders under s 657D(2)(a).<sup>58</sup> Section 657D(2)(a) at that time empowered the Panel to make any order (except one requiring compliance with the law)<sup>59</sup> that ‘it thinks appropriate to ... protect the rights or interests of any person affected by the circumstances’.

Responding to the judgment in *Glencore (First Application)*, a second Review Panel in *Re Austral Coal Ltd 02(RR)* (*Austral 02RR (Second Review)*)<sup>60</sup> made a series of findings in relation to the effect of the non-disclosure of the equity derivative transactions in light of the effect of the subsequent announcement of the transactions on the market.<sup>60</sup> The second Review Panel found that the price at which the banks acquired the shares to hedge the derivative transactions would have been higher had Glencore’s position been disclosed, that Glencore benefited from the lower prices paid by the banks and that shareholders selling their shares on the market were correspondingly adversely affected.<sup>61</sup> In *Glencore International AG v Takeovers Panel* (*Glencore (Second Application)*), Emmett J invalidated the declaration of unacceptable circumstances and orders made by the second Review Panel.<sup>62</sup>

A different order was made by the second Review Panel. The second Review Panel required Glencore to pay \$1 330 280 to ASIC — comprising the estimated difference in share value resulting from the non-disclosure and ASIC’s costs — to be distributed equally to all shareholders who sold the shares during the time that Glencore had not disclosed the equity derivative transactions to the market.<sup>63</sup> Emmett J found in *Glencore (Second Application)* that the second Review Panel had erred in law in finding that Glencore had acquired a ‘substantial interest’ in the target shares during the non-disclosure period.<sup>64</sup> It was also found that the Panel erred in finding that the relevant circumstances had an effect on the control of Austral by Centennial or on Centennial’s acquisition of a substantial interest in Austral.<sup>65</sup> These findings invalidated the Panel’s orders, although Emmett J

<sup>58</sup> See *ibid* 510.

<sup>59</sup> This is to ensure that the Panel (which is not a Chapter III court) does not exercise judicial power contrary to the *Constitution*: see, eg, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 256–9 (Mason CJ, Brennan and Toohey JJ), 267–9 (Deane, Dawson, Gaudron and McHugh JJ); *A-G (Cth) v Breckler* (1999) 197 CLR 83, 110 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

<sup>60</sup> (2005) 23 ACLC 1797, 1799 (Farrell P, Scott DP and Member D Byrne).

<sup>61</sup> *Ibid*.

<sup>62</sup> (2006) 151 FCR 77, 108. The decision of the second Review Panel required an extension of time by a court under *Corporations Act* s 657B, which was granted by Finkelstein J in *Takeovers Panel v Glencore International AG* (2005) 55 ACSR 453, 458.

<sup>63</sup> *Austral 02RR (Second Review)* (2005) 23 ACLC 1797, 1840–2, 1849–50 (Farrell P, Scott DP and Member D Byrne). This amount included \$10 000 to meet ASIC’s costs for acting as trustee: at 1850.

<sup>64</sup> (2006) 151 FCR 77, 99.

<sup>65</sup> *Ibid* 103 (Emmett J).

considered that there were also other grounds upon which they would have been invalid.<sup>66</sup>

The *Glencore* cases provided an unfortunate start to judicial review of Panel decisions following the 2000 reforms. They generated substantial concerns that the Panel's jurisdiction had been interpreted too narrowly for it to perform its role effectively.<sup>67</sup> This was recognised by further legislative changes designed to remove many of the limitations placed on the Panel's decision-making in the *Glencore* cases.<sup>68</sup> The cases also raised the spectre of a strategic pattern of parties seeking court intervention during the takeover bid period, contrary to the policy underlying the Panel reforms.<sup>69</sup> This was due to the outcome of the cases and the fact that the application in *Glencore (First Application)* was made *during* the takeover bid period under s 75(v) of the *Constitution*.<sup>70</sup> Notwithstanding that Emmett J placed some limits on the extent to which there should be intervention during the takeover bid in *Glencore (First Application)*,<sup>71</sup> these were not as strong as those applied in relation to the Panel's counterpart in the United Kingdom.

Although it now has a statutory basis,<sup>72</sup> the UK system of takeover dispute resolution operates differently from that in Australia. These differences primarily relate to the more extensive powers of the Panel on Takeovers and Mergers ('UK Panel') and its ability to make and enforce its own takeover rules.<sup>73</sup> Despite these differences, the Australian and UK Panels apply similar principles designed to ensure equal treatment of target shareholders, an informed market and proper conduct by target directors.<sup>74</sup> Both systems also rely upon a non-judicial body to deal with takeover matters efficiently and with the benefit of specialist commercial expertise in place of the courts.<sup>75</sup> Given this, the following approach of judicial restraint in relation to reviewing UK Panel decisions, which was established by Sir John Donaldson MR in the England and Wales Court of Appeal in *R v Panel on Take-Overs and Mergers; Ex parte Datafin plc*, should also be applied in the Australian context:

in the light of the special nature of the panel, its functions, [and] the market in which it is operating ... I should expect the relationship between the panel and the court to be historic rather than contemporaneous. I should expect the court

<sup>66</sup> Although it was not necessary to consider this question, Emmett J concluded that the Panel's failure to consider whether it would be unfair to make the orders if they were not based upon a 'substantial interest', but rather only based upon the effect on the bidder's control of the target company, would also have been sufficient to invalidate the orders: *ibid* 105–6.

<sup>67</sup> See Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 1–2.

<sup>68</sup> See *Corporations Amendment (Takeovers) Act 2007* (Cth) sch 1 items 3–4; *ibid*; *CEMEX (First Instance)* (2008) 106 ALD 5, 17 (Stone J). See also below Part II(B).

<sup>69</sup> See above nn 3–5, 28, 40–1 and accompanying text.

<sup>70</sup> *Glencore International AG v O'Bryan* [2005] HCATrans 458 (29 July 2005) 156–62 (Heydon J). See also above n 34 and accompanying text.

<sup>71</sup> (2005) 220 ALR 495, 506. See also above n 55 and accompanying text.

<sup>72</sup> *Companies Act 2006* (UK) c 46, pt 28 ch 1.

<sup>73</sup> See Emma Armson, 'Models for Takeover Dispute Resolution: Australia and the UK' (2005) 5 *Journal of Corporate Law Studies* 401, 408–9, 419–23.

<sup>74</sup> *Ibid* 411–19.

<sup>75</sup> *Ibid* 403.

to allow contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders which would enable the panel not to repeat any error and would relieve individuals of the disciplinary consequences of any erroneous finding of breach of the rules. This would provide a workable and valuable partnership between the courts and the panel in the public interest and would avoid all of the perils to which [the panel] alluded.<sup>76</sup>

### B Legislation after the Glencore Cases

Following the *Glencore* decisions, significant changes were made to ss 657A and 657D in the 2007 amendments to the *Corporations Act*. There were three key amendments to the Panel's power to make a declaration of unacceptable circumstances in s 657A. First, the precondition to this power in s 657A(2)(a) was amended to make it clear that it is the role of the Panel to satisfy itself as to the effect or likely effect of the relevant circumstances.<sup>77</sup> Section 657A(2) now provides that:

The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:

- (a) are unacceptable having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:
  - (i) the control, or potential control, of the company or another company; or
  - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company ...

Secondly, a new paragraph was inserted in s 657A(2) to provide an additional basis upon which the Panel can make a declaration. The new s 657A(2)(b) empowers the Panel to make a declaration if it appears to the Panel that the circumstances 'are otherwise unacceptable ... having regard to the purposes of [chapter 6] set out in section 602.'<sup>78</sup> Finally, the old s 657A(2)(b) became s 657A(2)(c) and now includes references to both the past and future tense in relation to the circumstances constituting or giving rise to a contravention of the relevant provisions of the *Corporations Act*.<sup>79</sup>

In addition, the Panel's power to make orders in s 657D(2)(a) was transformed in the 2007 amendments to allow an *en globo* (or collective) assessment of loss if the Panel is satisfied that the rights of 'a group of persons' have been affected.<sup>80</sup>

<sup>76</sup> [1987] QB 815, 842. See also Armson, 'The Australian Takeovers Panel and Judicial Review of Its Decisions', above n 37, 344–55.

<sup>77</sup> Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 5. For a more detailed discussion of the amendments, see Emma Armson, 'Before the High Court — *Attorney-General (Commonwealth) v Alinta Limited*: Will the Takeovers Panel Survive Constitutional Challenge?' (2007) 29 *Sydney Law Review* 495, 498–9.

<sup>78</sup> Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 5. See also below nn 92–5 and accompanying text.

<sup>79</sup> See Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 5–6.

<sup>80</sup> *Ibid* 6. See *CEMEX (First Instance)* (2008) 106 ALD 5, 17–18 (Stone J); *CEMEX (Full Court)* (2009) 177 FCR 98, 114 (Ryan, Jacobson and Foster JJ).

This section also allows the Panel to protect any rights or interests of affected persons and not just those affected by the relevant circumstances.<sup>81</sup> Section 657D(2) now provides that:

The Panel may make any order (including a remedial order but not including an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C) that it thinks appropriate to:

- (a) if the Panel is satisfied that the rights or interests of any person, or group of persons, have been or are being affected, or will be or are likely to be affected, by the circumstances — protect those rights or interests, or any other rights or interests, of that person or group of persons ...

The Panel's power to make a declaration of unacceptable circumstances in relation to a contravention of the *Corporations Act* subsequently survived constitutional challenge in *Alinta*.<sup>82</sup> Although the High Court's decision was limited to the Panel's power to make a declaration under the pre-2007 version of s 657A(2)(c), the reasoning in *Alinta* leaves little doubt that the Panel would also not be exercising judicial power by acting under any part of its current jurisdiction provided by s 657A.<sup>83</sup>

### III THE CEMEX CASES AND THEIR IMPLICATIONS

The decision under judicial review in the *CEMEX* cases was the Review Panel's declaration in *Re Rinker Group Ltd 02R* ('*Rinker 02R (Review Panel)*').<sup>84</sup> The declaration of unacceptable circumstances and the orders were in relation to statements made by CEMEX Australia Pty Ltd ('CEMEX') in the context of its takeover bid for Rinker Group Ltd ('Rinker').<sup>85</sup> Although CEMEX announced on 10 April 2007 that its offer was 'CEMEX's best and final offer, in the absence of a superior proposal', it subsequently announced on 7 May 2007 that it would allow Rinker shareholders to retain the benefit of a dividend.<sup>86</sup> This was contrary to the 'truth in takeovers' policy released by ASIC, which requires a bidder to clearly convey that it is reserving the right to change its mind if it is to depart from a 'last and final' statement.<sup>87</sup> The policy was considered by the Review Panel to be a 'fundamental policy consideration in takeovers regulation'.<sup>88</sup>

The Review Panel found that the circumstances were unacceptable on two bases. First, it found that the circumstances were unacceptable in relation to 'the effect ... on ... the control or potential control of Rinker' or 'the acquisition or proposed acquisition by CEMEX of a substantial interest in Rinker' under

<sup>81</sup> See Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 6.

<sup>82</sup> See above nn 11–13 and accompanying text.

<sup>83</sup> See Armson, 'Judicial Power and Administrative Tribunals', above n 12, 97.

<sup>84</sup> (2007) 64 ACSR 472, 497 (McKeon P, Alexander DP and Member J O'Sullivan).

<sup>85</sup> Ibid 497–506.

<sup>86</sup> Ibid 475–6.

<sup>87</sup> ASIC, *Takeovers: False and Misleading Statements*, Regulatory Guide 25, August 2002, para 6.

<sup>88</sup> *Rinker 02R (Review Panel)* (2007) 64 ACSR 472, 491 (McKeon P, Alexander DP and Member J O'Sullivan). See also *Re Summit Resources Ltd* (2007) 64 ACSR 626, 629 (McKeon P, Lansley DP and Member R Sultan).

s 657A(2)(a).<sup>89</sup> The Review Panel concluded that CEMEX's departure from its 10 April announcement had a significant effect on the control of Rinker.<sup>90</sup> This was because there was an increased level of acceptances by shareholders in the target company following the 7 May announcement, which was considered to be largely the result of the improved takeover offer consideration (shareholders being allowed to retain the dividend).<sup>91</sup>

Secondly, the declaration of unacceptable circumstances was based upon the new s 657A(2)(b), concerning the effect of the circumstances on the purposes of the takeover provisions set out in s 602 of the *Corporations Act*.<sup>92</sup> The Review Panel found that the departure from the initial announcement on 10 April undermined the existence of an informed market, as the market had been misled as to the status of the offer after the initial announcement and had accordingly not been given sufficient information to assess the merits of the offer.<sup>93</sup> Rinker shareholders had also been prevented from having a reasonable and equal opportunity to share in the benefits arising from the offer as they had 'lost the opportunity to include as part of their decision to sell the information that the offer consideration might be improved.'<sup>94</sup> Accordingly, the Review Panel ordered that CEMEX pay an amount equal to the dividend to each Rinker shareholder who sold their shares between the 10 April and 7 May announcements.<sup>95</sup>

Applications for judicial review of the Review Panel decision were unsuccessful both at first instance before Stone J in *CEMEX Australia Pty Ltd v Takeovers Panel* ('*CEMEX (First Instance)*')<sup>96</sup> and before the Full Federal Court in *CEMEX (Full Court)*.<sup>97</sup> Significantly, both Stone J and the Full Federal Court relied upon the High Court's endorsement of the Panel in *Alinta* in upholding the Review Panel's decision.<sup>98</sup> In particular, the Full Federal Court pointed to the approach adopted by Gleeson CJ, Kirby and Hayne JJ in *Alinta* in relation to the Panel's expertise and role in resolving takeover disputes.<sup>99</sup> Gleeson CJ in *Alinta* emphasised

<sup>89</sup> *Rinker 02R (Review Panel)* (2007) 64 ACSR 472, 499–500 (McKeon P, Alexander DP and Member J O'Sullivan). See also above n 77 and accompanying text.

<sup>90</sup> *Rinker 02R (Review Panel)* (2007) 64 ACSR 472, 489 (McKeon P, Alexander DP and Member J O'Sullivan).

<sup>91</sup> *Ibid.*

<sup>92</sup> See *ibid* 500. See also above n 78 and accompanying text.

<sup>93</sup> *Rinker 02R (Review Panel)* (2007) 64 ACSR 472, 489–90 (McKeon P, Alexander DP and Member J O'Sullivan).

<sup>94</sup> *Ibid* 490.

<sup>95</sup> *Ibid* 497. This amount was considered to be the best estimate of the value of the lost opportunity to sell with the information that the offer consideration might be improved and involved a payment of just over \$11.2 million: at 494.

<sup>96</sup> (2008) 106 ALD 5, 21.

<sup>97</sup> (2009) 177 FCR 98, 123 (Ryan, Jacobson and Foster JJ).

<sup>98</sup> See *CEMEX (First Instance)* (2008) 106 ALD 5, 15 (Stone J); *ibid* 114–15.

<sup>99</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 115 (Ryan, Jacobson and Foster JJ). The Full Court also noted Crennan and Kiefel JJ's decision and that Gummow J agreed with Hayne J as well as Crennan and Kiefel JJ. See also *CEMEX (First Instance)* (2008) 106 ALD 5, 8–9 (Stone J); Armson, 'Judicial Power and Administrative Tribunals', above n 12, 96–7.

[t]he constitution of the Panel, the way in which it is intended to go about its business, the way in which it informs itself about matters that arise for its consideration, and the nature of the considerations according to which it acts or declines to act ...<sup>100</sup>

Hayne J also referred to the fact that the Panel may take policy considerations into account.<sup>101</sup> In the clear statement of the Panel's specialist role quoted above in Part I,<sup>102</sup> Kirby J recognised the particular expertise of Panel members and summarised its approach to decision-making.<sup>103</sup>

#### A *The Role of Contraventions of the Corporations Act*

As in the *Glencore* matters, the declaration of unacceptable circumstances made by the Review Panel in the *CEMEX* matter did not relate to a contravention of the *Corporations Act*. However, this was not an option for the Review Panel in the *CEMEX* matter as the High Court had not yet overturned the majority decision of the Full Federal Court in *Australian Pipeline Ltd v Alinta Ltd* ('*Alinta (Full Court)*').<sup>104</sup> In that case, the majority of the Full Court held that a Panel declaration based upon a contravention of the *Corporations Act* involved the exercise of judicial power and so was invalid under Chapter III of the *Constitution*.<sup>105</sup> As a result, the Panel stopped accepting applications in relation to such contraventions.<sup>106</sup> This was the reason that the Review Panel decision in *Rinker O2R (Review Panel)* explicitly stated that it had found that the circumstances were unacceptable for reasons that did not include a contravention of the Act.<sup>107</sup>

Perversely, CEMEX argued that the Panel was *required* to consider whether its conduct constituted a contravention of the *Corporations Act*.<sup>108</sup> It contended that the Panel had consequently failed to take into account a relevant consideration or had otherwise improperly exercised its power under ss 5(1)(e) and 5(2) of the *ADJR Act*.<sup>109</sup> This was based upon two key arguments. First, it was argued that the purpose of ensuring that takeovers take place in an informed market in s 602(a) required the Panel to consider whether there had been misleading statements contrary to ss 670A and 1041H of the *Corporations Act*.<sup>110</sup> Secondly, CEMEX relied upon the majority view of the Full Federal Court in *Alinta (Full*

<sup>100</sup> *Alinta* (2008) 233 CLR 542, 552, cited in *CEMEX (Full Court)* (2009) 177 FCR 98, 115 (Ryan, Jacobson and Foster JJ).

<sup>101</sup> *Alinta* (2008) 233 CLR 542, 576, cited in *CEMEX (Full Court)* (2009) 177 FCR 98, 115 (Ryan, Jacobson and Foster JJ).

<sup>102</sup> See above n 13 and accompanying text.

<sup>103</sup> *Alinta* (2008) 233 CLR 542, 562, cited in *CEMEX (Full Court)* (2009) 177 FCR 98, 115 (Ryan, Jacobson and Foster JJ).

<sup>104</sup> (2007) 159 FCR 301. For further analysis of this decision, see generally Armson, '*Attorney-General (Commonwealth) v Alinta Limited*', above n 77.

<sup>105</sup> *Alinta (Full Court)* (2007) 159 FCR 301, 392 (Gyles and Lander JJ); cf at 326 (Finkelstein J).

<sup>106</sup> Takeovers Panel, '*APL vs Alinta Ltd*' (Media Release No 19/2007, 30 April 2007).

<sup>107</sup> (2007) 64 ACSR 472, 477 (McKeon P, Alexander DP and Member J O'Sullivan). See also *CEMEX (First Instance)* (2008) 106 ALD 5, 12 (Stone J).

<sup>108</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 102 (Ryan, Jacobson and Foster JJ).

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid* 116.

*Court*) that, in the context of ‘a plethora of legal requirements’, it is ‘unrealistic’ to expect to determine the acceptability of circumstances without finding whether the conduct contravened those requirements.<sup>111</sup>

The Full Federal Court made it clear that the Panel is not required to consider whether there has been a contravention of the *Corporations Act* in determining whether there are unacceptable circumstances under s 657A.<sup>112</sup> It emphatically rejected the above arguments on the basis that they were neither supported by the express wording of s 657A nor by its purpose or underlying policy as discussed by the High Court in *Alinta*.<sup>113</sup> The Full Court gave four reasons for this. First, s 657A(1) clearly states that the Panel may make a declaration of unacceptable circumstances ‘whether or not the circumstances constitute a contravention of a provision of this Act’.<sup>114</sup> Secondly, the Panel must be satisfied of only one of the matters set out in ss 657A(2)(a), (b) or (c), with a contravention of the Act only referred to in sub-s (c).<sup>115</sup> Thirdly, s 657A(3)(a) only requires the Panel to have regard to chapter 6, whereas the prohibition against misleading statements in takeover documents in s 670A (and the more general prohibition in s 1041H) falls outside that chapter.<sup>116</sup> It follows from the Full Court’s reasoning that this provision does not in any event require the Panel to consider whether there has been a contravention of chapter 6. Fourthly, the Full Court relied upon the High Court’s reasoning in *Alinta* to emphasise that, even when making a declaration in relation to a contravention of the Act, the Panel has regard to broader considerations.<sup>117</sup> That is, the Panel’s role is to determine whether, in its opinion, the conduct constitutes unacceptable circumstances in light of the relevant ‘commercial, policy and public interest factors’.<sup>118</sup> The Full Court also referred to the decision of Emmett J in *Glencore (Second Application)*, which emphasised that the provisions relating to unacceptable circumstances in part 6.10 of the *Corporations Act* provide flexibility ‘where the literal operation of the regulatory regime is either unnecessarily restrictive or ineffective to achieve the object of [the takeover provisions in] Ch 6’.<sup>119</sup>

### B The Panel’s Power to Make Orders

The challenge to the Panel’s orders in the *CEMEX* cases included a similar argument to that made successfully in the *Glencore* cases. That is, *CEMEX* contended that a causal link had not been established between the unacceptable circumstances and the effect on the rights or interests of the affected person or

<sup>111</sup> *Ibid.* See also *Alinta (Full Court)* (2007) 159 FCR 301, 394 (Gyles and Lander JJ).

<sup>112</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 116 (Ryan, Jacobson and Foster JJ).

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.* See also *CEMEX (First Instance)* (2008) 106 ALD 5, 14–15 (Stone J).

<sup>115</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 116 (Ryan, Jacobson and Foster JJ).

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid* 116–17.

<sup>118</sup> *Ibid* 116.

<sup>119</sup> *Glencore (Second Application)* (2006) 151 FCR 77, 108 (Emmett J), cited in *ibid* 117. See also *CEMEX (First Instance)* (2008) 106 ALD 5, 15 (Stone J).

group of persons for whom the order was made.<sup>120</sup> This argument was rejected by the Full Federal Court on the basis that, unlike s 82 of the *Trade Practices Act 1974* (Cth), s 657D(2) does not require a causal nexus between the conduct and affected person(s).<sup>121</sup> The Full Court also made it clear that the amendments to s 657D(2)(a) following the *Glencore* cases mean that the Panel does not need to consider whether any particular shareholder is affected by the conduct in question.<sup>122</sup> Instead, the Panel only needs to satisfy itself that the order is appropriate to protect the rights or interests of the group of affected persons.<sup>123</sup> This is in addition to the requirements in s 657D(1), which include that the Panel has made a declaration of unacceptable circumstances and that the order would not unfairly prejudice any person.<sup>124</sup> All of these requirements were satisfied in this case, with the nexus between the orders and the circumstances established by the finding that the market was misinformed and that Rinker shareholders selling shares during the relevant period had been affected by the unacceptable circumstances because they had lost the opportunity to trade in an efficient and informed market.<sup>125</sup>

In a second line of argument, CEMEX argued that the Panel had taken an incorrect approach in valuing the loss of this opportunity as a 100 per cent certainty.<sup>126</sup> Although the Court indicated that '[o]rdinarily it might seem inappropriate to value a lost chance at 100%', it found that the reasoning of the Panel demonstrated 'a rational basis' for the Panel's orders.<sup>127</sup> That is, the Panel had not erred in considering the value of the final dividend to be the 'most logical and best estimate' of the value of the lost opportunity given that there was evidence that market price had increased to reflect the amount of the dividend after the announcement.<sup>128</sup> Consistently with its position in relation to s 657D(2)(a),<sup>129</sup> the Full Federal Court emphasised that s 657D(2)(a) does not require the Panel 'to make an evaluation of each shareholder's reliance, or to

<sup>120</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 120 (Ryan, Jacobson and Foster JJ).

<sup>121</sup> *Ibid* 121–2.

<sup>122</sup> *Ibid*. See also *CEMEX (First Instance)* (2008) 106 ALD 5, 17–18 (Stone J).

<sup>123</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 121–2 (Ryan, Jacobson and Foster JJ). This approach is consistent with that adopted in relation to the earlier incarnation of this power when it was exercised by the court under ss 737 and 739 of the *Corporations Law*: see *CEMEX (Full Court)* (2009) 177 FCR 98, 121–2 (Ryan, Jacobson and Foster JJ); *Australian Securities and Investments Commission v Yandal Gold Pty Ltd* (1999) 32 ACSR 317, 355 (Merkel J); *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 576–7, 590 (Gleeson CJ, Gaudron and Gummow JJ). See also *CEMEX (First Instance)* (2008) 106 ALD 5, 21 (Stone J).

<sup>124</sup> See also *CEMEX (Full Court)* (2009) 177 FCR 98, 121 (Ryan, Jacobson and Foster JJ); Emma Armson, 'The Australian Takeovers Panel and Unfair Prejudice to Third Parties' (2004) 16 *Australian Journal of Corporate Law* 187.

<sup>125</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 122 (Ryan, Jacobson and Foster JJ).

<sup>126</sup> *Ibid* 120.

<sup>127</sup> *Ibid* 122.

<sup>128</sup> *Ibid*. See also *CEMEX (First Instance)* (2008) 106 ALD 5, 19 (Stone J).

<sup>129</sup> See above n 122 and accompanying text.



determine the value of each individual's lost chance.<sup>130</sup> The Court set a high threshold for the circumstances in which it would have intervened in relation to this matter, indicating that '[t]he position would have been quite different if the purportedly protective order had been totally disproportionate to any rational view of the lost opportunity'.<sup>131</sup>

CEMEX also challenged the Panel's ability to delegate to ASIC the function of determining who should be paid under the Panel's orders.<sup>132</sup> Had it succeeded, this would have necessitated significant changes to the current operation of the Panel.<sup>133</sup> As recognised in *CEMEX (Full Court)*, the Panel does not have significant resources and relies upon ASIC to provide staff and support facilities.<sup>134</sup> The Full Federal Court found that the orders did not involve an impermissible delegation of power as they did not require ASIC to exercise the powers of the Panel under s 657D(2)(a).<sup>135</sup> That is, ASIC was not determining the appropriate order or satisfying itself of the nexus between the rights of the persons affected and the unacceptable circumstances.<sup>136</sup> Rather, the Panel's orders determined that the affected shareholders were Rinker shareholders who had sold shares during the relevant period and determined the amount they should be paid, with ASIC only determining whether a claimant was entitled to be paid.<sup>137</sup>

### C Other Grounds of Judicial Review

The grounds of judicial review under the *ADJR Act* can provide a fertile basis for objections to the Panel's decisions. One of the more significant issues for the Panel is whether decisions on the construction of takeover documents and announcements like those in the *CEMEX* matter can be challenged successfully. In this case, both of the grounds of 'error of law' and 'no evidence' relied upon were rejected on the basis that they involved an attack on the Panel's factual findings, which were immune from judicial review.<sup>138</sup>

First, CEMEX argued that the Review Panel had made an error of law under s 5(1)(f) of the *ADJR Act* in its construction of the bidder's statement and certain later documents, including supplementary bidder's statements and the 'best and final offer' statement.<sup>139</sup> The Full Federal Court agreed with Stone J that CEMEX's arguments were challenging the Panel's findings of fact rather than

<sup>130</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 122 (Ryan, Jacobson and Foster JJ). Similarly, Stone J found that the Panel was not required to establish that payment was only made to individuals who have suffered financial loss: *CEMEX (First Instance)* (2008) 106 ALD 5, 17–18.

<sup>131</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 122 (Ryan, Jacobson and Foster JJ).

<sup>132</sup> *Ibid.*

<sup>133</sup> See *ibid* 123.

<sup>134</sup> *Ibid.* See also *CEMEX (First Instance)* (2008) 106 ALD 5, 20 (Stone J).

<sup>135</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 123 (Ryan, Jacobson and Foster JJ). See also *CEMEX (First Instance)* (2008) 106 ALD 5, 20 (Stone J).

<sup>136</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 123 (Ryan, Jacobson and Foster JJ).

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid* 119–20.

<sup>139</sup> *Ibid* 102.

raising a question of law.<sup>140</sup> However, the Full Court came to this conclusion only after examining the question of construction involved.<sup>141</sup>

As had been concluded by the initial and Review Panels and Stone J at first instance,<sup>142</sup> the Full Federal Court found that the documents made it clear that CEMEX had preserved its contractual entitlement to decrease the cash amount payable to Rinker shareholders under the takeover offer by the amount of any subsequent dividend.<sup>143</sup> Consequently, any waiver of this contractual entitlement would ordinarily have involved a variation to the offer, which had been recognised by CEMEX when it filed a variation notice under s 650D of the *Corporations Act* to allow Rinker shareholders to retain the earlier interim dividend.<sup>144</sup> Significantly, the Full Court considered that the Review Panel had approached this issue ‘not merely as one of the proper construction of a document, but as a matter of market practice.’<sup>145</sup> In support of this, the Court referred to an extract from the Review Panel’s analysis, which included the following:

The review panel considers that CEMEX followed usual practice by including in its notice of variation on 10 April the improved offer consideration that resulted by allowing Rinker shareholders to retain the benefit of the interim dividend. As the initial panel noted, it accords with market practice and common understanding that allowing the benefit of a dividend to be retained improves the offer consideration. The review panel thinks it is also a variation.<sup>146</sup>

As a result, the Full Court concluded that the question before the Review Panel was not just one of the terms or construction of a document.<sup>147</sup> This meant that it was a question of fact, rather than one of law, and was consequently not subject to judicial review.<sup>148</sup>

Secondly, the Review Panel’s decision was challenged under s 5(1)(h) of the *ADJR Act*.<sup>149</sup> CEMEX argued that there was ‘no evidence’ to support the Panel’s findings that the departure from its original announcement had a causal effect on the control of Rinker or upon the informed market principle in s 602 of the

<sup>140</sup> Ibid 119. See also *CEMEX (First Instance)* (2008) 106 ALD 5, 15–16. Stone J did not consider the ‘no evidence’ ground in her judgment.

<sup>141</sup> See *CEMEX (Full Court)* (2009) 177 FCR 98, 117–19 (Ryan, Jacobson and Foster JJ); see especially at 117.

<sup>142</sup> *CEMEX (First Instance)* (2008) 106 ALD 5, 16 (Stone J); *Rinker 02R (Review Panel)* (2007) 64 ACSR 472, 483 (McKeon P, Alexander DP and Member J O’Sullivan); *Re Rinker Group Ltd 02* [2007] ATP 17 (Unreported, McCann P, Ashforth DP and Member J Fast, 12 July 2007) [42]–[46] (McCann P, Ashforth DP and Member J Fast).

<sup>143</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 118–19 (Ryan, Jacobson and Foster JJ).

<sup>144</sup> Ibid 118; see also at 107.

<sup>145</sup> Ibid 119.

<sup>146</sup> *Rinker 02R (Review Panel)* (2007) 64 ACSR 472, 483 (McKeon P, Alexander DP and Member J O’Sullivan), quoted in *ibid* 110 and cited at 119.

<sup>147</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 119 (Ryan, Jacobson and Foster JJ).

<sup>148</sup> *Ibid*, citing *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 395 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ). See also *CEMEX (First Instance)* (2008) 106 ALD 5, 16 (Stone J).

<sup>149</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 119 (Ryan, Jacobson and Foster JJ).

*Corporations Act*.<sup>150</sup> Setting out the circumstances in which this ground could be successful, the Full Federal Court stated that ‘it is enough to show an absence of material from which the decision-maker could reasonably be satisfied that the particular matter was established.’<sup>151</sup> Importantly, the Court emphasised the fact that it is necessary to bear in mind the commercial expertise and role of the Panel in relation to this issue.<sup>152</sup> It recognised, as did Emmett J in *Australian Pipeline Ltd v Alinta Ltd* (*‘Alinta (First Instance)’*),<sup>153</sup> that the Panel must necessarily speculate when trying to work out what would have happened if the relevant circumstances had not existed.<sup>154</sup>

Although the Panel is required to and has the expertise to engage in speculation regarding the effect of the circumstances on the market, the Full Court emphasised that the Panel cannot speculate without any foundation for its conclusion.<sup>155</sup> Such speculation had not occurred here, however, because there was evidence supporting the Panel’s finding that one of the largest shareholders had accepted the takeover offer due to CEMEX allowing shareholders to retain the final dividend.<sup>156</sup> In addition, the Panel’s expertise was considered to be a sufficient basis for its finding that the acceptance by that particular shareholder was likely to have persuaded other shareholders to accept the offer.<sup>157</sup> The Court drew similar conclusions in relation to the Panel’s findings concerning the causal effect on control and its use of the increased amount of acceptances and trading volumes after the initial announcement on 10 April.<sup>158</sup>

#### IV COULD THE *GLENCORE* CASES HAPPEN AGAIN?

As discussed above in Part II(A), the decisions in the *Glencore* cases generated significant concerns about the potential for the Panel’s role to be undermined as a result of the narrow interpretation given to the powers bestowed upon it by the legislature. The outcome in *CEMEX (Full Court)* demonstrates clearly the benefits of the 2007 amendments to the Panel’s jurisdiction.<sup>159</sup> As these changes were made in light of the Federal Court decisions in *Glencore (First Application)* and *Glencore (Second Application)*, it is not surprising that many of the conclusions in those cases would have been different had the amendments been in place at that time. However, the question remains whether the difficulties

<sup>150</sup> Ibid. This was also argued to involve a decision that no reasonable person could have reached, as contemplated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, cited in *ibid*.

<sup>151</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 119 (Ryan, Jacobson and Foster JJ), citing *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 358 (Mason CJ). See also *ADJR Act* s 5(3); *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446, 587 (Weinberg J).

<sup>152</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 119 (Ryan, Jacobson and Foster JJ).

<sup>153</sup> (2006) 237 ALR 158, 190.

<sup>154</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 119 (Ryan, Jacobson and Foster JJ), citing *ibid*.

<sup>155</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 119–20 (Ryan, Jacobson and Foster JJ).

<sup>156</sup> *Ibid* 120.

<sup>157</sup> *Ibid*.

<sup>158</sup> *Ibid*.

<sup>159</sup> See above Part II(B).

encountered in the *Glencore* matters could arise in future cases. In order to examine this issue, the following discussion analyses the conclusions drawn in the *Glencore* matters and considers whether the outcomes would have been different if the 2007 amendments were already in force and *CEMEX (Full Court)* had already been concluded.

*A Declarations of Unacceptable Circumstances in the Glencore Cases*

One of the key difficulties arising from the declarations of unacceptable circumstances in the *Glencore* cases resulted from Emmett J's conclusion in relation to s 657A(2)(a) of the *Corporations Act*. That is, Emmett J found that s 657A(2)(a) (prior to amendment) required the Panel to make a determination as to the effect of the relevant circumstances (in that case, the non-disclosure of the equity derivative transactions entered into between Glencore and the banks).<sup>160</sup> The subsequent change to s 657A(2)(a) in the 2007 amendments would have significantly improved the position of the Review Panels, as they would instead have only been required to satisfy themselves as to the effect or likely effect of the circumstances.<sup>161</sup>

However, it is possible that the challenges to the Review Panel decisions in the *Glencore* cases may still have succeeded on judicial review grounds, in light of findings that suggest that Emmett J may have also found that the Panels had not demonstrated a sufficient basis for their conclusions in relation to the unacceptable circumstances.<sup>162</sup> That is, in *Glencore (First Application)*, it was concluded that the Review Panel had not attempted to determine the different decisions shareholders would have made had the equity derivative transactions been disclosed.<sup>163</sup> Similarly, in relation to the reliance of the second Review Panel's declaration upon the effect of the circumstances on Centennial's takeover bid,<sup>164</sup> Emmett J found in *Glencore (Second Application)* that it was unclear why the Panel had made the conclusions it had in relation to the effect on the timing and extent of the success of Centennial's bid and the price at which this was achieved.<sup>165</sup>

The main weakness identified in the second Review Panel's declaration flowed from Emmett J's interpretation in *Glencore (Second Application)* of the meaning of 'substantial interest' in s 657A(2)(a), which was not at that time defined in the *Corporations Act*. In particular, Emmett J concluded that 'interest' in this context must refer to 'an interest in relation to voting shares in a company, voting shares in a listed body or voting interests in a listed managed investment scheme.'<sup>166</sup> It was also found that 'the concept of substantial interest entails an

<sup>160</sup> See *Glencore (First Application)* (2005) 220 ALR 495, 507–8; *Glencore (Second Application)* (2006) 151 FCR 77, 103.

<sup>161</sup> See above n 77 and accompanying text.

<sup>162</sup> See *ADJR Act* s 5(1)(h). Cf above n 156 and accompanying text.

<sup>163</sup> (2005) 220 ALR 495, 503 (Emmett J).

<sup>164</sup> See above n 65 and accompanying text.

<sup>165</sup> (2006) 151 FCR 77, 102–3.

<sup>166</sup> *Ibid* 97.

interest that can be a relevant interest or a positive power or right in relation to voting shares.<sup>167</sup> This narrow interpretation of the meaning of substantial interest was clearly rebutted in s 602A of the Act, which was inserted by the 2007 amendments following the *Glencore* cases:

A reference in [chapter 6] to a substantial interest in a company, listed body or listed managed investment scheme is not to be read as being limited to an interest that is constituted by one or more of the following:

- (a) a relevant interest in securities in the company, body or scheme;
- (b) a legal or equitable interest in securities in the company, body or scheme;
- (c) a power or right in relation to:
  - (i) the company, body or scheme; or
  - (ii) securities in the company, body or scheme.

As a result, although s 602A responds to the above findings in *Glencore (Second Application)*, it unfortunately does not provide any guidance as to what would be sufficient to establish a substantial interest. The Explanatory Memorandum to the Bill containing proposed s 602A instead only reinforces the clear desire of the Parliament to provide the Panel with the flexibility to determine if an interest meets this threshold:

The definition is intended to ensure that the term ‘substantial interest’ is broad enough to encompass new and evolving instruments and developments in takeovers and to deter avoidance of the purposes of the takeovers law.<sup>168</sup>

Although this comment does not refer explicitly to the *Glencore* situation, it is consistent with the second Review Panel’s approach in relation to the equity derivatives in the *Glencore* cases. The second Review Panel concluded that, although *Glencore* did not have a relevant interest or voting power in Austral shares as a result of the transactions, *Glencore* had a substantial interest due to its ‘de facto control’ over the 7.4 per cent of Austral shares that the banks had purchased to ‘hedge’ (or offset) the risk resulting from the transactions.<sup>169</sup> This was due to the commercial imperative for the banks to purchase shares to counterbalance the ensuing risk.<sup>170</sup> Notwithstanding that there was no legal requirement for *Glencore* to disclose the transactions due to the finding that the banks and *Glencore* were not associates,<sup>171</sup> it was concluded that there was a

<sup>167</sup> Ibid 98 (Emmett J).

<sup>168</sup> Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 5.

<sup>169</sup> *Austral 02RR (Second Review)* (2005) 23 ACLC 1797, 1799, 1830 (Farrell P, Scott DP and Member D Byrne). See also *Glencore (Second Application)* (2006) 151 FCR 77, 89–90 (Emmett J).

<sup>170</sup> *Austral 02RR (Second Review)* (2005) 23 ACLC 1797, 1810 (Farrell P, Scott DP and Member D Byrne); *Glencore (First Application)* (2005) 220 ALR 495, 502–3 (Emmett J). See also Takeovers Panel, *Equity Derivatives*, Guidance Note 20, 11 April 2008, para 22 (‘Guidance Note 20’).

<sup>171</sup> See *Austral 02RR (Second Review)* (2005) 23 ACLC 1797, 1830 (Farrell P, Scott DP and Member D Byrne); *Glencore (Second Application)* (2006) 151 FCR 77, 89 (Emmett J).

substantial interest based upon the number of Austral shares purchased by the banks and the effect of the transactions in producing a misinformed market.<sup>172</sup>

The Panel has since made it clear in its guidance note on *Equity Derivatives* ('*Guidance Note 20*') that it considers equity derivatives may result in a substantial interest 'even though they give rise only to an economic interest.'<sup>173</sup> Due to the deliberately imprecise nature of s 602A, it is difficult to say with certainty whether a future court would disagree with the second Review Panel's interpretation of 'substantial interest' accepted in *Austral 02(RR)* (*Second Review*) and supported by *Guidance Note 20*. However, if this issue arose again in the future, it could be expected that the court would make its decision in light of the guidance in the Explanatory Memorandum. This suggests that the court would be likely to take a broader approach than was adopted in *Glencore (First Application)* and *Glencore (Second Application)*, as suggested in the Explanatory Memorandum, to be consistent with the policy underlying the takeover provisions.<sup>174</sup>

#### B *The Orders in the Glencore Cases*

Many of the concerns raised in the *Glencore* decisions relating to the Review Panels' orders were specifically addressed in the 2007 amendments. In *Glencore (First Application)*, Emmett J found that the Review Panel had not determined in what manner any right of any person was affected and that the orders consequently applied whether or not any such person would have acted differently had the disclosure been made.<sup>175</sup> When *CEMEX (First Instance)* was decided, Stone J made it clear that this argument could no longer be sustained in light of the 2007 amendments.<sup>176</sup> This is because s 657D(2)(a) of the *Corporations Act* now only requires the Panel to satisfy itself as to the effect of the circumstances on a group of persons and allows it to make orders to protect any of the rights or interests of those persons, not just those affected by the circumstances.<sup>177</sup> The concern raised in *Glencore (First Application)* in relation to the fact that persons who sold shares on the market during the non-disclosure period had not been consulted in relation to the orders<sup>178</sup> is also no longer relevant. This is because s 657D(1)(a) now only requires the Panel to give an opportunity to make submissions 'to each person to whom a proposed order would be directed' rather than each person to whom it relates.<sup>179</sup>

<sup>172</sup> *Austral 02RR (Second Review)* (2005) 23 ACLC 1797, 1830 (Farrell P, Scott DP and Member D Byrne); *Glencore (Second Application)* (2006) 151 FCR 77, 90–1 (Emmett J).

<sup>173</sup> *Guidance Note 20* para 8.

<sup>174</sup> See above n 168 and accompanying text.

<sup>175</sup> (2005) 220 ALR 495, 509–10.

<sup>176</sup> (2008) 106 ALD 5, 17.

<sup>177</sup> See *ibid* 17–18; Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 6. See also above nn 80–1 and accompanying text. Cf *Glencore (Second Application)* (2006) 151 FCR 77, 105 (Emmett J).

<sup>178</sup> (2005) 220 ALR 495, 509 (Emmett J).

<sup>179</sup> Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 6. It was also found in *Glencore (Second Application)* that a failure to comply with the earlier version of this

The Full Federal Court in *CEMEX (Full Court)* concluded that, following the 2007 amendments, s 657D(2)(a) does not require a causal nexus to be established between the unacceptable circumstances and their effect on the rights or interests of the affected persons.<sup>180</sup> However, the Full Court also found that the orders cannot be ‘totally disproportionate to any rational view’ of the effect of the unacceptable circumstances.<sup>181</sup> It is possible that Emmett J would have considered the orders in *Glencore (First Application)* to be totally disproportionate. This is due to Emmett J’s finding that the Review Panel had failed to have regard to the market price of the target company’s shares when the orders may have required Glencore to purchase them.<sup>182</sup>

In *Glencore (First Application)*, the finding that the Review Panel had not identified the particular interests or rights affected led Emmett J to conclude that the Panel had not balanced appropriately the interests of Glencore and the affected persons.<sup>183</sup> As a result, Emmett J concluded that the Panel had not addressed properly the question whether Glencore had been unfairly prejudiced under s 657D(1) of the *Corporations Act*.<sup>184</sup> Emmett J similarly suggested in *Glencore (Second Application)* that the orders would have been invalidated in any event due to the second Review Panel’s failure to consider whether the orders would be unfair if they were only based upon the effect of the circumstances on the control of Austral by Centennial (and not on the acquisition of a substantial interest by Glencore).<sup>185</sup>

With respect to unfair prejudice, Stone J found in *CEMEX (First Instance)* that to satisfy s 657D(1) it was sufficient for the Review Panel to conclude that the relevant Rinker shareholders had sold their shares in a market that was not efficient and informed (and had in making their decision to sell lost the opportunity to consider information relating to the offer consideration), to determine the ‘most logical and best estimate’ of the value of this opportunity and to compare this to the benefit that CEMEX had received as a result of its actions.<sup>186</sup> Although this reasoning is based upon the application of the new jurisdiction for the Panel under current s 657A(2)(b),<sup>187</sup> a similar approach could be applied in relation to the findings of the second Review Panel in *Glencore (Second Application)*. That is, the second Review Panel’s conclusions in relation to the effect of the non-disclosure of the derivative transactions on the Austral shareholders in essence involved a finding that the market had been misin-

provision would not have automatically led to invalidity: *Glencore (Second Application)* (2006) 151 FCR 77, 106–7 (Emmett J).

<sup>180</sup> (2009) 177 FCR 98, 121–2 (Ryan, Jacobson and Foster JJ). See also above n 121 and accompanying text.

<sup>181</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 122 (Ryan, Jacobson and Foster JJ).

<sup>182</sup> *Glencore (First Application)* (2005) 220 ALR 495, 510. This also suggests that Emmett J would have found in any event that the Review Panel had failed to take into account a relevant consideration, as to which see *ADJR Act* ss 5(1)(e), (2)(b).

<sup>183</sup> (2005) 220 ALR 495, 510.

<sup>184</sup> *Ibid.*

<sup>185</sup> (2006) 151 FCR 77, 105–6.

<sup>186</sup> (2008) 106 ALD 5, 19.

<sup>187</sup> For discussion of this, see below Part IV(C).

formed.<sup>188</sup> Accordingly, the lost opportunity identified by the second Review Panel was the opportunity to trade in a fully informed market.<sup>189</sup> The second Review Panel then made an order based upon the benefit it estimated that Glencore had derived as a result of the finding that the shares were being traded in the market at a lower price than would have been the case if the market had been fully informed.<sup>190</sup>

It might similarly be argued that the reasoning of Stone J in *CEMEX (First Instance)* in relation to the approach to making orders more generally could also be applied to the situation in the *Glencore* cases. As in the case of the Full Federal Court, Stone J in *CEMEX (First Instance)* did not find any errors in the steps that the Review Panel had taken in making its orders.<sup>191</sup> Those steps were summarised as identifying the group of persons affected and their interests that were affected by the conduct, making a finding relating to the value that could be attached to those interests and concluding that an appropriate order was to compensate those persons for that amount.<sup>192</sup> As discussed above in relation to unfair prejudice, this is consistent with the approach that was adopted by the second Review Panel in *Austral 02RR (Second Review)*.<sup>193</sup>

### C Applying the New Jurisdiction Based on Policy

Of all of the 2007 amendments, the insertion of the new basis for a declaration of unacceptable circumstances in s 657A(2)(b) of the *Corporations Act* would likely have had the most significant impact in the *Glencore* cases. As mentioned above, s 657A(2)(b) allows a declaration to be made if it appears to the Panel that the circumstances

are otherwise unacceptable (whether in relation to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have in relation to the [target] company or another company or in relation to securities of the company or another company) having regard to the purposes of [Chapter 6] set out in section 602 ...

This would have allowed the Panels in the *Glencore* cases to have made a declaration in relation to the lack of an 'efficient, competitive and informed market' under s 602(a) (either instead of, or in addition to, the bases upon which the declarations were made in those decisions). In *Guidance Note 20*, released in April 2008, the Panel has made it clear that the non-disclosure of long positions in equity derivatives (that is, where the investor benefits from an increase in the

<sup>188</sup> See above n 61 and accompanying text. See also *Glencore (Second Application)* (2006) 151 FCR 77, 101–2 (Emmett J).

<sup>189</sup> See *Austral 02RR (Second Review)* (2005) 23 ACLC 1797, 1799 (Farrell P, Scott DP and Member D Byrne); *Glencore (Second Application)* (2006) 151 FCR 77, 84 (Emmett J).

<sup>190</sup> *Austral 02RR (Second Review)* (2005) 23 ACLC 1797, 1838–42 (Farrell P, Scott DP and Member D Byrne).

<sup>191</sup> (2008) 106 ALD 5, 18. See also *CEMEX (Full Court)* (2009) 177 FCR 98, 122 (Ryan, Jacobson and Foster JJ).

<sup>192</sup> *CEMEX (First Instance)* (2008) 106 ALD 5, 18 (Stone J).

<sup>193</sup> See above nn 188–90 and accompanying text.



price of the underlying security) above the five per cent threshold in a takeover context can give rise to unacceptable circumstances.<sup>194</sup> The Panel concludes in *Guidance Note 20* that:

By creating the economic incentive to hedge and then by controlling the unwinding, the taker of a long equity derivative position (even one that is cash-settled) may affect the market in the underlying securities, for example by bringing about a reduction in the 'free float' of the company [in this context, the shares available for the bidder to purchase under the takeover]. Such an effect on the supply (and perhaps therefore the price) of the securities may, in turn, affect:

- (a) control or potential control of the company
- (b) the acquisition or proposed acquisition of a substantial interest in the company or
- (c) the efficient, competitive and informed market for control of the company's voting securities.<sup>195</sup>

In *Guidance Note 20*, the Panel makes it clear that the consequences of a failure to disclose such derivative transactions may be a declaration and orders to disclose the equity derivatives, to dispose of any securities and/or (taking into account the effect on third parties) to cancel any agreements.<sup>196</sup> Assuming that an application to the Panel is brought before the end of the takeover bid period, a Panel order to cancel the derivative transactions would be more straightforward than the orders made in the *Glencore* matters. This is because the purpose of the order would be to ensure that the takeover proceeded, as far as possible, in a way as if the unacceptable circumstances had not occurred.<sup>197</sup>

Overall, the developments in the law since the *Glencore* cases raise the possibility that the Review Panel decisions in those matters may have survived judicial review had they been decided after the *CEMEX* cases. Such a conclusion would be even more likely had the Review Panels in the *Glencore* cases based the declaration of unacceptable circumstances upon the new jurisdiction in s 657A(2)(b), relying on the purposes of the takeover provisions set out in s 602. This was explicitly recognised by Emmett J in *Glencore (Second Application)*:

The Panel made its declaration because, notwithstanding compliance by *Glencore* and the Banks with the disclosure regime prescribed by the Act, the purposes of Ch 6, as expressed in s 602, were not achieved. That is precisely the circumstances for which s 657A provides. It is not unreasonable for the Panel, if its decision was otherwise lawful and authorised, to reach that conclusion.<sup>198</sup>

<sup>194</sup> See *Guidance Note 20*; see especially paras 9–11, 21–2.

<sup>195</sup> *Guidance Note 20* para 24.

<sup>196</sup> *Guidance Note 20* paras 48–9.

<sup>197</sup> *Corporations Act* s 657D(2)(b). See also *CEMEX (First Instance)* (2008) 106 ALD 5, 21 (Stone J).

<sup>198</sup> (2006) 151 FCR 77, 108. See also above n 119 and accompanying text; *CEMEX (First Instance)* (2008) 106 ALD 5, 15 (Stone J).

## V CONCLUSION

Judicial review is constitutionally mandated in relation to the Panel (and all other federal decision-makers) under s 75(v) of the *Constitution*. There will always be an ongoing tension between this and the policy rationale underlying the Panel in seeking to avoid litigation being used to affect the outcome of a takeover bid. As this tension can never be resolved, the challenge is to ensure that there is an appropriate balance between the role of the courts and the Panel.

The Full Federal Court's decision in *CEMEX (Full Court)* evens up the scales by putting the Panel in a stronger position than it had been following the *Glencore* cases. It builds upon the clear endorsement of the Panel's expertise by the High Court in *Alinta* and subsequently by Stone J in *CEMEX (First Instance)*.<sup>199</sup> In addition, *CEMEX (Full Court)* confirms that the 2007 amendments to the Panel's jurisdiction have allowed the Panel to focus upon the policy underlying the takeover provisions.<sup>200</sup> The decision to allow the Panel to delegate to ASIC the function of determining who should be paid under the Panel's orders also avoids the need for a significant restructure of its staffing and resources.

In relation to the Panel's jurisdiction, the Full Federal Court in *CEMEX (Full Court)* has made it clear that the Panel is not required to consider whether there has been a contravention of the *Corporations Act* under s 657A(2).<sup>201</sup> Although this followed from the reasoning of the High Court in *Alinta*, it is nonetheless useful for the Full Federal Court to have come to this conclusion. Similarly, the *CEMEX* decision demonstrates that the 2007 amendments to the Panel's power to make orders were successful in avoiding the need for the Panel to consider the effect of the unacceptable circumstances on individual persons.

Significantly, the Full Court concluded that the Panel does not need to establish a causal nexus between the unacceptable circumstances and their effect on the group of persons but instead only needs to satisfy itself that the order is appropriate to protect the rights or interests of the group of affected persons.<sup>202</sup> The decisions in the *CEMEX* cases also reinforce the view of Emmett J in *Alinta (First Instance)* that, in determining the effect of the relevant circumstances, the Panel can speculate as to what would have happened without those circumstances provided there is a foundation for its conclusion.<sup>203</sup> In relation to the valuation of the lost opportunity giving rise to the unacceptable circumstances in *CEMEX (Full Court)*, the Full Court emphasised that the Panel did not have to make an assessment in relation to each shareholder's reliance or lost chance.<sup>204</sup> The Court also set a high threshold for the circumstances in which it would have intervened in relation to this matter, indicating that it would have come to a

<sup>199</sup> See above nn 96–103 and accompanying text.

<sup>200</sup> See above nn 92–5 and accompanying text.

<sup>201</sup> See above nn 112–19 and accompanying text.

<sup>202</sup> See above nn 120–5 and accompanying text.

<sup>203</sup> See above nn 154–5 and accompanying text.

<sup>204</sup> See above n 130 and accompanying text.

different position only if the order had been ‘totally disproportionate to any rational view of the [shareholders’] lost opportunity’.<sup>205</sup>

Although Panel decisions remain vulnerable to judicial review under s 75(v) of the *Constitution* and under the *ADJR Act*, the *CEMEX* decisions provide important guidance for future decision-making in this area. The Panel’s use of market practice in informing its decision was clearly accepted by the Full Federal Court.<sup>206</sup> This was a key factor in the Court’s ruling that the Panel’s conclusions in relation to the bidder’s documents were not subject to judicial review as they involved findings of fact and not questions of law, the latter of which is required to trigger s 5(1)(f) of the *ADJR Act*.<sup>207</sup> Similarly, in the context of a ‘no evidence’ claim under s 5(1)(h), the Full Court found that the Panel’s expertise was a sufficient basis for its findings relating to the effect of the circumstances on takeover acceptances and trading in the market.<sup>208</sup>

The question remains whether the difficulties encountered in the *Glencore* cases could arise in the future. It is possible that the Review Panel decisions in the *Glencore* cases may have survived judicial review had the cases been decided following the *CEMEX* cases. This would be even more likely had the Review Panels based their declaration of unacceptable circumstances on the overarching policy of an ‘efficient, competitive and informed market’ in s 602(a).<sup>209</sup> The differences between the approaches adopted by the courts in the *Glencore* and *CEMEX* cases demonstrate the significance of the 2007 amendments to the Panel’s jurisdiction. They also highlight the importance of the High Court’s endorsement of the Panel’s specialist expertise and role (in the Court’s decision upholding the Panel’s constitutional validity in *Alinta*). In drawing upon both of these developments in *CEMEX (Full Court)*, the Full Federal Court has strengthened the position of the Panel in any future judicial review cases. The relationship between the role of the courts and the Panel has accordingly changed since the *Glencore* cases were decided. Although the courts struck an appropriate balance in the *CEMEX* cases, the ongoing management of judicial review of Panel decisions will remain a challenge for all concerned.

<sup>205</sup> *CEMEX (Full Court)* (2009) 177 FCR 98, 122 (Ryan, Jacobson and Foster JJ). See above n 131 and accompanying text.

<sup>206</sup> See above nn 145–8 and accompanying text.

<sup>207</sup> See above nn 140–8 and accompanying text.

<sup>208</sup> See above nn 157–8 and accompanying text.

<sup>209</sup> See above Part IV(C).