CERTAINTY IN DECISION-MAKING: AN ASSESSMENT OF THE AUSTRALIAN TAKEOVERS PANEL

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Certainty in Decision-Making: An Assessment of the Australian Takeovers Panel

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Abstract

The Australian Takeovers Panel ('Australian Panel') has been the primary forum for resolving takeover disputes since reforms to Australian corporate law in 2000. This article examines whether there has been certainty in relation to the Australian Panel's decision-making following the reforms. It addresses this question by focusing on the two key elements of certainty in decision-making, namely consistency and finality. The article examines how to measure these two elements of certainty and assesses the Australian Panel's decision-making against them. Consistency is assessed using a case study analysis of the Panel's decision-making in relation to the Australian Securities and Investments Commission's policy on 'truth in takeovers'. In relation to finality, there is a qualitative analysis of the judicial review decisions in relation to Australian Panel matters from 13 March 2000 to 30 June 2016.

I Introduction

The Australian Takeovers Panel ('Australian Panel') has been responsible for resolving takeover disputes in place of the courts since the *Corporate Law Economic Reform Program Act 1999* (Cth) ('CLERP reforms') commenced on 13 March 2000.[1] A significant challenge for the Panel is to promote certainty in its decision-making. Creyke has observed that there is a need for certainty in relation to tribunal decisions generally.[2] This also reflects one of the key purposes of corporate and securities law regulation. Accordingly, the legislative aims of the regulator in this area, the Australian Securities and Investments Commission ('ASIC'), include maintaining the performance of the financial system 'in the interests of commercial certainty'.[3] Indeed, Brown refers to commercial certainty

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1 These reforms were implemented in light of the policy aims set out in the proposals paper entitled Commonwealth Treasury, *Corporate Law Economic Reform, Proposals for Reform, No 4, Takeovers — Corporate Control: A Better Environment for Productive Investment* (Canberra, 1997) 7–8 ('*CLERP 4*'). See also *Corporations Act 2001* (Cth) s 659AA ('*Corporations Act*').

2 Robin Creyke, 'Tribunals: Divergence and Loss' (2001) 29(3) *Federal Law Review* 403, 423.

3 *Australian Securities and Investments Commission Act 2001* (Cth) s 1(2)(a) ('*ASIC Act*').

as a 'fundamental legal and economic need'.[4] Similarly, in the context of proposals to change the law applying to overseas acquisitions affecting Australian companies, the Legal Committee of the Companies and Securities Advisory Committee commented that 'effective participation by Australia in international capital markets requires greater certainty'.[5]

This article addresses the question whether there has been certainty in relation to the Australian Panel's decision-making since the CLERP reforms. Certainty is one of the key criteria that has been applied to the Panel on Takeovers and Mergers ('UK Panel'), together with speed and flexibility.[6] The UK Panel was the key overseas body cited in support of the CLERP reforms based on its 'reputation of resolving takeover disputes promptly and effectively'.[7] In light of this, the aims of the CLERP reforms were to inject legal and commercial specialist expertise into takeover dispute resolution, provide 'speed, informality and uniformity' in decision-making, minimise 'tactical litigation' and free up court resources.[8] Accordingly, it has been concluded that the criteria of speed, flexibility and certainty can be applied to the Australian Panel in determining whether the CLERP reform aims have been achieved.[9]

As a result of the CLERP reforms, an interested party is required to apply to the Australian Panel instead of the courts in relation to a takeover bid during the takeover bid period.[10] The Panel can exercise its main power to make a declaration of unacceptable circumstances under s 657A(2) of the *Corporations Act 2001* (Cth) ('*Corporations Act*') on three alternative grounds. These grounds are where it appears to the Panel that the circumstances are unacceptable either:

(a) having regard to their effect on the control of, or an acquisition of a substantial interest in, a company;
(b) in relation to a company in light of the purposes of the takeover provisions; or
(c) because they are likely to give rise to a contravention of the provisions on takeovers, compulsory acquisitions, takeover rights and liabilities, substantial shareholdings or tracing beneficial ownership.[11]

This power must be exercised having regard to the underlying purposes of the takeover provisions.[12] These purposes are to ensure that: acquisitions take place in an 'efficient, competitive and informed market'; target shareholders have enough information, reasonable time to make a decision and are afforded a 'reasonable and

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4 Liam Brown, 'The Impact of Section 51AC of the *Trade Practices Act 1974* (Cth) on Commercial Certainty' (2004) 28(3) *Melbourne University Law Review* 589, 590. See also *Re Cape Lambert Minsec Pty Ltd* (2009) 73 ACSR 370, 376, 383; *International All Sports Ltd* [2009] ATP 4 (13 February 2009) 6.

5 Legal Committee of the Companies and Securities Advisory Committee, Commonwealth Parliament, *Anomalies in the Takeovers Provisions of the Corporations Law: Report* (1994) 30.

6 See Emma Armson, 'Lessons for the Australian Takeovers Panel from the United Kingdom' (2014) 29(3) *Australian Journal of Corporate Law* 295, 316.

7 *CLERP 4*, above n 1, 36.

8 Ibid 32. See also Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 38.

9 See Armson, above n 6, 321.

10 *Corporations Act* ss 657C, 659AA, 659B.

11 Ibid ss 602A, 657A(1)–(3).

12 Ibid s 657A(3)(a)(i).

equal opportunity to participate in any benefits' under a takeover bid; and an appropriate procedure is followed prior to the use of the compulsory acquisition provisions.[13] Although the Australian Panel cannot order a person to comply with a requirement in the legislation for constitutional reasons,[14] it can make a broad range of orders including restraining the exercise of voting rights, directing the disposal of shares, and vesting shares in ASIC.[15]

The other type of Australian Panel decision involves review of certain ASIC decisions, namely those relating to the exercise of ASIC's exemption and modification powers concerning the *Corporations Act* provisions on takeovers, substantial shareholdings and beneficial ownership.[16] These Panel decisions are not subject to an internal review process.[17] On the other hand, an application can be made for review of a Panel decision to exercise its powers to make a declaration of unacceptable circumstances and orders.[18] The Review Panel comprises another three members of the Panel and has similar powers to the initial Panel.[19] There are limits on when an application can be made to the Panel for internal review. That is, the President of the Panel must consent to an application for review if the decision is not to make a declaration of unacceptable circumstances, interim orders or final orders.[20] Both types of decisions by the Panel are subject to judicial review.[21]

Certainty is sought by parties involved in a takeover so that they can make properly informed and timely decisions. As emphasised by the Panel, the need for certainty in the market is founded upon two of the purposes of the takeover provisions, namely ensuring an 'efficient, competitive and informed market' and that target shareholders have enough information to enable them to assess the merits of the takeover proposal.[22] Certainty can be evaluated using two key elements. The first element is consistency in decision-making.[23] This requires that persons who are in a similar situation 'receive similar treatment and outcomes',[24]

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13 Ibid s 602.

14 Ibid s 657D(2). This limitation is designed to avoid the Panel exercising judicial power contrary to ch III of the *Australian Constitution*: see *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 ('*Alinta*'); Emma Armson, 'Judicial Power and Administrative Tribunals: The Constitutional Challenge to the Takeovers Panel' (2008) 19(2) *Public Law Review* 91; *Corporations Act* ss 657F–657G, 658C(5)–(6).

15 *Corporations Act* ss 9 (definition of 'remedial order'), 657D(2). Orders must also not prejudice any person unfairly: s 657D(1). The Panel has the power to make interim orders under s 657E.

16 Ibid s 656A(1).

17 Cf *Corporations Act* s 657EA(1).

18 Ibid.

19 Ibid s 657EA; *ASIC Act* s 184.

20 *Corporations Act* s 657EA(2).

21 See *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 3, 5; *Judiciary Act 1903* (Cth) s 39B; *Australian Constitution* s 75.

22 See *Corporations Act* s 602(a), (b)(iii); Takeovers Panel, *Consultation Paper — Revision of GN 14 Funding Arrangements* (6 October 2015) [10] <http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=consultation/051.htm&pageID=&Year=>.

23 See, eg, Brian J Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26(3) *Journal of Environmental Law* 365, 378.

24 Kevin Whitaker, Michael Gottheil and Michael Uhlmann, 'Consistency in Tribunal Decision Making: What Really Goes On Behind Closed Doors…' in Laverne A Jacobs and Justice Anne L Mactavish (eds), *Dialogue Between Courts and Tribunals: Essays in Administrative Law and Justice (2001–2007)* (Les Éditions Thémis, 2008) 351, 354 <papers.ssrn.com/sol3/papers.cfm?abstract_id=2332875#page=358>.

and is reflected in the CLERP reform aim of 'uniformity' in decision-making.[25] It is also an important means of achieving fairness.[26] Consistency in decision-making is a particular concern in any system where similar matters are decided by different decision-makers. Panel matters are decided by a 'sitting Panel' comprising three members,[27] who are chosen by the Panel's President from the current total of 39 part-time members.[28] In addition, applications for internal Panel reviews in relation to 'unacceptable circumstances' matters may lead to a different decision by a Review Panel comprising another three Panel members.[29] Panel decisions are also not subject to the doctrine of precedent as it applies to courts.[30]

The second element of certainty relates to the finality of Panel decisions, namely the extent to which the Panel determines the matter finally.[31] This element incorporates decisions made under the internal Panel review process. However, the availability of judicial review affects finality adversely. This is consistent with the CLERP reform aim of minimising 'tactical litigation'.[32] There are many incentives to use litigation as a strategy to affect the outcome of a takeover bid. This is primarily due to the significant financial interests and conflicting aims of the parties involved.[33] Consequently, the CLERP reforms were designed to allow the target's shareholders to decide upon the merits of a takeover bid.[34] This was sought to be achieved by removing the opportunity for parties to bring court proceedings in order to delay or stymie the bid and instead placing takeover disputes before a commercial body set up to hear matters informally and quickly.[35]

There is an underlying tension between providing finality and the need to allow for the review of Panel decisions in some circumstances. Importantly, the CLERP reforms included an internal Panel review process 'to provide appropriate

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25 See above n 8 and accompanying text.

26 See, eg, France Houle and Lorne Sossin, 'Tribunals and Policy-Making: From Legitimacy to Fairness' in Laverne A Jacobs and Justice Anne L Mactavish (eds), *Dialogue Between Courts and Tribunals: Essays in Administrative Law and Justice (2001-2007)* (Les Éditions Thémis, 2008) 93, 106, <papers.ssrn.com/sol3/papers.cfm?abstract_id=2332875#page=358>.

27 *ASIC Act* s 184(1).

28 Ibid s 184(2). The Panel's current members include solicitors, barristers, company administrators, investment bankers and advisors: see Takeovers Panel, *Panel Members* <http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=about/panel_members.htm>.

29 See above n 19 and accompanying text.

30 For an overview of how the Australian Panel operates, see, eg, Armson, above n 6, 311–14.

31 See, eg, The Takeover Panel, *Report and Accounts for the Year Ended 31 March 1989*, 10 <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/report1989.pdf>; Jonathan Mukwiri, 'The Myth of Tactical Litigation in UK Takeovers' (2008) 8(2) *Journal of Corporate Law Studies* 373, 377.

32 See above n 8 and accompanying text.

33 For example, the likelihood that directors of the target will lose their position if the takeover is successful creates a conflict of interest between the target company and its directors: see, eg, *Corporations Act* s 181; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821; *Darvall v North Sydney Brick & Tile Co Ltd (No 2)* (1989) 16 NSWLR 212; Emma Armson, 'The Frustrating Action Policy: Shifting Power in the Takeover Context' (2003) 21(8) *Company and Securities Law Journal* 487, 498–500.

34 *CLERP 4*, above n 1, 37; Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 38.

35 Ibid.

protection against erroneous decisions and facilitate uniform standards'.[36] However, there are both legal and policy reasons for judicial review of Australian Panel decisions. As a matter of law, the *Australian Constitution* mandates that decisions of Panel members (as officers of the Commonwealth) are subject to review under the High Court's original jurisdiction.[37] This reflects the underlying policy concern that, as part of the rule of law, a person exercising public power should be subject to judicial supervision.[38] Accordingly, the CLERP proposals envisaged that the Australian Panel would be 'protected from judicial review whilst it operated in good faith and within reasonable bounds and complied with the procedures in the legislation and the rules of natural justice'.[39] As a result, the availability of judicial review presents a significant challenge to the finality of Panel decisions. Given that judicial review proceedings typically involve lengthy delays, this type of review is also likely to have a significant impact on the time taken to resolve the matter.

There are five parts in this article, which examines the Australian Panel's decision-making from 13 March 2000 to 30 June 2016. Part II examines how to measure the two elements of certainty in relation to decisions by the Australian Panel. Part III assesses the first element of consistency in decision-making. It contains a case study analysis of Panel decisions relating to the application of ASIC's policy on statements providing 'truth in takeovers'.[40] Part III also discusses the rationale for focusing solely on Panel decisions concerning this policy. Part IV focuses on the second element relating to the finality of Panel decisions. In particular, it analyses the impact of judicial review on Panel decision-making. Part V concludes with an assessment of the extent to which decision-making by the Australian Panel satisfies the criterion of certainty.

II How to Measure Certainty

This Part examines how to measure the extent to which the Australian Panel's decision-making meets the certainty criterion. As discussed in Part I above, certainty in this context can be evaluated using two elements. Although there are other factors affecting certainty for market participants, such those arising from market and other risks, consistency and finality are the key elements that determine certainty in relation to Panel decisions. Accordingly, the methodology adopted to assess each of these elements is discussed below, including an analysis of the factors relevant to determining whether Panel decision-making meets the certainty criterion. The different levels of certainty that could be achieved in relation to

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36 *CLERP 4*, above n 1, 40. This is consistent with the aim of providing 'uniformity' in decision-making: see above text accompanying n 8.

37 *Australian Constitution* s 75(v).

38 See, eg, *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 157 (Gaudron J).

39 *CLERP 4*, above n 1, 40.

40 ASIC Regulatory Guide 25, *Takeovers: False and Misleading Statements* (22 August 2002) <http://www.asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-25-takeovers-false-and-misleading-statements/> ('*ASIC RG 25*').

these two elements are also considered and placed on a spectrum to assist with the assessment process.

Consistency in decision-making is, like the flexibility criterion,[41] perhaps one of the more difficult matters to assess. This is because it involves a qualitative analysis of the Panel's decisions to evaluate the level of consistency in the reasoning and outcomes of decisions by both initial and review panels. There is a tension arising between the flexibility and certainty criteria in this context. This is because the flexibility provided through the exercise of discretions based on policy considerations can lead to uncertainty in relation to the outcome.[42] The Panel can help to minimise this uncertainty by providing guidance on how it will exercise its discretionary powers.[43] Part III assesses the consistency element of certainty through a case study approach. The impact of the internal Panel review process on consistency is also determined using an analysis of the matters subject to internal review. This includes an examination of how frequently reviews led to different outcomes, and the extent to which the different outcomes were the result of a different conclusion based on the same facts or new circumstances arising.

The extent to which the certainty criterion is achieved necessarily involves value judgments in relation to both the consistency and finality of Panel decisions. Accordingly, this article's assessment of these two elements is based on what the author considers to be strong, medium and weak forms of both consistency and finality.[44] In terms of consistency, the strong form would result in a system where there is a high level of consistency in relation to the outcome of both the initial and review panel decisions considered in the case study. The medium form would provide consistency as a general rule with deviation in a limited number of matters. The weak form would involve inconsistency in decision-making due to the existence of such factors as inadequate guidance provided by the Panel and/or decision outcomes varying frequently in relation to similar circumstances.

Given that judicial review applications affect adversely the finality of decision-making, the impact on finality can be assessed using an empirical and qualitative analysis of the matters subject to judicial review. Consequently, the analysis in Part IV focuses on the frequency and extent to which the court decisions result in a different outcome to the Panel decisions subject to review. Adopting a similar approach to that in relation to consistency, a strong form of finality would exist where the courts consistently affirm decisions of the Panel and/or discourage judicial review applications through their decisions. Under the medium form, judicial review would be limited to some extent and/or would lead to a different outcome in a limited number of matters. The weak form would involve frequent judicial review applications being made and/or the consistent overturning of Panel decisions by the courts. For example, the Panel's decisions

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41 See above n 6 and accompanying text.

42 See Emma Armson, 'Evolution of Australian Takeover Legislation' (2013) 39(3) *Monash University Law Review* 654, 696–7.

43 See, eg, ibid; Whitaker, Gottheil and Uhlmann, above n 24, 363.

44 This is similar to the approach adopted in relation to the efficient capital market hypothesis, in which different forms of efficiency reflect the extent to which information is reflected in market prices: see, eg, Eugene F Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25(2) *Journal of Finance* 383, 383.

may be overturned where it has acted in breach of the rules of natural justice or outside its jurisdiction. It is also important to consider the general approach adopted by the courts in relation to judicial review, given its potential to affect the number of judicial review applications.

III Consistency in Decision-Making

This Part comprises a case study analysis of Australian Panel decisions in order to assess the extent to which they are consistent. The analysis examines Panel decisions relating to the 'truth in takeovers' policy ('TTP'),[45] which is set out in ASIC Regulatory Guide 25, *Takeovers: False and Misleading Statements* ('*ASIC RG 25*').[46] This set of decisions was chosen for a number of reasons. First, the policy provides a clear basis for comparing Panel decisions in different factual situations, as it focuses on the extent to which persons are held to statements that they have made in the context of a takeover bid. Many of the decisions in the case study involve a 'last and final statement', which is a 'statement made by a market participant that it will or will not do something in the course of the bid'.[47] Such statements include a bidder stating that they will not improve the consideration, extend the offer period and/or waive a condition applicable to the offer, or substantial shareholders stating their intention to accept or reject offers under the takeover bid.[48] Second, there is a significant body of Panel decisions relating to the TTP.[49] This article provides a case study of 38 decisions, which represents just under 10% of the Panel decisions analysed.[50] Although there is a larger body of Panel decisions in relation to other key topic areas — such as matters involving association, bidder's statement disclosure and rights issues[51] — these are less useful for comparative purposes as they have a greater focus on the particular circumstances in each case. The case study also includes six Review Panel decisions,[52] which can be analysed to determine the extent to which they are consistent with the decisions of the initial Panel.[53]

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45 The decisions used in the case study are predominantly those listed under the 'Truth in takeovers' heading in the Takeovers Panel, *Index of Reasons: By Topic 2000-2014* (8 April 2015), 33–4 <http://www.takeovers.gov.au/content/index_of_reasons/default.aspx> ('*Panel Index of Reasons*'). This list was supplemented by decisions obtained from searches of the LexisNexis database and Takeovers Panel website using the search terms of 'truth in takeovers', 'takeovers: false and misleading statements' and 'last and final'. It does not include other decisions that have had the effect of holding a person to their statement, without any such reference to the TTP policy: see, eg, *Normandy Mining Ltd 07* [2002] ATP 02 (22 February 2002); *Qantas Airways Ltd (No 2)* (2007) 62 ACSR 347; *Qantas Airways Ltd (No 2R)* (2007) 62 ACSR 416.

46 *ASIC RG 25*, above n 40.

47 Ibid para 25.4.

48 Ibid paras 25.21–25.31.

49 See above n 45. For a list of the decisions in the case study in order of the date of the decision, see Appendix 1 to this article.

50 This includes the decisions following the commencement of the CLERP reforms on 13 March 2000 to 30 June 2016 (up to and including *Re Warrnambool Cheese and Butter Factory Company Holdings Ltd 02* [2016] ATP 11 (30 June 2016)).

51 See *Panel Index of Reasons*, above n 45, 2–5, 7–9, 26–9 respectively.

52 *Re Anaconda Nickel Ltd 18* [2003] ATP 18 (10 April 2003) ('*Anaconda 18*'); *Re BreakFree Ltd (No 4R)* (2004) 22 ACLC 1165 ('*BreakFree 04R*'); *Re Rinker Group Ltd (No 2R)* (2007) 64 ACSR 472 ('*Rinker 02R*'); *Re Consolidated Minerals Ltd 03R* (2007) 25 ACLC 1739 ('*Consolidated*

The case study analysis is divided into two sections below. The first section examines statements in Panel decisions concerning the appropriateness of the TTP. This provides a framework for the case study, by setting out the extent to which the Panel states that the policy should be applied in the context of its decisions. The second section contains an analysis of the Panel decisions relating to the TTP. It starts by focusing on the decisions where the TTP was not applied and the reasons for this. It then discusses the range of outcomes in the decisions where the policy was applied. Finally, there is an analysis of the extent to which there is consistency in the Panel's decision-making in this area.

A *'Truth in Takeovers' Policy*

Many Panel decisions have included general statements endorsing the TTP,[54] with a number of later decisions referring to the policy without commenting on its appropriateness.[55] In the first decision relating to the TTP, the *Taipan 06* Panel stated that the underlying principle was that 'offerees and the market should be able to rely on statements of intention by participants in a takeover'.[56] It noted that this principle is based on the legislative policy relating to the *Corporations Act* provisions on misleading and deceptive conduct and proposing or announcing a takeover bid, and the purposes of the takeover provisions to ensure that target shareholders and directors have sufficient information and that acquisitions take place in an 'efficient, competitive and informed market'.[57] However, the *Taipan 06* Panel made it clear that the principle is not absolute and that its application will depend upon the circumstances:

> [W]e accept that ASIC's published policies include a general principle, which we regard as sound, that where a bidder makes a statement about its intention in relation to the conduct of a bid, shareholders and market participants can reasonably expect the bidder to act consistently with that stated intention. *This principle is not an absolute rule that the bidder must act out its stated intentions mechanically*. What it is reasonable to expect

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Minerals 03R'*); Re Gosford Quarry Holdings Ltd 01R* (2008) 67 ACSR 164 ('*Gosford Quarry 01R*'*); Re Ludowici Ltd 01R(a) and (b)* [2012] ATP 4 (9 March 2012) ('*Ludowici 01R*').

53 *Re BreakFree Ltd (Nos 3 and 4)* (2003) 49 ACSR 337 ('*BreakFree 03/04*'); *Re Rinker Group Ltd 02* [2007] ATP 17 (12 July 2007) ('*Rinker 02*'); *Re Consolidated Minerals Ltd 03* (2007) 25 ACLC 1729 ('*Consolidated Minerals 03*'); *Re Gosford Quarry Holdings Ltd* (2008) 67 ACSR 156 ('*Gosford Quarry 01*'); *Ludowici 01R* [2012] ATP 4 (9 March 2012). Although it falls outside the case study, the corresponding initial Panel decision to *Anaconda 18* is included for this purpose: see *Re Anaconda Nickel Ltd 16 and 17* [2003] ATP 15 (14 July 2003) ('*Anaconda 16-17*').

54 See *Anaconda 18* [2003] ATP 18 (10 April 2003), 8; *Re Prudential Investment Co of Australia Ltd* (2003) 49 ACSR 147, 159 ('*Prudential*'); *Re Novus Petroleum Ltd (No 2)* (2004) 50 ACSR 95, 101 ('*Novus 02*'); *Re Andean Resources Ltd* [2006] ATP 21 (5 July 2006), 4–5 ('*Andean*'); *Rinker 02* [2007] ATP 17 (12 July 2007), 6; *Re Just Group Ltd* [2008] ATP 22 (1 August 2008), 4 ('*Just Group*'); *Re Ludowici Ltd* [2012] ATP 3 (28 February 2012), 7 ('*Ludowici 01*'); *Re Warrnambool Cheese and Butter Factory Company Holdings Ltd* [2013] ATP 16 (17 December 2013), 7 ('*Warrnambool*'). See also *Re Austral Coal Ltd (No 2RR)* (2005) 23 ACLC 1797, 1816 ('*Austral Coal 02RR*').

55 See *Consolidated Minerals 03R* (2007) 25 ACLC 1739, 1743; *Re Golden West Resources Ltd 03 and 04* (2008) 26 ACLC 116, 119, 121 ('*Golden West 03/04*'); *Re MYOB Ltd* [2008] ATP 27 (21 November 2008), 6–7 ('*MYOB*').

56 *Re Taipan Resources NL (No 6)* (2000) 36 ACSR 716, 720 ('*Taipan 06*').

57 See ibid; *Corporations Act* ss 1041H, 631, 602(b), 602(a) respectively.

> depends also on the degree of precision of its statement, the presence or absence of clear qualifications to the statement, on the acts of other persons, on new circumstances, on later statements of the bidder itself and on how far it is reasonable to expect stated intentions to be pursued.[58]

The third TTP decision in *BreakFree 03/04* also included a clear qualification to its support for the policy, with the Panel stating 'that, *in general*, ASIC's truth in takeovers policy is an important and appropriate policy to apply in the context of takeovers in Australia'.[59] This was made more explicit in the subsequent Review Panel decision, where the *BreakFree 04R* Panel emphasised the different roles that ASIC and the Panel have in relation to the TTP:

> Like the Initial Panel, we consider that PS 25 [now *RG 25*] is a soundly-based policy … However, we consider that *PS 25 must be understood within its purposes and context* … PS 25, is one of the Policy Statements [now Regulatory Guides] concerning ASIC's enforcement discretions and not the exercise of its statutory discretionary powers (such as that under section 655A) … While *ASIC needs to make its own assessment whether a statement may be 'relied on' against a person*, whether a market statement would be misleading or deceptive for the purposes of section 1041H is a question of law, not administrative discretion. Similarly *whether circumstances are unacceptable is a matter for the decision by the Panel, not ASIC*.[60]

The *Consolidated Minerals 03* Panel also noted that:

> ASIC RG 25 does contemplate the correction, clarification and withdrawal of last and final statements in certain circumstances. It *does not preclude the possibility that there might be a change of position as a result of realising that a mistake had been made (ie, not only between what was intended and what was said, but also between what was intended and what was desirable*). Of course the ability to make such a change is very severely circumscribed, and properly so if the market is to be able to rely on due skill and care being applied to statements on which market participants are intended to rely.[61]

There have been stronger statements of support for the TTP in other Panel decisions, which should be considered in the context of the outcome in those decisions. In *ALH 03*, the Panel considered it 'essential that market participants should not be able to resile from "last and final statements" made during the course of a takeover bid',[62] but did not require the bidder to adhere to its statements in that case due to the intervention of the Panel. Significantly, the Panel in *Summit* stated that '[t]he panel considers that truth in takeovers is a fundamental tenet of the takeovers regime and on this basis made a declaration of unacceptable circumstances'.[63] However, the *Summit* Panel concluded that there were no orders

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58 *Taipan 06* (2000) 36 ACSR 716, 720 (emphasis added).
59 *BreakFree 03/04* (2003) 49 ACSR 337, 355 (emphasis added).
60 *BreakFree 04R* (2004) 22 ACLC 1165, 1173–4 (emphasis added).
61 *Consolidated Minerals 03* (2007) 25 ACLC 1729, 1735 (emphasis added).
62 *Re Australian Leisure and Hospitality Group Ltd (No 3)* (2004) 52 ACSR 260, 269 ('*ALH 03*').
63 *Re Summit Resources Ltd* (2007) 64 ACSR 626, 627 ('*Summit*'). See also *Rinker 02* [2007] ATP 17 (12 July 2007), 6; *Ludowici 01* [2012] ATP 3 (28 February 2012), 7.

that 'would appropriately remedy the effects of the unacceptable circumstances'.[64] Similarly, although the *Warrnambool* Panel accepted undertakings instead of making a declaration of unacceptable circumstances,[65] it stated that:

> A fundamental principle of an efficient, competitive and informed market is that those who make last and final statements to the market about their own intentions or proposed conduct should act consistently with them. Thus, '*Market participants that make a last and final statement should be held to it, as with a promise*'.[66]

This approach was implemented in *Ambassador 01*, where a number of target shareholders had made similar 'Intention Statements' to the effect that they intended to accept the takeover offer 'within 14 days from the opening of the [o]ffer, in the absence of a superior offer'.[67] After finding that that these were 'statements to which ASIC's truth in takeovers policy applies', the *Ambassador 01* Panel concluded that '[i]t follows that the … Shareholders should be held to their Intention Statements'.[68] In support of this conclusion, the *Ambassador 01* Panel referred to a number of earlier TTP decisions (including *BreakFree 03/04, BreakFree 04R, Rinker 02R, Summit* and *Warrnambool*).[69] The *Rinker 02R* Panel had stated the following:

> The purpose in s 602(a) [of the *Corporations Act*] is to ensure that the acquisition of control over shares takes place in an efficient, competitive and informed market. *If statements on which the market should be entitled to rely are subsequently departed from, or … actions are taken inconsistent with them, the review panel considers that all or some aspects of this purpose are undermined.* The need for reliable and accurate information also underpins ss 602(b) and (c).[70]

B *Analysis of Panel Decisions*

1 *Where Policy Not Applied*

The issue of whether the TTP should apply to the particular circumstances was not decided by the Panel in a significant number of the decisions in the case study.[71] Of these, the TTP policy was only implied or mentioned in passing in seven

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64 *Summit* (2007) 64 ACSR 626, 627.

65 See *Warrnambool* [2013] ATP 16 (17 December 2013), 14–15.

66 Ibid 7 (emphasis in original); see also *ASIC RG 25*, above n 40, para 25.9.

67 See *Re Ambassador Oil and Gas Ltd 01* [2014] ATP 14 (28 July 2014), 2 ('*Ambassador 01*').

68 Ibid 14 (citations omitted).

69 Ibid.

70 *Rinker 02R* (2007) 64 ACSR 472, 481 (emphasis added). See also *ASIC RG 25*, above n 40, paras 25.2, 25.6.

71 See, eg, *Novus 02* (2004) 50 ACSR 95; *Re Consolidated Minerals Ltd* [2007] ATP 20 (26 August 2007) ('*Consolidated Minerals 01*'); *Gosford Quarry 01* (2008) 67 ACSR 156; *Gosford Quarry 01R* (2008) 67 ACSR 164; *Re Alesco Corp Ltd 01 and 02* [2012] ATP 14 (16 August 2012) ('*Alesco 01/02*'); *Re Alesco Corp Ltd 03* [2012] ATP 18 (3 September 2012) ('*Alesco 03*'); *Re Envestra Ltd* [2014] ATP 13 (9 July 2014) ('*Envestra*'); *Yancoal Australia Ltd* [2014] ATP 24 (12 December 2014) ('*Yancoal*').

decisions.[72] In a number of other matters, the Panel concluded that there was an insufficient basis for commencing proceedings,[73] either in relation to the TTP specifically[74] or the issues raised in the application generally.[75] Some of the applications were found to be premature, either because there was not yet a concrete proposal or revised bid,[76] or the statements related to an event for which the time had not yet elapsed.[77] Another decision merely stated that the Panel had determined not to commence proceedings in relation to statements by a bidder concerning revised consideration that a rival bidder alleged were 'last and final statements' under *ASIC RG 25*.[78] Similarly, the *Yancoal* Panel noted ASIC's submission that the Regulatory Guide did not apply as the assurances were not made in the context of a control transaction and concluded that it did 'not need to consider this issue further'.[79] In contrast, the *Gosford Quarry 01* Panel did not discuss the TTP in response to the applicant's argument that it had been misled by a 'last and final statement' that the bid would be extended to 4pm on a particular day.[80] The matter was instead decided on the basis that the reference to 4pm was 'simply incorrect', as the offer period had been extended by the legislation until the close of trading at 4.12pm.[81]

In other decisions, the Panel concluded that there was not a 'last and final' statement and/or the TTP did not apply to the statement. In *Axiom 02*, the Panel considered a statement by the bidder that 'it was reluctant to revise its bid … because it was concerned it would further delay the rival offers for the company being put to shareholders'.[82] The *Axiom 02* Panel concluded that this was not sufficiently definitive to be a 'last and final statement', as the statements 'had some

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72 *Re Sirtex Medical Ltd* [2003] ATP 22 (2 July 2003), 5; *Re Patrick Corporation Ltd* (2005) 55 ACSR 231, 234; *Austral Coal 02RR* (2005) 23 ACLC 1797, 1816; *Re Vision Systems Ltd 02* [2006] ATP 33 (6 October 2006) ('*Vision 02*') (only references to 'truth in takeovers' and 'lapse of lock-up device because of last and final statement' in Panel catchwords); *Re Aztec Resources Ltd 02* [2006] ATP 30 (26 September 2006) ('*Aztec 02*') (only reference to 'truth in takeovers' in Panel catchwords); *Re Sedgman Ltd* [2016] ATP 2 (19 February 2016), 7; *Re Gulf Alumina Ltd* [2016] ATP 4 (11 March 2016), 7 ('*Gulf Alumina*'). Although not stated in the reasons, *ASIC RG 25,* above n 40, para 25.51 was relevant to the facts in the decision in *Andean* [2006] ATP 21 (5 July 2006): see below n 134. The *Gulf Alumina* decision instead relied on the recent Guidance Note on shareholder intention statements: see *Gulf Alumina* [2016] ATP 4 (11 March 2016), 6–7, 14, 17; Takeovers Panel, *Guidance Note 23: Shareholder Intention Statements* (11 December 2015) <http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance_notes/current/023.htm&pageID=&Year=>.

73 See *Australian Securities and Investments Commission Regulations 2001* (Cth) r 20(a).

74 *Consolidated Minerals 01* [2007] ATP 20 (26 August 2007), 4; *Alesco 01/02* [2012] ATP 14 (16 August 2012), 8; *Alesco 03* [2012] ATP 18 (3 September 2012), 6; *Yancoal* [2014] ATP 24 (12 December 2014), 19.

75 *Novus 02* (2004) 50 ACSR 95, 96; *Vision 02* [2006] ATP 33 (6 October 2006), 2; *Envestra* [2014] ATP 13 (9 July 2014), 1.

76 *Alesco 01/02* [2012] ATP 14 (16 August 2012), 9; *Alesco 03* [2012] ATP 18 (3 September 2012), 6 respectively.

77 *Envestra* [2014] ATP 13 (9 July 2014), 4–5.

78 *Consolidated Minerals 01* [2007] ATP 20 (26 August 2007), 4.

79 *Yancoal* [2014] ATP 24 (12 December 2014), 19.

80 *Gosford Quarry 01* (2008) 67 ACSR 156, 162.

81 Ibid. The Review Panel agreed with this reasoning: see *Gosford Quarry 01R* (2008) 67 ACSR 164, 165, 167.

82 *Re Axiom Properties Ltd 02* [2006] ATP 5 (22 February 2006), 3 ('*Axiom 02*').

reasonable words of caution and possibility of change'.[83] In *Consolidated Minerals 02*, the Panel also concluded that the bidder had not made a 'last and final' statement, as an on-market order had been announced as being 'in addition' to the off-market bid and a reasonable target shareholder would not have considered that the order was part of the bid.[84] On the other hand, the *Golden West 03/04* Panel found that a 'last and final' statement no longer applied because a variation in the offer consideration had triggered one of the conditions applying to the statement.[85]

In *BreakFree 03/04*, the Panel concluded that the TTP did not apply to the facts because 'ASIC's policy is that a substantial holder may only be held to a public statement made on its behalf (that is, a third party statement) if the substantial holder made a statement to the declarant which supports the third party statement'.[86] It also found it implicit that the holder could only be taken to have 'made' the statement if it was reflected accurately in the third party statement.[87] The *BreakFree 04R* Panel considered that the initial Panel's guidance on this issue was consistent with the TTP and its understanding of what the market expected.[88] Consistent with this, the *Bullabulling* Panel found that the TTP did not apply to statements that had been attributed to shareholders in a way that was misleading, and without appropriate qualifications and the express consent of the shareholders.[89] Consequently, the *Bullabulling* Panel accepted an undertaking by the target to provide supplementary disclosure about shareholder intention statements that it had included in documents sent to shareholders.[90]

The *Novus 02* Panel also did not apply the TTP to the alleged statements in that matter, although it considered that there should be disclosure to remedy inaccurate information in the market, consistent with *ASIC RG 25*.[91] Press reports had attributed statements to the bidder that it would decide on a possible increase in the bid price by a certain date, with no further comment by the bidder.[92] However, the *Novus 02* Panel did not conduct proceedings in light of an announcement by the bidder that it would increase its bid price conditional on a number of specified factors.[93] Similarly, both the *Ludowici 01* and *Ludowici 01R* Panels concluded that there was not a 'last and final' statement in an article first published overseas, as a result of the bidder's chief executive officer answering 'no' to a question whether 'he would consider raising the bid'.[94] Instead, the bidder

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83 Ibid 4.

84 *Re Consolidated Minerals Ltd 02* [2007] ATP 21 (29 August 2007), 2, 4–5.

85 *Golden West 03/04* (2008) 26 ACLC 116, 118–119. An application for review in relation to this issue was subsequently withdrawn: *Re Golden West Resources Ltd 04R* [2008] ATP 02 (20 February 2008) 2.

86 *BreakFree 03/04* (2003) 49 ACSR 337, 356.

87 Ibid.

88 *BreakFree 04R* (2004) 22 ACLC 1165, 1174.

89 *Re Bullabulling Gold Ltd* [2014] ATP 8 (5 June 2014), 4, 6 ('*Bullabulling*').

90 Ibid 1, 7, 11.

91 *Novus 02* (2004) 50 ACSR 95, 101.

92 Ibid 96. Many of these statements were alleged to have been made in Indonesia and were reported in online financial news services: ibid 97, 99.

93 Ibid 96, 100.

94 *Ludowici 01* [2012] ATP 3 (28 February 2012), 1, 5, 9; *Ludowici 01R* [2012] ATP 4 (9 March 2012), 1, 5.

was ordered to pay compensation to shareholders able to establish that they had sold their shares in reliance on the article before it was corrected.[95]

There are also decisions in which the Panel found that the TTP applied in the circumstances, but decided the matter on another basis. In *Anaconda 18*, the Review Panel considered statements that the bidder would only exercise its rights under a rights offer for the target's shares at a level that reflected its maximum shareholding ownership at a certain date under its takeover offer.[96] The *Anaconda 18* Panel stated that it supported the TTP and found that the bidder had acted inconsistently with these statements.[97] However, it 'prefer[red] not to base its decision on this',[98] and instead focused on the breach of the prohibition against certain acquisitions above the 20% threshold in s 606 of the *Corporations Act* ('takeover prohibition') that had resulted from the bidder's conduct.[99] On the other hand, the *MYOB* Panel concluded that it did not need to decide whether the TTP would require investors to act in accordance with statements that they intended to accept the takeover offer.[100] Instead, the *MYOB* Panel made a declaration of unacceptable circumstances on the basis that the statements formed part of an understanding between the parties that resulted in the bidder breaching the takeover prohibition, and made orders including releasing the investors from their commitment.[101]

2 *Outcomes Where Policy Applied*

The TTP has been applied by the Panel in order to hold a person to their statement in only a few decisions. In the only decision involving an application for unacceptable circumstances, the *Ambassador 01* Panel held a number of target shareholders to their statements that they intended to accept the offer 'within 14 days' after the offer opened, unless there was a superior offer.[102] The *Ambassador 01* Panel concluded that the shareholders had acted contrary to their intention statements by only waiting four days before accepting the offer.[103] As a result, there were unacceptable circumstances as the market had been misinformed, with the early acceptances by the shareholders also precluding the opportunity of a rival bid emerging.[104] Rather than allowing these shareholders withdrawal rights, the Panel agreed with ASIC that it should order reversal of their acceptances to ensure that they were held to their statements.[105]

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95 *Ludowici 01* [2012] ATP 3 (28 February 2012), 9, 15–17; *Ludowici 01R* [2012] ATP 4 (9 March 2012), 6.

96 *Anaconda 18* [2003] ATP 18 (10 April 2003), 11 (especially recitals B–C).

97 Ibid 8.

98 Ibid.

99 Ibid 5–6, 11 (especially recitals C–E). However, the declaration of unacceptable circumstances was also based on the bidder's actions being inconsistent with its statements: see ibid 11, paras (a), (b).

100 *MYOB* [2008] ATP 27 (21 November 2008), 2, 6.

101 Ibid 6, 8–9, Annexure A [3]–[4], Annexure B, especially [1]–[3].

102 *Ambassador 01* [2014] ATP 14 (28 July 2014), 1 (definition of 'Accepting IS Shareholders'), 2–3.

103 Ibid 14.

104 Ibid 11, 15, 18–19, 27.

105 Ibid 17–19, 28–32.

The other Panel decisions resulting in a person being held to their statement involved applications for the review of ASIC decisions. In the first decision, the *Taipan 06* Panel refused to remove an ASIC condition for regulatory relief under s 631 of the *Corporations Act* that reflected a condition that the bidder had included in earlier public statements.[106] Significantly, the bidder had earlier threatened court proceedings in relation to the target stating in a letter to shareholders that it was 'always open for [the bidder] to waive this self-imposed condition at any time'.[107] In response to this, the bidder announced that it intended to maintain the condition 'as a pre-condition to any … bid'.[108] Accordingly the *Taipan 06* Panel agreed with ASIC that the condition should continue to apply,[109] although it noted that

> [i]f [the bidder] had not taken issue with [the target's] letter in the way that it did, or if it had made an immediate and public protest over ASIC's condition that the defeating condition be made non-waivable and had quickly sought to set aside that condition, our conclusion might have been different.[110]

Both *Prudential* and *Lion-Asia* involved review of a minimum acceptance condition imposed by ASIC in the context of providing joint bid relief.[111] In *Prudential*, the Panel observed that market participants appreciate that ASIC can allow a condition to be waived where the bidder makes it clear that the condition has been included at ASIC's insistence.[112] The *Prudential* Panel consequently drew a distinction between this case, where it was clear to the market that the 'bid acceptances condition was not immutable if ASIC had good policy reasons to allow a change to it',[113] and the statements of the 'bidder's own intentions' that applied in the *Taipan 06* decision.[114] Consequently, the *Prudential* Panel varied the regulatory relief to remove the condition, as its purpose had already been achieved.[115] In contrast, the *Lion-Asia* Panel held the joint bidders to their statement. Although the *Lion-Asia* Panel considered the decisions of *Taipan 06* and *Prudential*, it concluded that it did not need to decide whether the application raised a TTP issue.[116] The *Lion-Asia* Panel emphasised that, unlike in the case before it, the applicant in *Prudential* could establish that it had satisfied the condition when uncontactable shareholders were excluded.[117] The *Lion-Asia* Panel concluded that it was not appropriate to waive the condition as it would change the basis on which the market had been operating, with a number of target shareholders having chosen to accept a rival bid on the basis that the condition was not waivable.[118]

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106 *Taipan 06* (2000) 36 ACSR 716, 717–19.
107 Ibid 719.
108 Ibid.
109 Ibid 721–2.
110 Ibid 721.
111 *Prudential* (2003) 49 ACSR 147, 151; *Re Lion-Asia Resources Pte Ltd* [2009] ATP 25 (3 December 2009), 2 (definition of 'Minimum Acceptance Condition'), 4 ('*Lion-Asia*').
112 *Prudential* (2003) 49 ACSR 147, 161.
113 Ibid 160.
114 Ibid 162.
115 Ibid 159, 164.
116 *Lion-Asia* [2009] ATP 25 (3 December 2009), 10.
117 Ibid 10–11.
118 Ibid 7–8, 11.

On the other hand, both the *Consolidated Minerals 03* and *Consolidated Minerals 03R* Panels made orders allowing the bidder to withdraw statements that it would not increase the consideration for, or extend voluntarily, its bid.[119] The bidder had made two statements in relation to not increasing the consideration just over two hours apart.[120] The *Consolidated Minerals 03* Panel found that the second statement represented 'a change of position' due to an error in the first statement,[121] and noted that this was contemplated in *ASIC RG 25*.[122] The *Consolidated Minerals 03* Panel found that the no voluntary extension statement was misleading due to the possibility of an automatic extension of the offer period being triggered under the legislation.[123] Given this, the *Consolidated Minerals 03* Panel 'did not consider that it would be appropriate to hold [the bidder] to the ordinarily understood effect of the statement'.[124] The *Consolidated Minerals 03R* Panel also made orders allowing the statements to be withdrawn.[125]

The *ALH 03* Panel similarly found that it would be unreasonable to hold a bidder to its original ASX announcement given that the Panel had made an interim order overriding it.[126] The bidder had announced at 2.13pm on a Monday that it would increase the offer price if it obtained a relevant interest in 20% of the target's shares by 6pm that day, or close the bid at 7pm that day if it did not.[127] In response to the interim order extending the bid until the following Monday, the bidder made a second announcement that provided for a similar increase in the offer if a differently defined 20% threshold was reached by 6pm on the later Monday.[128] The Panel declined to hold the bidder to the details in the original announcement, as its order had 'fundamentally changed the analysis underlying' the bidder's original commitments.[129]

In *Warrnambool*, the target and a bidder were also not held to their 'last and final' statements as the Panel found they had established dividend 'arrangements that were complex, created uncertainty and were most undesirable'.[130] The *Warrnambool* Panel noted that it would not be possible for the market 'to trade in an informed and orderly manner after the conditional record date' that had been announced,[131] as it would not be clear at that time whether the dividends would become payable.[132] Consequently, the *Warrnambool* Panel accepted undertakings, that included the bidder increasing the consideration to provide at least equal value to what was originally proposed and offering withdrawal rights to shareholders

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119 *Consolidated Minerals 03* (2007) 25 ACLC 1729, 1738; *Consolidated Minerals 03R* (2007) 25 ACLC 1739, 1740, 1745–6.
120 *Consolidated Minerals 03* (2007) 25 ACLC 1729, 1731–2.
121 Ibid 1735.
122 See above n 61 and accompanying text.
123 *Consolidated Minerals 03* (2007) 25 ACLC 1729, 1736.
124 Ibid.
125 *Consolidated Minerals 03R* (2007) 25 ACLC 1739, 1740, 1745–6.
126 *ALH 03* (2004) 52 ACSR 260, 263.
127 Ibid.
128 Ibid 264–5, 269.
129 Ibid 269.
130 *Warrnambool* [2013] ATP 16 (17 December 2013), 11.
131 Ibid.
132 Ibid 5, 11.

who had accepted the offer as at a certain date.[133] The *Andean* Panel also accepted undertakings in circumstances where it 'considered it to be important that [the target] make an announcement as required [by] paragraph PS 25.51 [now ASIC RG 25 para 25.51]'.[134] However, it did not conduct proceedings given undertakings to make disclosures to update the market on possible rival proposals in light of *ASIC RG 25*.[135] Similarly, the *Just Group* Panel declined to conduct proceedings after the bidder announced, in accordance with *ASIC RG 25*, the percentage of shareholders who represented the 'couple of major players' that it had indicated would accept the offer.[136]

Unusually, although the *Summit* Panel made a declaration of unacceptable circumstances on the basis that the bidder's conduct was contrary to the TTP, it could not find any orders that would have remedied the circumstances effectively.[137] The *Summit* Panel considered it unacceptable for the bidder to have departed from an unqualified intention statement, in addition to its failure to advise the market and shareholders in the target and bidder of its changed intentions.[138] The Panel noted that it may have found withdrawal rights or other orders to be appropriate had the application been made before a significant number of target shareholders had accepted the bidder's offer or, irrespective of the timing, provided evidence of adverse effects on them.[139] In addition, it was considered impractical to order the bidder to vote in favour of the transaction, as it would not be possible to work out how many target shareholders had accepted on the basis of the original announcement and it would potentially harm the bidder's shareholders to compel the bidder to join a joint venture against its wishes.[140] However, the *Summit* Panel emphasised that it 'would not regard the fact that it decided in this situation not to make orders as any precedent for future cases involving the truth in takeovers policy'.[141]

It is surprising that ASIC applied for compensation orders in *Rinker 02*, rather than insisting on its own policy that bidders cannot depart from 'no increase' statements (even with compensation).[142] This is particularly so given that ASIC did not give reasons why it considered compensation to be appropriate in that case.[143] After announcing its 'best and final' offer on 10 April 2007, the bidder had announced on 7 May that it would allow target shareholders to retain a dividend.[144] Noting the impact on the market and target shareholders if intention statements are

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133 Ibid 1, 15, 18–20.

134 *Andean* [2006] ATP 21 (5 July 2006), 4–5. *ASIC RG 25* para 25.51 requires that the target company update the market between 7 and 14 days before the end of the offer period about the status of any discussions with possible competing bidders that it has announced: see *ASIC RG 25*, above n 40, para 25.51.

135 *Andean* [2006] ATP 21 (5 July 2006), 1.

136 *Just Group* [2008] ATP 22 (1 August 2008), 2, 6; *ASIC RG 25*, above n 40, [25.74].

137 *Summit* (2007) 64 ACSR 626, 627, 630.

138 Ibid 627–30.

139 Ibid 632. See also ibid 630–1.

140 Ibid 631–2.

141 Ibid 632.

142 *ASIC RG 25*, above n 40, para 25.23.

143 *Rinker 02* [2007] ATP 17 (12 July 2007), 3, 6.

144 Ibid 1, 7.

not complied with,[145] the *Rinker 02* Panel concluded that the circumstances were unacceptable particularly in light of the significant increase in trading following the first announcement.[146] Consequently, the *Rinker 02* Panel ordered that the bidder pay the equivalent of the dividend to those target shareholders who sold their shares on the market between the announcements.[147] The conclusions and outcomes in *Rinker 02R* were similar to that in the *Rinker 02* decision.[148]

Interestingly, both the *Rinker 02* and *Rinker 02R* Panels noted that they may have considered ordering the bidder to comply with its first announcement in other circumstances.[149] The *Rinker 02* Panel observed that it was not appropriate 'in a practical sense' for it to make such an order given that the offer had been accepted by nearly 70% of target shareholders by the time ASIC made the application.[150] Similarly, the *Rinker 02R* Panel stated that it may have been appropriate to hold the bidder to its first announcement had ASIC applied to the Panel or made a public announcement a day or two after the second announcement (instead of just over a month later).[151]

3 *Consistency between Initial and Review Panel Decisions*

As discussed above, the key determinant of consistency is ensuring that persons in similar situations 'receive similar treatment and outcomes'.[152] Review Panel matters provide an important way of testing this as they will generally be decided based on the same facts, except where new information is presented to the Review Panel. A significant percentage of the matters in the TTP case study involved Review Panel proceedings, with over a quarter of the total number of decisions being either a Review Panel decision or the earlier initial Panel decision relating to the same matter. There was a high level of consistency between the decisions in two out of the six 'sets' of decisions. In these matters, the Review Panel declined to conduct proceedings on the basis that it agreed with the initial Panel (*Gosford Quarry 01R* and *Ludowici 01R*). However, there were differences in relation to the remaining matters, which are discussed below.

The first set of decisions was unusual in that only the Review Panel decision in *Anaconda 18* considered the issue of the TTP in its decision.[153] However, this did not make a significant difference in terms of the application of the policy given that the *Anaconda 18* Panel based its decision on the contravention of the takeover prohibition in any event.[154] On the other hand, both

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145 The *Rinker 02* Panel referred to the *BreakFree 03/04* and *Taipan 06* decisions in this regard: see ibid 6.

146 Ibid 9–10, 17.

147 Ibid 1, 12, 18–19.

148 *Rinker 02R* (2007) 64 ACSR 472, especially 473–4, 480, 495, 497.

149 *Rinker 02* [2007] ATP 17 (12 July 2007), 6–7; *Rinker 02R* (2007) 64 ACSR 472, 496.

150 *Rinker 02* [2007] ATP 17 (12 July 2007), 6–7.

151 This would have been achieved by requiring the bidder to withdraw the second announcement and provide withdrawal rights to any shareholder who had subsequently accepted its offer: see *Rinker 02R* (2007) 64 ACSR 472, 496.

152 See above n 24.

153 *Anaconda 16–17* [2003] ATP 15 (14 July 2003), 4 n 7.

154 *Anaconda 18* [2003] ATP 18 (10 April 2003) 5–6, 11 (especially recitals C–E).

the *BreakFree 03/04* and *BreakFree 04R* Panels considered that the TTP did not apply given that the shareholders had not authorised the statements included in the target's announcements. However, in light of additional documentation provided to the *BreakFree 04R* Panel, it also found that the statements were misleading.[155]

Notwithstanding the fact that the conclusions and outcomes in *Rinker 02* and *Rinker 02R* were similar, there were differences between the declarations of unacceptable circumstances and orders made by the initial and review panels. The *Rinker 02R* Panel made only minor changes to the declaration,[156] with more significant changes made to the orders. Although the Review Panel's orders still required the payment of the equivalent of the dividend to affected target shareholders, they introduced a claim form system and allowed the bidder a longer time for payment.[157] On the other hand, there were only slight substantive differences between both the declarations and orders in *Consolidated Minerals 03* and *Consolidated Minerals 03R*. This reflected the fact that only the *Consolidated Minerals 03* included a reference to the 'no extension' statement being misleading in its declaration, and consequently ordered that there be corrective disclosure in the event that the statement was not withdrawn.[158]

4 *Consistency in Approach to Policy*

A number of commentators have criticised the Panel's decision-making in relation to the TTP on the basis that there is uncertainty as to when the Panel will apply ASIC's policy.[159] However, at the outset, the Panel made it clear in the first decision in *Taipan 06* that it would not be automatically following the policy in the TTP, instead noting that there were some circumstances in which it may not be appropriate to do so.[160] In particular, it was emphasised that the Panel would consider other matters including new circumstances and the extent to which it was reasonable to expect the statement to be pursued. The *Consolidated Minerals 03* Panel later added that the TTP contemplated that statements could be corrected where there had been a mistake, including where the intended action was undesirable.[161] In *BreakFree 04R*, the Panel made it clear that it had a different role to ASIC in relation to the policy. That is, rather than determining whether ASIC

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155 *BreakFree 04R* (2004) 22 ACLC 1165, 1171, 1176.

156 See, eg, the new text in *Rinker 02R* (2007) 64 ACSR 472, 499 (Annexure A, [11], [16]).

157 See, eg, *Rinker 02* [2007] ATP 17 (12 July 2007), 18–19 (Annexure B, [3], [7]); *Rinker 02R* (2007) 64 ACSR 472, 500–6 (especially Annexure B [3], [5], [11]).

158 *Consolidated Minerals 03* (2007) 25 ACLC 1729, 1737 (Annexure A, [5]–[6]), 1738–9 (Annexure B, [9]–[10]).

159 See, eg, Neil Andrews, 'Editorial' (2012) 27(2) *Australian Journal of Corporate Law* 123, 124; Braddon Jolley and Jaclyn Riley-Smith, 'Truth in Takeovers – No ifs; No buts' in Jennifer G Hill and RP Austin (eds), *The Takeovers Panel After 10 Years* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2011) 85–93; Rodd Levy and Neil Pathak, 'The Takeovers Panel of the Future – Proposals to Enhance the Effectiveness and the Role of the Panel' in Ian Ramsay (ed), *The Takeovers Panel and Takeovers Regulation in Australia* (Melbourne University Press, 2010) 229–30; Say-Kit Soo, 'Truth in Takeovers: A Discussion on the Policy and its Application in Australia' [2013] *University of New South Wales Law Journal Student Series* No 13–05, 12 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312818>.

160 See above text accompanying n 58 and following.

161 See above n 61 and accompanying text.

enforcement action should be taken, the Panel was required to determine whether there were unacceptable circumstances (in accordance with the legislative provisions).[162] Although it could be argued that the stronger, less qualified statements made by other panels in support of the TTP undermine this,[163] the approach that the Australian Panel has adopted overall in applying the TTP is consistent with these general principles.

There were only three decisions in the case study in which persons were held to their statements. Two of those decisions involved situations where the Panel refused to remove a condition that ASIC had required to be non-waivable in exchange for relief from the legislative provisions (*Taipan 06* and *Lion-Asia*). The Panel's decision in *Prudential* to waive a similar condition to that in *Lion-Asia* is not inconsistent with the other decisions, given that the Panel found that the condition had, in effect, been satisfied in that case. In contrast, the condition had not been satisfied in *Lion-Asia* and a number of target shareholders had sold their shares on the basis that the condition was non-waivable.

The other decision where the Panel held persons to their statements involved circumstances where shareholders had accepted their shares earlier than the 14-day period given in their statements, with the Panel reversing their acceptances (*Ambassador 01*). The Panel found that the shareholders' intention statements in both *Ambassador 01* and *MYOB* evidenced an association between the parties. It would not have been reasonable to expect the shareholders in *MYOB* to be held to their statements, given that these statements related to accepting the takeover bid and the Panel had found that their conduct led to a contravention of the takeover prohibition. There is some inconsistency in the decision in *Anaconda 18* recognising that a 'last and final' statement had been made, but instead basing its decision on the takeover prohibition contravention. However, this is explicable given that the takeover prohibition is considered to be the 'cornerstone' of the takeover regulatory regime.[164]

Similarly, it would not have been reasonable to expect statements to be implemented where they were mistaken and misleading (*Consolidated Minerals 03* and *Consolidated Minerals 03R*), operating at a different time due to Panel intervention (*ALH 03*) or unworkable (*Warrnambool*). In addition, persons were found not to be bound by statements contained in overseas press reports where it was unclear whether they were responsible for making 'last and final' statements (*Novus 02*, *Ludowici 01* and *Ludowici 01R*). This was also not appropriate in circumstances where statements that were sent to target shareholders were misleading and not authorised by the persons alleged to have made them (*BreakFree 03/04, BreakFree 04R* and *Bullabulling*). In these circumstances, the Panel required disclosure to the market to ensure that it was properly informed.

The Panel decisions in *Summit*, *Rinker 02* and *Rinker 02R* are more controversial in relation to their outcome on orders. However, the timing of the applications in these matters meant that there were new circumstances that the

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[162] See above n 60 and accompanying text.
[163] See above text accompanying n 62 and following.
[164] See, eg, *MYOB* [2008] ATP 27 (21 November 2008), 7.

panels needed to take into account.[165] Specifically, the panels found that it was no longer appropriate to order withdrawal rights for target shareholders who had already accepted (which would have facilitated holding the bidders in those matters to their original statement), given the significant number of shareholders who had already accepted by the time of the application. Consequently, the panels found that it was not reasonable for the bidders to be held to their statements in these circumstances. This is consistent with the reasoning in *Lion-Asia*, where the Panel refused to allow the removal of a condition that had been disclosed to target shareholders as being non-waivable, as a significant number of target shareholders had already accepted a rival offer. Accordingly, the *Lion-Asia* Panel found that it was not appropriate for the condition to be waived in circumstances that would require compensation to be paid. In contrast, the panels in *Summit*, *Rinker 02* and *Rinker 02R* needed to decide what action to take in light of the bidders in those circumstances already having departed from their 'last and final' statements.

The different outcomes concerning the orders in the *Summit*, *Rinker 02* and *Rinker 02R* decisions are also explicable. In *Summit*, the Panel unusually did not make any orders as there had not been any evidence provided of the adverse impact of the circumstances on target shareholders. This meant that there were no effective remedies available to the *Summit* Panel given that withdrawal rights were not appropriate in the circumstances. In contrast, it was clear that the bidder's departure from its 'no increase' statement in the *Rinker* matters had an adverse effect on target shareholders who had subsequently sold their shares on-market, as they would not get the benefit of the dividend that the bidder later announced would be available under the takeover offer. Ordering the bidder to pay an equivalent amount to the dividend to those shareholders was obviously contrary to ASIC's policy that a person should be held to a 'no increase' statement, rather than providing compensation. However, it is significant that ASIC was the party seeking the compensation order in this context. This reinforces the point that it is not tenable for the TTP to be applied inflexibly, but rather that it is the role of the Panel to consider the circumstances before it in exercising its powers. Consequently, the Panel has adopted a pragmatic approach of holding persons to their statements where appropriate, and otherwise accepting undertakings or making orders where practical to protect the interests of target shareholders and ensure that the market is properly informed.

C *Assessment of Consistency*

As discussed in Part II above, whether consistency is being achieved in Panel decisions has been assessed at different levels, namely: strong, medium and weak forms. The strong form involves a high level of consistency in relation to the outcome of both the initial and Review Panel decisions in the case study, with the medium form providing consistency as a general rule with deviation in a limited number of matters. On the other hand, the weak form would involve inconsistency in decision-making, for example, where decision outcomes vary frequently in relation to similar circumstances.

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[165] See above text following n 160.

Notwithstanding criticism that there is uncertainty as to when the Panel will apply ASIC's 'truth in takeovers' policy,[166] the above case study analysis demonstrates that the Panel has achieved high levels of consistency in relation to its decisions on this issue. This is because, with the exception of minor differences between the declarations and orders in some of the Review Panel decisions, the Panel decisions, on the whole, adopt a consistent approach in relation to the way in which it applies the ASIC policy. In light of the size of the case study and controversy surrounding the Panel's decisions on this issue, this provides a sufficient basis upon which to conclude that the Panel's decisions generally provide high levels of consistency.

IV Finality

As discussed in Part I above, the finality of Panel decision-making relates to the extent to which the matter is determined finally by the Panel and is affected adversely by applications for judicial review. The operation of the UK Panel provides an important comparator when examining the issue of finality, given its experience in relation to minimising tactical litigation. Its appeal processes have to date focused on internal review. That is, UK Panel decisions are subject to review by a separate Hearings Committee, with a right of appeal against Hearings Committee decisions to an independent tribunal (the Takeover Appeal Board).[167] In contrast to the Australian situation, the UK Panel's operations have not been affected significantly by applications for judicial review due to a general approach of judicial restraint in relation to review of Panel decisions. This was established by the Court of Appeal's decision in 1987 in relation to the first judicial review application in *R v Panel on Take-overs and Mergers, Ex parte Datafin plc* ('*Datafin*').[168] As a result, there have only been three judicial review applications since the UK Panel commenced in 1968, with none of them successful and the most recent decision in 1992.[169] In *Datafin*, Sir Donaldson MR made it clear that judicial review applications would only succeed in exceptional circumstances:

> in the light of the special nature of the panel, its functions, the market in which it is operating, the time scales which are inherent in that market and the need to safeguard the position of third parties, who may be numbered in thousands, all of whom are entitled to continue to trade upon an assumption of the validity of the panel's rules and decisions, unless and until they are quashed by the court, *I should expect the relationship between the panel and the court to be historic rather than contemporaneous. I should expect the court 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

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166 See above n 159.
167 *Companies Act 2006* (UK) s 951.
168 [1987] QB 815.
169 *Datafin* [1987] 1 QB 815; *R v Panel on Take-overs and Mergers, Ex parte Guinness plc* [1990] 1 QB 146; *R v Panel on Take-overs and Mergers, Ex parte Fayed* [1992] BCC 524.

> partnership between the courts and the panel in the public interest and would avoid all of the perils to which [counsel for the panel] alluded.[170]

In Australia, there have been nine court decisions involving judicial review of its Panel decisions in relation to four different circumstances since 2000.[171] To examine the effect of judicial review on the finality of the Australian Panel's decision-making, this article first provides an overview of the legislative framework underpinning the role of the courts in relation to takeover matters following the CLERP reforms. Second, there is an analysis of the judicial review decisions to date. Then the third and final part examines the impact of judicial review on the finality of Australian Panel decisions.

A *Legislative Framework*

To minimise the opportunity for the tactical use of litigation, the *Corporations Act* places significant limitations 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'.[172] First, s 659B contains a limitation clause that restricts access to a 'Court' (principally the Federal and Supreme Court)[173] during the takeover bid period, only allowing governmental authorities to 'commence court proceedings in relation to a takeover bid or proposed takeover bid' at that time.[174] However, this privative clause does not prevent applications to the High Court under s 75(v) of the *Australian Constitution*.[175] Second, where the Panel has refused to make a declaration of unacceptable circumstances despite finding that there has been a breach of the *Corporations Act*, s 659C limits the orders that a Court can make following the bid period.[176] That is, the Court cannot exercise its powers under the *Corporations Act* to unwind a transaction and instead can only use those powers to make remedial orders involving the payment of money.[177] However, this restriction does not apply to the Court's exercise of its other powers, such as those exercisable in relation to breaches of directors' duties under the general law.

B *Judicial Review Decisions to Date*

1 *Glencore Cases*

The first two judicial review decisions ('*Glencore* cases') arose from circumstances occurring around five years after the CLERP reforms.[178] They resulted from a declaration of unacceptable circumstances and orders made by both

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170 *Datafin* [1987] 1 QB 815, 842 (Sir Donaldson MR) (emphasis added).
171 For a list of the judicial review decisions, see Appendix 2 to this article.
172 *Corporations Act* s 659AA.
173 Ibid s 58AA(1).
174 Ibid ss 659B(1), (4).
175 Ibid s 659B(5).
176 Ibid ss 659C(1), 58AA.
177 Ibid s 659C(2).
178 *Glencore International AG v Takeovers Panel* (2005) 220 ALR 495, 497–8 (Emmett J) ('*Glencore (No 1)*'); *Glencore International AG v Takeovers Panel* (2006) 151 FCR 77, 80–2 (Emmett J) ('*Glencore (No 2)*').

a Review Panel and (unusually) a Second Review Panel.[179] The declarations and orders were based on a deficiency in information available to the market in light of the non-disclosure of certain equity derivative transactions.[180]

The *Glencore* cases were significant for a number of reasons. First, the initial *Glencore* decision resulted from an application to the High Court made during the takeover bid period under the exception to the privative clause in s 659B(5) of the *Corporations Act*.[181] This demonstrated the relative ease with which parties are able to sidestep the privative clause through the use of constitutional writs, with the High Court referring the matter to the Federal Court to decide.[182] Second, in the first *Glencore* case, Emmett J recognised the importance of allowing the Panel to fulfil its role with minimal court intervention in certain circumstances. Although Emmett J did not make any explicit reference to any other material in this regard, his Honour concluded that:

> Having regard to the clear policy evinced by the privative provisions of s 659B of the [Corporations] Act, the court should be slow to interfere with a decision of the [P]anel, in circumstances where the market is significantly volatile by reason of the currency of takeover offers.[183]

However, Emmett J concluded in the first *Glencore* case that this limitation did not apply in the circumstances.[184] This resulted from the finding that, although the takeover bid was still open, there was 'probably unlikely to be any significant volatility in the market'.[185] Third, the *Glencore* cases resulted in the quashing of the declaration and orders made by both the Review Panel and those made by the second Review Panel constituted in response to the first *Glencore* decision.[186] As they were the first judicial review decisions, this unfortunate start raised the spectre of a continuing pattern of parties seeking court intervention during the takeover bid period contrary to the policy underlying the CLERP Panel reforms.

Finally, the *Glencore* decisions generated substantial concerns that the Panel's jurisdiction had been interpreted too narrowly for it to perform its role effectively.[187] This was recognised by consequential legislative changes designed to remove many of the limitations placed on the Panel's decision-making in the *Glencore* cases.[188] There were three key amendments made 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

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179 See *Re Austral Coal Ltd (No 2R)* (2005) 55 ACSR 60, 132–5 ('*Austral Coal 02R*'); *Austral Coal 02RR* (2005) 23 ACLC 1797, 1842–5, 1849–50.

180 *Austral Coal 02R* (2005) 55 ACSR 60, 132–5; *Austral Coal 02RR* (2005) 23 ACLC 1797, 1842–5, 1849–50. See also *Austral Coal Limited (No 2)* (2005) 55 ACSR 60, 65–6; 110–4.

181 *Glencore International AG v O'Bryan* [2005] HCATrans 458 (29 July 2005) 156–62 (Heydon J).

182 *Glencore (No 1)* (2005) 220 ALR 495, 498.

183 Ibid 506–7.

184 Ibid.

185 Ibid.

186 Ibid 511–12; *Glencore (No 2)* (2006) 151 FCR 77, 108.

187 See Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 1–2.

188 See *Corporations Amendment (Takeovers) Act 2007* (Cth) sch 1 items 3–4; Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 1–2.

circumstances.[189] Second, a new paragraph was inserted in s 657A(2) to provide an additional basis upon which the Panel can make a declaration. Significantly, 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' in relation to their effect on a company 'having regard to the purposes of [ch 6] set out in section 602'.[190] 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*.[191] In addition, the Panel's power to make orders in s 657D(2)(a) was transformed 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.[192] This section was also amended to allow the Panel to protect any rights or interests of affected persons and not just those affected by the relevant circumstances.[193]

2 *CEMEX Cases*

Following the second set of judicial review decisions ('*CEMEX* cases'),[194] the Panel was in a stronger position than it had been following the *Glencore* cases. In the *CEMEX* cases, both Stone J at first instance and the Full Federal Court dismissed applications seeking judicial review of the *Rinker 02R* Panel decision.[195] The *Rinker 02R* Panel had made a declaration of unacceptable circumstances and orders in relation to statements by the bidder that it had made its 'best and final offer', in light of a subsequent announcement that it would allow target shareholders to retain the benefit of a dividend.[196]

The *CEMEX* cases strengthened the position of the Panel in two main ways. First, the Full Court decision confirmed that the amendments to the Panel's jurisdiction following the *Glencore* cases allow the Panel to focus on maintaining the policy under the takeover provisions. This included a finding that the Panel does not need to establish a causal nexus between the unacceptable circumstances and their effect on the group of persons, instead only needing to satisfy itself that the order is appropriate to protect their rights or interests.[197] In addition, the Full Court reinforced the view that, in determining the effect of the relevant circumstances, the Panel can speculate as to what would have happened without

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189 Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 5. See also Emma Armson, 'Before the High Court — *Attorney–General (Commonwealth) v Alinta Limited*: Will the Takeovers Panel Survive Constitutional Challenge?' (2007) 29(3) *Sydney Law Review* 495, 498–9.

190 *Corporations Act* s 657A(2)(b).

191 Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 5–6.

192 Ibid 6; *Cemex Australia Pty Ltd v Takeovers Panel* (2008) 106 ALD 5, 17–18 (Stone J) ('*CEMEX (First Instance)*'); *Cemex Australia Pty Ltd v Takeovers Panel* (2009) 177 FCR 98, 114 ('*CEMEX (Full Court)*').

193 See Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 6.

194 *CEMEX (First Instance)* (2008) 106 ALD 5; *CEMEX (Full Court)* (2009) 177 FCR 98.

195 *CEMEX (First Instance)* (2008) 106 ALD 5, 21; *CEMEX (Full Court)* (2009) 177 FCR 98, 123.

196 *Rinker 02R* (2007) 64 ACSR 472, 475–6.

197 *CEMEX (Full Court)* (2009) 177 FCR 98, 121–2.

those circumstances provided there is a foundation for its conclusion.[198] The Full Court 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 different position if the order had been 'totally disproportionate to any rational view of the lost opportunity [to benefit from the dividend]'.[199]

Second, the *CEMEX* cases build upon the clear endorsement of the Panel's expertise by the High Court in upholding the constitutionality of the Panel in *Attorney-General (Cth) v Alinta Ltd* ('*Alinta*').[200] 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.[201] The Full Court emphasised the approach adopted in separate judgments by Gleeson CJ, Kirby J and Hayne J in *Alinta* in relation to the Panel's expertise and role in resolving takeover disputes.[202] In particular, Kirby J stated that

> 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.[203]

3 *Tinkerbell Case*

The third judicial review matter ('*Tinkerbell* case') related to decisions of an initial and Review Panel finding that persons were associated and had consequently breached the takeover prohibition in the *Corporations Act*.[204] A declaration of unacceptable circumstances and orders were made by the initial Panel.[205] The Review Panel declined to conduct proceedings as there was not any reasonable likelihood they would come to a different outcome.[206] The initial Panel used inferences to come to its conclusions, applying the Panel's usual approach in relation to such matters.[207] These conclusions were that a daughter and her father were acting or proposing to 'act in concert' in relation to an acquisition of shares, or that they had entered into a relevant agreement in relation to the acquisition for the purpose of controlling or influencing the conduct of the company's affairs.[208]

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198 See *Australian Pipeline v Alinta Ltd* (2006) 237 ALR 158, 190 (Emmett J); *CEMEX (Full Court)* (2009) 177 FCR 98, 119.

199 *CEMEX (Full Court)* (2009) 177 FCR 98, 122.

200 (2008) 233 CLR 542.

201 See *CEMEX (First Instance*) (2008) 106 ALD 5, 15; *CEMEX (Full Court)* (2009) 177 FCR 98, 114–15.

202 See *CEMEX (Full Court)* (2009) 177 FCR 98, 115; *Alinta* (2008) 233 CLR 542, 552 (Gleeson CJ), 562 (Kirby J), 576 (Hayne J).

203 See *Alinta* (2008) 233 CLR 542, 562; *CEMEX (Full Court)* (2009) 177 FCR 98, 115.

204 *Tinkerbell Enterprises Pty Ltd as Trustee for The Leanne Catelan Trust v Takeovers Panel* (2012) 208 FCR 266, 268–9, 279 (Collier J) ('*Tinkerbell*').

205 Ibid 269.

206 Ibid 280.

207 Ibid 279.

208 Ibid 278–9.

In dismissing the judicial review application,[209] the Federal Court in the *Tinkerbell* case bolstered the position of the Panel in relation to the three key grounds of attack against the Panel decisions. First, Collier J rejected an argument that the Panel's finding is reviewable as an error of law if it is not 'reasonable and definite'.[210] Instead, the Court reaffirmed earlier authority that there will be no error of law provided the inference is 'reasonably open' to the Panel, even if the inference appeared to have resulted from 'illogical reasoning'.[211] Second, and importantly, the Court made it clear that the Panel is not required to hold an oral hearing 'in every case' to comply with the rules of natural justice.[212] Rather, Collier J recognised that it would have been unusual for the Panel to convene an oral conference in this case.[213]

Finally, the Court in the *Tinkerbell* case rejected the argument that it was a breach of natural justice for the initial Panel to draw inferences and reach conclusions relating to what was 'uncommercial behaviour' or 'usual' based upon their collective experience.[214] Collier J instead concluded that it was appropriate for the initial Panel to draw on 'their own skill, knowledge and experience … in assessing evidence and drawing inferences', and noted that the Panel had stated in its reasoning when it had done this.[215] In support of this, the Court cited the Full Court decision in the *CEMEX* matter,[216] and noted that the Panel would otherwise be stripped 'in large part of its effectiveness as a specialist body established to resolve takeover disputes, as mandated by the legislation'.[217]

4 *QNA Cases*

The most recent set of judicial review cases ('*QNA* cases')[218] raise important questions relating to certainty and the role of the Australian Panel. The first three of these cases related to a declaration of unacceptable circumstances and orders by the Panel ('First Panel') in July 2012, in relation to acquisitions by Queensland North Australia Pty Ltd ('QNA') in July 2011 ('first acquisition') and March 2012 ('second acquisition').[219] The First Panel had found that the first acquisition occurred in contravention of the takeover prohibition in s 606 of the *Corporations Act*, while the second acquisition only satisfied the creeping acquisition exception in s 611 item 9 due to the first acquisition.[220] The pivotal issue before the courts

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209 Ibid 299.
210 Ibid 288, 296–7.
211 Ibid 296–7.
212 Ibid 298.
213 Ibid 297.
214 Ibid.
215 Ibid 299.
216 *CEMEX (Full Court)* (2009) 177 FCR 98, 119–20.
217 *Tinkerbell* (2012) 208 FCR 266, 299.
218 *Queensland North Australia Pty Ltd v Takeovers Panel* (2014) 100 ACSR 358 (Collier J) ('*QNA (First Instance)*'); *Queensland North Australia Pty Ltd v Takeovers Panel* (2015) 320 ALR 726 ('*QNA (Full Court) (No 1)*'); *Queensland North Australia Pty Ltd v Takeovers Panel (No 2)* (2015) 236 FCR 370 ('*QNA (Full Court) (No 2)*'); *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* (2015) 328 ALR 664 (Greenwood J) ('*QNA (Time Extension)*').
219 *Re The President's Club Ltd* [2012] ATP 10 (24 July 2012) ('*QNA (Panel) (No 1)*') 25–9.
220 Ibid 26, 28–9.

was whether the application to the First Panel on 26 June 2012 had been made within the time limit in s 657C(3) of the *Corporations Act*.[221] This subsection provides that:

> (3) An application for a declaration under section 657A can be made only within:
>
> (a) 2 months after the circumstances have occurred; or
>
> (b) a longer period determined by the Panel.[222]

The First Panel concluded that this requirement was satisfied as the application alleged contraventions of the *Corporations Act* that were 'ongoing circumstances'.[223] In addition to the s 606 breach, the application had alleged that 'QNA appeared to be in breach of s 631 as the time for making a complying bid had passed',[224] and that QNA had lodged a bidder's statement that did not comply with the minimum price rule in s 621(3) and contained 'material information deficiencies'.[225] As an alternative, the First Panel stated that 'in case it should be necessary we extended the time for making the application to the date on which it was made'.[226]

In the Federal Court at first instance, Collier J dismissed QNA's application for judicial review of the First Panel's decision.[227] In relation to the key issue of the timing of the application, Collier J concluded that the First Panel had found that there were 'ongoing unacceptable circumstances' and that this finding was open to the Panel.[228] However, it was found that the proceedings would otherwise have been out of time as the First Panel had extended the time for the application in a manner that was contrary to the rules of natural justice.[229] In particular, Collier J noted that the First Panel had made its decision 'cursorily', without providing QNA with an opportunity to make submissions and without reasons.[230] Her Honour contrasted this with the 'careful consideration' of this issue in *Re Austral Coal Ltd (No 3)* ('*Austral Coal 03*'),[231] and endorsed the following statement by the Panel in that decision:

> The [P]anel is given a discretion to extend the 2 month time limit set out in s 657C(3)(a) to make an application. The panel considered that it should not lightly exercise that discretion. The time limit was set by the legislature to provide certainty to market participants in the context of takeovers that actions could not be challenged indefinitely.[232]

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221 Ibid 5.

222 Unless it obtains an extension from the Court, the Panel is required to make the declaration within the latest of '[three] months after the circumstances occur' or one month after the application: *Corporations Act* s 657B. See also *QNA (Panel) (No 1)* [2012] ATP 10 (24 July 2012), 6.

223 *QNA (Panel) (No 1)* [2012] ATP 10 (24 July 2012), 6.

224 Ibid 5.

225 Ibid.

226 Ibid 6.

227 *QNA (First Instance)* (2014) 100 ACSR 358, 417.

228 Ibid 378, 383.

229 Ibid 376.

230 Ibid.

231 (2005) 55 ACSR 283.

232 *Austral Coal 03* (2005) 55 ACSR 283, 286. See also *QNA (First Instance)* (2014) 100 ACSR 358, 379.

The Full Federal Court allowed QNA's appeal against Collier J's decision, set aside the First Panel's declaration of unacceptable circumstances and orders, and remitted the matter for rehearing by the Panel.[233] This decision resulted from the Full Court's finding that the application to the First Panel, and consequently its declaration of circumstances, were made out of time.[234] The Full Court agreed with Collier J that the First Panel's decision to extend time was contrary to the rules of natural justice,[235] but disagreed that the circumstances were 'ongoing or continuing'.[236] In coming to this conclusion, the Full Court focused on the wording of the First Panel's declaration, the relevant legislation and the policy rationale for the Australian Panel's role. It first noted that the First Panel's declaration relied on the conclusion that the 'circumstances' of the first and second acquisitions were 'unacceptable' having regard to their 'effect'.[237] Second, the Full Court emphasised the fact that ss 657B(a) and 657C(3)(a) refer respectively to when the circumstances 'occur' and 'occurred'.[238] In particular, the Full Court observed that: 'That the *effects* of the circumstances (the acquisition of the shares in breach of s 606) are continuing does not render the circumstances as continuing to 'occur' or as continuing to 'have occurred'.[239]

Finally, the Full Court pointed out that coming to a different interpretation would be contrary to the policy objectives of the legislative scheme, which contemplated applications to and declarations by the Australian Panel being made 'within relatively short periods of time following the occurring of the particular "circumstances"'.[240] Consequently, the time limits in ss 657B and 657C(3) could not be extended through reliance on the 'ongoing *effects* of the circumstances'.[241] Significantly, the Court emphasised the effect of uncertainty on the market that would otherwise occur, as there would be extended periods during which 'the market would be operating on a basis which might later be the subject of regulatory intervention by the panel'.[242]

Notwithstanding this, the Full Federal Court remitted the matter to be considered by another Panel ('Second Panel') for determination in light of its conclusion that it was 'by no means clear that … [this] would be futile'.[243] The Second Panel's decision to extend the time for the application to be made under s 657C(3)(b) was also the subject of a judicial review application.[244] However, this challenge was unsuccessful, with the Federal Court also extending the time for a declaration of unacceptable circumstances to be made.[245] In making this decision,

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233 The Full Court delivered two decisions by the whole Court, the first setting out its reasons (*QNA (Full Court) (No 1)* (2015) 320 ALR 726), and the second containing its orders effective on 4 September 2015 (*QNA (Full Court) (No 2)* (2015) 236 FCR 370).

234 *QNA (Full Court) (No 1)* (2015) 320 ALR 726, 741.

235 Ibid.

236 Ibid 739–40.

237 Ibid 739.

238 Ibid.

239 Ibid 740 (emphasis in original).

240 Ibid.

241 Ibid (emphasis in original).

242 Ibid.

243 Ibid 746.

244 *QNA (Time Extension)* (2015) 328 ALR 664.

245 Ibid 686, 694.

the Court concluded that the purpose of the provisions on declarations of unacceptable circumstances could still be achieved notwithstanding the amount of time that had passed.[246] The Second Panel concluded that there was a clear contravention of the takeover prohibition in s 606 and the 'ongoing effects' of this contravention had not diminished over time.[247] In relation to market certainty, the Second Panel noted that the legislative time limit reflected the need for matters to be resolved quickly, but that this was not determinative.[248] As a result, the Second Panel made a declaration of unacceptable circumstances, with orders limiting the voting rights of the relevant parties to be consistent with the 20% threshold and the circumstances in which they could rely on the creeping acquisition exception.[249]

There are two clear lessons for the Australian Panel resulting from the *QNA* cases. First, before exercising its discretion under s 657C(3)(b) to extend time for an application, the Panel must give affected persons an opportunity to make submissions and give reasons for its decision.[250] Second, the Panel must ensure that it distinguishes clearly between unacceptable circumstances that are ongoing and the ongoing effects of unacceptable circumstances.[251] Indeed, it was argued in the most recent Federal Court decision that the Second Panel had erred in continuing to refer to 'ongoing unacceptable circumstances' in its summary of its reasons for extending time for the application.[252] Although the Court concluded that it was not satisfied that the Second Panel had taken irrelevant considerations into account or otherwise erred in making its decision, it remarked that the 'use of this phrase is unfortunate'.[253] This serves as a further warning to future Panels to avoid such statements.

C *Impact of Judicial Review on Finality*

The judicial review decisions to date confirm the important role that courts play in ensuring that the Panel acts according to law. This rule of law concern provides a significant policy basis for judicial review of Panel decisions, in addition to the legal requirement arising from s 75(v) of the *Australian Constitution*. In particular, this is demonstrated through the *Tinkerbell* and *QNA* cases, which provide guidance on the application of the rules of natural justice to the Panel's proceedings. The *Glencore* and *QNA* cases also present examples of where the Court has found that the Panel has erred in exercising its powers. Following the *Glencore* cases, the legislative provisions were amended in response to concerns that the interpretation given to the Panel's jurisdiction would undermine its ability to perform its functions. The benefits of these amendments and the High Court's decision in *Alinta* were confirmed in the *CEMEX* cases. Following this, the outcome of the *QNA* cases reflected the *Datafin* principle applied by the UK

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246 Ibid 694.
247 *Re The President's Club Ltd 02* [2016] ATP 1 (5 February 2016) ('*QNA (Panel) (No 2)*') 22, 37.
248 Ibid 23.
249 Ibid 37–9, 42, 56–8.
250 See above nn 229–32 and accompanying text.
251 See text accompanying above n 239 and following.
252 See *QNA (Time Extension)* (2015) 328 ALR 664, 682.
253 Ibid 683.

courts, as they resulted in orders enabling the Panel not to repeat its errors and relieving parties of the consequences.

However, the availability of judicial review necessarily affects the ability of Panel decision-making to provide finality for market participants. Although the experience to date has not validated concerns that judicial review might become a routine part of Panel proceedings following the *Glencore* cases, the entrenched ability to apply to the High Court under s 75(v) during the takeover bid period undermines the effectiveness of the privative clause in s 659B of the *Corporations Act*. This means that the extent to which the system can minimise tactical litigation depends upon the approach adopted by the courts in response to applications made by market participants. In the UK, the courts have adopted an approach of judicial restraint, which has resulted in only three applications to date (with none successful in over 45 years). In contrast, the Australian courts have adopted a less restrictive approach, and have decided more judicial review matters in relation to the Australian Panel decisions in over 15 years.

Although judicial review has been used to a greater extent in Australia than in the UK, there have only been seven Australian Panel decisions in four different circumstances affected by judicial review applications since the CLERP reforms commenced on 13 March 2000 until 30 June 2016. This represents a relatively small proportion of the total decisions made by the Panel over that period (totalling less than 2%). However, the incidence of judicial review has had a significant impact on those particular matters in terms of the time that it has taken to resolve the matters. In this context, it is unfortunate that the *QNA* cases resulted in further delay given the focus of the Full Federal Court on promoting certainty in the market.

D *Assessment of Finality*

As in the case of consistency, this article has assessed finality against benchmarks involving strong, medium and weak forms. The strong form of finality is indicated where courts confirm decisions of the Panel consistently and/or discourage judicial review applications through their decisions. Under the medium form, judicial review is limited to some extent and/or leads to a different outcome in a limited number of matters. On the other hand, the weak form involves frequent judicial review applications being made and/or the consistent overturning of Panel decisions by the courts.

Based on the above analysis, the outcome of judicial review applications regarding Australian Panel decisions to date reflects a medium form of finality. The position in Australia can be contrasted with the strong form evidenced in relation to judicial review in the UK. On the other hand, the relatively small number of judicial review decisions in Australia compared to the total number of Panel decisions means that it would not be appropriate to assess the finality of Panel decision-making as reflecting the weak form. The conclusion of a medium form of finality is supported by the fact that Panel decisions have been overturned in the context of half of the four different circumstances affected by judicial review. In addition, judicial review applications are able to be made during the

takeover bid period notwithstanding the privative clause,[254] with the Australian courts also adopting less restraint in relation to judicial review matters compared to their UK counterparts.[255]

V Conclusion

Certainty is needed to create an environment in which parties can enter into commercial transactions. This is particularly the case in the context of takeovers, given the significant amount of funds involved and impact that such transactions have on shareholders. As the Australian Takeovers Panel is responsible for deciding takeover disputes during the bid period, it is consequently important that there is certainty in relation to its decisions. This article has examined whether there has been certainty in relation to Australian Panel decision-making since 2000, when the Panel was given its current role under the CLERP reforms. The article has addressed this question by focusing on the two key elements of certainty. The first element of consistency requires that persons who are in a similar situation 'receive similar treatment and outcomes'.[256] The second element of certainty relates to the finality of Panel decisions, namely the extent to which the matter is determined finally by the Panel, which is affected adversely by the availability of judicial review.

The analysis in this article began with a focus on how to measure these two elements of certainty. In relation to consistency, a case study approach was adopted to facilitate a qualitative analysis of the Panel's decision-making. The case study focused solely on ASIC's 'truth in takeovers' policy, and established that the Panel decisions demonstrated a high level of consistency. This is because, with the exception of minor differences between the declarations and orders in some of the Review Panel decisions, the Panel decisions, on the whole, adopted a consistent approach in relation to the way in which the Panel applied the policy. In light of the sample size of the case study and controversy surrounding the Panel's decisions on the TTP policy, this provides a sufficient basis upon which to conclude that the Panel's decisions provide high levels of consistency generally.

In order to assess finality, a qualitative analysis was conducted of the judicial review decisions in relation to Panel matters. The analysis demonstrated that the Australian Panel's experience with judicial review to date reflects a medium form of finality. This is because, while there has been a relatively small number of judicial review decisions in Australia compared to the total number of Panel decisions, the courts have overturned its decisions in the context of half of the four circumstances affected by judicial review. The regulatory framework and judicial approach in Australia also place fewer limitations in relation to judicial review applications than in the UK. As a result, it is concluded that the Australian Panel has achieved, to date, a medium to high level of certainty overall since the CLERP reforms in 2000.

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254 See text accompanying above n 181 and following.
255 Compare text following above n 167 with text following above n 182.
256 See above n 24.

Appendix 1: Case Study Decisions by the Australian Takeovers Panel: 13 March 2000 to 30 June 2016

The decisions in this article's case study in order of the date of the decision are as follows.

Re Taipan Resources NL (No 6) (2000) 36 ACSR 716 ('*Taipan 06*')
Re Anaconda Nickel Ltd 18 [2003] ATP 18 (10 April 2003) ('*Anaconda 18*')
Re Sirtex Medical Ltd [2003] ATP 22 (2 July 2003)
Re Prudential Investment Co of Australia Ltd (2003) 49 ACSR 147 ('*Prudential*')
Re BreakFree Ltd (Nos 3 and 4) (2003) 49 ACSR 337 ('*BreakFree 03/04*')
Re BreakFree Ltd (No 4R) (2004) 22 ACLC 1165 ('*BreakFree 04R*')
Re Novus Petroleum Ltd (No 2) (2004) 50 ACSR 95 ('*Novus 02*')
Re Australian Leisure and Hospitality Group Ltd (No 3) (2004) 52 ACSR 260 ('*ALH 03*')
Re Patrick Corporation Ltd (2005) 55 ACSR 231
Re Austral Coal Ltd (No 2RR) (2005) 23 ACLC 1797 ('*Austral Coal 02RR*')
Re Axiom Properties Ltd 02 [2006] ATP 5 (22 February 2006) ('*Axiom 02*')
Re Andean Resources Ltd [2006] ATP 21 (5 July 2006) ('*Andean*')
Re Aztec Resources Ltd 02 [2006] ATP 30 (26 September 2006) ('*Aztec 02*')
Re Vision Systems Ltd 02 [2006] ATP 33 (6 October 2006) ('*Vision 02*')
Re Summit Resources Ltd (2007) 64 ACSR 626 ('*Summit*')
Re Rinker Group Ltd 02 [2007] ATP 17 (12 July 2007) ('*Rinker 02*')
Re Rinker Group Ltd (No 2R) (2007) 64 ACSR 472 ('*Rinker 02R*')
Re Consolidated Minerals Ltd [2007] ATP 20 (26 August 2007) ('*Consolidated Minerals 01*')
Re Consolidated Minerals Ltd 02 [2007] ATP 21 (29 August 2007) ('*Consolidated Minerals 02*')
Re Consolidated Minerals Ltd 03 (2007) 25 ACLC 1729 ('*Consolidated Minerals 03*')
Re Consolidated Minerals Ltd 03R (2007) 25 ACLC 1739 ('*Consolidated Minerals 03R*')
Re Golden West Resources Ltd 03 and 04 (2008) 26 ACLC 116 ('*Golden West 03/04*')
Re Gosford Quarry Holdings Ltd (2008) 67 ACSR 156 ('*Gosford Quarry 01*')
Re Gosford Quarry Holdings Ltd 01R (2008) 67 ACSR 164 ('*Gosford Quarry 01R*')
Re Just Group Ltd [2008] ATP 22 (1 August 2008) ('*Just Group*')
Re MYOB Ltd [2008] ATP 27 (21 November 2008) ('*MYOB*')
Re Lion-Asia Resources Pte Ltd [2009] ATP 25 (3 December 2009) ('*Lion-Asia*')
Re Ludowici Ltd [2012] ATP 3 (28 February 2012) ('*Ludowici 01*')
Re Ludowici Ltd 01R(a) and (b) [2012] ATP 4 (9 March 2012) ('*Ludowici 01R*')
Re Alesco Corp Ltd 01 and 02 [2012] ATP 14 (16 August 2012) ('*Alesco 01/02*')
Re Alesco Corp Ltd 03 [2012] ATP 18 (3 September 2012) ('*Alesco 03*')
Re Warrnambool Cheese and Butter Factory Company Holdings Ltd [2013] ATP 16 (17 December 2013) ('*Warrnambool*')
Re Bullabulling Gold Ltd [2014] ATP 8 (5 June 2014) ('*Bullabulling*')
Re Envestra Ltd [2014] ATP 13 (9 July 2014) ('*Envestra*')
Re Ambassador Oil and Gas Ltd 01 [2014] ATP 14 (28 July 2014) ('*Ambassador 01*')
Yancoal Australia Ltd [2014] ATP 24 (12 December 2014) ('*Yancoal*')
Re Sedgman Ltd [2016] ATP 2 (19 February 2016)
Re Gulf Alumina Ltd [2016] ATP 4 (11 March 2016) ('*Gulf Alumina*')

Appendix 2: Judicial Review of the Decisions by the Australian Takeovers Panel: 13 March 2000 to 30 June 2016

Glencore International AG v Takeovers Panel (2005) 220 ALR 495 ('*Glencore (No 1)*')
Glencore International AG v Takeovers Panel (2006) 151 FCR 77 ('*Glencore (No 2)*')
Cemex Australia Pty Ltd v Takeovers Panel (2008) 106 ALD 5 ('*CEMEX (First Instance)*')
Cemex Australia Pty Ltd v Takeovers Panel (2009) 177 FCR 98 ('*CEMEX (Full Court)*')
Tinkerbell Enterprises Pty Ltd as Trustee for The Leanne Catelan Trust v Takeovers Panel (2012) 208 FCR 266 ('*Tinkerbell*')
Queensland North Australia Pty Ltd v Takeovers Panel (2014) 100 ACSR 358 ('*QNA (First Instance)*')
Queensland North Australia Pty Ltd v Takeovers Panel (2015) 320 ALR 726 ('*QNA (Full Court) (No 1)*')
Queensland North Australia Pty Ltd v Takeovers Panel (No 2) (2015) 236 FCR 370 ('*QNA (Full Court) (No 2)*')
Palmer Leisure Coolum Pty Ltd v Takeovers Panel (2015) 328 ALR 664 ('*QNA (Time Extension)*')