

# *Before the High Court*

## *Attorney-General (Commonwealth) v Alinta Limited:* Will the Takeovers Panel Survive Constitutional Challenge?

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### *Abstract*

The Takeovers Panel is the primary decision-making body in relation to takeovers under the *Corporations Act* 2001 (Cth). In *Australian Pipeline Limited v Alinta Limited*,<sup>1</sup> a majority of the Full Federal Court found a key part of the Panel's jurisdiction to be invalid on the basis that it was exercising judicial power contrary to Chapter III of the *Commonwealth Constitution*. This article examines the High Court authorities on 'judicial power' and analyses their application to the Panel. It finds that the Panel's functions are similar to those previously considered by the High Court to be non-judicial. However, if the High Court were to come to a contrary conclusion due to the provision allowing the Panel to make a declaration based upon certain contraventions of the *Corporations Act*, then this provision should be severed. This would allow the Panel to continue to operate based upon it making decisions solely taking into account policy considerations.

### *1. Introduction*

The High Court will soon decide the fate of the Takeovers Panel. Elements of the Panel's jurisdiction have been struck down by a majority of the Full Federal Court and its remaining powers have been called into question. Originally established as the Corporations and Securities Panel ('previous Panel') with more limited powers, the Panel survived constitutional challenge in the High Court following its first matter in *Precision Data Holdings Ltd v Wills*.<sup>2</sup> Similarly, the Takeovers Panel's expanded powers were found to be constitutional in Federal Court decisions made by a single judge,<sup>3</sup> including by Emmett J in the *Alinta* proceedings at first instance.<sup>4</sup>

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1 (2007) 25 ACLC 602 ('*Alinta*').

2 (1991) 173 CLR 167 ('*Precision Data*').

3 *Glencore International AG v Takeovers Panel* (2005) 220 ALR 495 ('*Glencore*') at 510–1 (Emmett J); *Tower Software Engineering Pty Ltd, Re; Pendant Software Pty Ltd v Harwood* (2006) 154 FCR 150 at 167 (Goldberg J).

4 *Australian Pipeline Limited v Alinta Limited* (2006) 24 ACLC 1207 at 1235 (Emmett J).

The Takeovers Panel is a Commonwealth administrative body responsible for determining whether circumstances relating to a takeover are unacceptable under the *Corporations Act 2001* (Cth) (*Corporations Act*). In the Full Federal Court decision in *Alinta*, Gyles and Lander JJ held that the Panel was exercising the judicial power of the Commonwealth contrary to Chapter III of the *Commonwealth Constitution* ('the Constitution').<sup>5</sup> The majority relied upon four main changes to the legislative regime governing the Takeovers Panel: namely, the ability of the Panel to make a declaration based upon a contravention of the *Corporations Act*; the fact that any interested person can apply to the Panel; the limitations on the courts' powers and the more detailed specification of Panel orders.<sup>6</sup> In dissent, Finkelstein J found that the Panel did not exercise judicial power.<sup>7</sup>

The *Alinta* proceedings were concerned with a series of agreements arising from the merger between The Australian Gas Light Company and Alinta Limited ('Alinta'), and subsequent acquisitions of units in the Australian Pipeline Trust by Alinta and a subsidiary ('Alinta acquisitions'). At first instance, Emmett J heard two proceedings relating to this matter. The first proceeding involved alleged contraventions of the 20 per cent takeover threshold in s 606 of the *Corporations Act*. In the second proceeding, Emmett J refused an application for judicial review of a Panel decision ('judicial review proceeding'). The Panel had made a declaration of unacceptable circumstances in relation to the Alinta acquisitions and made orders that included requiring divestiture of the units. Both of these proceedings were the subject of an appeal to the Full Federal Court.

This article focuses upon the constitutional issues identified in the Full Federal Court decision, which are presently the subject of a grant of special leave to the High Court. The primary question is whether the provisions giving the Panel its jurisdiction to make a declaration of unacceptable circumstances, at that time s 657A(2)(a) and s 657A(2)(b) of the *Corporations Act*,<sup>8</sup> are invalid on the ground that they purport to confer on the Panel the judicial power of the Commonwealth contrary to Chapter III of the Constitution. While the majority in the Full Federal Court held that s 657A(2)(b) was invalid, it also found that the general jurisdiction provision in s 657A(1) was invalid to the extent that it purported to give the Panel jurisdiction to declare circumstances that contravened the Act to be unacceptable. Similarly, the majority found s 657A(2)(a) to be invalid, subject to s 15A of the *Acts Interpretation Act 1901* (Cth),<sup>9</sup> to the extent that it purported to confer judicial power on the Panel. These *Corporations Act* provisions are discussed in detail below.<sup>10</sup>

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5 *Alinta* (2007) 25 ACLC 602 at 673, 676–7 (Gyles & Lander JJ).

6 *Alinta* (2007) 25 ACLC 602 at 669–70, 676 (Gyles & Lander JJ).

7 *Alinta* (2007) 25 ACLC 602 at 622 (Finkelstein J).

8 Although the provisions have since been amended, their substance is in effect the same for the purposes of this article.

9 This section provides that '[e]very Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power'.

10 See below text following n24.

## 2. *The Takeovers Panel*

The Panel was originally established in 1991 for the purpose of enforcing the ‘spirit’ of the takeover provisions.<sup>11</sup> That is, in addition to breaches of the law being brought before the courts, the regulator (then the Australian Securities Commission) had the power to apply to the previous Panel for a ‘declaration of unacceptable circumstances’ where a takeover did not comply with the policy underlying the law.<sup>12</sup> This role was expanded significantly in 2000 ‘to make the Panel the main forum for resolving disputes about a takeover bid until the bid period has ended’.<sup>13</sup> The policy reasoning behind the reforms was to allow the Panel to respond more appropriately to the commercial issues raised in takeover disputes, so that they could be resolved efficiently to allow shareholders to decide on the merits of the takeover.<sup>14</sup>

In order to achieve these aims, the Panel’s role was expanded by allowing any ‘person whose interests [were] affected’ (not just the regulator) to apply to the Panel in relation to unacceptable circumstances arising from a takeover.<sup>15</sup> The Panel’s jurisdiction to make a declaration was also expanded to allow it to take into account contraventions of the takeover and other related provisions.<sup>16</sup> An internal review process was introduced for ‘unacceptable circumstances’ matters, with the Review Panel similarly comprising three members of the Panel and having comparable powers to the original Panel.<sup>17</sup> The Panel was also given the role previously undertaken by the Administrative Appeals Tribunal of reviewing decisions of the regulator (now the Australian Securities and Investments Commission or ‘ASIC’) in relation to its exemption and modification powers.<sup>18</sup>

The Panel’s core role is to ensure that parties act in accordance with the purposes of the takeover provisions in Chapter 6 of the *Corporations Act*. Set out in s 602, these purposes essentially ensure that acquisitions take place in an ‘efficient, competitive and informed market’ and that members of the target company or listed managed investment scheme have sufficient information and time to make a decision and are afforded a ‘reasonable and equal opportunity to participate in any benefits’ under a takeover bid.<sup>19</sup> With the exception of the first,

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11 *Australian Securities Commission Act* 1989 (Cth) s 171. It was renamed in 2001: see Takeovers Panel, ‘New Name for the Takeovers Panel’ (Press Release, 11 October 2001).

12 *Corporations Law* ss 733, 732. This policy comprised the ‘Eggleston principles’, the substance of which is now contained in *Corporations Act* 2001 (Cth) ss 602(b), 602(c): see below nn 19–20 and accompanying text.

13 *Corporations Act* 2001 (Cth) s 659AA. See also *Corporate Law Economic Reform Program Act* 1999 (Cth) sched 1 item 5.

14 Corporate Law Economic Reform Program, *Takeovers*, Proposals for Reform: Paper No 4 (1997) at 36 (‘CLERP 4’); Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) at 38.

15 *Corporations Act* 2001 (Cth) s 657C(2).

16 See below text accompanying n25.

17 *Corporations Act* 2001 (Cth) s 657EA.

18 *Corporations Act* 2001 (Cth) ss 655A, 656A, 656B.

19 *Corporations Act* 2001 (Cth) s 602.

these purposes are known as the ‘Eggleston principles’<sup>20</sup> and formed the basis of the previous Panel’s jurisdiction. The s 602 purposes are fulfilled by a legislative regime that is founded upon a prohibition against acquiring more than 20 per cent voting power unless one of the exceptions is satisfied.<sup>21</sup> Of these, the key exception is for a takeover bid conducted in accordance with Chapter 6.<sup>22</sup> This Chapter includes detailed requirements as to the terms of the takeover offer, the takeover procedure, variation and withdrawal of offers, acceptances and other activities during the bid.<sup>23</sup>

To ensure that the purposes of the takeover provisions are complied with, the Panel has the power to make a declaration of unacceptable circumstances and/or orders.<sup>24</sup> The basis upon which such a declaration may be made is set out in s 657A of the *Corporations Act*. Section 657A(1) gives the Panel the power to make a declaration whether or not the circumstances constitute a contravention of the Act. The grounds for making a declaration are set out in s 657A(2), which at the time of the *Alinta* proceedings provided that:

- (2) The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:
  - (a) are unacceptable having regard to the effect of the circumstances on:
    - (i) the control, or potential control, of the company or another company; or
    - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company; or
  - (b) are unacceptable because they constitute, or give rise to, a contravention of a provision of this Chapter [6] or of Chapter 6A, 6B or 6C.<sup>25</sup>

These provisions were amended earlier this year in light of the first judicial review proceeding with respect to the Panel’s operation since the 2000 reforms.<sup>26</sup>

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20 They originate from the Company Law Advisory Committee, *Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and Takeovers* (1969). For a critique of these principles, see Justin Mannolini, ‘Convergence or Divergence: Is there a Role for the Eggleston Principles in a Global M&A Environment?’ (2002) 24 *Sydney Law Review* 336 at 336-340, 360.

21 *Corporations Act* 2001 (Cth) s 606. This prohibition operates using a series of defined terms designed to capture influence over the voting, with the key term of ‘voting power’ being defined by reference to ‘relevant interests’ and ‘associates’: *Corporations Act* 2001 (Cth) ss 610, 608(1), 12(2).

22 *Corporations Act* 2001 (Cth) s 611 item 1, s 9 ‘takeover bid’.

23 *Corporations Act* 2001 (Cth) Parts 6.4–6.9.

24 See *Corporations Act* 2001 (Cth) ss 657A, 657D, 657E.

25 *Corporations Act* 2001 (Cth) ss 657A(2)(a), 657A(2)(b). Chapters 6, 6A, 6B and 6C deal with takeovers, compulsory acquisitions, rights and liabilities, and ownership information respectively.

26 *Corporations Amendment (Takeovers) Act* 2007 (Cth) sched 1 item 3-4. See generally *Glencore* (2005) 220 ALR 495 (Emmett J); Emma Armson, ‘The Australian Takeovers Panel and Judicial Review of its Decisions’ (2005) 26 *Adelaide Law Review* 327.

Consequently, the latest amendments seek to remedy concerns that the Panel's jurisdiction may be interpreted too narrowly for it to perform its role effectively.<sup>27</sup> Firstly, s 657A(2)(a) has been amended so that it applies having regard to the effect 'that the Panel is satisfied the circumstances have had, are having, will have or are likely to have' (rather than having regard to the effect 'of the circumstances').<sup>28</sup> This makes it clear that it is the role of the Panel to satisfy itself as to the effect or likely effect of the circumstances.<sup>29</sup> Secondly, a new subsection has been inserted to provide an additional basis upon which the Panel can make a declaration. The new s 657A(2)(b) empowers the Panel to make a declaration if it appears to the Panel that the circumstances 'are otherwise unacceptable ... having regard to the purposes of this Chapter set out in section 602'. Finally, the old s 657A(2)(b) has now become s 657A(2)(c) and 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*.

Despite the broad ambit of the Panel's powers, they are subject to a number of important limitations. Firstly, a declaration of unacceptable circumstances can only be made if the Panel considers it 'not against the public interest' after taking into account any relevant policy considerations.<sup>30</sup> In exercising this discretion, the Panel is required to have regard to the purposes of the takeover provisions, the other legislative provisions in Chapter 6 of the *Corporations Act*, the *Corporations Regulations* 2001 (Cth), Panel Rules,<sup>31</sup> and may also take into account any other matters it considers relevant.<sup>32</sup> Secondly, any orders that the Panel makes must not 'unfairly prejudice' any person.<sup>33</sup> Finally, enforcement of the legislative provisions, Panel's orders and Panel Rules is left to the courts. Although the Panel can take into account contraventions of the takeover related provisions in the *Corporations Act*, it cannot make an order requiring a person to comply with the legislation.<sup>34</sup> The Panel has the power to refer questions of law to a court and matters can be referred to the Panel when a court is hearing proceedings relating to a Panel decision.<sup>35</sup> A person contravening a Panel order is subject to prosecution in the courts for a strict liability offence.<sup>36</sup> In addition, ASIC, the President of the Panel, a party to the proceedings and a person to whom a Panel's order relates can

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27 Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) at 1.

28 A new definition of 'substantial interest' was also inserted as *Corporations Act* 2001 (Cth) s 602A.

29 Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) at 5.

30 *Corporations Act* 2001 (Cth) s 657A(2).

31 Takeovers Panel, *Rules for Proceedings* 2004 (Cth) ('Panel Rules'). These are the Takeover Panel's procedural rules provided for by section 195 of the *Australian Securities and Investments Commission Act* 2001 (Cth).

32 *Corporations Act* 2001 (Cth) s 657A(3).

33 *Corporations Act* 2001 (Cth) s 657D(1). See also Emma Armson, 'The Australian Takeovers Panel and Unfair Prejudice to Third Parties' (2004) 16 *Australian Journal of Corporate Law* 187.

34 *Corporations Act* 2001 (Cth) s 657D(2).

35 See *Corporations Act* 2001 (Cth) ss 659A, 657EB.

36 *Corporations Act* 2001 (Cth) s 657F.

apply for a court order to secure compliance with the Panel order.<sup>37</sup> Furthermore, Panel decisions are subject to review by both an internal Panel and the courts.<sup>38</sup>

The *Corporations Act* places significant restrictions on the courts' role in relation to takeovers. Section 659B contains a limitation clause that restricts access to a 'Court' (principally the Federal and Supreme Court)<sup>39</sup> during the takeover bid period, only allowing governmental authorities to commence such proceedings in relation to a takeover bid at that time.<sup>40</sup> However, the legislation emphasises that the High Court's jurisdiction under s 75 of the Constitution is not affected.<sup>41</sup> Section 659C of the *Corporations Act* limits the orders that a Court can make following the bid period, where it is found that there has been a breach of the Act and the Panel has refused to make a declaration of unacceptable circumstances.<sup>42</sup> In such a case, the Court cannot exercise its powers under the *Corporations Act* to unwind a transaction and can only use those powers to make remedial orders involving the payment of money.<sup>43</sup> This restriction does not, however, apply to the Court's exercise of its other powers.

### 3. *Judicial Power*

The central issue arising from the *Alinta* proceedings is whether the Takeovers Panel exercises judicial power contrary to Chapter III of the Constitution. The separation of judicial power brought about by Chapter III prevents the Parliament 'both from reposing any power essentially judicial in any other organ or body, and from reposing any other than that judicial power in such tribunals'.<sup>44</sup> Only the first limb of this requirement is relevant to the Panel. In deciding whether the Parliament has exceeded its legislative powers with respect to judicial power, it has been recognised that '[n]ullification of enactments and confusion of public business are not lightly to be introduced' and should not occur unless 'it becomes clear beyond reasonable doubt' that the legislation exceeds the constitutional limits.<sup>45</sup>

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37 *Corporations Act* 2001 (Cth) s 657G. Similar provisions apply in relation to Panel rules: ss 658C(5), 658C(6). See also the Court's powers to make orders in relation to takeover contraventions: s 1325A.

38 See *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ss 3, 5; *Judiciary Act* 1903 (Cth) s 39B; *Commonwealth Constitution* s 75; Armson above n26.

39 *Corporations Act* 2001 (Cth) s 58AA(1).

40 *Corporations Act* 2001 (Cth) s 659B(1).

41 *Corporations Act* 2001 (Cth) s 659B(5).

42 *Corporations Act* 2001 (Cth) ss 659C(1), 58AA.

43 *Corporations Act* 2001 (Cth) s 659C(2). Under section 659C(1), the Court's jurisdiction is limited to determining whether there has been an offence or contravention, ordering a person to pay a penalty or compensation to another or providing relief from liability or removing any procedural irregularity.

44 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 98 (Dixon J). See also *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 323 (Webb J) and 296 (Dixon CJ, McTiernan, Fullagar & Kitto JJ); *Commonwealth Constitution* s 71.

45 *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 ('*Munro*') at 180 (Isaacs J).

In *Precision Data*, the High Court highlighted the ‘acknowledged difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive’.<sup>46</sup> Instead, the courts have formulated a series of propositions, with no one factor, or series of factors, considered to be conclusive.<sup>47</sup> Consequently, the classification of a power often relies upon a value judgment.<sup>48</sup> This lack of precision has allowed the courts to adopt a flexible approach. In its 2007 decision in *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board; Gould v Magarey*,<sup>49</sup> the High Court majority affirmed that the authorities focus on the manner of exercise of the power, its subject matter and the purposes and consequences of its decisions.<sup>50</sup> The key factors considered by the High Court in determining whether judicial power exists are discussed in detail below.

### A. *Binding and Authoritative Decision*

The following definition is the traditional starting point in determining the meaning of judicial power,<sup>51</sup> namely:

the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects .... The exercise of this power does not begin until some tribunal which has power to give a *binding and authoritative decision* (whether subject to appeal or not) is called upon to take action.<sup>52</sup> [Emphasis added.]

It has accordingly been observed that judicial power includes ‘the power to carry [the] judgment into effect between the contending parties’.<sup>53</sup> The majority of the High Court in *Brandy v Human Rights and Equal Opportunity Commission*<sup>54</sup> found that, while the power of enforcement is not essential, it was ‘one aspect of judicial power which may serve to characterise a function as judicial when it is otherwise equivocal’.<sup>55</sup> In that case, the relevant function of the Human Rights and Equal Opportunity Commission was essentially to determine whether the legislation had been contravened. Furthermore, its power to grant damages and

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46 *Precision Data* (1991) 173 CLR 167 at 188 (the Court).

47 *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 (‘*Quinn*’) at 15 (Aickin J); *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530 at 544 (the Court).

48 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 67 (McHugh J).

49 (2007) 234 ALR 618 (‘*Albarran*’).

50 *Albarran* (2007) 234 ALR 618 at 627 (Gleeson CJ, Gummow, Hayne, Callinan, Heydon & Crennan JJ). See also Wendy Lacey, ‘Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the *Constitution*’ (2003) 31 *Federal Law Review* 57 at 73.

51 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 267–8 (Deane, Dawson, Gaudron & McHugh JJ).

52 *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ).

53 *Waterside Workers’ Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 451 (Barton J).

54 (1995) 183 CLR 245 (‘*Brandy*’).

55 *Brandy* (1995) 183 CLR 245 at 268 (Deane, Dawson, Gaudron & McHugh JJ).

declaratory relief made ‘its functions closely analogous to those of a court’.<sup>56</sup> Although the legislation provided that the Commission’s determinations were not ‘binding or conclusive’,<sup>57</sup> other provisions gave the determinations the effect of a Federal Court order through a process of registration.<sup>58</sup> The High Court concluded that this involved an exercise of judicial power, with the majority finding that this would not have been the case except for the effect of the registration process.<sup>59</sup>

In *Attorney-General (Cth) v Breckler*,<sup>60</sup> the High Court concluded that the Superannuation Complaints Tribunal (‘SCT’) did not exercise judicial power. Although not in itself conclusive, one of the key factors in this decision was the finding that the legislation in question took ‘the existence of a determination by the Tribunal as a criterion by reference to which legal norms [were] imposed and remedies provided for their enforcement’.<sup>61</sup> That is, it was found that the SCT’s determination provided a factual basis upon which the legislation then operated to impose obligations that could be enforced by the courts. Other factors taken into account in *Breckler* included that the SCT’s decision involved the arbitration of a dispute, the voluntary nature of submitting to the jurisdiction of the SCT and the fact that the legislation did ‘not purport to give determinations of the Tribunal that conclusive character which would prevent collateral challenge in proceedings to compel observance of those determinations’.<sup>62</sup> The majority noted that there existed broader opportunities for collateral challenge than in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*,<sup>63</sup> where the legislation provided that the determination was not to be ‘challenged, reviewed or called in question in any proceedings’.<sup>64</sup> However, the validity of the Tribunal in *Tasmanian Breweries* was upheld in the context of a specific provision that this did not limit the High Court’s jurisdiction.<sup>65</sup>

The powers of the Takeovers Panel can be contrasted with those of the Human Rights and Equal Opportunity Commission in *Brandy*, as the Panel’s main function

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56 *Brandy* (1995) 183 CLR 245 at 269 (Deane, Dawson, Gaudron & McHugh JJ).

57 *Brandy* (1995) 183 CLR 245 at 253 (Mason CJ, Brennan & Toohey JJ).

58 *Brandy* (1995) 183 CLR 245 at 269–70 (Deane, Dawson, Gaudron & McHugh JJ).

59 *Brandy* (1995) 183 CLR 245 at 269–70 (Deane, Dawson, Gaudron & McHugh JJ). The rest of the Court similarly focused upon this registration and enforcement process in concluding that it involved the exercise of judicial power: at 264 (Mason CJ, Brennan & Toohey JJ). See also *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 110 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ).

60 (1999) 197 CLR 83 (‘*Breckler*’).

61 *Breckler* (1999) 197 CLR 83 at 111 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ). See also *Munro* (1926) 38 CLR 153 at 180 (Isaacs J); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 378 (Kitto J).

62 *Breckler* (1999) 197 CLR 83 at 111–2 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ).

63 (1970) 123 CLR 361 (‘*Tasmanian Breweries*’).

64 *Tasmanian Breweries* (1970) 123 CLR 361 at 382 (Menzies J). See also *Breckler* (1999) 197 CLR 83 at 112 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ).

65 *Tasmanian Breweries* (1970) 123 CLR 361 at 382 (Menzies J); *Breckler* (1999) 197 CLR 83 at 112 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ).

is not to determine whether the legislation has been contravened<sup>66</sup> and Panel orders are not given the effect of a court order. Instead, Panel orders are enforced by the courts as was the case in *Albarran*.<sup>67</sup> As in *Breckler*, the Panel's decision to make a declaration of unacceptable circumstances and orders provides the factual basis for the operation of the enforcement provisions in the *Corporations Act*. Under both the strict liability offence provision in s 657F and the ability to apply for court enforcement of Panel orders under s 657G,<sup>68</sup> a court must find that there has been non-compliance with a Panel order for there to be legal consequences.

Although the majority of the Full Federal Court in *Alinta* placed particular emphasis on the existence of a strict liability offence,<sup>69</sup> the provisions for orders made by the previous Panel had a similar effect. That is, there was a mechanism for court enforcement of Panel orders<sup>70</sup> and general penalty provisions made it an offence if a person did 'not do an act or thing that [they were] required or directed to do by or under a provision of [the] Act'.<sup>71</sup> This applied to Panel orders through a provision that deemed a failure to comply with a Panel order to be a failure to comply with the provision empowering the Panel to make the order.<sup>72</sup> The current provision was expressly redrafted as a strict liability offence under the 2001 reforms resulting from the application of the *Criminal Code*,<sup>73</sup> reflecting the fact that strict liability would have applied under the common law for an offence with such a small penalty.<sup>74</sup>

The majority was also concerned that the enforcement of Panel orders under s 657F and s 657G did not provide for review of the Panel's decisions.<sup>75</sup> Notwithstanding the time limitation on commencing court proceedings in s 659B and the limitation on court orders where a Panel has refused to make a declaration under s 659C,<sup>76</sup> the ability of Panel decisions to be set aside on judicial review has been demonstrated in recent court cases.<sup>77</sup> Consequently, the fact that collateral challenge is not prevented in relation to Panel decisions strengthens the case for its

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66 See below text accompanying nn 95–100.

67 *Albarran* (2007) 234 ALR 618 at 620 (Gleeson CJ, Gummow, Hayne, Callinan, Heydon & Crennan JJ).

68 See above text accompanying nn 36–37.

69 *Alinta* (2007) 25 ACLC 602 at 671 (Gyles & Lander JJ).

70 *Corporations Act* 1989 (Cth) s 736.

71 *Corporations Act* 1989 (Cth) s 1311(1)(b) [Emphasis added.].

72 See *Corporations Act* 1989 (Cth) ss 104, 734.

73 *Treasury Legislation Amendment (Application of Criminal Code) Act (No 3) 2001* (Cth) s 3, sched 1 item 230.

74 Explanatory Memorandum, Treasury Legislation Amendment (Application of Criminal Code) Bill (No 3) 2001 (Cth) at 2, sched 1 item 224. The current penalty is \$2,750 (or \$13,750 for bodies corporate): see *Corporations Act* 2001 (Cth) s 1312, sched 3 item 212; *Crimes Act 1914* (Cth) s 4AA. Similarly, the applicable penalty for a Chapter 6 provision not specifically set out in schedule 3 of the previous Act was \$2,500 (or \$12,500 for bodies corporate): see *Corporations Act* 1989 (Cth) ss 1311(1)(b), 1312, sched 3.

75 *Alinta* (2007) 25 ACLC 602 at 671 (Gyles & Lander JJ).

76 See above text accompanying nn 40–43.

77 *Glencore* (2005) 220 ALR 495 (Emmett J); *Alinta* (2007) 25 ACLC 602 (Gyles & Lander JJ).

validity.<sup>78</sup> As in the case of *Tasmanian Breweries*, the legislation expressly provides that the High Court's jurisdiction is not affected.<sup>79</sup>

### **B. Existing Legal Rights versus Policy Considerations**

Prior to the majority of the Full Federal Court's decision in *Alinta*, the Panel's jurisdiction had been upheld primarily on the basis that its determinations created legal rights and obligations, rather than resolving controversies relating to existing rights.<sup>80</sup> As with other factors, it has been noted that this issue is not conclusive in determining whether judicial power has been exercised.<sup>81</sup> It was elaborated upon in *Tasmanian Breweries*:

Thus a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be *an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts* as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist ... [or it] needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified.<sup>82</sup> [Emphasis added.]

On the other hand, if the decision is not determined 'merely'<sup>83</sup> by applying legal principles but also includes policy considerations, it does not involve judicial power as it is not decided 'according to law'.<sup>84</sup> The consideration of policy demonstrates that the object of the power is to determine what rights and obligations should exist.<sup>85</sup> This is consistent with the Takeovers Panel's role, which continues to be centred upon its discretion to take into account policy considerations. Therefore, in exercising its powers to make a declaration of unacceptable circumstances, the Panel must have regard to the purposes of the takeover provisions and the public interest,<sup>86</sup> and may take into account any other matters considered relevant.<sup>87</sup> The purposes of the takeover provisions are based

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78 *Breckler* (1999) 197 CLR 83 at 111–2 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ).

79 *Corporations Act* 2001 (Cth) s 659B(5).

80 See above nn 2–7 and accompanying text.

81 *Precision Data* (1991) 173 CLR 167 at 190–1 (the Court). See also *Alinta* (2007) 25 ACLC 602 at 672 (Gyles & Lander JJ).

82 *Tasmanian Breweries* (1970) 123 CLR 361 at 374–5 (Kitto J).

83 *Precision Data* (1991) 173 CLR 167 at 189 (the Court).

84 *Brandy* (1995) 183 CLR 245 at 268 (Deane, Dawson, Gaudron & McHugh JJ).

85 *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 666 (the Court).

86 See generally *Visnic v Australian Securities and Investments Commission* (2007) 234 ALR 413 ('*Visnic*') at 417 (Kirby J).

87 See n32 and accompanying text.

upon the principles required to be considered by the previous Panel in *Precision Data* and are similarly set out in the legislation.<sup>88</sup>

In *Alinta*, the majority of the Full Federal Court took the view that, as the Panel decides whether there has been a contravention of the *Corporations Act* as ‘an essential part’ of the declaration process, it was ‘not to the point that the decision to declare or not to declare [involved] other factors involving the public interest and what might be called policy’.<sup>89</sup> Gyles and Lander JJ noted that the ‘mere existence’ of a discretion was not considered to be a determinative factor.<sup>90</sup> The majority concluded that the Panel’s powers involved more than creating future rights as the *Corporations Act* gave it the power to determine whether a breach has been committed and, if so, the power to make an appropriate remedial order.<sup>91</sup> Concerned that the Panel’s orders were ‘typical of remedies now available to courts’,<sup>92</sup> the majority relied upon the decision in *Mikasa (NSW) Pty Ltd v Festival Stores*.<sup>93</sup> In *Mikasa*, it was found that it was a judicial function to make a determination that there was a breach of a statute and to order an injunction to restrain an act in breach, particularly where it was not a criminal offence.<sup>94</sup>

Although the Panel may now make a declaration if the circumstances appear unacceptable due to a contravention of the takeover provisions or related Chapters in the *Corporations Act*, its decision-making process is very different to that described in the above quote from *Tasmanian Breweries*.<sup>95</sup> Even if the Panel makes its decision in light of a contravention of the legislation, it does not merely consider the facts and apply the law to them. As considered by the Court in *Albarran*, the Panel’s function is not to make a determination as to whether an offence has been committed, and any consideration of a possible contravention is only one step in its decision-making process.<sup>96</sup> Similarly, the Panel does not make a determination of guilt in relation to an offence, nor does it impose punishment for that offence.<sup>97</sup> There is also no requirement that the Panel make a declaration where there has been a contravention of the law.<sup>98</sup> Rather than resulting from the contravention, Panel declarations and orders follow from a finding of unacceptable circumstances. This finding is based upon both ‘subjective’ and ‘value’

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88 See above n19 and accompanying text.

89 *Alinta* (2007) 25 ACLC 602 at 672 (Gyles & Lander JJ).

90 *Alinta* (2007) 25 ACLC 602 at 672 (Gyles & Lander JJ). See also *Fencott v Muller* (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan & Deane JJ).

91 *Alinta* (2007) 25 ACLC 602 at 672–3 (Gyles & Lander JJ).

92 *Alinta* (2007) 25 ACLC 602 at 672 (Gyles & Lander JJ).

93 (1972) 127 CLR 617 (*‘Mikasa’*).

94 *Mikasa* (1972) 127 CLR 617 at 631 (Barwick CJ). See also *Alinta* (2007) 25 ACLC 602 at 663–4 (Gyles & Lander JJ).

95 See above text accompanying n82.

96 *Albarran* (2007) 234 ALR 618 at 623–4 (Gleeson CJ, Gummow, Hayne, Callinan, Heydon & Crennan JJ) and 640 (Kirby J).

97 *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2006) 151 FCR 466 at 477–8 (the Court). This statement was endorsed by the majority of the High Court in *Albarran* (2007) 234 ALR 618 at 625 (Gleeson CJ, Gummow, Hayne, Callinan, Heydon & Crennan JJ).

98 See *Alinta* (2007) 25 ACLC 602 at 620–1 (Finkelstein J).

judgments,<sup>99</sup> and results from the exercise of ‘an evaluative and discretionary power’.<sup>100</sup> Although renamed ‘remedial orders’, the range of orders that the Takeovers Panel can make is similar to that available to the previous Panel except for the introduction of costs orders.<sup>101</sup>

### C. *Nature of the Body*

Another important factor in the characterisation of a power is the nature of the body exercising it. It has been recognised that ‘there are functions which, when performed by a court, constitute the exercise of judicial power but, when performed by some other body, do not’.<sup>102</sup> Accordingly, some functions ‘may, chameleon like, take their colour from their legislative surroundings or their recipient’.<sup>103</sup>

Although takeover disputes arising during the course of a takeover bid are now dealt with by the Panel instead of the courts, the Panel has a substantially different role. Rather than focusing only upon whether there has been compliance with the technical requirements of the takeover provisions, the Panel’s jurisdiction centres upon upholding their purposes. Like a court, the Panel makes decisions involving disputes between parties and does so within an adversarial setting. However, the approach taken by the Panel in its decision-making differs markedly from a court.<sup>104</sup> For example, the Panel is not bound by the rules of evidence, although the rules of procedural fairness apply in circumstances where they are not inconsistent with the other requirements.<sup>105</sup> As a commercial body, the Panel bases its decisions on the circumstances before it in each matter and is not bound by the rules of precedent. Similarly, a significant proportion of Panel matters result in it accepting undertakings from one or more parties in lieu of making a declaration and/or orders.<sup>106</sup>

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99 *Precision Data* (1991) 173 CLR 167 at 189–90 (the Court).

100 *Albarran* (2007) 234 ALR 618 at 625, 623, 627 (Gleeson CJ, Gummow, Hayne, Callinan, Heydon & Crennan JJ) and 640 (Kirby J). See generally *Visnic* (2007) 234 ALR 413 at 417 (Kirby J).

101 *Corporations Act* 1989 (Cth) s 734(2); *Corporations Act* 2001 (Cth) s 657D, s 9 ‘remedial order’.

102 *Brandy* (1995) 183 CLR 245 at 267 (Deane, Dawson, Gaudron & McHugh JJ). See also *Farbenfabriken Bayer Aktien-Gesellschaft v Bayer Pharma Pty Ltd* (1959) 101 CLR 652 at 659–60 (Dixon CJ) and 660 (McTiernan, Kitto, Menzies & Windeyer JJ); *Precision Data* (1991) 173 CLR 167 at 189 (the Court); *Pasini v United Mexican States* (2002) 209 CLR 246 at 254 (Gleeson CJ, Gaudron, McHugh & Gummow JJ).

103 *Quinn* (1977) 138 CLR 1 at 18 (Aickin J). See also *Munro* (1926) 38 CLR 153 at 180 (Isaacs J); *Luton v Lessels* (2002) 210 CLR 333 at 387 (Callinan J).

104 See generally, Emma Armson, ‘The Australian Takeovers Panel: Commercial Body or Quasi-Court?’ (2004) 28 *Melbourne University Law Review* 565.

105 See *Australian Securities and Investments Commission Act* 2001 (Cth) (‘ASIC Act’) s 195(4); *Australian Securities and Investments Commission Regulations* 2001 (Cth) r 16(2)(a); *Panel Rules* r 7.

106 See, for example Emma Armson, ‘An Empirical Study of the First Five Years of the Takeovers Panel’ (2005) *Sydney Law Review* 665 at 678–9.

In deciding that the previous Panel was not exercising judicial power in *Precision Data*, the High Court took into account a number of its features.<sup>107</sup> With only a few exceptions, these features still characterise the Panel. Firstly, the Court relied upon the fact that only the regulator could apply to the previous Panel. The expansion of access to the Takeovers Panel to include applications by any person whose interests are affected has significantly increased the frequency of Panel decision-making (from four decisions by the previous Panel in the first decade to over 210 decisions since the 2000 reforms). However, this difference is not in itself significant enough to change the characterisation of the power given the nature of the Panel and its decision-making process. Secondly, the previous Panel did not ‘resolve an actual or potential controversy as to existing rights .... [or] make its decision *solely* by reference to the application of the law to past events or conduct’.<sup>108</sup> Although the Panel can now make a declaration based upon a contravention of the takeover and related provisions in the *Corporations Act*, it still remains the case that it does not make its decision based only upon an application of the law to the circumstances before it.<sup>109</sup>

The remaining features taken into account in *Precision Data* are particularly relevant to the Takeovers Panel’s operations. Thirdly, the Panel takes into account the commercial policy considerations reflected in the ‘spirit’ or purposes of the takeover provisions and any other matters considered relevant. This reinforces the first and second features discussed above. Fourthly, the Court emphasised that the object of the Panel’s role was to make both declarations and orders, thereby creating a new set of rights and obligations flowing from those orders. This was found notwithstanding the Panel’s power to make orders similar to that of a court, such as an order prohibiting or disregarding the exercise of voting rights, prohibiting the acquisition or disposal of particular shares or requiring the divestiture of shares.<sup>110</sup> As noted above, these orders are similar to the orders that can be made by the Takeovers Panel, with the exception of the introduction of costs orders.<sup>111</sup> The Court concluded that ‘in creating that new set of rights and obligations, considerations of policy, including commercial policy, as well as factors not specified by the legislature yet deemed relevant by the Panel, on which it may form a subjective judgment, must inevitably play a prominent part’.<sup>112</sup>

Finally, the High Court noted in *Precision Data* that the importance of the role of policy considerations in the Panel’s decision-making process is reflected in the qualifications required for Panel members. These include knowledge or experience in such fields as business, law, economics or accounting, but do not

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107 The features that form the basis of the following discussion are set out in *Precision Data* (1991) 173 CLR 167 at 190–1 (the Court).

108 *Precision Data* (1991) 173 CLR 167 at 190 (the Court) [Emphasis added.].

109 See above text following n95.

110 See *Precision Data* (1991) 173 CLR 167 at 188 (the Court); *Corporations Act* 1989 (Cth) s 734(2).

111 See above text accompanying n101.

112 *Precision Data* (1991) 173 CLR 167 at 190 (the Court).

require legal qualifications.<sup>113</sup> The Court in *Albarran* similarly placed an emphasis upon the appointment of ‘business members’ to the tribunal under consideration.<sup>114</sup>

The High Court in *Precision Data* concluded that the previous Panel did not exercise judicial power because it had ‘the function of making orders creating new rights and obligations’, policy considerations had ‘an important part to play in the determination’ and the making of declarations and orders was not ‘binding in the same sense that a judicial determination would be’.<sup>115</sup> In relation to the last point, the Court noted that both the Panel’s declaration and orders were subject to judicial review. As discussed above,<sup>116</sup> this remains the case with the Takeovers Panel.

In the Full Federal Court decision in *Alinta*, Gyles and Lander JJ considered that, even without s 657A(2)(b), the Panel would necessarily need to decide whether there was a contravention of the *Corporations Act*. This conclusion is consistent with the majority’s view that the Panel was filling a ‘judicial vacuum’,<sup>117</sup> resulting from the limitation on access to the courts during the course of the takeover bid.<sup>118</sup> By way of example, Gyles and Lander JJ considered an application based upon s 657A(2)(a),<sup>119</sup> premised upon alleged deficiencies in a bidder’s statement (which is required to contain certain disclosures under Part 6.5 Division 2 of the *Corporations Act*). The majority took the view that, as an application could not be made to the courts to enforce compliance with the Part 6.5 Division 2 disclosure requirements, it was ‘inevitable’ that the Panel would be required to decide whether there had been a contravention of the Act and, if so, on the appropriate orders to prevent or remedy the breach.<sup>120</sup>

The *Alinta* majority appears to be examining the Panel’s decision-making process as if it were a court rather than the commercial body that it is. In fact, the Panel would deal with such an application by focusing on the central purposes set out in s 602, namely to ensure that acquisitions take place in an ‘efficient, competitive and informed market’ and that shareholders have been given ‘enough information to enable them to assess the merits of the proposal’.<sup>121</sup> The Panel would not be obliged to consider whether there had been a contravention of the requirements in Part 6.5 Division 2 of the *Corporations Act*. In any event, it is entirely possible that any departure from those requirements would not lead to a declaration of unacceptable circumstances, either because the purposes of the takeover provisions were not affected or the bidder had undertaken to provide further disclosure.

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113 *ASIC Act* ss 172(4), (4A). See also Armson, above n104 at 573–7.

114 *Albarran* (2007) 234 ALR 618 at 623–4 (Gleeson CJ, Gummow, Hayne, Callinan, Heydon & Crennan JJ) and 640 (Kirby J).

115 *Precision Data* (1991) 173 CLR 167 at 191 (the Court). See also *Visnic* (2007) 234 ALR 413 at 417 (Kirby J).

116 See above text accompanying n77 and following.

117 *Alinta* (2007) 25 ACLC 602 at 669 (Gyles & Lander JJ)

118 *Alinta* (2007) 25 ACLC 602 at 675 (Gyles & Lander JJ).

119 See above text accompanying n25.

120 *Alinta* (2007) 25 ACLC 602 at 675 (Gyles & Lander JJ).

121 *Corporations Act* 2001 (Cth) ss 602(a), 602(b)(iii).

#### 4. *Conclusion*

Decisions concerning the exercise of judicial power involve a balancing of different factors. The arguments relating to the Takeovers Panel are not clear cut. In *Alinta*, the majority of the Full Federal Court found that the Panel exercises judicial power in deciding disputes between parties about the application of the law to facts and making remedial orders. Gyles and Lander JJ relied upon four main changes to the Panel in coming to this conclusion: namely, the ability of the Panel to make a declaration of unacceptable circumstances based upon a contravention of the *Corporations Act*; the ability of any interested person to apply to the Panel; the limitations on the courts' powers and the more detailed specification of Panel orders.<sup>122</sup> The majority was concerned that the Panel was filling a 'judicial vacuum' created by these reforms.

Although the Panel can make a declaration based upon a contravention, this is only one step in the decision-making process. Similarly, even though there is a restriction on courts enforcing the many legal requirements applying while a takeover is on foot, this does not mean that the Panel is performing the same role as a court or that it exercises judicial power. The Panel determines matters affecting disputes between parties arising from past events and can make similar orders to those made and enforced by courts. However, the process by which the Panel determines whether to make a declaration of unacceptable circumstances and accompanying orders is different to court processes.

Notwithstanding the changes to the Panel, its key features remain consistent with those upheld by the High Court in relation to both the previous Panel in *Precision Data* and with other High Court authorities in relation to judicial power. Firstly, the Panel's determinations are not binding and authoritative in the same way as a court. Both the orders that the Panel can make and the method of their enforcement are similar to those applicable to the previous Panel. Secondly, rather than exclusively applying the law to the facts, the Panel must take policy considerations into account and has the discretion to take into account any other relevant matters. Finally, the Panel is a commercial body and its decisions are reflective of its members, which include not only lawyers but also bankers and other business people.

The Takeovers Panel is a unique body that operates based upon policy factors notwithstanding its legal context. On balance, the Panel is sufficiently similar to the body considered by the High Court in *Precision Data* to justify the same conclusion that it is not exercising judicial power. However, if the High Court were to come to a contrary conclusion due to s 657A(2)(b) (now 657A(2)(c)) allowing the Panel to make a declaration based upon certain contraventions of the *Corporations Act*, then this provision should be severed. This would allow the Panel to continue to operate based solely on policy considerations in order to uphold the purposes of the takeover provisions.

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<sup>122</sup> *Alinta* (2007) 25 ACLC 602 at 669–70, 676 (Gyles & Lander JJ).

