

THE AUSTRALIAN TAKEOVERS PANEL AND JUDICIAL REVIEW OF ITS DECISIONS

ABSTRACT

The recent decision of the Federal Court in *Glencore International AG v Takeovers Panel*¹ ('*Glencore*'), involved the first court challenge to an Australian Takeovers Panel decision since the Panel replaced the courts as the primary forum for deciding takeover matters. Two of the key aims of this change were to minimise 'tactical litigation' and free up court resources. Although the court in *Glencore* concluded that, in certain limited circumstances, it should be slow to interfere in Panel decisions, these were found not to apply and the Panel's decision was quashed due to jurisdictional error. This article explores the implications of the *Glencore* decision for the Panel, particularly in light of the approach of judicial restraint adopted by United Kingdom courts in relation to the UK Panel. Notwithstanding the challenges posed by the complex Australian system of judicial review, it is concluded that the Australian courts should adopt a similar approach to that in the UK.

I INTRODUCTION

The extent to which courts should intervene in administrative decision-making has become an increasingly important question in light of the expansion of the role of administrative bodies in our society. On the one hand, courts have a responsibility to ensure that administrative decision-makers are not acting outside the law. On the other, court proceedings are likely to involve delay and disruption to the decision-making process. Such a tension necessarily exists in the context of any administrative system predicated on the rule of law. However, it is particularly acute where a system of dispute resolution has been established in order to avoid court proceedings in relation to the same matters. In such cases, the potential for challenges to the administrative decisions in the courts can undermine the very purpose of the system.

This dilemma is especially significant in the context of takeover regulation. Whereas some jurisdictions (such as the United States and Canada) give the

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¹ (2005) 220 ALR 495.

primary decision-making role to the courts, other nations are increasingly relying upon non-judicial bodies to resolve takeover disputes. Since the Panel on Takeovers and Mergers ('UK Panel') was established in 1968, countries such as Australia, Hong Kong, Ireland, New Zealand and South Africa have also established their own takeover panels. In Australia, the Takeovers Panel ('Australian Panel') was given the power to determine takeover matters in place of the courts in March 2000 under the *Corporate Law Economic Reform Program Act 1999* (Cth) ('CLERP reforms'). Such an approach was adopted in order to facilitate speed and flexibility in decision-making and to obtain the benefit of the commercial expertise of Panel members.²

The purpose of this article is to examine the circumstances in which the courts should intervene in relation to decisions of the Australian Panel. In focusing upon this issue, the article includes a detailed analysis of Australian and UK decisions involving judicial review of their respective Panels. This is particularly appropriate given that the approach adopted by the UK courts has been an important factor in the limited number of judicial review applications over the long history of the UK Panel. The success of the UK system was also considered to be an important precedent in the context of the CLERP reforms in Australia.³ In the UK, the Court of Appeal's decision in *R v Panel on Take-overs and Mergers, Ex parte Datafin Plc & Anor*⁴ ('Datafin') has played a crucial role in establishing a general approach of judicial restraint in relation to review of UK Panel decisions. It is this element of *Datafin* that is the focus of the analysis in the article, rather than the decision's establishment of court jurisdiction in relation to decisions of non-statutory bodies where they exercise a public role (often referred to as the 'public function' test).⁵ The first case involving judicial review of an Australian Panel decision since the CLERP reforms, *Glencore*⁶ provides Australian courts with greater latitude in relation to review of Panel decisions than is the case in the UK.

A comparison of the Australian and UK systems of takeover regulation demonstrates significant similarities and differences. Both the Australian and UK Panels have the primary role of deciding whether the actions of parties to a takeover are acceptable. However, despite being based upon similar aims and regulatory principles, there are a number of differences between the frameworks underpinning

² Corporate Law Economic Reform Program, *Takeovers Proposals for Reform* Paper No 4 (1997) ('CLERP 4') 32.

³ Ibid.

⁴ [1987] QB 815.

⁵ See, eg, Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 127–32.

⁶ *Glencore* (2005) 220 ALR 495.

the Panels, and their respective roles and operation.⁷ Importantly for the purposes of this article, a key difference is that the UK Panel does not currently have a statutory basis. This was one of the factors that the UK courts relied upon in advocating judicial restraint in relation to UK Panel decisions in *Datafin*. In contrast, the Australian Panel is established under statute,⁸ with multiple levels of regulation applying to the Panel and its proceedings.⁹

In the absence of a *Datafin*-like approach, the system of judicial review in Australia has the potential to undermine the effectiveness of the Australian Panel. Although this possibility has existed since the CLERP reforms were implemented in March 2000, it did not become a reality until the first court challenge in September 2005. The decision by Emmett J of the Federal Court in *Glencore* has significant implications for the future operation of the Panel. Although the constitutionality of the Panel was confirmed (albeit by a single Federal Court judge), the application for judicial review was successful leading to the matter being remitted back to another Review Panel for reconsideration.¹⁰ The *Glencore* decision did not refer to the *Datafin* principle. Instead, the decision included a statement that the court should be ‘slow to interfere’ with a Panel decision, and then only in certain limited circumstances.¹¹ However, Emmett J found that these circumstances did not apply to the case before the court.

This article explores the implications of the *Glencore* decision for the Australian Panel. In order to provide a foundation for the analysis in the later Parts, Part II of the article provides an overview of the principles and underlying policy arising from takeover, administrative and constitutional law as they relate to the Australian Panel and the *Glencore* decision. Part II comprises three sections, with the first setting out the legislative aims and framework underpinning the Panel, the second providing an overview of the Australian system of judicial review and the third containing a detailed analysis of the *Glencore* decision and its immediate impact upon Panel decision-making. Part III focuses upon the UK courts’ approach to judicial review of its Panel decisions in *Datafin* and subsequent cases, and the implications of recent proposals to implement a statutory regime as required by the Directive of the European Parliament and of the Council on Takeover Bids (‘EU

⁷ For a detailed comparison of the Australian and UK systems, see Emma Armson ‘Models for Takeover Dispute Resolution: Australia and the UK’ (2005) 5 *Journal of Corporate Law Studies* 401.

⁸ See *Australian Securities and Investments Commission Act 1989* (Cth) s 171.

⁹ See eg Emma Armson, ‘The Australian Takeovers Panel: Commercial Body or Quasi-Court?’ (2004) 28 *Melbourne University Law Review* 565, 568.

¹⁰ See *Glencore* (2005) 220 ALR 495; *Re Austral Coal Limited 02(RR)* [2005] ATP 20 (Farrell P, Scott DP and D Byrne, 27 October 2005) (‘*Austral 02(RR)*’).

¹¹ *Glencore* (2005) 220 ALR 495, 506–7.

Takeovers Directive’).¹² Part IV examines the extent to which the *Datafin* approach concerning judicial restraint in relation to review of Panel decisions could apply in Australia,¹³ in light of similarities and differences between the Australian and UK Panels and the operation of the Australian system of judicial review. Part V concludes with a suggested approach to balance the tension between ensuring that the Panel operates according to law and yet retains its effectiveness through only limited scope for judicial challenge of Panel decisions.

II JUDICIAL REVIEW OF AUSTRALIAN PANEL DECISIONS

A *Takeover Dispute Resolution Under The Corporations Act*

The implementation of the CLERP reforms in March 2000 transformed the role of the Australian Panel and consequently the takeover regulatory landscape in Australia. One of the most significant reforms involved the Panel replacing the jurisdiction of the courts during a takeover bid. To achieve this, the Panel’s jurisdiction was expanded to allow it to decide applications from any interested person rather than relying only upon referrals of matters from the corporate regulator (the Australian Securities and Investments Commission or ‘ASIC’).¹⁴ As a result, the Panel was transformed from a body that had previously only considered four matters over a decade,¹⁵ to one that made 148 decisions in the first five years following the reforms.¹⁶ The aims of the reforms were to inject legal and commercial specialist expertise into takeover dispute resolution, provide ‘speed, informality and uniformity’ in decision-making, minimise ‘tactical litigation’ and free up court resources.¹⁷ In order to fulfil the first aim, the Australian Government

¹² Directive 2004/25/EC, [2004] OJ L142/12 (‘EU Takeovers Directive’) Art 4(1).

¹³ Compare above n 5 and accompanying text.

¹⁴ *Corporations Act 2001* (Cth) s 657C(2)(d).

¹⁵ The sparing use of the Panel led to arguments that its role should be expanded: see eg G F K Santow and George Williams, ‘Taking the Legalism Out of Takeovers’ (1997) 71 *Australian Law Journal* 749; John M Green and Stephen Brent, ‘Takeovers: Breathing More Life into the Corporations and Securities Panel’ (1997) 15 *Company and Securities Law Journal* 319.

¹⁶ See Emma Armson, ‘An Empirical Study of the First Five Years of the Takeovers Panel’ (2005) *Sydney Law Review* 665, 668–9.

¹⁷ CLERP 4, above n 2, 32. For an evaluation of the CLERP reforms, see eg Armson, above n 9; Armson, *ibid*; Nicole Calleja, *The New Takeovers Panel — A Better Way?* (2002); Rowen Cross, ‘The Takeovers Panel Three Years On: Should We Ever Go Back to the Courts?’ (2003) 21 *Company and Securities Law Journal* 367; Emmanuel Hadjidakis, ‘The Takeovers Panel: From Toothless Tiger to Sleeping Tiger? Will the Courts Now Advance?’ (2002) 20 *Company and Securities Law Journal* 59; Barbara Mescher, ‘Powers of the Takeovers Panel and their Effect upon ASIC and the Court’

has appointed 48 part-time members of the Panel, the vast majority of whom work in the areas of law, banking and company management.¹⁸

There are clear incentives for litigation to be used as a strategy to affect the outcome of a takeover bid. This is particularly the case given the opposing aims of the shareholders of the company being taken over ('target') and the acquirer ('bidder') in terms of the price to be paid, and the possibility that the directors of the target will lose their positions if the takeover is successful. These conflicts of interest provide considerable challenges for the resolution of disputes in light of the complex and detailed requirements of the takeover provisions in Chapter 6 of the *Corporations Act 2001* (Cth) ('*Corporations Act*'). The takeover provisions prevent a person from acquiring more than 20 per cent of the voting power in a company,¹⁹ unless one of the exceptions applies.²⁰ One of the key exceptions requires the bidder to make an offer to buy the shares of all the target's shareholders.²¹ The legislation sets out detailed requirements in relation to the terms of the offers and information to be disclosed, including a structured system of time limits for the provision of information and payment in relation to the offers.²²

An open-ended process of judicial review has the potential to disrupt the takeover process. Such delay could thwart a takeover bid given the high financial stakes for the bidder in making a general offer to purchase target shares in light of the associated risks and timing pressures. Speed and certainty in relation to the outcome of takeover decisions are consequently crucial to the effective operation of the regime. This is particularly important given that the threat of takeover provides a strong incentive for directors to ensure that the company is operating efficiently. In light of this, a key aim of the CLERP Panel reforms was to allow the target's shareholders to decide upon the merits of a takeover bid, by removing the opportunity for parties to bring court proceedings in order to delay or stymie the bid and instead placing takeover disputes before a commercial body set up to hear

(2002) 76 *Australian Law Journal* 119; Erin Walsh, 'Judging The Takeovers Panel' (2002) 20 *Company and Securities Law Journal* 435.

¹⁸ Members are appointed based upon their knowledge or experience in at least one of the fields of business, administration of companies, financial markets, financial products and services, law, economics and accounting: *Australian Securities and Investments Commission Act 2001* (Cth) s 172(4), (4A). For a recent study of the backgrounds of Panel members, see Armson, above n 9, 573–5.

¹⁹ The prohibition does not apply where a company has 50 or fewer members and its shares are not traded on the stock exchange, but extends to certain indirect forms of investments that are so traded: see *Corporations Act 2001* (Cth) ss 604, 606.

²⁰ *Corporations Act 2001* (Cth) s 611.

²¹ *Corporations Act 2001* (Cth) s 611, item 1.

²² See eg *Corporations Act 2001* (Cth) Pt 6.4–6.6 (especially ss 633, 635).

matters informally and quickly.²³ Applications for judicial review of Panel decisions consequently have the potential to undermine the purpose of the current system of takeover dispute resolution. It is this risk that differentiates the Panel from other administrative bodies.

There is also significant flexibility in the discretionary powers given to ASIC and the Panel under the takeover provisions, with the regulatory system based upon an unusual combination of policy and legislative requirements. In exercising their statutory powers, both ASIC and the Panel are required to take into account the purposes underlying the takeover provisions. These purposes are to ensure that acquisitions of shares take place in an ‘efficient, competitive and informed market’ and that members of the target company or listed managed investment scheme have sufficient information and time to make a decision and a ‘reasonable and equal opportunity’ to participate in any benefits under the takeover bid.²⁴ Consistent with these aims, ASIC has broad powers to exempt persons from, or modify the operation of, the takeover provisions in relation to individual persons or classes of cases.²⁵ The CLERP reforms gave the Panel the role of reviewing ASIC’s exercise of these powers.²⁶

Although takeover matters are now decided by the Panel instead of the courts, the Panel has a substantially different role. Rather than focusing upon whether there has been compliance with the technical requirements of the takeover provisions, the Panel’s jurisdiction is based upon upholding their purposes. The Panel’s main role

²³ See CLERP 4, above n 2, 36; Explanatory Memorandum, *Corporate Law Economic Reform Program Bill 1998* (Cth) 38.

²⁴ See *Corporations Act 2001* (Cth) ss 602, 604. In relation to the first purpose, recent studies suggest that there are inefficiencies in the market for corporate control in Australia: see Alan Dignam, ‘The Takeovers Panel, the Market Efficiency Principle and the Market for Corporate Control — An Empirical Study’ (2005) 23 *Company and Securities Law Journal* 58; Darren Henry, ‘Directors’ Recommendations in Takeovers: An Agency and Governance Analysis’ (2005) 32 *Journal of Business Finance & Accounting* 129. The other purposes are known as the ‘Eggleston principles’ and originate from the Company Law Advisory Committee, *Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and Takeovers*, 1969. For a critique of these principles, see eg Justin Mannolini, ‘Convergence or Divergence: Is there a Role for the Eggleston Principles in a Global M&A Environment?’ (2002) 24 *Sydney Law Review* 336 at 336–40, 360; James Mayanja, ‘The Equal Opportunity Principle in Australian Takeover Law and Practice: Time for Review?’ (2000) 12 *Australian Journal of Corporate Law* 1, 16, 18; Benedict Sheehy, ‘Australia’s Eggleston Principles In Takeover Law: Social and Economic Sense?’ (2004) 17 *Australian Journal of Corporate Law* 218.

²⁵ *Corporations Act 2001* (Cth) s 655A.

²⁶ See *Corporations Act 2001* (Cth) ss 656A–656B. This role was previously undertaken by the Administrative Appeals Tribunal.

is to exercise its power to make a declaration of unacceptable circumstances and/or orders to ensure that the purposes of the takeover provisions are complied with.²⁷

The basis upon which such a declaration may be made is set out in subsection 657A(2) of the *Corporations Act*, which provides that:

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

Despite the broad ambit of the Panel's powers, they are subject to a number of important limitations. First, a declaration of unacceptable circumstances can only be made if the Panel considers that it is 'not against the public interest' after taking into account any policy considerations considered relevant by the Panel.²⁸ In exercising its discretion, the Panel is required to have regard to the purposes of the takeover provisions, the other legislative provisions in Chapter 6, the *Corporations Regulations* and Panel rules, and may also take into account any other matters it considers relevant.²⁹ Second, as an administrative body, it cannot exercise judicial power contrary to Chapter III of the *Commonwealth Constitution* ('the Constitution').³⁰ This is reflected in the fact that, although the Panel can take into account contraventions of the takeover related provisions in the *Corporations Act*, it cannot require a person to comply with the legislation.³¹ The legislation similarly provides for court enforcement of Panel orders and rules.³² Third, any orders that the Panel makes must not 'unfairly prejudice' any person.³³

²⁷ See *Corporations Act 2001* (Cth) ss 657A, 657D–657E.

²⁸ *Corporations Act 2001* (Cth) s 657A(2).

²⁹ *Corporations Act 2001* (Cth) s 657A(3).

³⁰ See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 256–9 (Mason CJ, Brennan and Toohey JJ); 267–9 (Deane, Dawson, Gaudron and McHugh JJ); *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 110 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

³¹ *Corporations Act 2001* (Cth) ss 657A(2)(b), 657D(2).

³² *Corporations Act 2001* (Cth) ss 657F–657G, 658C(5)–(6). The role of the 'Court' is primarily undertaken by the Federal Court or a Supreme Court of a State or Territory: see below n 37.

³³ *Corporations Act 2001* (Cth) s 657D(1). See also *Austral 02(RR)* [2005] ATP 20 [293], Annexure D, 1853 para 19–20; Emma Armson, 'The Australian Takeovers Panel and Unfair Prejudice to Third Parties' (2004) 16 *Australian Journal of Corporate Law* 187.

Panel decisions are also subject to review by both an internal Panel and by the courts. The internal review process applies in relation to unacceptable circumstances proceedings, and allows ASIC and parties to apply for review of a Panel decision by a Review Panel.³⁴ In order to limit review applications to appropriate cases, the President of the Panel must consent to an application if the initial Panel did not make a declaration of unacceptable circumstances or an order.³⁵ The Panel's decisions are also subject to judicial review, which is discussed in more detail in the following section.

However, the *Corporations Act* places significant restrictions on the courts' role in order 'to make the Panel the main forum for resolving disputes about a takeover bid until the bid period has ended'.³⁶ First, section 659B contains a limitation clause that restricts access to a 'Court' (principally the Federal and Supreme Courts³⁷) during the takeover bid period, only allowing governmental authorities to commence Court proceedings in relation to the takeover bid at that time.³⁸ Second, section 659C limits the orders that a Court can make following the bid period, where it is found that there has been a breach of the *Corporations Act* and the Panel has refused to make a declaration of unacceptable circumstances.³⁹ In such a case, the Court cannot exercise its powers under the *Corporations Act* to unwind a transaction and can only use those powers to make remedial orders involving the payment of money.⁴⁰ This restriction does not, however, apply to the Court's exercise of its other powers.

B Overview of Judicial Review System

Australian Panel decisions are subject to judicial review through a number of different avenues. These are principally applications to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*'), the High Court's jurisdiction under section 75(v) of the Constitution and the equivalent Federal Court jurisdiction in section 39B of the *Judiciary Act 1903* (Cth).⁴¹ The grounds for review of a decision under the *ADJR Act* are mostly based upon the

³⁴ *Corporations Act 2001* (Cth) s 657EA(1).

³⁵ *Corporations Act 2001* (Cth) s 657EA(2).

³⁶ *Corporations Act 2001* (Cth) s 659AA.

³⁷ *Corporations Act 2001* (Cth) s 58AA(1).

³⁸ *Corporations Act 2001* (Cth) s 659B(1).

³⁹ *Corporations Act 2001* (Cth) ss 659C(1), 58AA.

⁴⁰ *Corporations Act 2001* (Cth) s 659C(2). Under subsection 659C(1), the Court's jurisdiction is limited to determining whether there has been an offence or contravention, ordering a person to pay a penalty or compensation to another or providing relief from liability or removing any procedural irregularity.

⁴¹ It has been observed that section 39B is almost always pleaded together with the *ADJR Act*: see Aronson, Dyer and Groves, above n 5, 34.

common law grounds.⁴² They apply where there is a breach of natural justice, non-observance of the procedures required by law, a lack of jurisdiction to make the decision, the decision is not authorised by the legislation, an improper exercise of the power conferred (including where the exercise of the power is so unreasonable that no reasonable person could have so exercised it), an error of law, a decision induced or affected by fraud, no evidence or other material to justify the decision and/or a decision that is ‘otherwise contrary to law’.⁴³ Consistent with the principle that judicial review is not an appeal, these grounds generally do not involve review of the factual findings underpinning the decision.⁴⁴ Indeed, there will be no legal error if there is ‘simply ... a wrong finding of fact’.⁴⁵ The error must be material (rather than trivial) in the sense that it contributed to the decision.⁴⁶

An *ADJR Act* application would need to be made by a person ‘aggrieved by a decision’ of an ‘administrative character’ made ‘under an enactment’.⁴⁷ These requirements would be met in the case of a person whose interests are affected adversely by a Panel decision in exercising its powers under the *Corporations Act*.⁴⁸ A wide range of orders can be granted by the court, namely an order setting aside the decision, referring the matter to the decision-maker for further consideration, declaring the rights of the parties involved and/or directing any party to do or refrain from doing any act that ‘the court considers necessary to do justice between the parties’.⁴⁹ The key advantages of the *ADJR Act* compared to the common law

⁴² See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 (‘*Bond*’), 356–7 (Mason CJ, Brennan and Deane JJ agreeing).

⁴³ *Administrative Decisions (Judicial Review) Act 1977* (Cth) (‘*ADJR Act*’) s 5(1)–(2).

⁴⁴ *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 (‘*S20*’) 84 (Kirby J). See also *Corporation of the City of Enfield v Development Assessment Commission & Anor* (2000) 199 CLR 135 (‘*Enfield*’), 153 (Gleeson CJ, Gummow, Kirby and Hayne JJ). One key exception is the ‘no evidence’ ground: see *ADJR Act* s 5(1)(h). Another is an error made in relation to a ‘jurisdictional fact’, that is, where the body’s jurisdiction is ‘contingent upon the actual existence of a state of facts’ as opposed to their ‘opinion or determination that the facts do exist’: see *Parisiene Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, 391; *ADJR Act* s 5(1)(c).

⁴⁵ *Enfield* (2000) 199 CLR 135, 154 (Gleeson CJ, Gummow, Kirby and Hayne JJ), 158 (Gaudron J).

⁴⁶ *Bond* (1990) 170 CLR 321, 353 (Mason CJ, Brennan and Deane JJ agreeing), 384 (Toohey and Gaudron JJ).

⁴⁷ *ADJR Act* ss 3(1) (‘decision to which this Act applies’, ‘enactment’), 3(2)(a), 3(4), 5(1).

⁴⁸ The decision would be a final conclusion of a kind that was authorised by the legislation: see *Bond* (1990) 170 CLR 321, 336–7 (Mason CJ, Brennan and Deane JJ agreeing). It has been found that the Panel is not exercising judicial power in performing this function: see below n 97 and accompanying text.

⁴⁹ *ADJR Act* s 16(1).

grounds (which are relevant to section 75(v) of the Constitution⁵⁰), lie in the fact that it has a streamlined procedure⁵¹ and provides relief upon broader grounds.⁵² Consequently, it would be expected that this regime would be used to challenge Panel decisions where access was not prevented by the limitation clause in section 659B of the *Corporations Act*.⁵³

Section 75(v) of the Constitution empowers the High Court to grant three specified remedies against officers of the Commonwealth.⁵⁴ These remedies are mandamus (compelling the respondent to perform their duty), prohibition (a restraining order) or an injunction (which could be used to prevent a person acting outside their power).⁵⁵ There is also an ancillary power to grant certiorari (to quash a decision).⁵⁶ The grounds for the common law remedies apply to the exercise of the High Court's jurisdiction under section 75(v).⁵⁷ This means that the remedies of mandamus and prohibition are confined to jurisdictional errors.⁵⁸ The High Court has found the following to be jurisdictional errors, which would invalidate a decision

[i]f ... an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected ...⁵⁹

It has also been found that denial of natural justice or fairness and decisions that are manifestly unreasonable⁶⁰ can lead to jurisdictional error.⁶¹ In contrast to the other

⁵⁰ See text accompanying n 57 below.

⁵¹ See *Central Queensland Land Council v Attorney-General (Cth)* (2002) 116 FCR 390, 434–5 [190].

⁵² See Aronson, Dyer and Groves, above n 5, 167; and compare below nn 58–61 and accompanying text.

⁵³ See text accompanying n 38 above.

⁵⁴ Panel members clearly fall within this definition in light of the *Glencore* decision.

⁵⁵ These remedies are referred to in this context as the 'constitutional writs': see *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 ('*Aala*'), 92–3 (Gaudron and Gummow JJ), 133–4 (Kirby J), 142 (Callinan J).

⁵⁶ See, eg, *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 ('*McBain*'), 403–4 (Gaudron and Gummow JJ), particularly 461–73 (Hayne J).

⁵⁷ *Aala* (2000) 204 CLR 82.

⁵⁸ Ibid. Certiorari would appear to be subject to similar limitations when being granted in the context of the section 75(v) jurisdiction: *McBain* (2002) 209 CLR 372, 465–72 (Hayne J).

⁵⁹ *Craig v South Australia* (1995) 184 CLR 163, 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ). See also below n 74 and text accompanying n 102.

⁶⁰ See below n 134 and accompanying text.

section 75(v) remedies, injunctions can also be based upon other errors of law.⁶² The High Court can remit section 75(v) matters to the Federal Court.⁶³

There are significant restrictions on the extent to which judicial review can be limited in relation to administrative decisions under federal legislation. One of the crucial factors is the fact that the High Court's jurisdiction under section 75(v) cannot be limited by statute, because it is conferred by the Constitution.⁶⁴ Indeed, the High Court has emphasised that section 75(v) is central to the separation of powers and the rule of law, in making the High Court the ultimate decision-maker to ensure that limits are placed upon the powers of the executive and that it acts lawfully.⁶⁵ It has been observed that statutory restrictions in relation to other bases for judicial review have resulted in an increase in the number of decisions under the section 75(v) jurisdiction.⁶⁶ Indeed, the *Glencore* decision resulted from a section 75(v) application, in light of the restriction on commencing Court proceedings during the takeover bid period in section 659B of the *Corporations Act*.⁶⁷

Legislative provisions designed to prevent judicial review (known as 'privative' or 'ouster' clauses) have been read down by the High Court to prevent conflict with section 75(v) of the Constitution. It has been concluded that such clauses cannot prevent jurisdictional review as Chapter III of the Constitution would not allow a non-judicial body to be given 'the power to conclusively determine the limits of its own jurisdiction'.⁶⁸ As a result, privative clauses have been interpreted to protect only decisions that are bona fide, relate to the subject matter of the legislation and

⁶¹ See eg *Aala* (2000) 204 CLR 82, 100–1 (Gaudron and Gummow JJ); *S20* (2003) 198 ALR 59, 95 (Kirby J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 ('S157'), 490 (Gleeson CJ).

⁶² See eg *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. Unlike in other contexts, it would not be possible for Parliament to restrict injunctions under section 75(v) to only arise in relation to jurisdictional errors given the constitutional source of the power: *S157* (2003) 211 CLR 476, 508 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

⁶³ *Judiciary Act 1903* (Cth) s 44.

⁶⁴ See *S157* (2003) 211 CLR 476, 482–4 (Gleeson CJ), 498 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); Duncan Kerr and George Williams, 'Review of Executive Action and the Rule of Law under the Australian Constitution' (2003) 14 *Public Law Review* 219, 229.

⁶⁵ See eg *Aala* (2000) 204 CLR 82, 92 (Gaudron and Gummow JJ), 134 (Kirby J); *S157* (2003) 211 CLR 476, 513–4 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); below n 77.

⁶⁶ Aronson, Dyer and Groves, above n 5, 866.

⁶⁷ See also above n 63 and accompanying text.

⁶⁸ *S157* (2003) 211 CLR 476, 512 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

are reasonably capable of being referred to the power granted.⁶⁹ Although the position remains unclear,⁷⁰ there has been no High Court finding that clauses placing time limits on judicial review are contrary to section 75(v) of the Constitution. One High Court judge has found that it is possible to regulate the procedure by which section 75(v) proceedings can be brought.⁷¹ However, it is an open question whether a provision such as section 659B of the *Corporations Act*, which excludes review for an initial time period,⁷² would lead to constitutional difficulties. There is similarly no authority on this issue in the context of a provision like section 659C, which prevents the exercise of court powers following a takeover bid in certain circumstances.⁷³

The High Court considered the extent to which there should be judicial deference (that is, allowing more leeway before intervening) in relation to an administrative tribunal's findings of 'jurisdictional facts'⁷⁴ in *Corporation of the City of Enfield v Development Assessment Commission & Anor*⁷⁵ ('*Enfield*'). Rejecting this proposition, both High Court judgments concluded that the court must determine 'for itself' whether a tribunal has acted within jurisdiction.⁷⁶ In doing this, they

⁶⁹ The court must then determine whether the legislation intended that invalidity result from the type of error in question: see *ibid*.

⁷⁰ This is particularly the case after the decision in *S157*.

⁷¹ *S157* (2003) 211 CLR 476, 537 (Callinan J). See also Simon Evans, 'Privative Clauses and Time Limits in the High Court' (2003) 5 *Constitutional Law and Policy Review* 61. Compare *Ex parte Thomas; Re Arnold* [1966] 2 NSWLR 197, 198; *R v Tillet; Ex parte Newton* (1969) 14 FLR 101, 115–7; *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78, 103.

⁷² See above n 38 and accompanying text.

⁷³ See above nn 39–40 and accompanying text.

⁷⁴ This term was explained by the majority of the High Court as being 'often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion': *Enfield* (2000) 199 CLR 135, 148 (Gleeson CJ, Gummow, Kirby and Hayne JJ). Gaudron J agreed with the majority's reasons in this respect: see 156–9. See also above text accompanying n 59.

⁷⁵ (2000) 199 CLR 135. This is a significant question given that one of the pivotal issues in the *Glencore* decision involved whether section 657A(2)(a) of the *Corporations Act* had been satisfied in order to give the Panel the jurisdiction to make a declaration of unacceptable circumstances: see above text following n 27. Although *Enfield* involved equitable remedies rather than judicial review, the High Court's findings are nevertheless significant given the majority's view that the procedural distinctions between the two have become blurred: see *Enfield*, 147 (Gleeson CJ, Gummow, Kirby and Hayne JJ).

⁷⁶ *Ibid* 155 (Gleeson CJ, Gummow, Kirby and Hayne JJ), 158 (Gaudron J). This is consistent with the approach taken in the UK: see eg *R (Prolife Alliance) v British Broadcasting Corp* [2003] All ER 977, 997 (Lord Hoffmann). The majority also found that, where the statutory provision turns upon the administrative body's opinion or satisfaction as to a state of affairs, this would require such an opinion or

emphasised the importance of the court's role in ensuring that an administrative body acts within the law.⁷⁷ Although dismissing the US approach of according deference with respect to the interpretation of a statute by an administering regulatory body,⁷⁸ the High Court cited authority allowing a court to give greater weight to an administrative body's findings of jurisdictional fact where the evidence before the court is the same or substantially the same as that before the body and it holds expertise in that particular area.⁷⁹ The majority referred to a similar approach having been taken in relation to appeals from the decision of a specialist body dealing with trade marks.⁸⁰ In this context, it was concluded that

[t]he weight to be given to the opinion of the tribunal in a particular case will depend upon the circumstances. These will include such matters as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in exercising its functions and the extent to which its decisions are supported by disclosed processes of reasoning.⁸¹

The Panel meets these criteria. It makes decisions in a specialist commercial field, and its members are appointed by the Government according to their expertise in areas that are highly relevant to the Panel's operations.⁸² The *Corporations Act* also sets out the factors that the Panel must take into account Panel exercises its functions.⁸³ Finally, the Panel provides detailed reasons for its decisions.⁸⁴

Notwithstanding this and the limitations on review of Panel decisions in sections 659B and 659C of the *Corporations Act*, the discussion in this section shows that some forms of judicial review cannot be avoided in the Australian context. This is particularly the case in relation to the High Court's jurisdiction under section 75(v)

satisfaction to be 'formed reasonably upon the material before the decision-maker': *Enfield* (2000) 199 CLR 135, 150 (Gleeson CJ, Gummow, Kirby and Hayne JJ).

⁷⁷ In this regard, the majority cited one of the judiciary's essential characteristics as determining the limits of administrative power under statute under *Marbury v Madison* (1803) 5 US 87; 1 US 137, *Enfield* (2000) 199 CLR 135, 152–3 (Gleeson CJ, Gummow, Kirby and Hayne JJ). See also *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–6 (Brennan J). On the other hand, Gaudron J invoked the rule of law in support of this view: *Enfield*, 157.

⁷⁸ See *Chevron USA Inc v National Resources Defense Council Inc* 467 US 837 (1984). The Canadian Supreme Court adopted a similar deferential approach in *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

⁷⁹ *Enfield* (2000) 199 CLR 135, 153–5 (Gleeson CJ, Gummow, Kirby and Hayne JJ), 159 (Gaudron J).

⁸⁰ *Ibid* 154 (Gleeson CJ, Gummow, Kirby and Hayne JJ).

⁸¹ *Ibid* 154–5 (Gleeson CJ, Gummow, Kirby and Hayne JJ).

⁸² See above n 18 and accompanying text.

⁸³ See above n 29 and accompanying text.

⁸⁴ See eg below n 118 and accompanying text.

of the Constitution. Although judicial review is inevitable, there are choices as to the extent of review conducted by the courts. This is clearly demonstrated in the following analysis of the Australian approach in the *Glencore* decision, which is subsequently compared to the approach adopted in the UK context.

C First Court Challenge To Post-CLERP Panel: The *Glencore* Decision

The *Glencore* decision resulted from the first court challenge to a Panel decision since the CLERP reforms.⁸⁵ Both the initial Panel⁸⁶ and Review Panel⁸⁷ had made a declaration of unacceptable circumstances and orders against Glencore International AG ('Glencore') in relation to transactions concerning the shares of Austral Coal Limited ('Austral'), which were subject to a takeover bid by Centennial Coal Company Limited ('Centennial'). At a time when Glencore had an interest in nearly 5% of Austral's shares, it entered into cash settled equity swaps over another 7.4% with two investment banks ('the banks').⁸⁸ Emmett J described a cash settled equity swap as:

an arrangement between an investor and a bank whereby the bank agrees to pay the investor an amount equal to the difference between the value of a given number of equity securities at the time of the closing out of the swap and the value of those equity securities at the time when the arrangement was entered into. Under such an arrangement the investor does not acquire any interest in any equity securities and the investor has no right to call for delivery of equity securities or to require the bank to undertake any action involving the acquisition, holding or disposal of equity securities. Closing out of, and settlement under, such a swap will, depending on the terms of the arrangement, be either at the option of one party or be automatic.⁸⁹

⁸⁵ The pre-CLERP Panel was subject to challenge in relation to its first decision, leading to the High Court confirming the constitutionality of the Corporations and Securities Panel (as it then was) in *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167.

⁸⁶ *Re Austral Coal Limited 02* (2005) 55 ACSR 60; 23 ACLC 1723; [2005] ATP 13 (Hellicar P, Alexander DP and H Douglass, 28 June 2005) ('*Austral 02*').

⁸⁷ *Re Austral Coal Limited 02(R)* (2005) 55 ACSR 60; 23 ACLC 1764; [2005] ATP 16 (Ramsay P, O'Bryan DP and D Gonski, 25 July 2005) ('*Austral 02(R)*').

⁸⁸ See *Austral 02* [2005] ATP 13 [151]; *Austral 02(R)* [2005] ATP 16 [61]. The transactions were entered into by a Glencore subsidiary, Fornax Investments Limited. A person is required to disclose their holdings if they and associated persons have a relevant interest in 5 per cent or more of the shares in a listed company and following any subsequent movements of at least 1 per cent: see *Corporations Act 2001* (Cth) s 671B. See also ss 9 ('substantial holding'), 10–16, 608, 610.

⁸⁹ *Glencore* (2005) 220 ALR 495, 498.

Consistent with their internal policies and commercial practice, the banks acquired an equivalent number of Austral shares in order to hedge their risk exposure.⁹⁰ These transactions were not disclosed to the market until 14 days after the first transactions took place. Although they differed as to the exact time at which unacceptable circumstances existed and in relation to the detail of the orders, both the initial and Review Panels made a declaration and orders based upon the deficiency in information available to the market as a result of the non-disclosure of the transactions.⁹¹ The Review Panel ordered Glencore to offer to sell Austral shares to any shareholder who had sold their shares during the period of non-disclosure, and indicated that it might order the banks to sell shares to Glencore if it received more acceptances than it could satisfy.⁹²

Glencore brought an action under section 75(v) of the Constitution seeking judicial review of the Review Panel's decision.⁹³ This matter was subsequently remitted to the Federal Court.⁹⁴ Given that the remedy for the judicial review application would involve sending the matter back to the Panel for reconsideration, Emmett J set out 'some provisional views' on the constitutional validity of the Panel's exercise of its powers under sections 657A and 657D of the *Corporations Act*.⁹⁵ His Honour applied the approach previously set out by the High Court in the constitutional challenge to the pre-CLERP Panel.⁹⁶ That is, Emmett J concluded that the making of a declaration or orders would not involve the exercise of judicial power as the Review Panel's decisions involved determinations on the creation of legal rights and obligations, rather than the resolution of a controversy relating to existing rights.⁹⁷

Significantly, the *Glencore* decision recognised the importance of allowing the Panel to fulfil its role with minimal court intervention in certain circumstances. Although Emmett J did not make any explicit reference to any other material in this regard, his Honour concluded that

⁹⁰ See *Austral 02* [2005] ATP 13 [191](j), 96–7 [205]. It was concluded that the banks had a strong economic incentive to purchase the Austral shares: see eg *Austral 02* [2005] ATP 13 [174], 91–4 [189]–[191], 95 [195]; *Austral 02(R)* [2005] ATP 16 [65], [89]–[92].

⁹¹ See *Austral 02* [2005] ATP 13 [20]–[27]; *Austral 02(R)* [2005] ATP 16 [2]; *Austral 02(RR)* [2005] ATP 20 [16], [19].

⁹² *Austral 02(R)* [2005] ATP 16 [27]; *Austral 02(RR)* [2005] ATP 20 [20].

⁹³ Other avenues for judicial review were not available to it as the action was brought during the bid period for Centennial's takeover: see above n 38 and accompanying text.

⁹⁴ See above n 63 and accompanying text.

⁹⁵ *Glencore* (2005) 220 ALR 495, 510–11.

⁹⁶ See above n 85.

⁹⁷ *Glencore* (2005) 220 ALR 495, 511.

[h]aving regard to the clear policy evinced by the privative provisions of s 659B of the [Corporations] Act, the Court should be slow to interfere with a decision of the Panel, in circumstances where the market is significantly volatile by reason of the currency of takeover offers.⁹⁸

However, Emmett J found that this approach did not apply in the current case. This was because, although Centennial's takeover bid was still open, there was 'probably unlikely to be any significant volatility in the market' due to Centennial holding more than 85 per cent of Austral's shares and Glencore and the banks holding more than 11 per cent.⁹⁹ Granting the application for judicial review, Emmett J set aside the Review Panel's declaration and orders on the basis of jurisdictional error.¹⁰⁰ His Honour concluded that such an error will occur in similar circumstances to that identified by the High Court,¹⁰¹ that is:

if a decision maker identifies a wrong issue, asks a wrong question, ignores relevant material, relies on irrelevant material in such a way as affects the exercise of power [or] ... where the decision maker fails to make a determination of a matter that is a precondition of the making of the decision.¹⁰²

In relation to this case, Emmett J concluded that the Panel had not made a determination as to the effect of the circumstances that it had found to be unacceptable and that such a finding was required under section 657A(2) of the *Corporations Act*.¹⁰³ That is, the Panel had not made a finding on the effect of the non-disclosure (and subsequent disclosure¹⁰⁴) of the transactions on either control of Austral or the acquisition of a substantial interest in it,¹⁰⁵ or in relation to whether the persons whose interests that the orders had been made to protect had suffered any detriment as a result of the non-disclosure.¹⁰⁶ Rather, the court referred to statements by the Review Panel that shareholders 'may have made different decisions' as a result of the non-disclosure and that the non-disclosure affected the control of Austral because the market was unaware that the number of shares available for trading or Centennial's takeover bid had been materially reduced.¹⁰⁷

⁹⁸ Ibid 506–7.

⁹⁹ Ibid.

¹⁰⁰ Ibid 511–12.

¹⁰¹ See above text accompanying n 59.

¹⁰² *Glencore* (2005) 220 ALR 495, 506.

¹⁰³ Ibid 507. See above text following n 27.

¹⁰⁴ *Glencore* (2005) 220 ALR 495, 508–9.

¹⁰⁵ Ibid 507–8, 503.

¹⁰⁶ Ibid 504.

¹⁰⁷ Ibid 507–8, 502–3.

The orders made under section 657D were similarly found to be defective. Although the Review Panel's orders had relied solely upon the object of protecting the rights or interests of the persons affected,¹⁰⁸ Emmett J found that jurisdictional error resulted from the fact that the Review Panel did not identify the particular interests affected by the non-disclosure, in order to balance them against the prejudice that might be suffered by Glencore.¹⁰⁹ In light of this, his Honour concluded that the Review Panel had not addressed the question of whether its orders would 'unfairly prejudice' Glencore.¹¹⁰

Following the *Glencore* decision, a second Review Panel decided in *Re Austral Coal Limited 02(RR)*¹¹¹ ('*Austral 02(RR)*') to vary the decision made by the initial Panel.¹¹² In response to Emmett J's judgment, the second Review Panel made a number of findings in relation to the effect of the non-disclosure of the transactions in light of the market impact of the subsequent announcement of the transactions by Glencore. That is, the Panel found that the price at which the banks acquired the shares to hedge the swap transactions would have been higher had Glencore's position been disclosed, that Glencore benefited from the lower prices paid by the banks and that shareholders selling their shares on the market were correspondingly adversely affected.¹¹³

In summary, the second Review Panel concluded that the non-disclosure of the transactions adversely affected the market in which Glencore acquired its substantial interest and Centennial acquired control of Austral, with the impact being sufficient monetarily and upon the Centennial bid to be unacceptable circumstances.¹¹⁴ Accordingly, the Panel ordered that Glencore pay \$1,330,280 to ASIC, comprising the estimated difference in share value resulting from the non-disclosure and ASIC's costs, to be distributed equally to all shareholders who sold Austral shares during the time that Glencore had not disclosed the transactions to

¹⁰⁸ See *ibid* 509; *Corporations Act 2001* (Cth) s 657D(2)(a).

¹⁰⁹ *Glencore* (2005) 220 ALR 495, 510.

¹¹⁰ See *ibid*; above n 33 and accompanying text. Emmett J was also concerned about the expropriatory effect of the orders and that the Review Panel had failed to consider the status of the market at the time its orders were to become operative: see *Glencore* (2005) 220 ALR 495, 510.

¹¹¹ [2005] ATP 20.

¹¹² *Austral 02(RR)* [2005] ATP 20 [5]. In the context of the Panel's application for an extension of time for the second Review Panel to make its declaration, Finkelstein J raised the issue whether the initial Review Panel's declaration had been a new declaration or merely a variation of the original declaration and discussed the implications in light of the time limitations for the making of declarations in section 657B of the *Corporations Act 2001* (Cth): see *Takeovers Panel v Glencore International AG* [2005] FCA 1628, [3], [7].

¹¹³ *Austral 02(RR)* [2005] ATP 20 [9].

¹¹⁴ *Ibid* [13].

the market.¹¹⁵ Glencore subsequently commenced an action seeking judicial review of the second Review Panel's decision.¹¹⁶

The second Review Panel provided even more detailed reasons than the earlier Panels, with the *Austral 02(RR)* reasons totalling 83 pages.¹¹⁷ At 33,463 words, the *Austral 02(RR)* reasons are the longest to date. Compared to a study of the word count of decisions in the first five years following the CLERP reforms, the reasons are more than double the next longest figure and around six times the largest average word count for a year during that period.¹¹⁸ Indeed, the reasons look more like a court judgment than a decision of a commercial body such as the Panel, which is designed to provide 'speed' and 'informality' in decision-making.¹¹⁹ This demonstrates clearly the potential adverse impact of judicial review upon the future operation of the Australian Panel.

III THE UNITED KINGDOM APPROACH

A *Judicial Restraint: The Datafin Approach*

The UK experience has been markedly different to that of Australia in the *Glencore* matter. This has to a significant extent resulted from the different nature of the UK Panel. Referred to by members of the Court of Appeal as a 'unique'¹²⁰ and 'truly remarkable body',¹²¹ its functions as '[p]art legislator, part court of interpretation, part consultant, part referee [and] part disciplinary tribunal' were described by Donaldson MR as follows:

[l]acking a statutory base, it has to determine and declare its own terms of reference and the rules applicable in the markets, thus acting as a legislator. It has to give guidance in situations in which those involved in take-overs and

¹¹⁵ This amount included \$10 000 to meet ASIC's costs for acting as trustee: see *Austral 02(RR)* [2005] ATP 20 [332]–[344], Annexure C.

¹¹⁶ See Takeovers Panel, 'Austral Coal 02RR – Application for Review of Decision' (Press Release TP05/80, 22 November 2005); Takeovers Panel, 'Austral Coal Limited 02RR – Decision on Injunction' (Press Release TP05/81, 24 November 2005).

¹¹⁷ This can be compared to the total of 59 pages for initial Panel's reasons in *Austral 02* [2005] ATP 13 and 27 pages for the first Review Panel's reasons in *Austral 02(R)* [2005] ATP 16.

¹¹⁸ These statistics include all text in the reasons except for the catchwords, headnotes and appendices: see Armson, above n 16, 676–8.

¹¹⁹ See above n 17 and accompanying text; Armson, above n 9.

¹²⁰ *R v Panel on Take-overs and Mergers, Ex parte Guinness Plc* [1990] 1 QB 146 ('*Guinness*'), 185 (Donaldson MR), 192 (Woolf LJ).

¹²¹ *Guinness* [1990] 1 QB 146, 157–8 (Donaldson MR).

mergers may be in doubt how they should act ... This is the consultancy role. Or they may arise out of difficulty in applying the rules literally, in which case the panel interprets them in its capacity as a court of interpretation ... Where it detects breaches of the rules during the course of a take-over, it acts as a whistle-blowing referee, ordering the party concerned to stop and, where it considers it appropriate, requiring that party to take action designed to nullify any advantage which it has obtained and to redress any disadvantage to other parties. Finally, when the dust has settled, it can take disciplinary action against those who are found to have broken the rules.¹²²

Another important feature of the UK system is the culture underpinning the self-regulatory nature of the Panel's operations. In particular, the proximity of the key organisations representing market participants within the City of London and their ability to exclude from the market those who do not follow the takeover rules (known as 'cold shouldering'),¹²³ has provided a significant incentive to ensure compliance. Although the enforcement of the UK takeover rules has been strengthened through the ability to rely upon the powers of the financial market regulator,¹²⁴ the self-regulatory nature of the system has led to few court cases in relation to UK Panel decisions.

Datafin was the first judicial review application in relation to the UK Panel to be considered by the courts. The application was made by a rival takeover bidder in light of a finding by the Panel that certain other parties had not acted in concert.¹²⁵ The Panel's submissions to the Court emphasised the 'overwhelming need for speedy finality' and that applications could be made to the court during the takeover as a tactic 'to create uncertainty even after the outcome of the bid is known'.¹²⁶ In its decision, the Court of Appeal sent out a strong message that applications would only succeed in exceptional circumstances. Indeed, in the leading judgment,¹²⁷ Donaldson MR considered that leave to apply for judicial review should not have

¹²² Ibid. The 'legislative' role of determining the content of the rules has since passed to a separate Code Committee, as a result of the need to separate the Panel's adjudicative and rule-making functions in light of the *Human Rights Act 1998*: see The Takeover Panel, *Annual Report on the Year Ended March 2001*, 'Chairman's Statement'. There are also proposals to give the UK Panel a statutory basis: see below text accompanying n 160 and following.

¹²³ See Armson, above n 7, 405.

¹²⁴ Ibid.

¹²⁵ See *Datafin* [1987] QB 815, 831–3 (Donaldson MR). A contrary finding would have required a higher price to be paid under the takeover rules determined by the Panel in The City Code on Takeovers and Mergers ('UK Code'): Rules 6, 11. See *Datafin* [1987] QB 815, 831–4; below n 142 and accompanying text.

¹²⁶ *Datafin* [1987] QB 815, 820.

¹²⁷ The other members of the court agreed with the reasons of Donaldson MR for dismissing the application: see *Datafin* [1987] QB 815, 844 (Lloyd LJ), 849 (Nicholls LJ).

been given in this case except for the issue as to whether the court had jurisdiction.¹²⁸ It was decided that the court had jurisdiction, notwithstanding the fact that the UK Panel does not have a statutory basis,¹²⁹ in light of the public nature of the role of the Panel.¹³⁰ However, this article does not focus on this aspect of the decision, but rather on the circumstances in which the courts will intervene in Panel decisions.¹³¹

Dismissing the *Datafin* application, Donaldson MR found that the role of the court in such matters was limited to considering three issues, which provide a general overview of the common law grounds for judicial review.¹³² That is, the issues were whether there had been illegality (namely whether the Panel had ‘misdirected itself in law’),¹³³ irrationality (in effect, whether no reasonable Panel could have reached such a decision)¹³⁴ or procedural impropriety (failure to comply with rules governing its conduct or ‘the basic rules of natural justice’).¹³⁵ It was only in relation to a breach of natural justice that it was anticipated that the remedies of certiorari and mandamus would be used.¹³⁶ If, as in this case, it was complained that the Panel should have found a breach of the rules, it was expected that the court would be ‘even more reluctant to move in the absence of any credible allegation of lack of bona fides’.¹³⁷ In relation to the court’s approach to its role, Donaldson MR established the following crucial principle in *Datafin*:

[I]n the light of the special nature of the panel, its functions, the market in which it is operating, the time scales which are inherent in that market and the

¹²⁸ Ibid 844.

¹²⁹ It was found that the UK Panel operates ‘without visible means of legal support’: see *Datafin* [1987] QB 815, 834 (Donaldson MR). For a discussion of the nature of the UK Panel, see eg ibid 824–6 (Donaldson MR); Armson, above n 7, 404–5.

¹³⁰ *Datafin* [1987] QB 815, 844 (Donaldson MR). See also ibid, 847–8 (Lloyd LJ), 850 (Nicholls LJ).

¹³¹ See above n 5 and accompanying text.

¹³² *Datafin* [1987] QB 815, 842. These issues are based upon the statement of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410–1. They also reflect the three tests advocated by Lord Cooke, namely that ‘the decision-maker must act in accordance with law, fairly and reasonably’: see Robin Cooke, ‘The Struggle for Simplicity in Administrative Law’ in Michael Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (1986) 5.

¹³³ *Datafin* [1987] QB 815, 842.

¹³⁴ Ibid. See also *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

¹³⁵ *Datafin* [1987] QB 815, 842.

¹³⁶ Ibid. See also *Guinness* [1990] 1 QB 146, 183 (Lloyd LJ); text accompanying nn 55–56 above.

¹³⁷ *Datafin* [1987] QB 815, 841.

need to safeguard the position of third parties, who may be numbered in thousands, all of whom are entitled to continue to trade upon an assumption of the validity of the panel's rules and decisions, unless and until they are quashed by the court, I should *expect the relationship between the panel and the court to be historic rather than contemporaneous*. I should *expect the court to allow contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders which would enable the panel not to repeat any error and would relieve individuals of the disciplinary consequences of any erroneous finding of breach of the rules*. This would provide a workable and valuable partnership between the courts and the panel in the public interest and would avoid all of the perils to which [the panel] alluded.¹³⁸

In examining the circumstances of the case, Donaldson MR emphasised the importance of the expertise of the Panel in assessing the evidence before it and noted that it illustrated 'the need for the court to avoid underestimating the extent to which expert knowledge can negative inferences which might otherwise be drawn from a partial knowledge of the facts'.¹³⁹ Lloyd LJ also observed that the court would need to ensure that 'unmeritorious applications' were not made to harass or delay and that a successful judicial review application 'is likely to be very rare'.¹⁴⁰

The two subsequent UK Panel matters that have been the subject of judicial review applications relied upon the *Datafin* decision. Both matters involved the Court of Appeal reviewing a Panel decision not to adjourn its proceedings, where it was alleged that this resulted in procedural impropriety or unfairness and the decision had been made some time after the relevant circumstances took place. In *R v Panel on Take-overs and Mergers, Ex parte Guinness Plc*¹⁴¹ ('Guinness'), Guinness Plc ('Guinness') sought to challenge a decision not to adjourn hearings that led to the Panel finding that Guinness had acted in concert with another purchaser (as a 'concert party').¹⁴² The Panel's initial inquiry at the time of Guinness' takeover bid in April 1986 concluded without further action, in light of evidence given by a Guinness representative (who was later implicated in the transactions leading to the concert party finding).¹⁴³ However, an investigation by Department of Trade and Industry ('DTI') inspectors into Guinness' affairs that commenced in December

¹³⁸ Ibid 842 (emphasis added). See also above n 127.

¹³⁹ *Datafin* [1987] QB 815, 844.

¹⁴⁰ Ibid 846 (Lloyd LJ).

¹⁴¹ [1990] 1 QB 146. This was an appeal from a decision by a Divisional Court of the Queen's Bench Division to refuse an application for judicial review in *R v Panel on Take-overs and Mergers, ex parte Guinness plc* (1988) 4 BCC 325.

¹⁴² *Guinness* [1990] 1 QB 146, 160–1 (Donaldson MR). This finding would have required Guinness to increase the consideration that it paid under the takeover bid to match the amount paid in transactions entered into by the concert party: see UK Code, Rule 11.

¹⁴³ *Guinness* [1990] 1 QB 146, 165–6 (Donaldson MR).

1986 uncovered a letter from a Swiss bank employee confirming the concert party relationship.¹⁴⁴

The Panel recommenced its inquiry in relation to Guinness in June 1987.¹⁴⁵ It received a copy of the letter from the DTI in August 1987, which Guinness had received in January that year.¹⁴⁶ In light of the letter, the Panel decided to proceed with its hearings in August and September, despite Guinness' requests for the hearings to be deferred until either the outcome of the DTI investigation was known or at least until employees of the Swiss bank were available to be present.¹⁴⁷ Although the Panel's decision not to grant either a short or longer adjournment were challenged on the grounds of unreasonableness, the key issue before the court was whether the decision was fair in a procedural sense.¹⁴⁸

In another leading judgment,¹⁴⁹ Donaldson MR confirmed the *Datafin* principle cited above.¹⁵⁰ However, its meaning was clarified in light of Donaldson MR's view that the passage had 'been misunderstood, at least by academic writers':

[w]hen the take-over is in progress the time scales involved are so short and the need of the markets and those dealing in them to be able to rely on the rulings of the panel so great, that contemporary intervention by the court will usually either be impossible or contrary to the public interest ... On the other hand, once the immediate problem has been dealt with by the panel, no similar objections would apply to a retrospective review of its actions designed to avoid the repetition of error, if error there has been, and when it comes to disciplinary action by the panel, which necessarily will be taken in retrospect and with all due deliberation, the court will find itself in its traditional position of protecting the individual from any abuse of power.¹⁵¹

¹⁴⁴ Ibid 166–7 (Donaldson MR).

¹⁴⁵ Ibid 169 (Donaldson MR).

¹⁴⁶ Ibid 171 (Donaldson MR).

¹⁴⁷ Ibid 171–6 (Donaldson MR).

¹⁴⁸ See *ibid* 178 (Donaldson MR), 184 (Lloyd LJ), 193–4 (Woolf LJ); above nn 134–135 and accompanying text. However, Donaldson MR preferred to apply the alternative test of 'whether something has gone wrong of a nature and degree which require the intervention of the court' rather than to consider the alternative bases of unreasonableness and unfairness: *ibid* 178 (Donaldson MR). See also *ibid* 193 (Woolf LJ).

¹⁴⁹ Woolf LJ agreed with the reasons of Donaldson MR for dismissing the appeal: *ibid*, 201.

¹⁵⁰ See text accompanying above n 138. In the decision at first instance, Watkins LJ (with whom Russell LJ and Tudor Evans J agreed), similarly referred to the *Datafin* principle: see *R v Panel on Take-overs and Mergers, ex parte Guinness plc* (1988) 4 BCC 325, 339.

¹⁵¹ *Guinness* [1990] 1 QB 146, 158–9 (Donaldson MR).

This confirms that, under the *Datafin* principle, a court would not usually intervene during the takeover, but would adopt a limited role after that time. In exercising this role in *Guinness*, the members of the Court of Appeal concluded that, although they would have granted a short adjournment had they been in the Panel's position, the failure to grant an adjournment did not cause any injustice.¹⁵² One of the reasons relied upon by Lloyd LJ in deciding that the procedure was not unfair was 'the public interest in the panel getting on with, and being seen to get on with, its self-appointed task'.¹⁵³ On the other hand, Woolf LJ referred to the particular nature of the Panel as being significant to his reasons:

I regard the unique qualities of the take-over panel as being important in deciding what is the correct outcome of this appeal. I have in mind two particular features of the panel. The first is that its authority is not derived from any statutory power. Instead it derives its authority from the institutions in the City of London who give it their support and nominate its members. The second is that the scope of its activities is self-determined. Except in so far as the panel itself decides to limit its jurisdiction and to set out its functions, as it has in the City Code on Take-overs and Mergers, the constraints on its powers are those dictated not by legal but by practical considerations.¹⁵⁴

The Court of Appeal decision in *R v Panel on Take-overs and Mergers, ex parte Fayed and Ors*¹⁵⁵ ('*Al Fayed*') involved an application for leave to apply for judicial review of a Panel decision not to adjourn disciplinary proceedings. There were broad similarities in the factual background behind the *Guinness* and *Al Fayed* decisions, with the Panel in the latter case deciding to act in response to information uncovered by a DTI investigation relating to a matter that had taken place some time in the past.¹⁵⁶ It was alleged that this resulted in procedural unfairness,

¹⁵² Ibid 182 (Donaldson MR), 187 (Lloyd LJ), 197–8, 201 (Woolf LJ). Donaldson MR focused upon whether there was any 'actual or apparent' injustice (at 182), whereas Lloyd and Woolf LJ applied the test of a 'real injustice' or 'real risk of injustice' (at 192 and 193–4 respectively). There was also a particular focus upon whether Guinness had been given a reasonable opportunity to present its case: see 185 (Lloyd LJ), 194 (Woolf LJ). In the decision at first instance, Watkins LJ (with whom Russell LJ and Tudor Evans J agreed), similarly concluded that, although inconsiderate, the decision to refuse the short adjournment was not irrational or unreasonable: see *R v Panel on Take-overs and Mergers, ex parte Guinness plc* (1988) 4 BCC 325, 341–2, 344.

¹⁵³ *Guinness* [1990] 1 QB 146, 192.

¹⁵⁴ Ibid 192.

¹⁵⁵ [1992] BCC 524.

¹⁵⁶ In *R v Panel on Take-overs and Mergers, ex parte Fayed and Ors* [1992] BCC 524 ('*Al Fayed*'), an even larger time period had elapsed, with the Panel conducting its proceedings around seven years after the original events took place: 527 (Neill LJ).

principally as a result of a significant overlap between the disciplinary proceedings and a court action that was expected to be heard at least two years after the proceedings.¹⁵⁷ The Court of Appeal declined the application for leave based upon the ‘unfairness’ or ‘injustice’ standard applied in *Guinness*.¹⁵⁸ In dismissing an argument that there was little to balance against an adjournment as the disciplinary proceedings related to events that were around seven years old, Neill LJ emphasised that the Panel ‘has a crucial part to play in the regulation of the financial markets in the United Kingdom’.¹⁵⁹

B *Impact of the EU Takeovers Directive*

The EU Takeovers Directive includes a requirement that Member States designate one or more authorities competent to supervise takeover bids, and that such bodies be recognised by national law.¹⁶⁰ Consequently, the UK Panel is required to be placed upon a statutory footing by 20 May 2006.¹⁶¹ The Company Law Reform Bill [HL] (‘the UK Bill’) was introduced into the House of Lords on 1 November 2005, and includes provisions implementing the EU Takeovers Directive in light of earlier consultation processes.¹⁶² One of the principal concerns raised in the consultation documents was the increased risk for litigation to delay or frustrate takeover bids, affect shareholders’ opportunity to decide upon the takeover based upon its

¹⁵⁷ Ibid 529–31 (Neill LJ).

¹⁵⁸ See above n 152. However, there were some slight variations on the exact wording of the tests applied, with references by Neill LJ to ‘a real and not merely a speculative risk of prejudice’, Scott LJ to ‘any real risk of prejudice’ and Steyn LJ to ‘a real risk of injustice’ (the latter being the test applied by the Panel): see *Al Fayed* [1992] BCC 524, 529, 534, 537.

¹⁵⁹ Ibid 532 (Neill LJ). Neill LJ also referred to the functions and characteristics of the Panel having been considered by the Court in *Datafin* and *Guinness*: 532.

¹⁶⁰ See above n 12.

¹⁶¹ EU Takeovers Directive Art 21(1).

¹⁶² See Department of Trade and Industry (‘DTI’), *Company Law Implementation of the European Directive on Takeover Bids: A Consultative Document*, January 2005 (‘DTI January 2005 paper’); DTI, *Company Law Implementation of the European Directive on Takeover Bids: Government Response and Summary of Responses to the Consultative Document*, July 2005; DTI, ‘Company Law Reform Bill, July 2005, Draft clauses and explanatory material, Takeovers directive clauses and explanatory material’, <<http://www.dti.gov.uk/cld/clauses.htm>> at 1 November 2005 (‘DTI July 2005 draft clauses’ and ‘DTI July 2005 explanatory material’). See also Takeover Panel, ‘The European Directive on Takeover Bids’ (Statement 2005/10, 20 January 2005) (‘Panel January 2005 paper’); Takeover Panel, *Consultation Paper – The Implementation of the Takeovers Directive: Proposals Relating to Amendments to be Made to the Takeover Code*, November 2005 (‘Panel November 2005 paper’).

merits¹⁶³ and undermine the ‘speed, flexibility and certainty’ provided by the current UK regulatory system.¹⁶⁴

There are four main provisions in the UK Bill designed to minimise this risk. First, the Panel’s rulings will be given binding effect subject to the Panel’s rules and any review or appeal.¹⁶⁵ Second, internal review of UK Panel decisions, reflecting the current process of hearings and appeals, would be conducted by the newly named ‘Hearings Committee’ and ‘Takeover Appeal Board’ respectively.¹⁶⁶ Third, contravention of a Panel rule or requirement would not give rise to a right of action for breach of statutory duty, and a rule breach would not affect the validity or enforceability of a transaction.¹⁶⁷ Finally, only the Panel would have the power to apply to the court to enforce a Panel requirement.¹⁶⁸ Where the Panel made such an application, the court would have the power to ‘make any order it thinks fit to secure compliance with the requirement’.¹⁶⁹ In light of concerns that this may lead to a reassessment of the merits of the Panel’s decision, the Explanatory Notes prepared by the DTI to accompany the UK Bill state that:

[i]t is expected that in accordance with usual practice, the court will not, in exercising its jurisdiction under this clause, rehear substantively the matter or examine the issues giving rise to the ruling or, as the case may be, the request for documents or information except on ‘judicial review principles’, where there has been an error of law or procedure.¹⁷⁰

This is consistent with the statement in the Explanatory Notes that the UK Bill does not affect the availability of judicial review. However, the Notes emphasise the Court of Appeal’s conclusion in *Datafin* that ‘generally the courts should limit themselves only to reviewing the Panel’s decision-making processes after the bid

¹⁶³ DTI January 2005 paper, para 1.8 and 2.32; DTI July 2005 explanatory material, Part C, para 11. See also Panel January 2005 paper, p 3; Panel November 2005 paper, para 2.1–2.4.

¹⁶⁴ DTI January 2005 paper, para 2.33. These concerns were accommodated in the EU Takeovers Directive through a provision stating that it would not affect the power of courts in Member States ‘to decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of a bid’: Art 4(6).

¹⁶⁵ Company Law Reform Bill [HL] s 620(2).

¹⁶⁶ Company Law Reform Bill [HL] s 626.

¹⁶⁷ Company Law Reform Bill [HL] s 631. However, transactions would continue to be liable to be set aside in such cases as misrepresentation or fraud: see Company Law Reform Bill [HL], Explanatory Notes, <<http://www.publications.parliament.uk/pa/ld200506/ldbills/034/en/06034x--htm#end>> at 5 December 2005 (‘UK Bill Explanatory Notes’), para 1176(b).

¹⁶⁸ Company Law Reform Bill [HL] s 630.

¹⁶⁹ Company Law Reform Bill [HL] s 630.

¹⁷⁰ UK Bill Explanatory Notes, para 1174.

has been concluded'.¹⁷¹ Although the impact of the UK Bill upon the court's current approach to judicial review is uncertain at this stage, it is arguable that giving the UK Panel a legislative basis should not affect the applicability of the *Datafin* decision. Apart from implementing statutory recognition of the UK Panel, the Bill maintains the essential features of the existing takeover regulatory regime. That is, the Panel will be determining the rules governing takeover bids, there will continue to be a system of hearings and appeals within the organisational structure of the Panel and there is a public interest in ensuring that the Panel continues to be able to provide 'speed, flexibility and certainty' in its decision-making. However, a new risk will be introduced with the operation of the EU Takeover Directive, namely the potential for litigation in the European Court of Justice. It remains to be seen whether this will undermine the efforts of the UK Parliament in seeking to maintain its preference for non-judicial determination of takeover disputes.

IV APPLYING *DATAFIN* TO THE AUSTRALIAN CONTEXT

In considering the extent to which the *Datafin* principle should apply in Australia, it is important to examine the similarities and differences between the Australian and UK takeover regimes. The key difference for the purposes of this issue is the fact that the UK system does not have a legislative backing. However, there are two distinct elements to this. The first is the lack of a statutory basis for the UK Panel and its operations. This is particularly significant to the threshold question in *Datafin* of whether there is court jurisdiction for judicial review in relation to a decision of the UK Panel (which was answered in the affirmative).¹⁷² In light of this, it is arguable that the implementation of a statutory framework as a result of the EU Takeovers Directive should in itself make little difference to the *Datafin* approach.

It is the second difference between the two systems that would appear to be more significant for judicial review purposes. That is, whereas the detailed takeover requirements and grounds for intervention by the Australian Panel are set out in the *Corporations Act*, the substance of the UK takeover rules are determined by its Panel. This provides less latitude for judicial review of decisions by the UK Panel, which can effectively determine the scope of its own jurisdiction.¹⁷³ While this does not mean that the *Datafin* approach could not operate in the Australian system, there will necessarily be a greater opportunity for the courts to find that there has been a jurisdictional or other error of law based upon the *Corporations Act* requirements.

¹⁷¹ Ibid, para 1142.

¹⁷² See above n 130 and accompanying text.

¹⁷³ Once the statutory framework for the Panel is implemented, this will be subject to the broad parameters of the legislation.

There are also differences between the factual contexts of the UK and Australian cases to date involving judicial review of Panel decisions. The applicants in the first matter that came before the UK courts were seeking review of a Panel decision not to find a breach of its rules, with the *Datafin* decision recognising that this created an even greater hurdle before the court would be prepared to intervene.¹⁷⁴ This allowed the court to establish a general principle that it should only intervene on a limited basis both during and after a takeover bid. The principle was then applied in the two subsequent UK matters, which involved Panel decisions to decline an adjournment of proceedings that took place some time after the events under scrutiny.¹⁷⁵ In contrast, the first judicial review application in relation to the Australian Panel since the CLERP reforms has created a more difficult platform from which to establish a *Datafin*-like principle. This is because, although Emmett J stated that courts should be reluctant to intervene in certain limited circumstances, his Honour concluded that these circumstances did not apply and that there were jurisdictional errors in relation to the Panel's decision.

Nonetheless, there is a strong case for implementing a similar approach to *Datafin* in Australia. In particular, there are significant parallels between the Australian and UK takeover regulatory regimes in terms of both their aims and the principles upon which they are based. Both systems give non-judicial bodies the primary role of deciding takeover matters with the aim of providing efficient and informal decision-making.¹⁷⁶ Although there are differences in the detail of the substantive takeover rules, the regimes are based upon similar principles designed to ensure an informed market and equal treatment for shareholders.¹⁷⁷ With the exception of the difference in terms of a statutory basis discussed above, the other factors that Donaldson MR relied upon to support a 'historic rather than contemporaneous' approach apply equally in the Australian context.¹⁷⁸ That is, the special nature of the Panel's functions and the market in which it operates (with its inherent time scales), together with the need for numerous third parties to be able to trade based upon an assumed validity of the Panel's actions, are similarly applicable to the Australian Panel.¹⁷⁹ In addition, the Australian Panel has a process of internal review of Panel decisions like its UK counterpart, although there is only one level of review in light of the fact that the Australian Panel Executive does not have the power to make rulings.¹⁸⁰

¹⁷⁴ See above text accompanying n 137.

¹⁷⁵ See above text following n 142 and at n 156.

¹⁷⁶ See Armson, above n 7, 403.

¹⁷⁷ Ibid 411–7.

¹⁷⁸ See above text accompanying n 138.

¹⁷⁹ Ibid.

¹⁸⁰ See Armson, above n 7, 419–20 and text accompanying n 166 above.

In light of this, the approach outlined in *Glencore*, namely that the court should be ‘slow to interfere ... where the market is significantly volatile by reason of the currency of takeover offers’,¹⁸¹ does not provide adequate protection against the damaging impact that the potential for litigation can have upon a Panel-centred system of takeover decision-making.¹⁸² Although it does limit this risk while the takeover is in play, such an approach does not take into account the impact of judicial review applications in other circumstances (particularly when the limitation clause in section 659B of the *Corporations Act* is not operative¹⁸³). The judicially imposed restriction in *Datafin* that, if the court were to intervene after the event, it should make declaratory orders enabling the UK Panel not to repeat an error and relieving persons from any erroneous disciplinary consequences would provide additional certainty in relation to the Australian Panel’s decisions.¹⁸⁴

By significantly reducing the risk and impact of litigation after the takeover bid, this approach would bolster the legislative aim of making the Australian Panel ‘the main forum for resolving disputes about a takeover bid until the bid period has ended’.¹⁸⁵ This is not to say that the court should not have a role. As recognised in both *Datafin* and the High Court decisions on judicial review, it is important that an administrative body does not act outside the law. Accordingly, it is appropriate that the courts be able to review decisions to ensure that they do not involve illegality, irrationality or procedural impropriety.¹⁸⁶ However, it is also important that the courts send a strong signal that it will only intervene in the manner discussed above.

Given that judicial review of Australian Panel decisions cannot be excluded entirely,¹⁸⁷ it is important to consider the extent to which the legislative regime could be amended to strengthen the implementation of the CLERP reform aims in relation to the Panel. One option that could be considered is to amend subsection 657A(2)(a) to make it clear that the Panel is not required to make a determination as to the effect of the circumstances that are considered to be unacceptable.¹⁸⁸ This would ensure that the Panel had the power to make a declaration of unacceptable circumstances ‘if it appears to the Panel that the circumstances are unacceptable’, where the Panel has considered the effect of the circumstances on the state of affairs

¹⁸¹ See above n 98.

¹⁸² See eg above nn 163–164 and accompanying text.

¹⁸³ This is generally after the end of the takeover bid period, although court proceedings can be commenced by ASIC and other government authorities and under section 75(v) of the Commonwealth *Constitution* at any time: see above nn 38, 64 and accompanying text.

¹⁸⁴ See above nn 39–40 and accompanying text.

¹⁸⁵ *Corporations Act 2001* (Cth) s 659AA.

¹⁸⁶ See above nn 132–135 and accompanying text.

¹⁸⁷ See above text accompanying n 54 and following, and n 74 and following.

¹⁸⁸ See above text following n 27 and compare above text accompanying n 103.

set out in section 657A(2)(a)(i) or (ii). Such an amendment would minimise the potential for future litigation based upon the issue of whether the Panel has made a jurisdictional error in relation to the effect of the circumstances. It would emphasise that it is the Panel's opinion as to the acceptability of the circumstances that is the focus of the provision, with its conclusion on this matter ideally only subject to review on the limited basis discussed above. However, it is possible that such an amendment may not be necessary should a court higher in the hierarchy adopt a different approach from that taken in *Glencore*.

Another more extreme option would be to remove the applicability of the *ADJR Act* regime to Panel decisions.¹⁸⁹ This would limit the scope of judicial review available to that under section 39B of the *Judiciary Act* and section 75(v) of the Constitution.¹⁹⁰ Although excluding the operation of the *ADJR Act* would make it more difficult for parties to make applications and restrict the bases upon which decisions could be reviewed, it would be more preferable from a policy perspective for the courts to adopt a *Datafin*-like approach to limit their intervention in relation to Panel decisions.

V CONCLUSION

The 'historic rather than contemporaneous' approach adopted by the English Court of Appeal in *Datafin* is an important facet of the successful operation of the UK Panel. It is anticipated that this approach will continue to apply following the implementation of the proposed statutory regime in light of the EU Takeovers Directive. In particular, limiting court orders to ensuring that an error is not repeated and avoiding any erroneous disciplinary consequences reduces significantly the incentive to bring litigation in the UK courts to challenge Panel decisions. There is a need for our courts to take a similar approach in relation to decisions of the Australian Panel. This would bolster the CLERP policy aims underlying the legislative restrictions in sections 659B and 659C of the *Corporations Act*, namely to provide 'speed, informality and uniformity' in decision-making, minimise 'tactical litigation' and free up court resources.¹⁹¹

As in the UK, the approach promoted by the *Datafin* decision would provide crucial support to the role of the Australian Panel. This is particularly important given the special nature of the Australian Panel's functions and the market in which it operates. The Panel makes commercially sensitive decisions in order to promote the purposes underlying the takeover provisions. The need for flexibility in takeover

¹⁸⁹ See list of excluded decisions in Schedule 1 to the *ADJR Act*, particularly para (ha) and (hb).

¹⁹⁰ See above text accompanying nn 41, 54 and following.

¹⁹¹ See above n 17.

regulation is reflected in ASIC's broad power to modify the takeover requirements or exempt persons from their operation. Panel decisions must be made within a relatively short time frame and often affect the decisions of numerous investors. It is consequently important that market participants are able to act based upon the certainty that Panel decisions will only be able to be challenged in exceptional circumstances.

Our Panel-based system of takeover dispute resolution could be undermined significantly through the potential for litigation seeking to challenge Panel decisions. The importance of the limitation clause in section 659B of the *Corporations Act* was recognised by Emmett J in *Glencore*, with his Honour concluding that courts should be 'slow to interfere' while takeover offers are current and there is significant volatility in the market.¹⁹² This reflects the policy that litigation should not be able to prevent shareholders deciding the outcome of the takeover based upon its merits.¹⁹³ However, this is only the first step in ensuring that the Panel reforms are not frustrated through the ability to bring judicial review proceedings following the takeover. Although the following is drawn from a 1991 judgment in relation to industrial tribunals, Deane J's statement could be similarly applied to the role of the Panel:

[i]n a context where prompt action ... to prevent and resolve disputes is necessary in the public interest, there is much to be said for the view that such specialist ... tribunals should be empowered to determine promptly and with finality the questions involved in the ... disputes which they are called upon to resolve ... The delays and expense of proceedings in the ordinary courts of this country serve to reinforce such a policy and its rationale.¹⁹⁴

There are clearly challenges to the successful operation of a *Datafin*-like approach in Australia. The rigidity of the judicial review system, particularly in light of the operation of section 75(v) of the Constitution and the related constitutional principles of the separation of powers and the rule of law, mean that judicial review of Panel decisions is inevitable. This is an important facet of our system of government. Panel decisions should be subject to court scrutiny to ensure that they are not contrary to the law. However, this also provides opportunities for litigation to be brought to test the boundaries of legal decision-making.

The continual threat of court challenges will have an undesirable effect on the Panel's processes. In particular, it could lead to the Panel providing even more detailed reasons in order to minimise the opportunity for challenge, with the likely

¹⁹² See above n 98.

¹⁹³ See above nn 23, 163 and accompanying text.

¹⁹⁴ *Public Service Association (SA) v Federated Clerks' Union (SA)* (1991) 173 CLR 132, 147–8 (Deane J). See also above text accompanying nn 81–4.

consequences of longer time periods before reasons are made available and an increased likelihood of court challenges as the points of contention become more technical. There is also a danger of the Panel having to adopt a checklist-type approach to demonstrate for a potential court matter that it has considered each of the factors set out in the legislation as interpreted by court judgments. Such developments are not inconceivable in light of the second Review Panel's reasons following the *Glencore* decision, which comprised 83 pages and appeared to look more like a court judgment than the work of a commercial body designed to provide speed and informality in its decisions.¹⁹⁵ Notwithstanding this, these detailed reasons are now the subject of a further application for judicial review, which will further delay the outcome of the *Glencore* matter.

Another significant challenge is the history and culture of litigation in relation to takeover matters in Australia. One of the key factors in the success of the UK Panel has been the culture underpinning the self-regulatory nature of the Panel's operations. This means that there is less likely to be litigation in the context of UK takeover matters. Indeed, there have only been a handful of court cases since the UK Panel's inception in 1968. Given this, it will be difficult if not impossible to replicate exactly the UK experience in relation to the number of matters litigated. However, this makes the adoption of a *Datafin*-like principle in Australia all the more important.

Glencore has opened the Pandora's Box of judicial review in relation to decisions of the Australian Panel under the new system. Although the possibility of review was always there, its impact upon the Panel's work has only now become a reality. In order to avoid the risk of a practice developing of Panel matters being challenged in the courts as a matter of course, a different approach needs to be taken in relation to judicial review of Panel decisions. Otherwise, there will be a significant risk of litigation undermining the effectiveness of Panel decisions and the takeover dispute resolution system as a whole.

The adoption in Australia of an approach similar to that in the *Datafin* decision would be a significant step forward in avoiding this risk. In addition, unless a different interpretation is adopted in relation to the provisions giving the Panel its jurisdiction under section 657A(2) of the *Corporations Act*, it may become necessary to consider amending this provision in order to ensure that the policy underlying the CLERP reforms to the Panel is maintained. Courts will necessarily be responsible for ensuring that the Australian Panel acts in accordance with the law. The challenge will be to ensure that this does not undermine the role and effectiveness of the Panel.

¹⁹⁵ See *Austral 02(RR)* [2005] ATP 20; above n 117 and accompanying text; Armson, above n 9.

ADDENDUM

The subsequent decision of Emmett J in *Glencore International AG v Takeovers Panel* [2006] FCA 274 further highlights the need for a re-examination of the provisions underpinning the Panel's jurisdiction. In this decision, Emmett J considered that the second Review Panel had not satisfied the requirements in subsection 657A(2)(a). That is, it was found that the Panel erred in concluding that Glencore acquired a substantial interest in the company being taken over through the swap transactions and that the non-disclosure of the transactions had an effect on the control or potential control of the company or on the bidder's acquisition of a substantial interest. This decision raises further issues with respect to the relationship between the Panel and the courts and reinforces the need to ensure that the Panel is not rendered ineffective through litigation challenging its decisions.