

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

ATTORNEY-GENERAL OF THE COMMONWEALTH
OF AUSTRALIA

APPELLANT

AND

ALINTA LIMITED & ORS

RESPONDENTS

Attorney-General (Cth) v Alinta Limited
[2008] HCA 2

Date of order: 13 December 2007

Date of publication of reasons: 31 January 2008
S331/2007

ORDER

1. *Appeal allowed.*
2. *Set aside so much of paragraph 2 of the orders of the Full Court of the Federal Court of Australia made on 30 April 2007 as ordered that there be a declaration that s 657A(2)(b) of the Corporations Act 2001 (Cth) is invalid and, in its place, order that there be a declaration that s 657A(2)(b) of the Corporations Act 2001 (Cth) is not invalid on the ground that it purports to confer the judicial power of the Commonwealth on the Takeovers Panel.*

On appeal from the Federal Court of Australia

Representation

D M J Bennett QC, Solicitor-General of the Commonwealth with M A Perry QC and E A Collins for the appellant (instructed by Australian Government Solicitor)

J R J Lockhart for the first and second respondents (instructed by Blake Dawson Waldron)

D M J Bennett QC, Solicitor-General of the Commonwealth for the third respondent (instructed by Australian Government Solicitor)

Submitting appearance for the fourth and fifth respondents

P J Hanks QC with S P Donaghue and F I Gordon appearing as amici curiae

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Attorney-General (Cth) v Alinta Limited

Constitutional law (Cth) – Judicial power – Meaning of judicial power – Takeovers Panel – Section 657A(2)(b) of the *Corporations Act* 2001 (Cth) allows the Takeovers Panel to make a declaration of unacceptable circumstances in connection with a finding of contravention of the takeovers provisions of the Act – Whether s 657A(2)(b) is invalid as involving the exercise of the judicial power of the Commonwealth by the Takeovers Panel.

Constitutional law (Cth) – Judicial power – Meaning of judicial power – Whether function of Takeovers Panel was to resolve disputes about existing rights and obligations or to create new rights and obligations.

Constitutional law (Cth) – Judicial power – Meaning of judicial power – Relevance of scope of Takeover Panel's power to make remedial orders – Relevance of inability to enforce Takeover Panel's orders without independent exercise of judicial power.

Constitutional law (Cth) – Judicial power – Meaning of judicial power – Relevance of requirement that the Takeovers Panel consider public interest and policy considerations in deciding whether to make a declaration – Extent to which inclusion of policy considerations is indicative of non-judicial power.

Practice and procedure – Parties – Interveners and amici curiae – The appellant intervened below as of right – After special leave was granted, the commercial controversy between the original parties was resolved and an order revoking special leave sought – Whether the appellant was a party to the proceedings – Whether the appellant had an interest in the appeal to this Court – Whether leave should be granted to amici curiae to appear to contradict the appellant's submissions.

Constitution, Ch III.

Corporations Act 2001 (Cth), s 657A.

1 GLEESON CJ. I joined in the order allowing the appeal in this matter. My reasons were substantially the same as those that have been given by Hayne J, and Crennan and Kiefel JJ. My reasons for joining in the order concerning the limiting of the grant of special leave, the amendment of the notice of appeal, and leave to counsel to appear as amici curiae were substantially the same as those stated by Hayne J. I would add the following comments on the principal issue before the Court.

2 There are two features of the statutory scheme which, in combination, strongly support a conclusion that the Takeovers Panel ("the Panel") does not exercise judicial power. The first is that, in deciding whether to make a declaration of unacceptable circumstances, and remedial orders, the Panel is required to take account of considerations and interests to which the judicial process is ill-adapted. The second is that a decision of the Panel creates new rights and obligations, and provision is made for their enforcement by a court in the independent exercise of judicial power.

3 In *Precision Data Holdings Ltd v Wills*¹, this Court said:

"In some situations, the fact that the object of the determination is to bring into existence by that determination a new set of rights and obligations is not an answer to the claim that the function is one which entails the exercise of judicial power ... However, where, as here, the function of making orders creating new rights and obligations is reposed in a tribunal which is not a court and considerations of policy have an important part to play in the determination to be made by the tribunal, there is no acceptable foundation for the contention that the tribunal, in this case the Panel, is entrusted with the exercise of judicial power."

4 In decisions of this Court, there is a long history of treating power as non-judicial where an exercise of the power was, to use the words of Kitto J, "intended [by the Parliament] to be made upon considerations of general policy and expediency alien to the judicial method."² The breadth of the concept of policy sometimes creates difficulty in its use as a criterion for distinguishing between legitimate judicial action on the one hand and legislative or executive action on the other. For the purpose of such a distinction, it may be necessary to be more specific as to the nature of the policy involved. It also may be necessary to relate the considerations of wisdom or expediency involved in the formulation of a certain kind of policy to the constraints inherent in the judicial method,

1 (1991) 173 CLR 167 at 190-191.

2 *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305.

including the way in which issues are defined, and the rules of procedure and evidence according to which a court receives the information upon which it is to base its decision.

5 When Kitto J spoke of "considerations of general policy and expediency alien to the judicial method", he was not suggesting that judging involves no more than the mechanical application of inflexible rules, without regard to questions of wisdom or expediency. The common law is judge-made, and its development and rationalisation necessarily involve attention to such questions. Furthermore, many of its settled principles, in their application to changing circumstances and social conditions, require judgment about what is wise and expedient. Statutes commonly confer upon judges discretionary powers which raise such matters for decision. Yet there are features of the judicial process, fundamental to its nature, that make it ill-suited to the application of certain kinds of policy and the exercise of certain kinds of power. Judges are appointed on the basis of their legal knowledge and experience. Individual judges may have other talents or interests, but what these might be is usually unknown, and is not the subject of any process of assessment, formal or informal. The material on which they base their decisions is provided, and tested, in accordance with rules of procedure and evidence. The decisions of the parties and their lawyers, made in an adversarial setting, impose limitations upon the information according to which a court legitimately may proceed. The parties to litigation, acting within the limits set by the law, define the issues to be resolved and the courses open to be followed by way of judicial order. These constraints, although not absolute or inflexible, influence the nature of the judicial process, and affect the suitability of that process for the exercise of certain forms of governmental power. It is to be expected that the Parliament, in deciding whether a certain kind of authority should be exercised judicially, or otherwise, would take account of the characteristics, and of the strengths, and the limitations, of the judicial method.

6 Chapter 6 of the *Corporations Act* 2001 (Cth), in regulating takeovers, seeks to preserve an efficient, competitive and informed capital market, and to protect the legitimate interests of investors in that market. The purposes of the Chapter are declared in s 602, in terms that define the nature of the considerations at work in reaching a conclusion that circumstances in relation to the affairs of a company are unacceptable and that the public interest requires a certain form of regulatory intervention in the market. The matters to which the Panel may have regard in deciding whether, and in what way, it should exercise its powers, and the information and judgment it brings to bear upon the likely consequences of intervention, understood in the light of the purposes stated in s 602, are aspects of a decision-making process of an order quite different from that which may be involved where a litigant seeks from a court an injunction to restrain a contravention of the Act, or where a court is asked to penalise a contravention. The constitution of the Panel, the way in which it is intended to go about its business, the way in which it informs itself about matters that arise

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for its consideration, and the nature of the considerations according to which it acts or declines to act, all point against a conclusion that this is a judicial process.

- 7 Various parts of the regulatory regime established by Ch 6 involve the exercise of judicial power, and the application of the judicial method to the determination of legal rights and liabilities. Judicial power is employed to enforce the rights and obligations which the Act attaches to actions of the Panel. On the other hand, the Panel's supervisory and regulatory function, having regard to the constitution of the body itself, the nature of the legislative purposes it pursues, and the consequences of what it does, is not an exercise of judicial power.

8 GUMMOW J. The facts and circumstances giving rise to the litigation in the Federal Court and to the conduct of the appeal in this Court by the Commonwealth Attorney-General are explained in the reasons of Hayne J and those of Crennan and Kiefel JJ. I agreed that the appeal should be allowed and that declaratory relief should be given to the effect that s 657A(2)(b) of the *Corporations Act* 2001 (Cth) ("the Corporations Act") is not invalid as purporting to confer the judicial power of the Commonwealth upon the Takeovers Panel.

9 I agree generally with what is said by Hayne J and by Crennan and Kiefel JJ in support of that outcome. In particular, I agree with what appears in the reasons of Hayne J under the heading "*Judicial power?*". I would add only the following.

10 First, as in the recent decision of *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board*³, the case for invalidity does not proceed on the footing that the statute confers on the regulatory body a power of a chameleon-like nature which takes its colour from the character of that body. Where it applies, the "chameleon" analogy supports a case for validity and not the opposite. Rather, here the case for invalidity depends upon demonstration that the authority conferred on the Panel by the provision in question (par (b) of s 657A(2)) is essentially and exclusively judicial in character.

11 Secondly, in support of an argument of invalidity, reliance cannot effectively be placed upon the "historical approach" most recently discussed in *White v Director of Military Prosecutions*⁴. The legislation of which s 657A is a component has no readily apparent analogue in the common law or in pre-1900 legislation.

12 Thirdly, the outcome thus depends upon the application of theories or descriptions of the judicial power of the Commonwealth which in the decisions of this Court are expressed in analytical but general and ahistorical terms. In that regard, and as Hayne J emphasises, the reasoning in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*⁵ is particularly significant in determining the outcome in the present case.

13 Further, with respect to the significance of *Tasmanian Breweries* several points may be made. One point concerns the interrelation between a regulatory

3 (2007) 81 ALJR 1155 at 1163-1164 [36]; 234 ALR 618 at 627.

4 (2007) 81 ALJR 1259 at 1272-1273 [45]-[49]; 235 ALR 455 at 468-469.

5 (1970) 123 CLR 361.

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regime such as one dealing with restrictive trade practices (as in *Tasmanian Breweries*) or corporate activity respecting takeovers (this case): without the superimposition of federal regulation these activities might readily give rise to contractual rights and obligations (and perhaps tortious claims), but, contrary to what was considered to be so by the majority in the Full Court⁶, the partial displacement of those rights and obligations by the regulatory regime does not necessarily stamp the functions exercised under that regime with the character of judicial power. The withdrawal of jurisdiction from the State courts in this way may give rise to other constitutional questions⁷, but these are not for consideration here.

14 The remaining point concerns the need for caution against placing determinative significance in this case solely upon considerations of "policy". It needs to be emphasised that matters of policy may enter permissibly (and necessarily) into the exercise of judicial power in various ways, as was indicated by Gummow and Crennan JJ in *Thomas v Mowbray*⁸. The legislative mandating of consideration by the Panel of matters of policy thus is not *necessarily* a sufficient indicator of conferral of non-judicial power. Rather, a significant pointer against invalidity of the legislation under consideration here, as with that upheld in *Precision Data Holdings Ltd v Wills*⁹, is the entrusting to the Panel of authority to alter (subject to collateral attack and challenge under s 75(v) of the Constitution) the law otherwise applying in the particular case, to create new rights and obligations, and to do so with regard to considerations of policy which are identified only by reference to the subject, scope and purpose of the legislation.

6 (2007) 159 FCR 301 at 386-387.

7 See *Truong v The Queen* (2004) 223 CLR 122 at 160 [93]-[94].

8 (2007) 81 ALJR 1414 at 1438-1439 [80]-[82]; 237 ALR 194 at 222-223.

9 (1991) 173 CLR 167 at 191.

- 15 KIRBY J. This appeal arises from a divided decision of the Full Court of the Federal Court of Australia¹⁰. That Court declared that s 657A(2)(b) of the *Corporations Act* 2001 (Cth) ("the Act") was invalid on the ground that it purported to confer on the Takeovers Panel ("the Panel") powers that Ch III of the Constitution reserves to the courts.

The facts, legislation and issues

- 16 The facts and circumstances, and the relevant provisions of the Act, are set out in other reasons¹¹. Some 16 years ago, an earlier manifestation of the Panel survived a challenge in this Court for reasons explained in *Precision Data Holdings Ltd v Wills*¹². The primary question which divided the Full Court in the present case was whether subsequent alterations to the Panel's powers meant that the holding in *Precision Data* continued to sustain the operations of the Panel as constitutionally valid.

- 17 The majority in the Full Court cited four principal intervening changes to the legislation as critical to the negative conclusion that they reached on this question:

- the empowerment of the Panel to make a declaration of "unacceptable circumstances" based upon a relevant contravention of the Act¹³;
- the introduction of an entitlement on the part of any interested person to apply to the Panel for relief¹⁴;
- the imposition of limitations on the powers of the courts to afford judicial remedies during the takeover bid period and, in particular, removal of their power to grant orders to remedy a breach of the law other than orders for the payment of money¹⁵; and

10 *Australian Pipeline Ltd v Alinta Ltd* (2007) 159 FCR 301 (Gyles and Lander JJ; Finkelstein J dissenting) reversing *Australian Pipeline Ltd v Alinta Ltd* (2006) 237 ALR 158 (Emmett J).

11 See reasons of Hayne J at [51]-[62]; reasons of Crennan and Kiefel JJ at [106]-[110], [129]-[140].

12 (1991) 173 CLR 167. See reasons of Hayne J at [69]-[71].

13 (2007) 159 FCR 301 at 385 [399(1)] referring to s 657A(1) of the Act.

14 (2007) 159 FCR 301 at 385 [399(2)] referring to s 657C(2) of the Act.

15 (2007) 159 FCR 301 at 386 [399(3)] referring to Div 3 of Pt 6.10 of the Act.

- the enlargement of the remedial orders which the Panel could make, rendering its orders similar to those that a court might make pursuant to Pt 9.5 of the Act and under the general law¹⁶.

Vigilance over filling a "judicial vacuum"

18 The reason given for the enhancement of the powers of the new Takeovers Panel was to facilitate the diversion of disputes about company takeovers from the courts to the speedier and more commercially sensitive decision-making of an administrative body¹⁷. However, the majority in the Full Court were concerned that the enlargement of the Panel's function was designed to fill what they described as the "judicial vacuum"¹⁸ created by the limitations placed by the legislation on access to the courts. They said¹⁹:

"It is one thing to remove the courts from the enforcement of prohibitions created by statute. It is quite another to transfer that function to a body which is not a court. It is also another thing to preclude courts from exercising jurisdiction under the general law as is provided expressly in s 659B(4) and impliedly in s 659C of the [Act]. ... The orders made in this case are a good illustration of the identity of Panel orders with orders that might have been made by a court. ...

The effect of s 659B is that, leaving aside any possible operation of s 75 of the Constitution, the Panel is the sole forum for resolving the defined disputes during the bid period between private parties, notwithstanding that such disputes might otherwise be within the jurisdiction of Federal, State and Territory courts. ... [T]he powers of courts having jurisdiction over a dispute to grant remedies for a contravention of the Act are significantly curtailed. As already noted, in particular, there is no power to make positive or negative injunctions. ... [Section] 659C authorises

16 (2007) 159 FCR 301 at 386 [399(4)] referring to s 657D(2) of the Act.

17 *Takeovers – Corporate Control: A Better Environment for Productive Investment*, Corporate Law Economic Reform Program – Proposals for Reform: Paper No 4, (1997) at 36-37. See also Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) at 38 [7.16]; cf Armson, "Attorney-General (Commonwealth) v Alinta Limited: Will the Takeovers Panel Survive Constitutional Challenge?", (2007) 29 *Sydney Law Review* 495 at 497.

18 (2007) 159 FCR 301 at 387 [403].

19 (2007) 159 FCR 301 at 386-387 [401]-[402].

exercise of the powers of the Court only where the Panel refuses to make a declaration of unacceptable circumstances".

19 The majority in the Full Court also noted²⁰ that s 657G of the Act gave power to a court to make orders securing compliance with the Panel's orders and that s 657F made contravention of an order of the Panel an offence of strict liability. They therefore considered that the Act established "stronger methods of enforcement" than were present in *Precision Data* or *Brandy v Human Rights and Equal Opportunity Commission*²¹.

20 The majority were right to exhibit vigilance against any erosion by the legislature or the Executive of access by what they described as "private parties" to the independent courts, as envisaged by the Constitution²². Protection of the right of access to courts, and thus to judicial officers independent from the other branches of government, is an essential policy which the constitutional separation of powers is designed to safeguard²³. However irksome it may sometimes be to the other branches to be obliged to have disputes over legal rights resolved through external and impartial determination by the courts, that is an essential role of the courts required under the Constitution.

21 On the other hand, there might be legitimate reasons for a legislature to prefer administrative over judicial decision-making in some situations, including in the often urgent circumstances of attempts to effect (or repel) company takeovers. The essential substantive issue in these proceedings is whether the legislative choice made by the Parliament, and the means chosen to give it effect, fall on the permissible side of the constitutional line.

Reconstitution of the proceedings in this Court

22 By the time the matter came before this Court for hearing, a preliminary issue had arisen. It concerned whether special leave should be revoked in light of

20 (2007) 159 FCR 301 at 388-389 [408].

21 (1995) 183 CLR 245.

22 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 607 per Deane J; *Visnic v Australian Securities and Investments Commission* (2007) 81 ALJR 1175 at 1183-1184 [45]; 234 ALR 413 at 423; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 81 ALJR 1155 at 1166-1168 [59]-[68]; 234 ALR 618 at 631-633.

23 cf *White v Director of Military Prosecutions* (2007) 81 ALJR 1259 at 1301 [202]; 235 ALR 455 at 507.

the settlement of the commercial dispute between the litigants in the Federal Court²⁴.

23 By the time of the hearing in this Court, those parties had neither the interest nor the desire to maintain their earlier constitutional arguments. Thus, the Alinta parties properly notified that they had arrived at a settlement of their dispute with Australian Pipeline Ltd. They filed a summons seeking revocation of the grant of special leave to the Attorney-General of the Commonwealth. In support of this, they filed written submissions pointing out that, in effect, the controversy which they had originally brought to be quelled by this Court had (so far as they were concerned) disappeared.

24 On the other hand, revocation of the grant of special leave and the discontinuance of Alinta's application would leave standing the orders favoured by the majority of the Full Court, including the judicial declaration that s 657A(2)(b) of the Act was invalid under the Constitution²⁵. It would also leave undisturbed the reasons of the Full Court upholding those orders. Until altered by other and later proceedings in the Federal Court or in this Court or by valid legislative amendments, this outcome would cast a shadow over the validity of the activities of the Panel in the important work committed to it by the Act.

25 Potentially, the result of such an outcome might be to expose the Panel and its members to liability for purporting to act under powers which the Full Federal Court had held to be constitutionally invalid. It would cause uncertainty and inconvenience to "private parties" involved in takeovers disputes. Without doubt, it would be an unsatisfactory outcome. If this Court were to revoke special leave earlier granted to the Attorney-General, litigants would inferentially enjoy access to the courts upon the hypothesis of the invalidity of s 657A(2)(b) of the Act until some other challenge was "fast-tracked" to bring the issue back to the Full Court or to this Court for fresh determination. The inconvenience of this outcome is manifest, and so is its potential importance. Nevertheless, convenience and public importance do not control the application of basic constitutional principles.

26 Into the breach, the Attorney-General of the Commonwealth entered to offer relief. He pointed out that, in the Federal Court, he had intervened in the Alinta proceedings in order to support the validity of the contested provision of the Act. He therefore asserted a statutory status as a "party", in consequence of his intervention in that Court²⁶. He submitted that this continued to sustain his

24 cf reasons of Hayne J at [63]-[68]; reasons of Crennan and Kiefel JJ at [148]-[150].

25 (2007) 159 FCR 301 at 396 [433].

26 *Judiciary Act* 1903 (Cth), s 78A(3). See reasons of Hayne J at [65].

appeal challenging the Full Court's declaration of invalidity. He emphasised that the issue that the appeal sought to raise remained one of general public importance.

- 27 Endeavouring to cure the problem presented by the departure of the original parties, the Attorney-General made arrangements for counsel to appear to seek leave to be heard as *amici curiae* to provide arguments contesting his own submissions and supporting the reasons and declaration of the Full Court majority. In effect, therefore, the Attorney-General was at once presenting his appellate attack on the Full Court's declaration and supporting advocacy by independent counsel to sustain its correctness. To say the least, this is an unusual position for a "party" to real litigation in this country to find itself in.

Curiosities in the adopted course and orders

- 28 At the end of argument on the preliminary issue, orders were made by this Court amending the earlier grant of special leave to appeal so as to limit it strictly to the attempt to set aside the declaration made by the Full Court. However, the Federal Court had made its orders and declarations as between identified parties who were no longer to be present in this Court. Moreover, those original parties had no continuing interest of their own to defend or contest the outcome. Following argument, this Court gave leave to counsel to appear as *amici curiae* to sustain the continuing "context". It reserved its reasons.

- 29 I have long accepted that the power of this Court to permit interveners and *amici curiae* to be heard is a wide one²⁷. However, normally the question of hearing from such persons has arisen in circumstances quite different from those of the present case. It has presented where such persons have sought to be heard in matters being litigated as between parties having a real, live and continuing interest in the relevant proceedings. In several cases, I have supported applications by interveners and *amici* which have either been rejected or restricted by the Court²⁸.

27 *Levy v Victoria* (1997) 189 CLR 579 at 650-652; cf at 600-605. See also *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 665-668; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 646-647 [144]-[148].

28 See *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 134-137 [102]-[109]; *Federal Commissioner of Taxation v Scully* (2000) 201 CLR 148 at 185-187 [75]-[80]; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 434-435 [158]; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 81 ALJR 304 at 322-323 [77]-[81]; 231 ALR 340 at 361-362; cf Kenny, "Interveners and Amici Curiae in the High Court", (1998) 20 *Adelaide Law Review* 159; Neville, "Abortion Before the High Court – (Footnote continues on next page)

30 The Attorney-General's effective application to continue the appeal with a single party (himself) presents curiosities that take the Court, in these proceedings, to the extremities of its past doctrine. That doctrine insists that the Court will not afford the Executive Government advisory opinions. As Gleeson CJ pointed out extracurially in his Boyer Lectures²⁹:

"[Judges] deal with issues that litigants bring to them for decision. ... Australian courts do not give advisory opinions. They resolve concrete issues raised by disputing litigants. Further, the procedures by which they deal with those disputes mean that they are not well placed to form an opinion on issues outside those in contest between the parties. It is the litigants and their lawyers who decide the information that will be put before a court, and the arguments that will be presented."

It is no criticism of counsel appearing as *amici curiae*, funded by the Attorney-General, to say that for them the presentation of argument involved a theoretical exercise. None of them, nor any client of theirs, had any personal, financial or other interest in the issues or the outcome. By inference, none of them would have appeared if the Attorney-General had not initiated, arranged and funded their appearance.

31 The most analogous precursor to the procedure adopted in this appeal appears to be *Mellifont v Attorney-General (Q)*³⁰. However, that was a case upholding the validity of a special and detailed procedure under State legislation. Here there is no detailed legislation, but rather an assertion on the part of the Attorney-General of the Commonwealth of an entitlement to prosecute an appeal concerning federal law where the foundational controversy to which he had earlier become a party has arguably evaporated.

32 The course adopted will stand as a precedent for a more expansive exercise of the power to permit *amici curiae* to be heard in this Court, wherever convenience and practical importance suggest the desirability of that course. It cannot, in my view, be sustained simply because by statute the Attorney-General intervened to become a "party" to earlier proceedings in another court. In this respect, the statute cannot override the constitutional requirement of a live

What Next? Caveat Interventus: A Note on *Superclinics Australia Pty Ltd v CES*", (1998) 20 *Adelaide Law Review* 183.

29 Gleeson, *The Rule of Law and the Constitution*, (2000) at 99.

30 (1991) 173 CLR 289.

controversy constituting a "matter"³¹. Because of their settlement, the parties to that controversy have packed their bags and announced their intention to depart from the courts.

33 Because, in the circumstances, no party was left to contest the arrangement initiated by the Attorney-General, I will not disagree with the Court's orders on this point. It is enough that I draw attention to the unusual features of the circumstances giving rise to those orders and to the apparent expansion of the notion of a constitutional "matter" which the appeal, thus presented to the Court, implies³².

Essential and inessential features of judicial power

34 The foregoing explanation of events brings me back to the substantive issue in the appeal as it is now reconstituted. In a number of cases³³, some of which were decided after the Full Court's orders in these proceedings³⁴, this Court has explained the approach to be taken to questions of invalidity in matters such as the present. I adhere to what I said in *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board*³⁵:

"Evaluating the criteria for the presence of 'the judicial power of the Commonwealth' cannot be undertaken in a vacuum, divorced from considerations of constitutional principle and policy. It is necessary to have some conception of the 'functions' of courts which particular criteria may suggest to be exclusive, or non-exclusive, to such bodies."

31 *The State of South Australia v The State of Victoria* (1911) 12 CLR 667 at 674-675, 715; *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264-267.

32 As to the ongoing relevance of this question, see South, "The campaign for a national Bill of Rights: would 'declarations of incompatibility' be compatible with the Constitution?", (2007) 10 *Constitutional Law and Policy Review* 2; Evans and Evans, "Legal redress under the Victorian Charter of Human Rights and Responsibilities", (2006) 17 *Public Law Review* 264 at 271; Lindell, "The statutory protection of rights and parliamentary sovereignty: Guidance from the United Kingdom?", (2006) 17 *Public Law Review* 188 at 204-207.

33 cf *Luton v Lessels* (2002) 210 CLR 333 at 373-376 [123]-[133].

34 *Visnic* (2007) 81 ALJR 1175; 234 ALR 413 and *Albarran* (2007) 81 ALJR 1155; 234 ALR 618.

35 (2007) 81 ALJR 1155 at 1169 [76]; 234 ALR 618 at 635.

35 As in the other recent decisions, it is appropriate, in this case, to take into account historical considerations; practical features that help to explain the assignment of the present controversies to an administrative body rather than to courts; and whether what is attempted in the impugned legislation offends basic features traditionally associated with the postulate of an independent judiciary³⁶. Necessarily, what is required is a judgment or evaluation of the legislation, ultimately by this Court. The Court's function cannot be reduced to the mechanical application of bright-line rules or to the simple task of working through a settled checklist³⁷.

36 This approach, which is borne out by long authority in this Court, has understandably attracted a measure of criticism³⁸.

37 A number of considerations are insufficient to establish an administrative intrusion upon the exercise of the judicial power of the Commonwealth. The fact that adjudication is required can be as true of decision-making in certain administrative bodies as of the courts³⁹. The fact that policy considerations are taken into account cannot, of itself, render a decision non-judicial⁴⁰. Nor is the ascertainment and enforcement of the law an exclusively judicial function. Nor can the mere fact that the Parliament has elected to assign a decision to a judicial or administrative body be conclusive of the constitutional character of the decision⁴¹. The so-called "chameleon doctrine" does not go so far.

36 cf *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11 per Jacobs J. See *Albarran* (2007) 81 ALJR 1155 at 1173 [98]; 234 ALR 618 at 641.

37 See *Precision Data* (1991) 173 CLR 167 at 188-189. See also reasons of Gummow J at [12]; reasons of Hayne J at [93]; reasons of Crennan and Kiefel JJ at [151].

38 Ratnapala, *Australian Constitutional Law: Foundations and Theory*, 2nd ed (2007) at 124-129; Williams, "Commentary", in Stone and Williams (eds), *The High Court at the Crossroads*, (2000) 178 at 179; cf Perry, "Chapter III and the Powers of Non-Judicial Tribunals: *Breckler* and Beyond", in Stone and Williams (eds), *The High Court at the Crossroads*, (2000) 148 at 177.

39 Reasons of Crennan and Kiefel JJ at [161].

40 Reasons of Gummow J at [14]; reasons of Crennan and Kiefel JJ at [168].

41 *Albarran* (2007) 81 ALJR 1155 at 1168 [70]; 234 ALR 618 at 634.

38 Likewise, the fact that relief is available under s 75(v) of the Constitution is not determinative⁴². Where administrative bodies are established by federal legislation their members will necessarily be answerable to the constitutional writs. Limited accountability to the courts is universal to such cases. According to long-standing authority, the constitutional writs provided for in s 75(v) apply to office-holders in federal courts⁴³. This cannot therefore provide a criterion to differentiate essential judicial functions, so as to set them apart and bar them from discharge by non-judicial bodies.

39 If, therefore, I acknowledge the validity of the Full Court majority's concern over the "judicial deficit" presented by the legislation in this case (as I do), what are the considerations that ultimately result in a conclusion that the impugned provision of the Act falls on the right side of the constitutional line? In effect, for me, they are various considerations referred to in the reasons of my colleagues (and in the dissenting reasons of Finkelstein J in the Full Court⁴⁴). I will mention those that are most important to my conclusion.

The indicia of non-judicial power

40 First, whilst policy choices are inevitably involved in many decisions made in the courts, the broad policy criteria that the Act requires the Panel to address in discharging its functions are such as to be more appropriate to, and characteristic of, an administrative decision than a judicial decision⁴⁵. Thus, the criteria are stated in wide and substantially open-ended terms. Those terms go beyond the language in which judicial decision-making functions are typically conferred. This is not a conclusive point⁴⁶. But it is the right place to start in appreciating the essential character of the governmental functions involved in this case. They are not inherently judicial.

42 Reasons of Hayne J at [100].

43 *The Tramways Case [No 1]* (1914) 18 CLR 54 at 68, 83, 86; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 276, 323, 368; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 399.

44 (2007) 159 FCR 301 at 322-326 [78]-[97].

45 Reasons of Gleeson CJ at [6]; see also reasons of Hayne J at [81]-[83] referring in particular to ss 602 and 657A(2), (3); see *Breckler* (1999) 197 CLR 83 at 130 [90].

46 Reasons of Gleeson CJ at [5]; reasons of Gummow J at [14]; reasons of Crennan and Kiefel JJ at [168].

41 Secondly, the limitation on the commencement of court proceedings, which weighed so heavily for the majority in the Full Court, is temporary, not permanent⁴⁷. It is neither absolute nor unrestricted⁴⁸. This is a partial answer to the understandable concern of the majority over the attempted exclusion of the courts from availability to resolve authoritatively disputes over the legal rights of parties caught up in a takeover dispute finally and conclusively. It is not decisive. But it tends to neutralise a significant feature supporting the majority's conclusion.

42 Thirdly, the width of the Panel's powers makes it clear that it is expected that the Panel, by its decisions, will create new rights and obligations and not simply determine conclusively (as a court might do) controversies over past suggested contraventions of the Act⁴⁹.

43 Fourthly, contrary to the conclusion of the majority in the Full Court⁵⁰, the determination by the Panel of the rights and obligations of the contesting parties under s 657A(2)(b) of the Act remains no more than a "basis for determining what rights and obligations should be created in the future". The Attorney-General of the Commonwealth correctly submitted that the decision by the Panel was a "criterion or factum" by reference to which legal norms are imposed and remedies provided for their enforcement⁵¹. In every case it remains for the Panel to conclude whether or not the circumstances are "unacceptable". For that conclusion to be reached, more is required than proof of a contravention of the Act, although in particular cases such proof may, in practice, be sufficient to result, without much more, in a conclusion of unacceptability⁵².

44 Fifthly, care has been taken in drafting the provisions of the Act to avoid any suggestion that the Panel enforces its own orders⁵³. It is left to the courts to

47 Reasons of Hayne J at [87]. See also *Breckler* (1999) 197 CLR 83 at 130-132 [92]-[96].

48 Reasons of Hayne J at [100] (referring to s 75(v) of the Constitution).

49 Reasons of Hayne J at [88]-[90].

50 (2007) 159 FCR 301 at 391-392 [418].

51 Noted in the reasons of Hayne J at [77].

52 cf reasons of Hayne J at [81]-[82].

53 The Act, s 657D. See reasons of Crennan and Kiefel JJ at [173]-[174]. This aspect of the legislative scheme was not relevantly altered from the previous legislation. See *Breckler* (1999) 197 CLR 83 at 132-134 [97]-[101].

make orders to ensure compliance with the Panel's determinations⁵⁴. Necessarily, this involves the court concerned in a judicial decision, not a mere formality⁵⁵. From the earliest days of this Court, it has been recognised that it is a special feature of the exercise of the judicial power of the Commonwealth to carry a decision into effect as between the parties who bring the case before the relevant tribunal for decision. In many decisions, this feature of the legislative design has been regarded as an important consideration marking off the judicial power from other governmental powers⁵⁶. The dissenting judge in the Full Court was right to conclude that s 657F of the Act was insufficient to amount to an "enforcement mechanism"⁵⁷. This is a feature of the legislation supporting the conclusion that it is administrative and not judicial power that has been invoked.

45 In the end, by reference to the proper construction of the Act and its intended operation, an evaluation must be reached as to the character of the governmental powers exercised in this case, viewed in their entirety. Certainly, 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.

46 By virtue of their composition and provisions for appeal, and procedures and the scope for collateral challenges, courts have disadvantages and defects in operating effectively in the resolution of such disputes⁵⁸, although carefully drawn legislation can, and does, submit all such questions to courts for judicial determination. The statutory provisions establishing the earlier panel had not succeeded in diverting more than a tiny handful of cases to administrative decision-making. It was open to the Federal Parliament to conclude that new measures were needed to divert such contests to the Panel, in the interests of corporations, their shareholders, officers and employees and the public interest more generally.

54 See ss 58AA and 657G of the Act.

55 Reasons of Hayne J at [97].

56 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 451 citing extrajudicial observations of Miller J of the Supreme Court of the United States. See also *Brandy* (1995) 183 CLR 245 at 258, 269.

57 (2007) 159 FCR 301 at 326 [97].

58 cf reasons of Gleeson CJ at [5].

47 Whilst it is true that the legal rights and economic interests of "private parties" commonly arise in the course of such contests, the way the legislation has been drafted pays appropriate attention to the considerations that this Court has identified as relevant to compliance with the constitutional requirements. Thus, it cannot be said that traditional or historical rights of parties have been disturbed⁵⁹. Specifically, the regulation of corporations and the adjustment of competing claims and entitlements in the context of company takeovers is substantially provided for in company legislation of relatively recent origin.

48 Care needs to be taken in suggesting that identifying exclusively judicial functions involves substantially an historical inquiry⁶⁰. History can be a useful guide in this respect; but it is not a straitjacket. Clearly, the Constitution created an integrated Judicature that was intended to endure and adapt over time, as the governmental needs of the Commonwealth required. A conclusion that a particular activity is not a classical or traditional or historical function of the courts (as for example criminal trials have long been) might militate against acceptance of the argument that an invasion of the judicial power of the Commonwealth has occurred. But it is not determinative of that conclusion. Of its nature, a constitutional doctrine is not ossified by history.

Conclusion and orders

49 In all of the circumstances, the better view of the arguments is that s 657A(2)(b) of the Act does not confer the judicial power of the Commonwealth on the Panel. It is not, therefore, invalid as offensive to Ch III of the Constitution. The majority in the Full Court were correct in identifying a real question to be decided between the parties in this dispute. However, they erred in deciding, and declaring, constitutional invalidity. Given the orders of the Court reconstituting the "parties" to the appeal, this Court should now correct the orders of the Full Court in the exercise of its own appellate powers in the matter.

50 For these reasons, I agree in the orders proposed by Hayne J.

59 cf reasons of Gummow J at [11].

60 Reasons of Gummow J at [11] by reference to *White* (2007) 81 ALJR 1259 at 1272-1273 [45]-[49]; 235 ALR 455 at 468-469.

51 HAYNE J. Chapter 6 of the *Corporations Act* 2001 (Cth) ("the Corporations Act") regulates takeovers. It applies to the acquisition of relevant interests in listed companies, unlisted companies with more than 50 members⁶¹, some listed bodies that are not companies⁶² and listed managed investment schemes⁶³.

52 Chapter 6 of the Corporations Act gives certain powers and functions to the Takeovers Panel ("the Panel")⁶⁴. The only issue in this appeal concerns the validity of one of the provisions of Ch 6 which deals with the Panel's powers: s 657A(2)(b). At the times relevant to this matter, s 657A(1), (2) and (3) provided:

"657A Declaration of unacceptable circumstances

- (1) The Panel may declare circumstances in relation to the affairs of a company to be unacceptable circumstances. Without limiting this, the Panel may declare circumstances to be unacceptable circumstances whether or not the circumstances constitute a contravention of a provision of this Act.

Note: Sections 659B and 659C deal with court proceedings during and after a takeover bid.

- (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

61 *Corporations Act* 2001 (Cth) ("the Corporations Act"), s 602(a)(i).

62 s 603.

63 s 604.

64 A body established, as the Corporations and Securities Panel, by s 171 of the *Australian Securities Commission Act* 1989 (Cth), continued in existence by s 261 of the *Australian Securities and Investments Commission Act* 2001 (Cth) and renamed by the *Financial Services Reform Act* 2001 (Cth), Sched 3.

19.

- (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 or of Chapter 6A, 6B or 6C.

The Panel may only make a declaration under this subsection, or only decline to make a declaration under this subsection, if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant.

- (3) In exercising its powers under this section, the Panel:
 - (a) must have regard to:
 - (i) the purposes of this Chapter set out in section 602; and
 - (ii) the other provisions of this Chapter; and
 - (iii) the rules made under section 658C; and
 - (iv) the matters specified in regulations made for the purposes of paragraph 195(3)(c) of the [*Australian Securities and Investments Commission Act 2001 (Cth)*]; and
 - (b) may have regard to any other matters it considers relevant.

In having regard to the purpose set out in paragraph 602(c) in relation to an acquisition, or proposed acquisition, of a substantial interest in a company, body or scheme, the Panel must take into account the actions of the directors of the company or body or the responsible entity for a scheme (including actions that caused the acquisition or proposed acquisition not to proceed or contributed to it not proceeding)."

The focus of this appeal is the provision, in s 657A(2)(b), that the Panel may declare circumstances to be unacceptable circumstances, if it appears to the Panel that the circumstances are unacceptable because they constitute a contravention of a provision of Chs 6, 6A, 6B or 6C. The Full Court of the

Federal Court of Australia (Gyles and Lander JJ, Finkelstein J dissenting) held⁶⁵ that s 657A(2)(b) is invalid because it purports to confer on the Panel the judicial power of the Commonwealth. These reasons will show that the impugned provision does not purport to confer on the Panel the judicial power of the Commonwealth. The appeal should be allowed.

The facts

54 In April 2006, Alinta Limited ("Alinta" – the first respondent in this appeal) and The Australian Gas Light Company ("AGL") agreed to merge their infrastructure assets. Those assets included units held by AGL in the Australian Pipeline Trust ("the APT"), a listed managed investment scheme. AGL held 30 per cent of the issued units in the APT. A wholly-owned subsidiary of Alinta (the second respondent, Trewas Pty Limited – "Trewas") later acquired on-market a further 10.25 per cent of the issued units in the APT.

55 Section 604 of the Corporations Act provides that Ch 6 applies to the acquisition of relevant interests in the interests in a listed managed investment scheme as if the scheme were a listed company and interests in the scheme were shares in the company. Section 606, which is the fulcrum about which the takeover provisions of the Corporations Act turn, prohibits the acquisition of relevant interests in shares or securities of a body corporate except in accordance with the Act. If, as was asserted in the proceedings in the courts below, the agreement between Alinta and AGL gave Alinta a relevant interest in AGL's units in the APT, Alinta's later purchases of units in the APT contravened s 606 of the Corporations Act. The assertion in the courts below was that Alinta's on-market acquisitions contravened s 606 because, as a result of the on-market acquisitions, Alinta's relevant interests in units in the APT would increase from a starting point above 20 per cent and below 90 per cent, and the acquisition of those further interests was not within one of the exceptions to the prohibitions in s 606 provided in Pt 6.2 of Ch 6 of the Corporations Act (ss 611-615).

56 Whether the agreement between Alinta and AGL did give Alinta a relevant interest in AGL's units in the APT is a dispute the resolution of which depended upon the effect of a declaration that had been made by the Australian Securities and Investments Commission ("ASIC") after Alinta and AGL made their agreement in April 2006. That declaration (made under s 655A(1) of the Corporations Act⁶⁶) had modified s 609(7) of the Act. In deciding this appeal,

65 *Australian Pipeline Ltd v Alinta Ltd* (2007) 159 FCR 301.

66 "ASIC may:

(a) exempt a person from a provision of this Chapter; or

(Footnote continues on next page)

however, it is neither necessary nor appropriate to resolve this dispute, whether by examining the effect of ASIC's declaration, or considering whether the agreement did give Alinta a relevant interest in AGL's units.

57 The fifth respondent to the appeal, Australian Pipeline Limited, which was the responsible entity of the APT, applied to the Panel for a declaration of unacceptable circumstances under s 657A of the Corporations Act. The Panel decided to make that declaration and to make orders, under s 657D of the Corporations Act, vesting in ASIC the units in the APT that Alinta had acquired on-market. Alinta sought internal review by the Panel⁶⁷ of those decisions but the Panel made the declaration and the vesting orders.

58 Pursuant to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), Alinta then applied to the Federal Court of Australia for judicial review of the Panel's decision to make a declaration of unacceptable circumstances and its decision to make the vesting orders. Alinta alleged (among other things) that the Panel's decisions were invalid because each of ss 657A and 657D "is unconstitutional because and to the extent to which they involve [the Panel] exercising the judicial power of the Commonwealth" or because the Panel's decisions "involved the exercise of the judicial power of the Commonwealth by a body other than a Ch III Court".

59 Australian Pipeline Limited also brought proceedings claiming declarations that Alinta's acquisitions of units contravened s 606. That proceeding was heard by the same judge (Emmett J) and immediately before Alinta's proceedings.

60 Both proceedings were dismissed⁶⁸.

61 Alinta and Trewas, and Australian Pipeline Limited, each appealed to the Full Court of the Federal Court of Australia against the orders dismissing its proceedings. Pursuant to s 78A of the *Judiciary Act* 1903 (Cth), the Attorney-General of the Commonwealth intervened in the proceedings. That Court ordered⁶⁹ that Alinta's appeal be allowed. The Court made a declaration that s 657A(2)(b) of the Corporations Act is invalid. It further ordered that the Panel's declaration of unacceptable circumstances be quashed, and the vesting

(b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration."

67 Corporations Act, s 657EA.

68 *Australian Pipeline Ltd v Alinta Ltd* (2006) 237 ALR 158.

69 *Australian Pipeline Ltd v Alinta Ltd* (2007) 159 FCR 301.

orders set aside. The Court also ordered that the appeal of Australian Pipeline Limited be allowed and made consequential orders, including a declaration that Alinta's acquisitions of units in the APT contravened s 606.

62 The Attorney-General of the Commonwealth sought and was granted special leave to appeal to this Court against the orders made by the Full Court of the Federal Court in Alinta's appeal. Australian Pipeline Limited also sought and obtained special leave to appeal seeking (among other things) an order declaring that s 657A is valid. A separate application for special leave brought by Alinta and Trewas (its wholly-owned subsidiary) against the orders of the Full Court of the Federal Court allowing the appeal by Australian Pipeline Limited and declaring the on-market acquisitions to be in contravention of s 606 was referred for argument before a Full Court of this Court.

The proceedings in this Court

63 After this Court had made the orders granting special leave to appeal, and referring the application by the Alinta parties for further argument before a Full Court, the underlying commercial controversy was resolved. Australian Pipeline Limited did not file a notice of appeal pursuant to the grant of special leave. The Alinta parties discontinued their application for special leave and applied for orders revoking the special leave granted to the Attorney-General, or revoking that leave in part so that the scope of the appeal was limited to whether the declaration of invalidity of s 657A(2)(b) should be set aside. The Attorney-General responded by seeking leave to amend the notice of appeal to confine the issues raised in his appeal to the validity of s 657A(2)(b). Further, the Attorney-General arranged for counsel not hitherto engaged in the matter to be briefed to apply for leave to appear in this Court as amici curiae and submit arguments supporting the declaration of invalidity made by the Full Court of the Federal Court. The Alinta parties did not thereafter press for complete revocation of leave, but neither the Alinta parties nor Australian Pipeline Limited sought to present arguments in the appeal, whether about the validity of s 657A(2)(b) or otherwise.

64 After hearing argument in relation to these applications, the Court ordered that the special leave granted to the Attorney-General be limited to the issue the subject of the Attorney-General's proposed amended notice of appeal, gave leave to the Attorney-General to amend the notice of appeal in the manner proposed, and gave leave to counsel to appear as amici.

65 I supported the making of those orders and now state my reasons for doing so. The Attorney-General intervened in Alinta's appeal to the Full Court of the Federal Court as of right. The matter was one arising under the Constitution or involving its interpretation. Having thus intervened in those proceedings the Attorney-General was "for the purposes of the institution and prosecution of an appeal from a judgment given in the proceedings ... taken to be a party to the

proceedings"⁷⁰. The controversy underpinning the matter in which the Attorney-General intervened included (but was not limited to) the question of validity of the impugned provisions of the Corporations Act, and s 657A(2)(b) in particular. And by his intervening, the Attorney-General became party to the controversy about the validity of the impugned provision. (It may well be that the controversy about validity is better seen, at least after the Attorney-General's intervention, as a matter distinct from the underlying commercial controversy but it is not necessary to decide whether that is so.)

66 The Full Court of the Federal Court having made the declaration it did, the interest of the Attorney-General in setting aside the declaration is evident. It is an interest of the same kind as that which, before the enactment of s 78A of the *Judiciary Act*, underpinned the appeal by the Attorney-General of the Commonwealth to the Privy Council in *Attorney-General of the Commonwealth of Australia v The Queen* ("the Boilermakers' Case")⁷¹.

67 Although other parties to the litigation in which the present constitutional controversy has arisen no longer have any commercial reason to oppose the Attorney-General's appeal, the matter is neither merely hypothetical⁷² nor moot. It is not necessary to consider questions of the kind examined in *Mellifont v Attorney-General (Q)*⁷³ and other cases⁷⁴ in relation to the availability of an appeal to this Court against answers given to a stated case. In the present case, the declaration that was made was about the validity of a particular provision of the Corporations Act regulating the rights and obligations of the parties to the litigation in which the declaration was made. The Attorney-General was a party to the proceedings in which the declaration that s 657A(2)(b) is invalid was made. It is that controversy about validity which the Attorney-General of the Commonwealth seeks to pursue further by appeal to this Court.

68 The appointment of amici curiae provided a contradictor to the Attorney-General's arguments where none otherwise would have appeared. That

70 *Judiciary Act* 1903 (Cth), s 78A(3).

71 (1957) 95 CLR 529; [1957] AC 288.

72 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

73 (1991) 173 CLR 289.

74 See, for example, *Fisher v Fisher* (1986) 161 CLR 438; *Swiss Aluminium Australia Ltd v Federal Commissioner of Taxation* (1987) 163 CLR 421; *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232.

was an entirely sufficient reason (and in the present case a compelling reason) to grant the amici leave to appear⁷⁵.

Precision Data Holdings Ltd v Wills

69 Much of the argument about the validity of s 657A(2)(b), both in this Court and in the courts below, proceeded by reference to this Court's decision in *Precision Data Holdings Ltd v Wills*⁷⁶. Both in this Court, and in the courts below, argument was directed to whether *Precision Data* was to be distinguished. Neither the decision in that case nor the principles that were applied in it were challenged.

70 In *Precision Data*, this Court held that the powers given by ss 733 and 734 of the Corporations Law of Victoria⁷⁷, to the Corporations and Securities Panel established by s 171 of the *Australian Securities Commission Act 1989* (Cth), were not part of the judicial power of the Commonwealth. Section 733 of the Corporations Law gave that body power to declare an acquisition of shares in a company to be an unacceptable acquisition, or to declare conduct in relation to shares in or the affairs of a company to be unacceptable conduct. Where an acquisition or conduct was declared unacceptable, the Corporations and Securities Panel, on application by the Australian Securities Commission, had power under s 734 to make "any order that it thinks necessary or desirable to protect the rights or interests of any person affected by the acquisition or conduct" or to ensure, as far as possible, that a takeover or proposed takeover "proceeds in the manner in which it would have proceeded if that acquisition had not taken place or that conduct had not been engaged in".

71 This Court held⁷⁸, in *Precision Data*, that the decision to be made under s 733 was "not an adjudication of a dispute about *existing* rights and obligations". The object of the inquiry and determination for which the law provided was "to create a new set of rights and obligations, that is, rights and obligations arising from such orders as the [Corporations and Securities] Panel may make in a

75 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation [No 2]* (1982) 152 CLR 179. See also *Levy v Victoria* (1997) 189 CLR 579 at 604-605.

76 (1991) 173 CLR 167.

77 Aspects of the origins and the operation of the scheme of national corporate regulation that preceded the enactment of the Corporations Act and was constituted by the *Corporations Act 1989* (Cth) and separate State Corporations Laws were examined by this Court in *R v Hughes* (2000) 202 CLR 535.

78 (1991) 173 CLR 167 at 190.

particular case, being rights and obligations which did not exist antecedently and independently of the making of the orders". The Court further held⁷⁹ that:

"The fact that the [Corporations and Securities] Panel is given a power to make orders conditionally upon its having declared the acquisition to have been an unacceptable acquisition or the conduct to have been unacceptable conduct does not indicate that the Panel is exercising judicial power in making the declaration or subsequently in making orders. As the making of a declaration necessarily proceeds in part, at least, from an assessment of considerations of commercial policy, not solely from an application of the law to the facts as found, neither the making of a declaration nor the making of orders is binding in the same sense that a judicial determination would be binding."

The Full Court of the Federal Court

72 In the present matter, the majority in the Full Court (Gyles and Lander JJ) identified⁸⁰ a number of differences between the present legislative provisions and those considered in *Precision Data*. Chief emphasis was given to two features of the provisions of Ch 6 of the Corporations Act which were not found in the legislation considered in *Precision Data*. First, the majority said⁸¹ that "an interested party can now apply to the Panel for a declaration of unacceptable circumstances based upon a contravention of the Act – in particular, a contravention of Ch 6, Ch 6A, Ch 6B or Ch 6C". Secondly, reference was made⁸² to the limitations provided by Div 3 of Pt 6.10 of Ch 6 (ss 659A-659C) on "court proceedings in relation to a takeover bid or proposed takeover bid"⁸³.

79 (1991) 173 CLR 167 at 191.

80 (2007) 159 FCR 301 at 385-386 [399].

81 (2007) 159 FCR 301 at 386 [400].

82 (2007) 159 FCR 301 at 386-387 [402].

83 An expression defined in s 659B(4), for the purposes of that section, as:

"(a) mean[ing] any proceedings before a court in relation to:

(i) an action taken or to be taken as part of, or for the purposes of, the bid or the target's response to the bid; or

(ii) a document prepared or to be prepared, or a notice given or to be given, under this Chapter; and

(b) includ[ing]:

(Footnote continues on next page)

Section 659B(1) limits those who may commence such proceedings, before the end of the bid period, to ASIC, a Minister of the Commonwealth or of a State or Territory, or the holder of an office established by a law of the Commonwealth or a State or Territory or a body corporate incorporated for a public purpose by such a law, to the extent to which it is exercising a power conferred by such a law. Section 659AA states that the object of s 659B (and of s 659C regulating certain court proceedings *after* the end of the bid period) "is to make the Panel the main forum for resolving disputes about a takeover bid until the bid period has ended".

73 The majority in the Full Court of the Federal Court said⁸⁴ that the effect of the provisions of Ch 6 (including, in particular, those just mentioned) was "to transfer the power to make orders to enforce a statute from the courts to another body otherwise than in conformity with Ch III of the Constitution". The effect of s 659B, their Honours said⁸⁵, was that "leaving aside any possible operation of s 75 of the Constitution⁸⁶, the Panel is the sole forum for resolving the defined disputes during the bid period between private parties, notwithstanding that such disputes might otherwise be within the jurisdiction of Federal, State and Territory courts".

74 The majority in the Full Court noted⁸⁷ that considerable emphasis was placed, by those supporting the validity of ss 657A and 657D, "upon the lack of

-
- (i) proceedings to enforce an obligation imposed by this Chapter; or
 - (ii) proceedings for the review of a decision, or the exercise of a power or discretion, under this Chapter; or
 - (iii) proceedings for the review of a decision, or the exercise of a power or discretion, under Chapter 6C in relation to securities of the target of a takeover bid during the bid period; and
 - (iv) proceedings under Part 2F.1A for leave to bring, or to intervene in, proceedings referred to in paragraph (a) or subparagraph (b)(i), (ii) or (iii).

This is not limited to proceedings brought under this Chapter or this Act but includes proceedings under other Commonwealth and State or Territory laws (including the general law)."

84 (2007) 159 FCR 301 at 386 [401].

85 (2007) 159 FCR 301 at 386-387 [402].

86 The operation of which is expressly preserved by s 659B(5).

87 (2007) 159 FCR 301 at 387 [404].

ability on the part of the Panel to enforce its own orders and the related point that the decisions of the Panel are subject to collateral challenge at the point of enforcement". These, their Honours said⁸⁸, were "difficult arguments to sustain" in the light of this Court's decision in *Brandy v Human Rights and Equal Opportunity Commission*⁸⁹. And their Honours contrasted⁹⁰ the provisions of the *Racial Discrimination Act* 1975 (Cth), considered in *Brandy*, with those of the Corporations Act. Whereas the *Racial Discrimination Act* had provided that a determination of the Commission was not binding or conclusive between any of the parties to the determination, s 657F made contravention of an order made by the Panel an offence of strict liability, and s 657G gave power to a court to make orders securing compliance with the Panel's orders. These provisions of the Corporations Act were said⁹¹ to "provide stronger methods of enforcement than were present in *Brandy*".

75 It was on these bases that the majority in the Full Court decided⁹² that the decision in *Precision Data* did not govern the present case, and that "[i]t cannot be concluded that a declaration by the Panel pursuant to s 657A(2)(b) ... is only a basis for determining what rights and obligations should be created in the future and that an order pursuant to s 657D ... creates those rights and obligations". Rather, their Honours concluded⁹³ that:

"[T]he Panel, as an essential part of the process of declaration, decides between contending parties whether there has been a contravention of the [Corporations Act], with reference to past events and conduct and with the application of law to those events and conduct ... Where, as here, a finding of contravention is the basis or a basis for the declaration then the remedy granted by the Panel is typical of remedies now available to courts, both in the general equitable jurisdiction pursuant to Pt 9.5 of the [Corporations Act] and under a range of other statutes ... where discretionary considerations of a similar kind are relevant to the grant of relief and where similar remedial orders may be made."

88 (2007) 159 FCR 301 at 387 [404].

89 (1995) 183 CLR 245.

90 (2007) 159 FCR 301 at 387-389 [404]-[409].

91 (2007) 159 FCR 301 at 389 [408].

92 (2007) 159 FCR 301 at 391-392 [418].

93 (2007) 159 FCR 301 at 389-390 [412].

76 The dissenting opinion of the third member of the Full Court (Finkelstein J) proceeded⁹⁴ from the premise that "the Panel does not decide whether a person has contravened a provision of the [Corporations Act] and in consequence impose punishment for that contravention". Two conclusions were said⁹⁵ to follow: that the Panel is not concerned with the ascertainment or enforcement of existing rights, and that when the Panel makes an order under s 657D it is creating rights that operate for the future.

Arguments in this Court

77 The Attorney-General submitted that there are two central features of the statutory scheme which demonstrate that the Panel is not vested with powers of an exclusively judicial character. The first was said to be "the broad ranging considerations of policy and public interest which the Panel is required and able to take into account in determining whether to make a declaration and remedial orders". The second was said to be "the fact that the legislative scheme takes the existence of a decision by the Panel as a criterion or factum by reference to which legal norms are imposed and remedies provided for their enforcement by a court in the independent exercise of judicial power".

78 By contrast, the amici contended that, on its true construction, s 657A(2)(b), when read with s 657D, "purports to empower the Panel to determine whether a person or company has contravened Chapters 6, 6A, 6B or 6C ... and, if so, to grant relief for the purpose of quelling a controversy between parties". The amici sought to draw support for their view of the operation of the relevant provisions from the stated legislative object of making "the Panel the main forum for resolving disputes about a takeover bid until the bid period has ended"⁹⁶.

Features of the relevant provisions

79 The competing submissions proceeded from premises that depended upon the proper construction of the relevant provisions. In particular, the arguments in favour of validity sought to identify the Panel's task as essentially the making of a policy decision about what new rights and duties should be created, whereas those against validity sought to portray the Panel's task as quelling a controversy about whether there had been a contravention of the Corporations Act and

94 (2007) 159 FCR 301 at 325 [93].

95 (2007) 159 FCR 301 at 325 [93].

96 s 659AA.

granting consequential relief to remedy that breach. It is essential, then, to begin by considering the relevant provisions of the Corporations Act.

80 In doing that, it is important in this appeal to recognise that the Full Court of the Federal Court held to be invalid only one aspect of the Panel's power to make a declaration of unacceptable conduct. Only s 657A(2)(b) was declared invalid. That is, only the Panel's power to declare circumstances unacceptable on the ground that they are unacceptable because they constitute or give rise to a contravention of specified provisions of the Corporations Act was held invalid. There may well be cases in which only that ground for making a declaration of unacceptable circumstances is engaged – whether because the person seeking the declaration makes no other argument or because the Panel acts on only that basis. But accepting that s 657A(2)(b) provides a distinct and separate ground upon which the Panel may act, it is nonetheless important to place the particular provision in its proper statutory context. Three matters should be observed.

81 First, s 657A(2) permits the Panel to make a declaration only if it appears to the Panel "that the circumstances ... are unacceptable". Contravention of a provision of one of the specified Chapters of the Corporations Act may provide the footing for that conclusion but it must appear to the Panel that the circumstances merit the description "unacceptable". Secondly, the power to make a declaration must, in every case, be exercised or be not exercised upon the Panel's consideration of whether making or refusing to make a declaration "is not against the public interest after taking into account any policy considerations that the Panel considers relevant"⁹⁷. Thirdly, in exercising its powers under s 657A, the Panel must have regard to the matters identified in s 657A(3)(a). The matters to which the Panel *must* have regard include the purposes of Ch 6 set out in

97 s 657A(2).

s 602⁹⁸ and the other provisions of Ch 6. The Panel *may* have regard "to any other matters it considers relevant"⁹⁹.

98 Section 602 provides:

"The purposes of this Chapter are to ensure that:

- (a) the acquisition of control over:
 - (i) the voting shares in a listed company, or an unlisted company with more than 50 members; or
 - (ii) the voting shares in a listed body; or
 - (iii) the voting interests in a listed managed investment scheme;
 takes place in an efficient, competitive and informed market; and
- (b) the holders of the shares or interests, and the directors of the company or body or the responsible entity for the scheme:
 - (i) know the identity of any person who proposes to acquire a substantial interest in the company, body or scheme; and
 - (ii) have a reasonable time to consider the proposal; and
 - (iii) are given enough information to enable them to assess the merits of the proposal; and
- (c) as far as practicable, the holders of the relevant class of voting shares or interests all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the company, body or scheme; and
- (d) an appropriate procedure is followed as a preliminary to compulsory acquisition of voting shares or interests or any other kind of securities under Part 6A.1.

Note 1: To achieve the objectives referred to in paragraphs (a), (b) and (c), the prohibition in section 606 and the exceptions to it refer to interests in 'voting shares'. To achieve the objective in paragraph (d), the provisions that deal with the takeover procedure refer more broadly to interests in 'securities'.

Note 2: Subsection 92(3) defines *securities* for the purposes of this Chapter."

99 s 657A(3)(b).

82 It may be accepted that the word "unacceptable" may readily be applied to most, perhaps all, contraventions of provisions of the kind found in Chs 6, 6A, 6B and 6C of the Corporations Act. The first observation, that the Panel must conclude that the word "unacceptable" can properly be attached to a contravention, may therefore be of little moment. But even if that is so, the second and third observations reveal that the Panel's task is not completed by deciding that there has been a contravention of one of the relevant provisions. The Panel must make a declaration or decline to do so if it considers that doing that is not against the public interest *after taking into account any policy considerations that the Panel considers relevant* (s 657A(2)), and in exercising its powers under s 657A the Panel may have regard to any matters (in addition to those specified in s 657A(3)(a)) that it considers relevant.

83 If the Panel finds that there has been no contravention, then assuming that there is no other basis for a declaration, the Panel's task is at an end. But if a contravention is demonstrated, the considerations which have been identified as emerging from the second and third contextual observations provide a distinct and additional layer of matters to which the Panel must give attention before making a declaration. And without a declaration of unacceptable circumstances, there can be no orders made by the Panel. Section 657D(1) empowers the Panel to make orders under s 657D(2) only if it has declared circumstances to be unacceptable and it follows that, if the Panel were to find that there had been a contravention of a relevant provision, but that no declaration should be made, the Panel could make no orders of any kind.

84 Section 657D(2) empowers the Panel to make *any* order that it thinks appropriate to:

- "(a) protect the rights or interests of any person affected by the circumstances; or
- (b) ensure that a takeover bid or proposed takeover bid in relation to securities proceeds (as far as possible) in a way that it would have proceeded if the circumstances had not occurred; or
- (c) specify in greater detail the requirements of an order made under this subsection; or
- (d) determine who is to bear the costs of the parties to the proceedings before the Panel".

The orders the Panel may make are expressly stated in s 657D(2) to include a "remedial order" but to *exclude* "an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C".

85 The expression "remedial order" is defined in s 9 of the Corporations Act in very elaborate terms that encompass many forms of order¹⁰⁰. They include

100 Section 9 defines "remedial order" as an order that:

- "(a) restrains a person from exercising any voting or other rights attached to securities; or
- (b) directs a body corporate not to make or to defer payment of an amount due from the body corporate in respect of securities; or
- (c) restrains a person from acquiring securities or an interest in securities; or
- (d) directs a person to dispose of, or not to dispose of, securities or interests in securities; or
- (e) directs the disposal referred to in paragraph (d):
 - (i) to be made within a specified time; or
 - (ii) to be made subject to specified conditions; or
 - (iii) not to be made to a specified person or persons or to a specified class or classes of persons;
- (f) directs a specified person to pay to the body corporate an amount equal to any profit or benefit that the person obtains because of the disposal referred to in paragraph (d); or
- (g) vests securities, or an interest in securities, in ASIC; or
- (h) directs a body corporate not to register the transfer or transmission of securities; or
- (i) cancels securities issued as consideration for offers under a takeover bid; or
- (j) declares that an exercise of the voting or other rights attached to securities be disregarded; or
- (k) cancels or declares voidable:
 - (i) an agreement or offer relating to a takeover bid, or a proposed takeover bid; or

(Footnote continues on next page)

orders that restrain persons in various ways (for example, from exercising voting rights or acquiring securities), orders that direct persons to do or refrain from doing various acts (such as disposing of securities or not disposing of securities), and orders vesting securities or an interest in securities in ASIC. Although the definition of remedial order includes an order that directs a person to comply with a requirement of Chs 6, 6A, 6B or 6C, it is to be recalled that the Panel's powers to make orders expressly exclude this form of order.

86 As noted earlier, emphasis was given by the majority in the Full Court to the effect of the statutory limitation upon the bringing of "court proceedings in relation to a takeover bid or proposed takeover bid"¹⁰¹. The limitation was an important step in the argument to their Honours' conclusion¹⁰² that there had been a "transfer [of] the power to make orders to enforce a statute from the courts to another body otherwise than in conformity with Ch III of the Constitution".

87 The statutory limitation upon the bringing of "court proceedings in relation to a takeover bid or proposed takeover bid" must be understood in the light of the Panel's powers to make a declaration of unacceptable circumstances. The limitation on the taking of such proceedings may prevent a person from instituting proceedings alleging that there has been a contravention of a provision of Chs 6, 6A, 6B or 6C. The limitation is, however, temporary, not permanent.

-
- (ii) any other agreement or offer in connection with the acquisition of securities or relevant interests in securities;
 - (l) directs a person to give specified information to the holders of securities of a body corporate; or
 - (m) directs a body corporate not to issue securities to a person; or
 - (n) if an order of a kind referred to in paragraphs (a) to (m) is in force in respect of securities – directs the registered holder of the securities to give written notice of the order to any person whom the holder knows to be entitled to exercise a right to vote attached to those securities; or
 - (o) directs a body corporate to repeal or modify its existing constitution or adopt a particular constitution; or
 - (p) if a person has failed to comply with a requirement of Chapter 6, 6A, 6B or 6C – directs that person to comply with that requirement."

101 s 659B(4).

102 (2007) 159 FCR 301 at 386 [401].

Section 659B(1) prevents the bringing of such proceedings "before the end of the bid period". Further, the limitation does not extend to the various public office holders, such as a Minister of the Commonwealth or of a State or Territory, or others specified in s 659B(1). In particular, s 659B(1) does not prevent the regulator, ASIC, taking whatever step it thinks fit to obtain enforcement of the law or seek punishment for its contravention.

The Panel's task

88 Delaying the institution or prosecution of proceedings in which a private party affected by an actual or proposed takeover bid alleges that there has been a contravention of a provision of one of the specified Chapters of the Corporations Act is at least consistent with the Panel's task under s 657A being the task of creating new rights and obligations as between those affected by the bid. And as explained earlier, the requirement that the Panel take into account any policy considerations that it considers relevant¹⁰³, in deciding whether to make or not make a declaration, coupled with the obligation to have regard to the matters identified in s 657A(3)(a) and the power to have regard to any other matters it considers relevant¹⁰⁴ reinforce the view that the Panel's task is better described as the creating of new rights and obligations rather than the quelling of a controversy about contravention of the Corporations Act.

89 Further, the question before the Panel is not confined to any question of contravention. The Panel may make a declaration under s 657A, a final order under s 657D, or an interim order under s 657E, only on an application under s 657C¹⁰⁵. The persons who may apply for a declaration or an order are limited¹⁰⁶ to the bidder, the target, ASIC or "any other person whose interests are affected by the relevant circumstances". Leaving aside ASIC (which is not affected by the limitations on bringing court proceedings relating to a takeover bid before the end of the bid period), those who may make application to the Panel all have commercial interests underpinning their application. Those of the bidder and the target are self-evident; the interests of a person "whose interests are affected by the relevant circumstances" are necessarily larger than and different from a bare interest in enforcement of compliance with the relevant provisions of the Corporations Act. And the Panel may *not* make an order directing a person to comply with the requirement of the provision that has been contravened¹⁰⁷.

103 s 657A(2).

104 s 657A(3)(b).

105 s 657C(1).

106 s 657C(2).

107 s 657D(2).

90 In these circumstances, it is not right to describe the proceedings before the Panel as encompassing only a controversy about contravention. The issues which arise in an application to the Panel by a party other than ASIC are necessarily wider and extend to the commercial questions that emerge from that party's interests in the bid in question. It follows that to describe the Panel as quelling a controversy about contravention is inaccurate. Even if it were right to describe the Panel's task as quelling a controversy, the controversy or dispute with which the Panel deals, when s 657A(2)(b) is engaged, is wider than a controversy or dispute about contravention of the Corporations Act.

Enforcement of the Panel's orders

91 It was not disputed, whether in this Court or in the courts below, that the Panel's orders under s 657D are not enforceable by the Panel. Rather, contravention of an order of the Panel is made an offence under s 657F. And "the Court", which is to say one of the several courts identified in s 58AA of the Corporations Act¹⁰⁸, may make orders to secure compliance with an order made by the Panel¹⁰⁹.

92 Whether, as the majority in the Full Court held¹¹⁰, these provisions provide "stronger methods of enforcement than were present in *Brandy*" depends upon what is meant by "stronger". If, as seems most likely, the "strength" of the enforcement methods is no more than a reference to the nature of the consequences that may follow disobedience, the observation is not to the point in deciding whether the Panel exercises the judicial power of the Commonwealth.

Judicial power?

93 As *Brandy* demonstrated, and has been recognised since the very earliest decisions of this Court about Ch III¹¹¹, no single combination of necessary or sufficient factors identifies what is judicial power. So much is made plain by the

108 The Federal Court, the Supreme Court of a State or Territory, the Family Court of Australia and "a court to which section 41 of the *Family Law Act* 1975 [(Cth)] applies because of a Proclamation made under subsection 41(2) of that Act".

109 s 657G.

110 (2007) 159 FCR 301 at 388-389 [408].

111 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434; *R v Davison* (1954) 90 CLR 353 at 368-369; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189.

so-called chameleon doctrine¹¹² and the cases in which that doctrine has been engaged.

94 In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*¹¹³, in a passage often since applied in this Court¹¹⁴, Kitto J said:

"[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."

95 In *Tasmanian Breweries*, the legislation in issue (the *Trade Practices Act* 1965 (Cth)) did not require the relevant tribunal to adjudicate upon any claim of right¹¹⁵ but did render unenforceable the restriction or practice found to be contrary to the public interest. But as Kitto J went on to say¹¹⁶:

"The determination [by the tribunal] itself has no operative effect: it constitutes the factum by reference to which the Act operates to alter the law in relation to the particular case. And an order under s 52 (or an interim restraining order under s 54) is in like case. It presents a direct contrast with an injunction granted by a court as a means of enforcing obligations that have been established by adjudication. The order restrains future conduct, not as being in breach of ascertained obligations, but as

112 *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 8.

113 (1970) 123 CLR 361 at 374.

114 See, for example, *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636 at 655; *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 12; *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 320; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 532, 685; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109-110 [41].

115 (1970) 123 CLR 361 at 377.

116 (1970) 123 CLR 361 at 378.

being in conformity with ascertained obligations or practices – not in order to ensure observance of them but to prevent observance of them, because it is considered that their observance would be against the public interest. The Act, particularly s 52(7), operates upon the order to give its provisions the force of law, and thus to alter the law for the future in relation to the particular case."

96 The features of the legislation in issue in *Tasmanian Breweries* which were identified in that case are also to be observed in the relevant provisions of the Corporations Act. The Panel is required to conclude whether a declaration of unacceptable circumstances should be made. If s 657A(2)(b) is engaged, the Panel must decide, along the way, whether there has been a contravention of a relevant provision of the Corporations Act. But if it does decide that there has been a contravention, the conclusion to which the Panel must ultimately come is whether identified circumstances should be declared unacceptable. In making a declaration, or orders consequent upon a declaration, the Panel does not create a charter for the observance of the rights and obligations that attach *to the contravention*. The Panel's powers to make orders expressly exclude¹¹⁷ the power to make "an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C". The charter that is established by the Panel's order is for the observance of the rights and obligations that are created *in consequence of a declaration* being made. For, if a declaration is made, an order is framed to prevent the consequences of what have been found to be unacceptable circumstances. The order is framed to prevent those consequences by "protect[ing] the rights or interests of any person affected by the circumstances"¹¹⁸ or by "ensur[ing] that a takeover bid or proposed takeover bid ... proceeds (as far as possible) in a way that it would have proceeded if the circumstances had not occurred"¹¹⁹. The order constitutes the new charter of rights and obligations of the parties. And the Corporations Act "operates upon the order to give its provisions the force of law, and thus to alter the law for the future in relation to the particular case"¹²⁰.

97 It is then for the courts in the exercise of judicial power to enforce the law as it has been framed by the Panel's orders. There is what was identified in

117 s 657D(2).

118 s 657D(2)(a).

119 s 657D(2)(b).

120 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 378.

*Brandy*¹²¹ as "an independent exercise of judicial power" to give effect to the Panel's orders.

98 The orders of the Panel stand in sharp contrast with the determinations of the Human Rights and Equal Opportunity Commission considered in *Brandy*. By the provisions of the *Racial Discrimination Act* 1975 (Cth) in issue in *Brandy*, the Commission's determination, when registered as it had to be, was binding upon the parties and enforceable as an order of the Federal Court. But the determination remained the determination of the Commission and in no sense became the determination of the Federal Court¹²². Under the relevant provisions of the Corporations Act, the binding effect of the orders of the Panel is determined by the Court which is called upon to decide whether orders should be made under s 657G to secure compliance with them or to decide whether there has been an offence committed under s 657F by a person contravening a valid order of the Panel.

99 This analysis of the effect of the relevant provisions requires the conclusion that the Panel does not exercise the judicial power of the Commonwealth.

100 It is important, however, to notice one further consideration which strengthens the case for validity of the impugned provisions. Although the Corporations Act gives an order of the Panel the force of law and makes contravention of the Panel's order an offence, an order of the Panel is open to challenge. It is open to direct challenge by proceedings under s 75(v) of the Constitution or proceedings seeking relief under s 39B of the *Judiciary Act*. No less importantly, an order of the Panel is open to collateral challenge¹²³ in other judicial proceedings in which its valid making is an element in issue. That an order of the Panel may be challenged in these ways points away from a conclusion that the Panel exercises judicial power.

Conclusions and orders

101 For these reasons, the Full Court erred in holding that s 657A(2)(b) was invalid as purporting to confer the judicial power of the Commonwealth on the Panel.

121 (1995) 183 CLR 245 at 261.

122 (1995) 183 CLR 245 at 270.

123 *Breckler* (1999) 197 CLR 83 at 111-112 [46].

102 The appeal to this Court should be allowed. So much of par 2 of the orders of the Full Court of the Federal Court of Australia as ordered that there be a declaration that s 657A(2)(b) of the Corporations Act is invalid should be set aside. In its place there should be a declaration that s 657A(2)(b) of the Corporations Act is not invalid on the ground that it purports to confer the judicial power of the Commonwealth on the Takeovers Panel.

103 HEYDON J. I agreed with the orders relating to the conduct of this appeal by the Attorney-General of the Commonwealth of Australia on the following grounds. The Commonwealth had an interest in defending the validity of the relevant Commonwealth legislation. It therefore had an interest in seeking to reverse, in this appeal, its failure in its attempt to defend validity in the Full Court of the Federal Court of Australia. It retained that interest, even though those who in the Full Court of the Federal Court of Australia were concerned to attack its validity no longer had the contrary interest in this Court because they had ceased to care about whether their victory there should be maintained here.

104 I agreed with the order granting leave to counsel to appear as amici curiae on the ground that that was the only possible means in the present highly unusual circumstances to ensure that the controversy in which the Commonwealth wished to engage in this Court was suitably sharpened and to prevent this Court from being hampered in quelling it satisfactorily.

105 I agree that there should be a declaration that s 657A(2)(b) of the *Corporations Act* 2001 (Cth) is not invalid on the ground that it purports to confer the judicial power of the Commonwealth on the Takeovers Panel for the primary reasons given by Finkelstein J in the Full Court of the Federal Court of Australia¹²⁴.

124 *Australian Pipeline Ltd v Alinta Ltd* (2007) 159 FCR 301 at 322-326 [78]-[95].

106 CRENNAN AND KIEFEL JJ. Section 657A(1), which appears in Ch 6 of the *Corporations Act* 2001 (Cth), provides that the Takeovers Panel may make a declaration that circumstances relating to the affairs of a company are "unacceptable circumstances". Pursuant to s 657A(2)(b), the provision with which this appeal is concerned, the Panel may consider circumstances to be unacceptable because they constitute, or give rise to, a contravention of Chs 6, 6A, 6B or 6C. A declaration may only be made by the Panel if it considers that it is not against the public interest, taking into account any policy considerations it considers relevant. If the Panel makes such a declaration it may make orders provided for by s 657D.

107 On the application of Australian Pipeline Limited the Panel made a declaration of unacceptable circumstances in relation to acquisitions by a wholly owned subsidiary of Alinta Limited between 16 August 2006 and 22 August 2006 of units in the Australian Pipeline Trust, representing 10.25 per cent of the voting power in the Trust. Prior to those acquisitions, the Panel held, Alinta had a relevant interest in units representing 30 per cent of the voting power. Section 606 of the Act prohibits acquisitions which increase a person's voting power to more than 20 per cent and prohibits any increase if the starting point is above 20 per cent and below 90 per cent. The stated bases for the declaration were that the acquisitions constituted, or gave rise to, a contravention of the section and the effect they had on the control, or potential control, of the Trust. The latter is a circumstance referred to in s 657A(2)(a). In the declaration the Panel said that it considered that it would not be against the public interest to make a declaration of unacceptable circumstances and that it had taken into account other statutory purposes.

108 The Panel made orders under s 657D, vesting the additional units acquired by Alinta in the Australian Securities and Investments Commission ("ASIC") on trust for sale, with the proceeds to be remitted to Alinta as registered holder. Further orders were made restricting Alinta's disposal of the acquired units or further acquisition of any interest in the Trust or exercise of any voting rights attaching to any units to be sold¹²⁵. The orders were said to be necessary in order to protect the interests of unitholders in the Trust, which interests had been adversely affected by the acquisitions.

109 In its application to the Federal Court, for review of the Panel's decision, Alinta contended that the declaration and the orders made by the Panel were invalid because in making them the Panel exercised the judicial power of the

125 *In the matter of Australian Pipeline Trust OIR* [2006] ATP 29.

Commonwealth. The Panel is not a court within the meaning of Ch III of the Constitution. Emmett J rejected the contention¹²⁶.

110 The reasons of Emmett J reflect, in part, the conclusion reached in *Precision Data Holdings Ltd v Wills*¹²⁷ with respect to powers exercised by the Takeovers Panel¹²⁸, under earlier legislation¹²⁹, to make a declaration that unacceptable circumstances had occurred in relation to the acquisition of shares in a company, and following orders. The majority in the Full Court (Gyles and Lander JJ, Finkelstein J dissenting) distinguished the decision in *Precision Data* on account of the significant changes to the Panel's functions and powers which had been effected by the *Corporate Law Economic Reform Program Act 1999* (Cth)¹³⁰ and carried into the *Corporations Act 2001*¹³¹. The Court declared s 657A(2)(b) invalid. It held that s 657A(2)(a) did not provide an alternative basis for the Panel's declaration, ordered that it be quashed, and set aside the Panel's orders.

The 1989 legislation

111 Under legislation which preceded the *Corporations Act 1989* (Cth)¹³², the National Companies and Securities Commission could make a declaration that "unacceptable conduct" had been engaged in, in relation to the shares in, or the affairs of, a company¹³³. The Commission also had an investigatory role. A declaration made by it had the effect of deeming a contravention of the statute to have occurred. The Court could make orders following upon a declaration, if it

126 *Australian Pipeline Ltd v Alinta Ltd* (2006) 237 ALR 158 at 193 [164].

127 (1991) 173 CLR 167.

128 Known at the time as the Corporations and Securities Panel. Subsequently renamed by the *Financial Services Reform Act 2001* (Cth), Sched 3.

129 Corporations Law of Victoria, Ch 6; *Corporations Act 1989* (Cth).

130 The "CLERP" Act.

131 *Australian Pipeline Ltd v Alinta Ltd* (2007) 159 FCR 301 at 386 [401].

132 *Companies (Acquisition of Shares) Act 1980* (Cth).

133 s 60.

determined not to displace it¹³⁴. The Court could, in any event, make orders with respect to a contravention of the section restricting the acquisition of shares¹³⁵.

112 The *Corporations Act* 1989 formed the basis for a national scheme for the regulation of corporations. That legislation was applied as the Corporations Law of Victoria¹³⁶. It was that Law, and in particular Ch 6 of it, with which the Court was concerned in *Precision Data*.

113 The *Australian Securities Commission Act* 1989 (Cth) established the Australian Securities Commission (now ASIC) and the Takeovers Panel¹³⁷. Qualification for appointment as a Panel member required knowledge of, or experience in, one or more of the fields of business, the administration of companies, the financial markets, law, economics and accounting¹³⁸.

114 Under the Corporations Law declarations were made on the application of the Commission to the Panel. The Panel had the power to make orders when it had made a declaration. The Court¹³⁹ could make orders securing compliance with the Panel's orders and it had power to make other orders with respect to contraventions of the Law.

115 Section 733(3) of the Corporations Law provided:

"Where, on an application under subsection (1), the Panel is satisfied:

- (a) that unacceptable circumstances have occurred:
 - (i) in relation to an acquisition of shares in the company; or
 - (ii) as a result of conduct engaged in by a person in relation to shares in, or the affairs of, the company; and

134 s 60.

135 ss 45, 11.

136 By *Corporations (Victoria) Act* 1990 (Vic), s 7.

137 ss 7 and 171.

138 s 172(4).

139 Defined under s 58AA to refer to the Federal Court, the Supreme Court, the Family Court and a court the subject of proclamation under s 41 of the *Family Law Act* 1975 (Cth).

- (b) having regard to the matters referred to in section 731 and any other matters the Panel considers relevant, that it is in the public interest to do so;

the Panel may by writing declare the acquisition to have been an unacceptable acquisition, or the conduct to have been unacceptable conduct, as the case may be."

116 Section 732 of the Law limited the occurrence of unacceptable circumstances to situations where the shareholders and directors did not know the identity of the proposed acquirer, did not have a reasonable time in which to consider the proposal, or were not supplied with sufficient information to assess the proposal; or where all shareholders did not have the opportunity to participate in benefits which might accrue under the proposal. These circumstances all involved a breach of the "Eggleston principles", which had been the subject of a report preceding the 1980 legislation¹⁴⁰. A further circumstance was added in 1995¹⁴¹: where the company proposes a buy-back which is unreasonable. Finally, two circumstances were added in 1998¹⁴²: where a company unreasonably reduced its share capital or itself acquired shares having an effect upon the control of it or another company.

117 Section 731, to which the Panel was required to have regard in considering whether to make a declaration, in addition to reiterating the Eggleston principles, obliged the Panel to "take account of the desirability of ensuring that the acquisition of shares in companies takes place in an efficient, competitive and informed market".

118 When the Panel had declared an acquisition of, or conduct in relation to, shares to be unacceptable s 734(2)(a) provided, in general terms, that it could make:

"any order that it thinks necessary or desirable to protect the rights or interests of any person affected by the acquisition or conduct or to ensure, as far as possible, that a takeover scheme or takeover announcement, or a proposed takeover scheme or proposed takeover announcement, in relation to shares in the company proceeds in the manner in which it

140 Victoria, Company Law Advisory Committee, *Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and Takeovers*, (February 1969).

141 *First Corporate Law Simplification Act 1995* (Cth), Sched 2, item 14.

142 *Company Law Review Act 1998* (Cth), Sched 2, item 226.

45.

would have proceeded if that acquisition had not taken place or that conduct had not been engaged in".

119 Paragraph (b) more specifically provided for orders directing a person to supply information to shareholders; prohibiting the exercise of voting rights; directing a company not to make payment of amounts due with respect to shares; prohibiting the acquisition of or directing the disposal of an interest in specified shares; directing a company not to register a transfer; directing that an exercise of voting rights be disregarded; directing a company not to issue shares; cancelling or declaring void an agreement or offer relating to a takeover scheme; and directing a person registered as a shareholder to give notice to a person entitled to exercise the right to vote attached to those shares. Paragraph (c) permitted the Panel to make an order directing a person to do, or refrain from doing, a specified act for the purpose of securing compliance with any of its orders made under the preceding paragraphs.

120 Where a declaration or order was to be made, procedural fairness was to be applied¹⁴³. The Panel could not make an order under s 734(2) if it was satisfied that it would unfairly prejudice any person¹⁴⁴.

121 Section 734(5) provided that a person was not to contravene an order made by the Panel under sub-s (2). In the event of contravention the Court, on the application of the Commission, might make such order or orders as it considered necessary for the purpose of securing compliance with the Panel's order including, but not limited to, a "remedial order"¹⁴⁵ and an order directing a person to do, or to refrain from doing, a specified act. Many of the orders which could be made by the Panel under s 734(2) came within the definition of a remedial order¹⁴⁶. The Court could also make an order vesting shares, or an interest in shares, in the Commission.

122 The Court had power, under Pt 6.10, to make remedial and other orders, in the nature of injunctions, in order to secure compliance where there had been a contravention of provisions relating to prohibited acquisitions, procedures or other matters connected with takeovers. A contravention also constituted an offence under the Law¹⁴⁷.

143 ss 733(5) and 734(6).

144 s 734(7).

145 s 736.

146 Defined in s 613.

147 s 1311.

The decision in *Precision Data Holdings Ltd v Wills*

123 In *Precision Data* the Court accepted that s 733(3)(a) involved the Panel in making findings of fact¹⁴⁸. It observed that whilst the finding of facts, the making of value judgments and the formation of an opinion as to the legal rights and obligations of parties are common ingredients in the exercise of judicial power, they may also be elements in the exercise of administrative and legislative power. Functions may be classified as either judicial or administrative according to the way in which they are to be exercised¹⁴⁹.

124 The making of binding declarations of right, "by way of adjudication of disputes about rights and obligations arising from the operation of the law upon past events or conduct", was considered to be a "classical instance of the exercise of judicial power"¹⁵⁰. But the declarations for which s 733 provided were held not to be binding declarations of right in this sense. The object of the adjudication before the Panel was to determine what legal rights and interests should be created, not to resolve a dispute about what rights and obligations existed¹⁵¹. Their Honours referred, in this regard, to *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia*¹⁵² where it was said by the Court:

"The power of inquiry and determination is a power which properly takes its legal character from the purpose for which it is undertaken. Thus inquiry into and determination of matters in issue is a judicial function if its object is the ascertainment of legal rights and obligations. But if its object is to ascertain what rights and obligations should exist, it is properly characterized as an arbitral function when performed by a body charged with the resolution of disputes by arbitration."

125 Although those remarks were made by reference to the function of the Conciliation and Arbitration Commission, they were considered to apply with

148 (1991) 173 CLR 167 at 187.

149 (1991) 173 CLR 167 at 189.

150 (1991) 173 CLR 167 at 188, referring to *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140 at 148-149 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.

151 (1991) 173 CLR 167 at 188-189.

152 (1987) 163 CLR 656 at 666.

equal force to determinations for administrative, executive or legislative purposes¹⁵³.

126 The Court accepted that the function entrusted to the Panel was one to make a declaration concerning past events or conduct. And it accepted that courts are sometimes vested with jurisdiction by the legislature to create rights or impose liabilities¹⁵⁴. Nevertheless in doing so a court exercises judicial power, which requires the application of legal principle or a standard which is prescribed, not considerations of policy. In the conclusion to its reasons the Court said¹⁵⁵:

"The fact that the Panel is given a power to make orders conditionally upon its having declared the acquisition to have been an unacceptable acquisition or the conduct to have been unacceptable conduct does not indicate that the Panel is exercising judicial power in making the declaration or subsequently in making orders. As the making of a declaration necessarily proceeds in part, at least, from an assessment of considerations of commercial policy, not solely from an application of the law to the facts as found, neither the making of a declaration nor the making of orders is binding in the same sense that a judicial determination would be binding."

127 In the view of the Court¹⁵⁶, the position of the Panel was analogous to that of the Trade Practices Tribunal considered in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*¹⁵⁷.

128 In that case the trade practices legislation provided that if the Tribunal was satisfied that an "examinable agreement or practice exists it shall make a determination whether the agreement or practice is contrary to the public interest". A number of matters were to be taken into account by the Tribunal in making its determination, the basis for which was expressed to be the principle that the preservation and encouragement of competition are desirable. The statutory effect of a determination made by the Tribunal was that the agreement or practice became unenforceable. The Tribunal could make orders restraining

153 (1991) 173 CLR 167 at 189-190.

154 (1991) 173 CLR 167 at 190, 191.

155 (1991) 173 CLR 167 at 191.

156 (1991) 173 CLR 167 at 191-192.

157 (1970) 123 CLR 361.

future conduct which fell within certain descriptions. The Court there held that the making of a restraining order by the Tribunal did not involve the exercise of judicial power.

The Corporations Act 2001

129 The *Corporate Law Economic Reform Program Act* 1999 repealed Ch 6 of the Corporations Law and certain other provisions. A new Ch 6, together with Chs 6A, 6B and 6C, were amongst the replacement provisions¹⁵⁸. These provisions continued in the same form with the enactment of the *Corporations Act* 2001.

130 The provisions of Ch 6 of the *Corporations Act* 2001 extend to listed managed investment schemes and listed bodies. Section 606 contains the prohibitions upon acquisitions earlier referred to, which are subject to certain exceptions and exemptions. A contravention of the section results in the commission of an offence, one of absolute liability¹⁵⁹.

131 The balance of Ch 6 deals with procedures to be undertaken in connection with takeovers, such as the formation of the takeover offer, the content of the bidder's statement, variations of offers and acceptance and other activities during the bid period. Chapter 6A contains requirements with respect to a compulsory acquisition and buy-out, which may follow upon a takeover bid. Chapter 6B contains provisions prohibiting misstatements in, or omissions from, takeover, compulsory acquisition and buy-out documents. Chapter 6C requires disclosure of substantial holdings and provides for the tracing of the beneficial ownership of shares. In each Chapter an offence is created for contravention of some provisions, and in the case of Chs 6A and 6C, the offences are of strict liability. Chapter 6C also provides for a liability for compensation in the event of contravention. Chapter 6B creates an offence, if a statement or omission is materially adverse, and a liability for compensation.

132 The Court¹⁶⁰ has both general and specific powers to make orders with respect to contraventions of Chs 6, 6A, 6B and 6C¹⁶¹. Its general powers include

158 Taking effect 13 March 2000.

159 s 606(4A).

160 Defined by ss 9 and 58AA, as before, to refer to the Federal Court, the Supreme Court, the Family Court and a court the subject of proclamation under s 41 of the *Family Law Act*.

161 ss 1325A, 1325B and 1325C.

the making of remedial orders and excusing contraventions of any of the Chapters¹⁶². The remedial orders listed in the definition section¹⁶³ are the same as those provided for in the 1989 legislation, with some additions. Amongst them is par (p), which provides for the making of an order which directs a person to comply with a requirement of Chs 6, 6A, 6B or 6C.

133 The Takeovers Panel and ASIC are continued in existence under s 261 of the *Australian Securities and Investments Commission Act* 2001 (Cth). Part 10 contains the provisions relating to the Takeovers Panel. The qualification for membership of the Panel is substantially the same as that required by the *Australian Securities Commission Act* 1989. As the majority in the Full Court observed¹⁶⁴, the current provisions relating to Panel proceedings are broadly the same as those earlier provided for.

134 The Panel is obliged to afford procedural fairness¹⁶⁵ and provide written reasons for the making of a declaration or consequential orders¹⁶⁶. The *Corporations Act* 2001 provides that a finding of fact recorded in an order by the Panel, or a written statement of the reasons for an order, is proof of the fact, in the absence of evidence to the contrary¹⁶⁷. The Panel may dismiss an application as frivolous or vexatious¹⁶⁸.

135 The Panel's powers to make a "[d]eclaration of unacceptable circumstances" are contained in s 657A. An application for a declaration may be made by ASIC, the bidder, the target and any other person whose interests are affected by the relevant circumstances¹⁶⁹. Sub-sections (1), (2) and (3), in relevant part, of s 657A provide:

162 ss 1325A, 1325D.

163 s 9.

164 *Australian Pipeline Ltd v Alinta Ltd* (2007) 159 FCR 301 at 380 [385].

165 *Corporations Act* 2001, ss 657A(4), 657D(1).

166 ss 657A(6), 657D(4).

167 s 658B.

168 s 658A.

169 s 657C.

- "(1) The Panel may declare circumstances in relation to the affairs of a company to be unacceptable circumstances. Without limiting this, the Panel may declare circumstances to be unacceptable circumstances whether or not the circumstances constitute a contravention of a provision of this Act.
- (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 or of Chapter 6A, 6B or 6C.

The Panel may only make a declaration under this subsection, or only decline to make a declaration under this subsection, if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant.

- (3) In exercising its powers under this section, the Panel:
- (a) must have regard to:
 - (i) the purposes of this Chapter set out in section 602; and
 - (ii) the other provisions of this Chapter; and
 - (iii) the rules made under section 658C; and
 - (iv) the matters specified in regulations made for the purposes of paragraph 195(3)(c) of the ASIC Act; and
 - (b) may have regard to any other matters it considers relevant.
- ..."

136 The purposes stated in s 602 are those stated in the 1989 legislation, namely the desirability of ensuring share acquisitions take place in an efficient, competitive and informed market and the four Eggleston principles.

137 Section 657D provides for the orders that the Panel may make if it has declared circumstances to be unacceptable under s 657A. It must not make an order if it is satisfied that it would unfairly prejudice any person¹⁷⁰. The Panel is permitted, by s 657D(2), to make orders of the kind referred to in the former s 734(2)(a), those necessary to protect the rights or interests of a person and to ensure that a takeover proceeds in the manner it should have, but for the circumstances which have occurred. Provision is now made for the Panel to order costs¹⁷¹. The power given by s 657D(2) extends to the making of remedial orders with a notable exception. The power previously given in par (c) of the former s 734(2), to direct compliance with orders made, is absent. The subsection expressly excludes from orders the subject of the Panel's powers an order directing compliance with a requirement of Chs 6, 6A, 6B or 6C¹⁷².

138 Similar provision to that contained in the 1989 legislation is made for the Court to make orders with respect to compliance with the Panel's orders. The provision is couched in terms of a discretion, but it is limited to orders the Court considers "appropriate to secure compliance" with the Panel's orders, as was the equivalent provision in the 1989 legislation. Application may be made for such an order by ASIC, the President of the Panel, a person to whom the Panel's order relates or a person who was a party to the proceedings before the Panel¹⁷³. A contravention of an order made by the Panel is an offence, one of strict liability¹⁷⁴.

139 Although the Court has extensive powers in relation to contraventions of, or non-compliance with, the Act in the context of takeovers, a feature of the *Corporations Act* 2001 is that access to the courts during the bid period is limited. Section 659B(1) provides that only ASIC, and other nominated office holders or public bodies having jurisdiction in the area, may bring "court proceedings in relation to a takeover bid, or proposed takeover bid". The phrase

170 s 657D(1).

171 s 657D(2)(d).

172 par (p) of the definition of "remedial order" in s 9.

173 s 657G.

174 s 657F. Such an offence is therefore one which does not contain the element of fault: *Criminal Code* (Cth), s 6.1.

refers to any proceedings before a court¹⁷⁵ in relation to action taken in connection with a bid or a target's response to it, or a document to be prepared, or a notice to be given under Ch 6. It includes any proceeding for the review of a decision or the exercise of a discretion under the Chapter and "proceedings to enforce an obligation imposed by this Chapter". It extends to proceedings under the general law¹⁷⁶. The powers of the Court, in proceedings after the end of the bid period, are also limited so far as concerns the remedies it may provide where it finds that the Act was in fact contravened, although the Panel refused to make a declaration of unacceptable circumstances¹⁷⁷.

140 The object of ss 659B and 659C, stated shortly in s 659AA, is "to make the Panel the main forum for resolving disputes about a takeover bid until the bid period has ended".

The reasons of the Full Court

141 Gyles and Lander JJ noted¹⁷⁸ that there were at least four significant differences between the present legislative provisions and those considered in *Precision Data*: the express power now given to the Panel to make a declaration of unacceptable circumstances based upon a contravention of the Chapters; the extension of those entitled to apply for a declaration or order; the restriction of the role of the courts; and the similarity between the orders which the Panel can now make and those made by a court.

142 Reference was made by their Honours¹⁷⁹ to statements in the Explanatory Memorandum to the Bill which introduced the changes¹⁸⁰:

"7.14 Takeover disputes are currently principally determined by the courts, with the jurisdiction of the Corporations and Securities Panel (Panel) depending upon referrals from ASIC. There have been only three matters brought before the Panel since it was established in 1991.

175 Defined by ss 9 and 58AA to mean any court.

176 s 659B(4).

177 s 659C.

178 (2007) 159 FCR 301 at 385-386 [399].

179 (2007) 159 FCR 301 at 385 [398].

180 Corporate Law Economic Reform Program Bill 1998 (Cth).

7.15 Target companies often resort to litigation in hostile takeover bids, sometimes for tactical reasons. This can result in bids being delayed and, where a final hearing cannot be held within the bid period, the courts having to decide between disrupting the bid by granting an injunction without the benefit of full evidence and allowing the bid to proceed even though it may later be found to be defective.

7.16 To meet these concerns, *a reconstituted Panel will take the place of the courts as the principal forum for resolving takeover disputes under the Corporations Law, with the exception of civil claims after a takeover has occurred and criminal prosecutions.* This will allow takeover disputes to be resolved as quickly and efficiently as possible by a specialist body largely comprised of takeover experts, so that the outcome of the bid can be resolved by the target shareholders on the basis of its commercial merits. Other benefits of an effective panel for dispute resolution include the minimisation of tactical litigation and the freeing up of court resources to attend to other priorities." (Emphasis was added by their Honours.)

143 It is apparent from their Honours' reasons that they took the view that the function of the courts had been impermissibly transferred from the courts to the Panel¹⁸¹. In their Honours' view the exclusion, effected by s 657D(2), of the Panel making orders directing compliance with requirements of the Chapters, did not avoid the conclusion that positive and negative orders, which could be made, have the effect of orders made by the courts. The courts, on the other hand, could no longer grant injunctions in the bid period. Their Honours said¹⁸² that as a "deliberate legislative policy" the Panel is now concerned with the "adjudication of disputes" about "existing obligations" to a degree not seen in *Precision Data*. In their Honours' view¹⁸³ the scheme was radically different from that considered in *Precision Data*.

144 In argument before their Honours some weight was placed upon the lack of ability of the Panel to enforce its orders, as indicating that it did not have judicial power. Their Honours pointed out¹⁸⁴ that this had not been considered an essential feature of judicial power, and that this was confirmed in *Brandy v Human Rights and Equal Opportunity Commission*¹⁸⁵. Under the *Corporations*

181 (2007) 159 FCR 301 at 386 [401].

182 (2007) 159 FCR 301 at 386 [400].

183 (2007) 159 FCR 301 at 386 [401].

184 (2007) 159 FCR 301 at 387 [404].

185 (1995) 183 CLR 245.

Act 2001 the Court was obliged to secure compliance with the Panel's orders and contravention of them was now an offence of strict liability. In their Honours' view, these were stronger methods of enforcement than had been present in that case¹⁸⁶.

145 Before the Full Court, in argument for the validity of s 657A(2)(b), reliance was placed upon the reasoning of Emmett J, that the effect of the Panel's inquiry was to create a new set of rights. Their Honours in the majority considered that the fact that the Panel had the power to determine whether a breach of the law had been committed and the power to make an appropriate remedial order was sufficient to indicate that more is involved than the creation of new rights¹⁸⁷. An essential part of the Panel's powers, in making a declaration, is to decide between contesting parties whether there has been a contravention of the Act, by reference to past events and conduct and with the application of law to those events and conduct¹⁸⁸. It is not to the point that the decision to declare or not to declare may involve other factors involving the public interest and "policy", in their Honours' view. The mere existence of such a discretion should not be regarded as determinative of power being non-judicial.

146 It was of some importance, Finkelstein J observed in his reasons for dissent, that in order to arrive at a decision the Panel is required to consider the matters in s 657A(3), including any other matter it considers relevant. This showed that deciding that the facts gave rise to a contravention is only one step along the path of deciding whether a declaration was justified. It may be an important step, but it was not one that itself leads to the conclusion that the Panel is exercising judicial power¹⁸⁹. The Panel does not decide whether a person has contravened and in consequence impose punishment. It follows that it is not concerned with the ascertainment or enforcement of existing rights. A declaration does not resolve any dispute about legal rights. The corollary of that is that when the Panel makes an order under s 657D it is creating rights that operate for the future¹⁹⁰.

147 In his Honour's view the point which was fatal to an argument that the Panel exercises judicial power is that its orders require an independent exercise

¹⁸⁶ (2007) 159 FCR 301 at 388-389 [408].

¹⁸⁷ (2007) 159 FCR 301 at 390 [413].

¹⁸⁸ (2007) 159 FCR 301 at 389-390 [412].

¹⁸⁹ (2007) 159 FCR 301 at 325 [92].

¹⁹⁰ (2007) 159 FCR 301 at 325 [93].

of judicial power to give effect to them¹⁹¹. The Court could refuse to do so, albeit by reference to limited discretionary factors. The offence provision was not a mechanism for putting into effect the Panel's orders.

Amici curiae and the question on the appeal

148 Since the bringing of this appeal the shares the subject of the Panel's orders have been disposed of, following a settlement reached between the corporate parties to the proceedings. The orders made by the Panel can have no operation. Alinta and its subsidiary have no interest in responding to the appeal.

149 A declaration of invalidity of a statutory provision is a matter of importance. A decision holding s 657A(2)(b) to be invalid may have consequences for the operation of the scheme of the Act so far as it concerns takeovers. Paragraph (b) of sub-s (2) was replaced by the *Corporations Amendment (Takeovers) Act 2007* (Cth). Sub-section (1) still refers to the occurrence of a contravention or possible contravention. In these circumstances, and in the absence of a contradictor to the arguments to be raised, the Attorney-General made arrangements for counsel, having no prior connection to the proceedings, to appear as amici curiae, in the event that the Court granted leave. That leave was granted at the commencement of the hearing.

150 The declaration sought by the Attorney-General was in wide terms: that s 657A of the Act is valid. The declaration of invalidity made by the Full Court is limited to s 657A(2)(b). And the invalidity in question is confined to contravention of Ch III of the Constitution, by investing judicial power in the Panel. This was accepted as the correct position on the hearing of the appeal. The question on the appeal is to be understood as so confined.

The appeal

151 No issue is taken with the approach taken by the Court in *Precision Data* to the question whether an exercise of judicial power is involved in a function such as the Panel's. The starting point is the identification of those features of the judicial function that are essential to it. Their presence characterises the power exercised as judicial. In *Precision Data* the Court referred to the difficulty, if not the impossibility, of framing an exclusive and exhaustive definition of judicial power. It arose from the many positive features essential to the exercise of the power but which were not conclusive of it¹⁹².

191 (2007) 159 FCR 301 at 326 [95].

192 (1991) 173 CLR 167 at 188-189; and see *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134 (PC).

152 The purpose of the judicial function identified by their Honours is not controversial. An adjudication is undertaken in order to resolve a dispute about the existing rights and obligations of the parties by determining what they are, not in order to determine what rights and obligations should be created¹⁹³. Holmes J, delivering the opinion of the Court in *Prentis v Atlantic Coast Line Company*¹⁹⁴, said that a judicial inquiry "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end."

153 It is both logical and necessary that the right or obligation in question exist independent of, and prior to, the exercise of judicial power¹⁹⁵. The controversy about its existence is the hallmark of a matter before the courts¹⁹⁶. The ascertainment of its existence is exclusively a judicial function¹⁹⁷. In doing so the courts apply the law, not considerations foreign to it, such as policy¹⁹⁸, which is to say policy which is not of the law. The conclusion of the judicial process was described by Kitto J in *Tasmanian Breweries*¹⁹⁹:

"[T]he 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."

193 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 463 per Isaacs and Rich JJ; *Tasmanian Breweries* (1970) 123 CLR 361 at 396 per Windeyer J; *Re Ranger Uranium Mines* (1987) 163 CLR 656 at 665.

194 211 US 210 at 226 (1908).

195 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 442-443 per Griffith CJ.

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

197 *R v Davison* (1954) 90 CLR 353 at 369 per Dixon CJ and McTiernan J.

198 *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134 at 149 per Lord Simonds delivering the opinion of the Privy Council; approved *R v Davison* (1954) 90 CLR 353 at 366-367 per Dixon CJ and McTiernan J.

199 (1970) 123 CLR 361 at 374 per Kitto J.

154 In his Honour's view a power that does not involve a process which applies the law to the facts as determined and lead to such an end needs special qualities to make it judicial²⁰⁰.

155 Neither a legislative, an executive nor an arbitral function has as its purposes the ascertainment and recognition of existing rights or obligations. It follows that the result reached cannot be the same as that of the judicial function. Holmes J described the legislative function as looking to the future and having as its purpose the creation of a new rule to be applied²⁰¹. In *Prentis* the legislative act was the fixing of railway passenger rates.

156 In *Precision Data* the Court gave as an example of a non-judicial function, the arbitration of an industrial dispute²⁰². Viewed in general terms, arbitration is a claim by one party that relations should be altered, with the other party not conceding that claim²⁰³. In the case to which the Court there referred, *Re Ranger Uranium Mines*, it was pointed out that an industrial dispute concerning the dismissal of an employee is properly to be viewed as a claim for the creation of an obligation, on the part of the employer, to reinstate²⁰⁴. In that example the employee does not have a legal entitlement to reinstatement arising from the contract of employment. If the employee did have such a right the courts, but not an arbitral body, could recognise and give effect to it. The local coal authority in *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd*²⁰⁵ could settle claims as a matter of what was right and fair as between the parties, but not a claim for the payment of wages, which was a matter of legal entitlement.

157 The majority in the Full Court placed some weight upon the acknowledgment in *Precision Data*²⁰⁶, that the Parliament sometimes confers upon courts authority to make orders which create rights and liabilities. However, the Court made plain that what is exercised is nevertheless judicial

200 (1970) 123 CLR 361 at 374-375.

201 *Prentis* 211 US 210 at 226 (1908).

202 (1991) 173 CLR 167 at 189.

203 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 463 per Isaacs and Rich JJ.

204 (1987) 163 CLR 656 at 664.

205 (1987) 163 CLR 140.

206 (1991) 173 CLR 167 at 191.

power, which requires the application of legal principle and objective standards, not reference to policy considerations and other matters not specified by the legislature. Considerations of that kind had an important part to play in the determination to be made by the Panel. That did not provide a proper foundation for the contention that it was entrusted with judicial power, the Court held.

158 The result of the exercise of judicial power, of which Kitto J spoke in *Tasmanian Breweries*, assumes some importance in connection with the declaration and the orders made by the Panel in this case. Palles CB in *R (Wexford County Council) v Local Government Board for Ireland*²⁰⁷ and Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*²⁰⁸ identified as an essential element in the judicial process that it resulted in a binding and authoritative determination²⁰⁹. It is the judicial determination which pronounces the existence of the right or duty and obliges the parties to that recognition. It is not an exercise of judicial power if effect is not given to a controversial matter of legal right²¹⁰.

159 A non-judicial determination does not itself have force and effect. It is the statute which stamps an arbitrator's opinion with legal rights or obligations, so that when it is declared those are the mutual rights and obligations²¹¹. In *Tasmanian Breweries* the statute operated upon the determination to render the agreement or practice unenforceable. As Kitto J pointed out²¹², the findings made by the Tribunal did not bind the parties in the sense referred to by Palles CB. The Tribunal did not conclude any question between them and its determination had no operative effect.

160 The provision in s 657A(2)(b), which permits the Panel to consider whether a contravention has occurred in connection with the making of a declaration, is a point of departure from the legislation considered in *Precision*

207 [1902] 2 IR 349 at 373-374.

208 (1909) 8 CLR 330 at 357.

209 And see *Brandy* (1995) 183 CLR 245 at 258 per Mason CJ, Brennan and Toohey JJ.

210 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 443 per Griffith CJ, 451 per Barton J.

211 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 463 per Isaacs and Rich JJ.

212 (1970) 123 CLR 361 at 376-378.

Data. It may be inferred that in *Tasmanian Breweries* the absence of any inquiry into the validity or legality of the practice or agreement in question was taken to indicate that a judicial function was not involved²¹³. The finding of, and conviction for, an offence together with the imposition of penalties are matters regarded as exclusively pertaining to judicial power²¹⁴. So too is the grant of an injunction on the finding of a contravention of a statute²¹⁵. On the other hand, it is not uncommon for a tribunal to find it necessary to form an opinion as to the existence of the legal rights of the parties as a step in arriving at its ultimate decision²¹⁶.

161 Another feature of the current legislation, pointed to by the majority in the Full Court, is that the applicant for a declaration is no longer limited to ASIC. The bringing of an application by persons whose interests might be affected, by the circumstances arising in connection with a takeover, may suggest a dispute about rights as more likely. The majority thought so, and that the Panel's function involved adjudication between the parties²¹⁷. The adjudication of a dispute is itself, however, neither conclusive, nor even a strong indicator, of a judicial function. It is commonplace in administrative law²¹⁸. A non-judicial function, such as arbitration, does not cease to be so because the decision-maker forms an opinion as to existing legal rights and obligations²¹⁹. A controversy of the kind dealt with by the courts requires more than an adjudication of some dispute. A controversy has as its subject-matter the existence of a legal right or obligation. The majority clearly considered that the contravention referred to in s 657A(2)(b) provided that subject-matter²²⁰. It may be inferred that their

213 (1970) 123 CLR 361 at 375 per Kitto J.

214 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444 per Griffith CJ.

215 *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617.

216 *Re Cram* (1987) 163 CLR 140 at 149 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.

217 (2007) 159 FCR 301 at 386 [400].

218 *Tasmanian Breweries* (1970) 123 CLR 361 at 371 per McTiernan J; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 463 per Isaacs and Rich JJ.

219 *Re Ranger Uranium Mines* (1987) 163 CLR 656 at 665.

220 (2007) 159 FCR 301 at 389-390 [412].

Honours considered that the Panel's determination under the sub-section was declaratory of it.

162 Sub-section (1) of s 657A provides a power, expressed in non-obligatory terms ("may declare"), to make a declaration that the affairs of a company are unacceptable. The purpose of sub-s (2) is to provide for the occurrences which may constitute unacceptable circumstances. Paragraph (a) requires an opinion, on the part of the Panel, about the effect of the circumstances on the company. Paragraph (b) requires only that the Panel be satisfied that there has been a contravention. The paragraph treats a contravention as synonymous with unacceptable circumstances. The circumstances are unacceptable "because" they constitute or give rise to a contravention of the Chapters.

163 The Panel may make something in the nature of a finding in relation to the contravention. There may be a dispute about whether it has occurred, for example if the acquisition in question is denied, where a subsidiary company or third party has purchased the shares. Some such question arose in the present proceedings. The Panel's finding may have some evidentiary effect in later proceedings²²¹, but it is not suggested that it is itself binding upon the parties or that it is determinative of any legal question.

164 If a declaration was made at this point it may more readily be inferred that the contravention was its sole subject-matter. The making of a declaration upon the basis of a finding of contravention is not, however, possible at this point. Sub-section (3) and the concluding words of sub-s (2) direct attention to other considerations. It is necessary to have regard to those considerations to determine whether the finding of "unacceptable circumstances", of which sub-s (2) speaks, is a conclusion reached by the Panel by reference to matters other than the contravention.

165 Section 657A(3) requires that, in exercising any power under the section, the Panel must have regard to the purposes of Ch 6 and in particular those referred to in s 602. It will be recalled that the section states the principles of maintaining a well-informed, efficient and competitive market, that shareholders and directors be well-informed and have an opportunity to properly consider any offer of acquisition and that shareholders be able to participate in any benefits the takeover proposal offers. The other matters which the Panel is permitted to take into account would be consistent with these purposes. These considerations could not inform a discretion to make or refuse a declaration in a situation where there has been a contravention of a provision of the Chapters. The matters to which sub-s (3) refers concern the principles upon which those provisions are

221 s 658B.

based. A reference to them could add nothing to the conclusion that the circumstances are unacceptable.

166 The concluding words of sub-s (2), however, import considerations of the public interest, and policy considerations relevant to it, in connection with the Panel's decision to make or to decline to make a declaration. The question which arises, when a contravention has occurred, is whether those considerations have a part to play in a decision whether to make or refuse to make a declaration.

167 Where a contravention is found to have occurred it may be thought that the making of a declaration is the only course consistent with the public interest. The public interest ordinarily requires the maintenance of standards set by statutes. It was pointed out in argument, however, that some contraventions may have less serious consequences than others. Even when that is not the case, considerations of interests other than those directly affected by the share acquisitions may lead the Panel to conclude that no action should be taken and that the takeover proposal should be permitted to proceed. In either case the point is that the public interest is to be taken into account in making the decision. This implies a process where the Panel weighs the contravention and its effects with other considerations in order to determine what is required.

168 Policy considerations are more often regarded as applying to a non-judicial process of decision-making. This is not to say that statutes do not sometimes require the courts to have regard to the public interest. Whether it is possible for a court to do so, consistent with its function, may depend upon what guide is given by the statutory context and stated criteria. Where policy considerations relevant to the public interest are ill-defined and subjective, their application may be regarded as inappropriate to the judicial method²²² and more consonant with a non-judicial process of decision-making. The policy considerations here reserved to the Panel are potentially of wide range, even with statements of statutory purpose. They may involve matters relevant to the market, corporate behaviour and the interests of stakeholders beyond those directly affected by the proposal. In this regard Panel members may be taken to be qualified to make an assessment by their knowledge and experience.

169 The considerations relevant to the Panel's decision point to a non-judicial function being undertaken. But such a conclusion is not reached by reference to the nature of the considerations alone. When identifying whether administrative power is being exercised, considerations of policy will not necessarily be

222 *Tasmanian Breweries* (1970) 123 CLR 361 at 399-400 per Windeyer J.

decisive²²³. The taking into account of policy considerations is part of a statutory scheme in which the declaration is preliminary to action taken by the Panel. The declaration is a statement of the Panel's conclusion that, having regard to the circumstances created by the contravention and to the public interest, it considers something needs to be done about those circumstances. They are "unacceptable" in the sense that they cannot remain as they are and that they require consideration to be given to the orders that may be made under s 657D. It follows that a declaration of unacceptable circumstances made under s 657A(2)(b) is not operative and determinative of any question of legal obligation.

170 In *Tasmanian Breweries* the determination by the Tribunal, that the agreement or practice was contrary to the public interest, was held to have no binding or operative effect. It was described as the factum upon which the section rendering it unenforceable depended²²⁴. This approach was relied upon by the Attorney-General in argument on this appeal. There is a difference, however, in the operation of the *Corporations Act* 2001. The provisions of Ch 6 do not work upon a declaration made under s 657A(2)(b). The making of a declaration enables the Panel to exercise the powers given by s 657D to make orders of the kind there referred to.

171 Where a body is given power, conditionally upon being satisfied as to a state of facts, a determination that it is satisfied rarely has the binding effect spoken of. The determination may be described as one as to jurisdictional facts²²⁵. In the present case the Panel's opinion, expressed in the declaration of unacceptable circumstances, provides the basis for the exercise of its powers to make orders. Windeyer J, in *Tasmanian Breweries*, observed that deciding whether or not facts exist, upon which jurisdiction depends, is not an exercise of judicial power unless the jurisdiction dependent upon the decision is itself part of the judicial power²²⁶. The focus of the inquiry then shifts to the orders made

223 *Thomas v Mowbray* (2007) 81 ALJR 1414 at 1438-1440 [80]-[91] per Gummow and Crennan JJ; 237 ALR 194 at 222-225.

224 (1970) 123 CLR 361 at 371 per McTiernan J, 378 per Kitto J; and see *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 464 per Isaacs and Rich JJ; *Federal Commissioner of Taxation v Munro* ("BIO No 2") (1926) 38 CLR 153 at 176 per Isaacs J; *Luton v Lessels* (2002) 210 CLR 333 at 357-358 [67] per Gaudron and Hayne JJ.

225 *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 197 per Latham CJ.

226 (1970) 123 CLR 361 at 399.

under s 657D. The nature of the final act may be determinative of the nature of the inquiry leading to it²²⁷.

172 The orders which can be made by the Panel are in substantially the same terms as those which could be made by the Panel under the 1989 legislation. The orders that that Panel could make were, in most respects, the same as those which could be made by the Court, although the Court's orders were called remedial orders. The *Corporations Act* 2001 refers the power to make those orders to both the Panel and the Court. No issue arises on the appeal concerning the ability of the Panel to make particular orders listed in the definition of remedial orders in s 9. It is not suggested that the further express power in the Panel to order costs is a distinctly judicial one. The fact that both the Court and the Panel can make orders in the same terms does not mean that they involve the exercise of judicial power.

173 The orders which the Panel may make include those which may direct a person to do or not to do an act. Many non-judicial bodies make orders of this kind, in order to regulate the future rights of the parties. In *Tasmanian Breweries* the Tribunal was given power to make restraining orders. They were regarded as laying down rules for the future²²⁸, consistent with the exercise of a non-judicial power. A similar power may be seen to be exercised by the Panel. Its orders address the circumstances as have occurred in connection with the takeover. Its role is to protect the interests of persons affected by the share acquisition and to realign the takeover process. In doing so it is to take account of the extent of burden or prejudice to a party in what it seeks to do. This suggests a power akin to one to do what is right and fair as between the respective interests²²⁹. Its orders, whilst remedial in effect, do not require a party to make good a legal obligation or correct a contravention of the Chapters. The Panel is expressly denied the power to do so.

174 By contrast, and in addition to the remedial orders it may make in the circumstances arising from a contravention, the Court may make any order, by way of injunction or otherwise, that it considers appropriate where a

²²⁷ *Prentis* 211 US 210 at 227 (1908) applied *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 382 per Isaacs J; and see *Tasmanian Breweries* (1970) 123 CLR 361 at 376-377 per Kitto J.

²²⁸ (1970) 123 CLR 361 at 408 per Owen J.

²²⁹ *Re Cram* (1987) 163 CLR 140 at 154 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.

contravention has occurred²³⁰. The specified orders it may make include one requiring a bidder to make an offer²³¹ and orders declaring unconscionable agreements to be void²³². It may make orders securing compliance with any of its orders so made²³³. It may excuse a contravention and declare that an act is not invalid because of a contravention and has at all times had legal effect²³⁴.

175 The absence of a power in the Panel to compel compliance with its orders says much about the nature and effect of its orders. In *Brandy* it was held that it is not essential to the exercise of judicial power that a body have the ability to enforce its own decision²³⁵. The other members of the Court accepted that, whilst not an exclusive test, the fact that the Human Rights and Equal Opportunity Commission could not enforce its own determinations was a strong factor weighing against the characterisation of its powers as judicial²³⁶. In the present case an order of the Court is necessary for enforcement of compliance with the Panel's orders. This aspect of the legislative scheme has not altered. That an offence of strict liability is now created, on non-compliance with the statute, does not render the Panel's orders enforceable in their own right.

Conclusion

176 The consideration which the Takeovers Panel may now give to the fact that a contravention of the provisions of Chs 6, 6A, 6B and 6C has occurred does not render its function a judicial one. The making of a declaration of unacceptable circumstances does not involve the resolution of a controversy about an existing legal obligation. It represents a conclusion reached by the Panel that the circumstances are such as to require orders and directions to be made by it. It reaches that conclusion by reference to the circumstances arising from the contravention and wider considerations, referable to the public interest. The orders it makes reflect the Panel's view about the process which should be undertaken with respect to the takeover and what the rights of the parties should

230 s 1325A.

231 s 1325B.

232 s 1325C.

233 s 1325E.

234 s 1325D.

235 (1995) 183 CLR 245 at 269 per Deane, Dawson, Gaudron and McHugh JJ.

236 (1995) 183 CLR 245 at 257 per Mason CJ, Brennan and Toohey JJ.

be. So understood, the function of the Panel under s 657A(2)(b) does not involve the exercise of judicial power.

177 The majority in the Full Court were clearly concerned about the restriction placed upon the use of the courts in the bid period. Although there was no question raised in the proceedings concerning that aspect of Ch 6, their Honours were alert to the prospect that the courts' functions might be undertaken by the Panel. It is apparent from the provisions of that and following Chapters, that some care has been taken to ensure that the Panel's functions do not impermissibly involve the exercise of judicial power.

178 The appeal should be allowed. The only orders necessary to be made are that the declaration made by the Full Court as to the invalidity of s 657A(2)(b) be set aside; and in lieu it be declared that s 657A(2)(b) is not invalid as involving an exercise of the judicial power of the Commonwealth.