FEDERAL COURT OF AUSTRALIA

Queensland North Australia Pty Ltd v Takeovers Panel [2014] FCA 591

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| Citation: | Queensland North Australia Pty Ltd v Takeovers Panel [2014] FCA 591 |
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| Parties: | **QUEENSLAND NORTH AUSTRALIA PTY LTD (ACN 146 828 122), CLOSERIDGE PTY LTD (ACN 010 560 157) and CLIVE FREDERICK PALMER v TAKEOVERS PANEL, THE PRESIDENT’S CLUB LIMITED (ACN 010 593 263), PRESIDENT, TAKEOVERS PANEL and AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** |
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| File number: | QUD 526 of 2012 |
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| Judge: | **COLLIER J** |
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| Date of judgment: | 5 June 2014 |
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| Catchwords: | **CORPORATIONS** – first applicant acquired control of company holding 41.4% of voting shares in second respondent – application to the Takeovers Panel seeking declaration of unacceptable circumstances – s 657A and s 657C(2) *Corporations Act 2001* (Cth) – alleged breaches of ss 606, 631(1) and 633(1) Corporations Act – Takeovers Panel declared circumstances unacceptable – regard to effect of circumstances on control of second respondent company and acquisition of a substantial interest in the second respondent company – orders by Takeovers Panel restricting exercise of voting rights by applicants, acquisition and disposal of shares in second respondent – whether s 657A circumstances can be ongoing – deed poll restricted holding company’s exercise of voting rights attached to shares in the second respondent – whether acquisition of holding company constituted an increase in voting power of first applicant – s 606 and s 610 Corporations Act – constitution of second respondent company contemplated each holder of share parcel also holding associated one-quarter interest in a villa property – whether evidence to support finding that shares and interest in villa properties stapled – whether orders of Takeovers Panel ensured takeover bid proceeds in way it would have if circumstances had not occurred – s 657D(2) Corporations Act**ADMINISTRATIVE LAW** – judicial review of decision of Takeovers Panel in relation to first applicant’s acquisition of interest in second respondent – s 5 *Administrative Decisions (Judicial Review) Act 1977* (Cth) – declaration of unacceptable circumstances under s 657A Corporations Act – no notice of intention to extend time – extension of time granted in alternative – whether breach of natural justice by Takeovers Panel in granting extension of time for application – primary finding that circumstances ongoing and application made in-time – whether Takeovers Panel erred in law in construing s 657B(a) Corporations Act as referring to continuing circumstances – whether circumstances can be ongoing – whether Takeovers Panel made decision to extend time in absence of evidence to justify doing so – whether Takeovers Panel erred in finding first applicant’s acquisition of holding company breached s 606 Corporations Act – whether evidence to support findings of Takeovers Panel – whether declaration an improper exercise of power – whether Takeovers Panel took into account irrelevant considerations – whether Takeovers Panel stated conclusions without setting out evidence on which findings based – whether orders made by Takeovers Panel constituted *Wednesbury* unreasonableness – whether Takeovers Panel denied natural justice in making orders affecting third applicant director of first applicant – President of Takeovers Panel also Chairman of Partners at law firm acting against company controlled by third applicant – whether reasonable apprehension of bias**COSTS** – corporate regulator ASIC sought to be joined to proceedings as a proper contradictor – whether ASIC entitled to costs |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) s 25D*Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5*Australian Securities and Investments Commission Act 2001* (Cth) ss 185(2), 194, 195(3)(c), 195(4)*Corporations Act 2001* (Cth) Chs 5, 6, ss 9, 140, 601QA(1)(a), 602, 606, 608, 610, 611, 621(3), 623, 631, 633, 657A, 657B, 657C, 657D, 658C*Federal Court of Australia Act 1976* (Cth) s 43(2)*Trade Practices Act 1974* (Cth) ss 152AB(2)(c), 152AB(2)(e), 152AL(3)*Australian Stock Exchange Official Listing Rules* rr 3K(2)(a), 3K(3) |
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| Cases cited: | *Adams v Yung* (1998) 83 FCR 248 cited*Adultshop .Com Ltd v Members of the Classification Review Board* [2007] FCA 1871 cited*Arnotts Ltd v Campbell Investment (Aust) Pty Ltd* (1993) 9 ACSR 675 cited*Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 cited*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 cited*Australian Pipeline Ltd v Alinta Ltd* (2006) 237 ALR 158 cited*Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 cited*Babcock & Brown Communities Group* [2008] ATP 25 cited*Brickworks Limited (No.1)* [2000] ATP 6 cited*Brierley Investments Limited v Australian Securities Commission* (1997) 78 FCR 255 cited*Campbell Investment (Aust) Pty Ltd v Arnotts Ltd* (1993) 9 ACSR 660 cited*Cemex Australia Pty Ltd v Takeovers Panel* (2009) 177 FCR 98 cited*Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 cited*Colonial First State Property Trust Group* [2002] ATP 17 cited*Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* [2005] NSWSC 1005 cited*CP Ventures Pty Ltd v Withnall* [1999] FCA 1437 cited*Cumbrian Newspapers Group Ltd v Cumberland and Westmorland Newspaper and Printing Co Ltd* [1987] Ch 1 cited*Dornan v Riordan* (1990) 24 FCR 564 cited*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 cited*Glencore International AG v Takeovers Panel* (2006) 151 FCR 77 cited*Grand Hotel Group* [2003] ATP 34 cited*Grimwade v Federal Commissioner of Taxation (No 2)* (1949) 78 CLR 199 cited*Hasran v Minister for Immigration and Citizenship* (2010) 183 FCR 413 cited*Hastings Diversified Utilities Fund* [2012] ATP 1 cited*Heydon v NRMA Ltd* (2000) 51 NSWLR 1 cited*Hickman v Kent or Romney Marsh Sheep-Breeders Association* [1915] 1 Ch 881 cited*Howards Storage World Pty Ltd v Haviv Holdings Pty Ltd* (2010) 182 FCR 84 cited*In the matter of Phosphate Resources Limited* [2005] FCA 1705 cited*Infratil Australia Ltd (No 2)* [2000] ATP 1 cited*Investa Properties Limited, in the matter of Investa Properties Limited* [2007] FCA 1104 cited*Jackamarra v Krakouer* (1998) 195 CLR 516 cited*Kavalee v Burbidge* [1998] NSWSC 111 cited*Kaycliff Pty Ltd v Australian Broadcasting Tribunal* (1989) 19 ALD 315 cited*Lantern Hotel Group* [2014] ATP 6 cited*Mills v Federal Commissioner of Taxation* [2012] 87 ALJR 53 cited*Minister for Immigration v Rajamanikkam* (2002) 210 CLR 222 cited*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 cited*Minister for Immigration and Multicultural and Indigenous Affairs v Lam* (2003) 214 CLR 1 cited*Oberhardt v Department of Education, Employment and Workplace Relations* (2008) 174 FCR 157 cited*Oshlack v Richmond River Council* (1998) 193 CLR 72 cited*Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 cited*R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13 cited*Re Austinmer Bowling Club Ltd (in liq); Russell v Rodden* (2008) 67 ACSR 183 cited*Re Austral Coal Limited* [2005] ATP 14 cited*Re Ballarat Brewing Company* (1977-78) CLC 40-344*Re Fernlake Pty Ltd* [1995] 1 Qd R 597 cited*Re LV Living Limited* [2005] ATP 5 cited*Registrar of Aboriginal Corporations v Barker* (1997) 81 FCR 53 cited*Saint v Holmes* (2008) 170 FCR 262 cited*Telstra Corporation Ltd v Seven Cable Television* (2000) 102 FCR 517 cited*The President’s Club* [2012] ATP 10 related*Tristar Steering and Suspension Australia Ltd v Industrial Relations Commission of New South Wales (No 2)* (2007) 159 FCR 274 cited*Seabrook, in the matter of the Takeovers Panel & the Corporations Act 2001* (Cth) [2002] FCA 1219 cited*Vietnam Veterans’ Association of Australia ((NSW Branch) Inc) v Gallagher* (1994) 52 FCR 34 cited*Waterford v The Commonwealth* (1987) 163 CLR 54 cited*Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 88 ALJR 52 cited*Xat Ky v Australvic Property Management Pty Ltd (No 2)* [2007] FCA 1785 cited |
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|  | Lipton P, Herzberg A and Welsh M, *Understanding Company Law* (17th ed, Lawbook Co, 2014) |
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| Date of hearing: | 30 and 31 July 2013 |
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| Date of last submissions: | 2 June 2014 |
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| Place: |  |
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| Division: |  |
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| Category: | Catchwords |
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| Counsel for the First and Third Respondents: | Mr J McKenna QC |
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| Counsel for the Second Respondent: | Mr B O’Donnell QC with Mr M de Waard |
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| Solicitor for the Second Respondent: | King & Wood Mallesons |
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| Counsel for the Fourth Respondent: | Ms A Mitchelmore |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 526 of 2012 |

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| BETWEEN: | QUEENSLAND NORTH AUSTRALIA PTY LTD (ACN 146 828 122)First ApplicantCLOSERIDGE PTY LTD (ACN 010 560 157)Second ApplicantCLIVE FREDRICK PALMERThird Applicant |
| AND: | TAKEOVERS PANELFirst RespondentTHE PRESIDENT’S CLUB LIMITED (ACN 010 593 263)Second RespondentPRESIDENT, TAKEOVERS PANELThird RespondentAUSTRALIAN SECURITIES AND INVESTMENTS COMMISSIONFourth Respondent |

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| JUDGE: | COLLIER J |
| DATE OF ORDER: | 5 JUNE 2014 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The costs of the first, second, third and fourth respondents of and incidental to this proceeding are to be paid by the applicants.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 526 of 2012 |

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| BETWEEN: | QUEENSLAND NORTH AUSTRALIA PTY LTD (ACN 146 828 122)First ApplicantCLOSERIDGE PTY LTD (ACN 010 560 157)Second ApplicantCLIVE FREDRICK PALMERThird Applicant |
| AND: | TAKEOVERS PANELFirst RespondentTHE PRESIDENT’S CLUB LIMITED (ACN 010 593 263)Second RespondentPRESIDENT, TAKEOVERS PANELThird RespondentAUSTRALIAN SECURITIES AND INVESTMENTS COMMISSIONFourth Respondent |

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| JUDGE: | COLLIER J |
| DATE: | 5 JUNE 2014 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

1. Before the Court is an amended originating application filed 30 July 2013 by the first applicant, Queensland North Australia Pty Ltd (“QNA”). QNA seeks judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (“ADJR Act”) of the following decisions and orders of the first respondent, the Takeovers Panel (“the Panel”):
2. the decision of the Panel dated 24 July 2012 to make a declaration under s 657A of the *Corporations Act 2001* (Cth) (“Corporations Act”) that circumstances constituted unacceptable circumstances in relation to the affairs of the second respondent (“The President’s Club”) arising out of:
* the acquisition by QNA around July 2011 of 98% of the shares in Coeur de Lion Holdings Pty Ltd (“Lion Holdings”); and
* the acquisition by QNA, in March 2012, of 221 shares in The President’s Club.
1. the decision of the Panel made 24 July 2012 to extend the time for The President’s Club to bring its application for relief to 26 June 2012.
2. the orders of the Panel made 27 July 2012 under s 657D of the Corporations Act.
3. the decision of the third respondent, the President of the Panel, not to revoke the direction appointing Mr Ewen Crouch as the President of the sitting Panel pursuant to s 185(2) of the *Australian Securities and Investments Commission Act 2001* (Cth) (“ASIC Act”).
4. Specifically, QNA seeks:
5. An order quashing or setting aside the decisions of the Panel.
6. An order setting aside the orders.
7. Further or alternatively, an order that the application be remitted to the Panel (differently constituted) to be dealt with according to law.
8. Such further or other orders as are appropriate.
9. Costs.
10. While the applicants did not specifically amend or abandon their challenge to the decision of the President of the Panel so far as concerned s 185(2) of the ASIC Act, I note that at the hearing they did abandon ground of review 18 which was specifically referable to s 185(2). Further the applicants continued to press their claim that the President of the Panel ought to have revoked the direction appointing Mr Crouch on the basis that his role on the Panel in this case gave rise to a reasonable apprehension of bias.
11. Overall, the primary protagonists in this litigation are on the one hand the applicants, and on the other hand The President’s Club and the Australian Securities and Investments Commission (“ASIC”). In accordance with the principles articulated in *R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13 the Panel and its President appeared only for the purpose of submitting to such order as the Court may make, and otherwise made no submissions in respect of the merits of the matters in dispute.
12. Materially, s 5 of the ADJR Act limits the grounds upon which a person aggrieved by a decision to which the Act applies to seek an order of review on one or more of the following grounds:

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;

(c) that the person who purported to make the decision did not have jurisdiction to make the decision;

(d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;

(g) that the decision was induced or affected by fraud;

(h) that there was no evidence or other material to justify the making of the decision;

(j) that the decision was otherwise contrary to law.

1. The background facts to this application are outlined in the Reasons for Decision of the Panel in *The President’s Club Ltd* [2012] ATP 10 published on 24 August 2012, and expanded in submissions of the applicants. It is useful to summarise those facts before turning to the grounds of review before the Court.

# Background

## Shareholdings and offers

1. The President’s Club is an unlisted public company. Its capital is divided into 7,488 ordinary shares and five subscriber shares. The subscriber shares are irrelevant to this case.
2. The President’s Club operates a time share scheme at the property previously known as the Hyatt Regency Coolum but now known as the Palmer Coolum Resort (“the resort”). The President’s Club is the tenant under two leases, both dated 21 December 1988 and each for a term of 80 years over all the lots in The President’s Club Golf Community Titles Scheme and The President’s Club Tennis Community Titles Scheme (“community titles schemes”).
3. The constitution of The President’s Club contemplated that each holder of ordinary shares in the company would hold one or more parcels of 13 ordinary shares, and would own an associated one-quarter interest as tenant in common in a lot (“a Villa Interest”) in either of the community titles schemes. The effect of a set of interlocking agreements was that a purchaser of one timeshare interest must become both:
* a member of The President’s Club, holding 13 shares; and
* the registered proprietor of a corresponding one-quarter interest in either of the community titles schemes.
1. Purchasers of timeshare interests were also required to execute:
* a deed poll, binding them, if they sold their Villa Interest, to sell the corresponding shares in The President’s Club to the same person; and
* an assignment of a letting pool agreement, under which their Villa Interest was made available with others as part of a pool.
1. At all material times Lion Holdings was the sole shareholder of Coeur de Lion Investments (“Lion Investments”), which in turn owns 3107 or 41.4% of the shares in The President’s Club. Helpfully, the applicant tendered a diagram explaining the share structure of relevant entities, as follows:

1. On 31 January 2005 ASIC exercised its powers pursuant to s 601QA(1)(a) of the Corporations Act to conditionally exempt The President’s Club and Lion Investments from registration as a managed investment scheme under Ch 5 of the Corporations Act. The exemption was provided on the basis that Lion Investments entered into a deed poll (“the deed poll”) whereby Lion Investments covenanted that it would not exercise more than 10% of its voting rights on any resolution other than:
* in circumstances consented to in writing by ASIC; or
* in relation to a resolution to wind up the scheme.
1. Clause 4.2 of the deed poll allowed Lion Investments to revoke the deed poll upon providing to ASIC and The President’s Club at least 180 days prior written notice.
2. In July 2011 QNA acquired 98% of the shares in Lion Holdings from Lend Lease. The remaining 2% of shares were acquired by the second applicant, Closeridge Pty Ltd (“Closeridge”). Both QNA and Closeridge are companies associated with the third applicant, Mr Palmer.
3. By letter dated 15 September 2011, Lion Investments gave notice to ASIC and The President’s Club that it intended to revoke the deed poll. The revocation took effect on or about 13 March 2012, following expiry of the 180 day notice period required by cl 4.2 of the deed poll. It followed that, on this date, the ASIC exemption ceased to apply.
4. In or around March 2012, QNA acquired 221 additional shares in The President’s Club (plus corresponding Villa Interests) being 2.9% of the shares in that company. This took QNA’s direct or indirect interest in the President’s Club to approximately 44.3%.
5. On 14 March 2012 The President’s Club held an extraordinary general meeting to consider amending its constitution to cap the voting power of Lion Investments at a meeting to 10%, effectively replicating the covenant in the deed poll previously entered by Lion Investments. The relevant resolution was not carried.
6. On 12 April 2012, QNA lodged a bidder’s statement with ASIC, proposing a bid for all shares in The President’s Club and the corresponding Villa Interests. The bid was unconditional. The purchase price offered for each parcel of 13 shares and corresponding Villa Interest was $55,013 (being $1 per share for the 13 shares and $55,000 for the Villa Interest).
7. On 20 April 2012, ASIC wrote to QNA raising a number of concerns with the bidder’s statement, including inadequate disclosure, and a suspected ongoing contravention of s 606 of the Corporations Act. On 24 April 2012, QNA’s solicitors wrote to The President’s Club advising that QNA did not intend to proceed with its bid. ASIC was notified of this decision by letter of the same date.
8. On 26 April 2012, ASIC advised QNA’s solicitors that, having regard to s 631(1) of the Corporations Act, ASIC considered the bid to have been made public through the lodgement of the bidder’s statement with ASIC. Accordingly, QNA could not withdraw its bid and was required to proceed with the offer within two months from the announcement.
9. Section 631 of the Corporations Act provides:

**631 Proposing or announcing a bid**

(1) A person contravenes this subsection if:

(a) either alone or with other persons, the person publicly proposes to make a takeover bid for securities in a company; and

(b) the person does not make offers for the securities under a takeover bid within 2 months after the proposal.

The terms and conditions of the bid must be the same as or not substantially less favourable than those in the public proposal.

Note: The Court has power under section 1325B to order a person to proceed with a bid.

(1A) For the purposes of an offence based on subsection (1), strict liability applies to paragraph (1)(b) and to the requirement that the terms and conditions of the bid must be the same as or not substantially less favourable than those in the public proposal.

Note: For strict liability, see section 6.1 of the Criminal Code.

Proposals if takeover bid not intended

(2) A person must not publicly propose, either alone or with other persons, to make a takeover bid if:

(a) the person knows the proposed bid will not be made, or is reckless as to whether the proposed bid is made; or

(b) the person is reckless as to whether they will be able to perform their obligations relating to the takeover bid if a substantial proportion of the offers under the bid are accepted.

(3) Section 1314 (continuing offences) and subsection 1324(2) (injunctions) do not apply in relation to a failure to make a takeover bid in accordance with a public proposal under subsection (1).

Note: For liability and defences for contraventions of this section, see sections 670E and 670F.

1. On 11 May 2012 QNA sought an extension of time within which to lodge a supplementary and replacement bidder’s statement. On the same date ASIC granted the extension of time sought.
2. On 21 May 2012, QNA lodged a replacement bidder’s statement (replacement bidder’s statement). Again, QNA proposed to make an offer to purchase all the shares in The President’s Club and all Villa Interests. On the front page of the replacement bidder’s statement was the following statement:

The bid is being made for both your shares and your Villa Interest. It is not possible to accept the bid in relation to your shares only or in relation to your Villa Interest only.

1. On page 1 of the replacement bidder’s statement there appeared the following statement:

While there is no formal stapling of your President’s Club Shares to your Villa Interest, it is likely that you have executed a deed poll which obliges you to sell your shares if you sell your Villa Interest to the same person. Also clauses 6(b) and 6(c) of the Constitution require that a member of President’s Club must own a Villa Interest and a member’s shareholding is limited to the number of Villa Interests owned.

1. Later in the replacement bidder’s statement there appeared the following statement:

Because the ASIC Deed Poll was still current at the time of the Acquisition and therefore QNA’s voting power was limited to 10% of persons who actually vote, QNA did not acquire voting power of more than 20% at the time of the Acquisition. Accordingly, QNA was not required to make a takeover offer for the remaining shares in President’s Club or otherwise comply with the takeover provisions of the Corporations Act.

As CDLI has revoked the ASIC Deed Poll (and the revocation became effective on 19 March 2012) QNA’s voting power is no longer restricted …

1. (The “Acquisition” was defined in the replacement bidder’s statement as the transaction in July 2011 whereby QNA completed the acquisition from Lend Lease of 98% of the shares in Lion Holdings.)
2. On 1 June 2012 the solicitors for QNA advised the solicitors for The President’s Club that:
* the replacement bidder’s statement would not be dispatched;
* a further replacement bidder’s statement would be provided on 4 June 2012; and
* QNA would propose further relief to ASIC to extent the dispatch period until 12 June 2012.
1. No further replacement bidder’s statement had been provided as of 26 June 2012 when The President’s Club lodged an application with the Panel for a declaration of unacceptable circumstances pursuant to s 657A and s 657C(2) of the Corporations Act.

## Application to the Panel by The President’s Club for declaration of unacceptable circumstances

1. In its application to the Panel The President’s Club contended (in summary) that:
* QNA appeared to have breached and continued to be in breach of s 606 of the Corporations Act. *Inter alia*, s 606 prohibits transactions which result in someone’s voting power in a defined company increasing from below 20% to above 20%, or increases from a starting point that is above 20% and below 90%.
* The circumstances giving rise to a breach of s 606 first occurred when QNA acquired an initial 41.1% interest in The President’s Club through QNA’s acquisition of Lion Holdings in or about July 2011. QNA continued to hold a relevant interest in The President’s Club in excess of 20% without qualifying for an exemption under s 611.
* QNA (together with its associates) had not lodged a bidder’s statement which complied with the minimum bid price principle set out in s 621(3) of the Corporations Act. Section 621(3) requires the bidder to pay all shareholders no less than it paid for shares during the four months before the date of the bid.
* The bidder’s statement was materially deficient in that it included material which was misleading and/or confusing, and omitted information that shareholders of The President’s Club and their professional advisers would reasonably require to make an informed assessment of QNA’s offer. These deficiencies included:

o an absence of disclosure of QNA’s breach of s 606 of the Corporations Act and the possible effects of this on QNA and The President’s Club;

o misleading disclosure in relation to the revocation of the ASIC exemption;

o deficient disclosure in relation to the funding of the offer;

o deficient disclosure in relation to compliance with the resort administration agreement and QNA’s intentions for The President’s Club; and

o deficient disclosure in relation to the net asset value of shares in The President’s Club and the comparative value of the offer.

* QNA appeared to have breached and continued to breach s 631(1) and s 633(1) of the Corporations Act by not lodging a complying bid within the time limits of the Corporations Act. Under s 631(1) it is an offence for a person who has publicly proposed to make a takeover not to proceed with offers within two months of that proposal. Circumstances relevant to breach of s 631(1) first occurred on or about 12 June 2012 when QNA failed to lodge a complying bid within two months of making a public proposal to make a takeover bid. Further, s 633(1) sets out the steps required of a bidder in order to make an effective off-market bid. Circumstances relevant to breach of s 633(1) first occurred on or about 7 June 2012 when QNA failed to dispatch a complying bidder’s statement to shareholders of The President’s Club as required by s 633(1).
1. The President’s Club sought both interim and final restraining orders. Interim orders sought were that QNA be restrained until the Panel determined the application from:
* dispatching a second bidder’s statement; and
* voting (with its associates) more than 20% of shares in The President’s Club.
1. Final orders sought by The President’s Club were that:
* QNA and its associates be restrained from voting more than 20% of The President’s Club;
* QNA proceed with its takeover bid for The President’s Club on terms no less favourable than in the original bidder’s statement;
* QNA raise the offer price per share to $1.00 per share and the price per Villa Interest to $65,000, being the highest price paid in the preceding 4 months; and
* QNA remedy the information deficiencies in a second replacement bidder’s statement.

## Decision of the Panel

1. The Panel observed that ongoing circumstances in the nature of contraventions of the Corporations Act were alleged in the application before it, or alternatively that the Panel had extended the time for making the application to the date on which it was made by The President’s Club (that is 26 June 2012). The Panel decided to conduct proceedings.
2. In a detailed decision the Panel decided, in summary, that the circumstances of the acquisition of shares in The President’s Club in July 2011 were unacceptable having regard to:
* The effect the circumstances had, were having, will have or were likely to have on:

o the control, or potential control, of The President’s Club; or

o the acquisition, or proposed acquisition, by a person of a substantial interest in The President’s Club; and

* The purposes of Ch 6 as set out in s 602 of the Corporations Act; and
* The fact that they constituted, constitute, will constitute or were likely to constitute a contravention of a provision of Ch 6.
1. Section 602 of the Corporations Act provides:

**602 Purposes of Chapter**

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.

1. The Panel considered that a declaration of unacceptable circumstances was warranted because, in summary:
* Although QNA had not filed a notice of appearance, it was not denied natural justice by the Panel in that:

o the Panel properly required QNA to provide confidentiality and media canvassing undertakings in the form required by the Panel, in accordance with 10 years of Panel practice of ensuring private conduct of Panel matters.

O under s 194 of the ASIC Act, leave of the Panel is required for a party to be legally represented, and leave was not requested in this case by QNA.

O QNA and Lion Investments were provided with all relevant material and were invited to make submissions and rebuttals, which they did.

O it was not a denial of natural justice for the Panel to direct that proceedings before the Panel were confidential.

* QNA had submitted that the Panel did not have jurisdiction to hear matters arising out of its offer for the Villa Interests, for which QNA had recently paid $65,000 each (in addition to $13 for each parcel of 13 shares). However the Panel considered that it did have jurisdiction because:

O Although complicated, the arrangement whereby shareholders in The President’s Club also had a corresponding Villa Interest, could only transfer shares together with that Villa Interest, and had a right to use the relevant villa because it was conferred by rights attached to the shares, clearly constituted rights in the form of a “stapled entitlement”.

O The allocation of the price between a Villa Interest and the related shares was arbitrary and it was commercially unrealistic to treat the shares and Villa Interests separately. Any bid for The President’s Club would also have to relate to the Villa Interests as well as the shares.

O The fact that Lion Holdings, as developer of the time share scheme, did not enter all the agreements and arrangements entered by the buyers, and entered into a different deed poll in favour of ASIC, was irrelevant.

O In any event it was inappropriate to ignore the rights attaching to the shares and simply allocate the shares a value of a nominal $1. Both the principle underpinning s 621(3) and the purpose of Ch 6 set out in s 602(c) are brought into play by the offers for shares and corresponding Villa Interests.

O Further, s 623 provides that a bidder must not during the offer period give or agree to give a benefit to a person unless the same benefit is offered to every offeree. QNA offered different prices for Villa Interests in March 2012, which meant that there may be a collateral benefits issue.

O QNA submitted that “the deed polls were only intended to regulate ***secondary*** sales of the timeshare scheme”, and that shares and Villa Interests were not stapled. However QNA’s acquisition of control over Lion Holdings did not involve the stapling arrangements, whereas all the other actual and proposed transactions under discussion were secondary sales.

O Although there had been a transfer during the Panel proceedings of a Villa Interest from Lion Investments to Mr Palmer while the associated shares remained with Lion Investments (which Mr Palmer controlled), this could be done because the stapling does not bind the Land Titles Office. It did not prove that a parcel of shares could be transferred without the corresponding Villa Interest.

* It is clear that s 606 of the Corporations Act applies to The President’s Club.
* The ordinary shares in The President’s Club were voting shares within the meaning of s 9 of the Corporations Act. “Voting share” is defined as:

***voting share*** in a body corporate means an issued share in the body that carries any voting rights beyond the following:

(a) a right to vote while a dividend (or part of a dividend) in respect of the share is unpaid;

(b) a right to vote on a proposal to reduce the body’s share capital;

(c) a right to vote on a resolution to approve the terms of a buy back agreement;

(d) a right to vote on a proposal that affects the rights attached to the share;

(e) a right to vote on a proposal to wind the body up;

(f) a right to vote on a proposal for the disposal of the whole of the body’s property, business and undertaking;

(g) a right to vote during the body’s winding up.

* This was not changed by a deed poll entered by Lion Investments with ASIC, revocable on 180 days’ notice: cf *Cumbrian Newspapers Group Ltd v Cumberland and Westmorland Newspaper and Printing Co Ltd* [1987] Ch 1.
* The Panel did not accept QNA’s submission that, because of the covenant in the ASIC deed poll, neither Lion Investments nor QNA had a relevant interest in the shares which Lion Investments had covenanted not to vote and that, even if they did have relevant interests in those shares, they did not have commensurate voting power. Rather, Lion Investments had a relevant interest constituted by its power to exercise the right to vote the shares and by its power to dispose of the shares. This was because, *inter alia*:

O Any fetter on voting arose entirely from the covenant in the deed poll, and not from the constitution of The President’s Club.

O The rights attached to the shares as set out in The President’s Club constitution were the same for all voting shares.

O Lion Investments had power to vote the shares in breach of the deed poll even though such a vote would have been cast in breach of an obligation owed to ASIC: *Re Fernlake Pty Ltd* [1995] 1 Qd R 597.

O Lion Investments had unfettered power to dispose of 41.4% of the shares in The President’s Club, and none of the exclusions in s 609 applied to its interest in those shares.

O When QNA acquired control of Lion Investments, QNA acquired the same relevant interest in the shares in The President’s Club held by Lion Investments pursuant to s 608(3) of the Corporations Act.

* At all relevant times Lion Investments’ relevant interest in the shares it held constituted 41.4% of the voting power in The President’s Club despite the covenant in the deed poll.
* The Panel rejected QNA’s submission that Lion Investments only acquired its relevant interest in the shares in The President’s Club on expiry of the notice it gave ASIC of the revocation of the deed poll, by operation of law pursuant to item 15 of s 606 of the Corporations Act.
* The acquisition by QNA of an additional 2.9% of the shares in The President’s Club and the corresponding Villa Interests by private treaty in March 2012, while technically falling within the parameters of the 3% creep rule as defined by item 9 of s 611 of the Corporations Act, nonetheless constituted unacceptable circumstances. This was because QNA contravened s 606 when it acquired 98% of the shares in Lion Holdings and therefore acquired control of Lion Investments.
* The Panel had regard to the matters in s 657A(3), namely:

O the purposes of Ch 6 of the Corporations Act set out in s 602;

O the other provisions of Ch 6;

O the rules made under s 658C;

O the matters specified in regulations made for the purposes of para 195(3)(c) of the ASIC Act; and

O any other matters it considers relevant.

* Control of The President’s Club effectively passed without a reasonable and equal opportunity being provided to all shareholders to participate in any benefits accruing from a proposal under which QNA acquired control of, or a substantial interest in, The President’s Club.
* The acquisition of control over voting shares occurred in contravention of s 606 and was not in an efficient competitive and informed market.

## Allegation of conflict

1. On 9 August 2012 the solicitors for QNA wrote to the Panel (*inter alia*) claiming as follows:

… we have been made aware that Allens Arthur Robinson (sic), the firm of which Mr Crouch is the Chairman, has acted since 2011 on behalf of a member of the CITIC Group of companies in an ongoing matter against Minerology, a company controlled by Professor Clive Palmer. We draw this to your attention as we note that Mr Crouch did not declare this matter at the time of his appointment to the Panel. We acknowledge that this is the first occasion on which we have drawn this to the Panel’s attention, but in that respect we submit that it was for Mr Crouch to conduct a full conflict search within Allens Arthur Robinson and declare his position regarding the above matter before agreeing to his appointment. Accordingly, we submit that the statement in the Panel’s Declaration of Interests dated 27 June 2012 that Mr Crouch “is not aware of any interest that could conflict with the proper performance of his functions in relation to this matter” may not have been accurate …

1. At [150]-[152] of the Panel’s Decision the Panel stated as follows:

[150] The President of the Panel considered the state of knowledge of [Mr Crouch], the stage of the proceedings at which the issue was raised, and the fact that (other than for completion of reasons) the Panel’s performance of its functions and exercise of its powers had been completed, and decided not to revoke the direction appointing Mr Crouch. In all the circumstances the President believed on reasonable grounds that the member’s interest is immaterial or indirect and will not prevent the member from acting impartially in relation to the matter.

[151] The parties and QNA were advised of the interest and the decision of the President, as was the sitting Panel.

[152] The President also considered that, on the test of a fair-minded, objective bystander having all the factual information, no reasonable apprehension of bias would arise.

## Declaration of Unacceptable Circumstances

1. The Panel made the following declaration of unacceptable circumstances pursuant to s 657A of the Corporations Act:

**CIRCUMSTANCES**

1. The President’s Club Ltd (TPC) is an unlisted company with more than 50 members. Its capital is divided into 7,488 ordinary shares and 5 subscriber shares (the latter having no right, to dividends or to participate in the net assets of the company on a winding up).

2. Coeur de Lion Holdings Pty Ltd (CDLH) owns all the shares in Coeur de Lion Investments Pty Ltd (CDLI). CDLI owns 3.107 shares in TPC (approximately 41.4%).

3. Ordinary shares in TPC are voting shares. They carry voting rights beyond those in the definition of ‘voting share’ in section 9. This is not changed by a deed poll entered by CDLI, revocable on 6 months’ notice and which has been revoked, in favour of the Australian Securities and Investments Commission as follows:

*Where [CDLI] and its associates are not disqualified and excluded from voting their interests at a meeting, [CDLI] covenants that any voting rights held by [CDLI] and its associates or any operator, manager, promoter in relation to each Scheme, must not be exercised in excess of 10% of the votes that may be cast (after deducting any votes not cast by anyone or more members) on a resolution by members of the relevant Club other than*:

*a. In circumstances consented to in writing by the ASIC; or*

*b.* In relation to a resolution to wind up the relevant Scheme.

4. In or around July 2011, CDLI:

a. Was the holder of the shares.

b. Had power to exercise, or control the exercise of, a right to vote attached to the shares, and/or

c. Had power to dispose of, or control the exercise of a power to dispose of, the shares.

5. In or around July 2011, Queensland North Australia Pty Ltd (QNA acquired 98% of the shares in CDLH. The remaining 2% of the shares in CDLH were acquired by Closeridge Pty Ltd.

6. By reason of section 608(3)(a), or alternatively section 608(3)(b), in or around July 2011 QNA acquired a relevant interest in the shares in TPC that CDLI had a relevant interest in (**first acquisition**).

7. None of the exceptions in section 611 applied to the first acquisition. The first acquisition occurred in contravention of section 606.

8. Further in March 2012, QNA acquired 221 additional shares in TPC (2.9%) taking its relevant interest in TPC shares to approximately 44.4% (collectively, **second acquisition**). The second acquisition was the acquisition of a substantial interest in TPC.

9. The second acquisition occurred in purported reliance on item 9 of section 611. However, to the extent that item 9 was met, it was only by reason of the first acquisition, which contravened section 606.

10. It appears to the Panel that the circumstances of the first acquisition are unacceptable, having regard to:

a. The effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:

i. The control, or potential control, of TPC or

ii. The acquisition, or proposed acquisition, by a person of a substantial interest in TPC and

b. The purposes of Chapter 6 set out in section 602 and

c. Because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6.

11. Further it appears to the Panel that the circumstances of the second acquisition are unacceptable having regard to:

a. The effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on

i. The control, or potential control, of TPC or

ii. The acquisition, or proposed acquisition, by a person of a substantial interest in TPC and

b. The purposes of Chapter 6 set out in section 602.

12. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to matters in section 657A(3)

**DECLARATION**

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of The President’s Club Limited.

## Orders of the Panel

1. In addition to making a declaration of unacceptable circumstances on 24 July 2012 in respect of the affairs of The President’s Club, the Panel made the following orders pursuant to s 657D of the Corporations Act:

1. The Associated Parties must not exercise any voting rights that attach to the Acquisition Shares

2. The Associated Parties must not make any further acquisitions of a relevant interest in shares in TPC, except:

a. With the consent of the Panel or

b. Pursuant to acceptances under a takeover offer referred to in Order 4 or

c. The acquisition by Mr Clive Palmer of the shares corresponding to Lot 64 on BUP 8874 recently acquired by Mr Palmer from CDLI.

3. The Associated Parties must not dispose of, transfer or charge any of the Acquisition Shares, except:

a. With the consent of the Panel or

b. For a disposal or transfer pursuant to the acquisition by Mr Clive Palmer of the shares corresponding to Lot 64 on BUP 8874 recently acquired by Mr Palmer from CDLI.

4. Orders 1, 2 and 3 cease if all of the following requirements are met:

a. QNA or an associate of it makes offers for all the shares in TPC under a takeover bid that complies with chapter 6 and which meets the following conditions:

i. The terms are no less favourable than those set out in the original Bidder’s Statement lodged with ASIC on 12 April 2012

ii. The offer price is no less than $65,013 for each parcel of shares and the corresponding villa interest

iii. The offer period is no less than 2 months and

iv. ASIC has confirmed in writing to the proposed bidder that it is otherwise satisfied with the terms of the offer and the disclosure in the bidder’s statement. This confirmation is not to be construed as ASIC’s approval of the bidder’s statement and

b. No less than 50% of the offers made for shares not already held by the Associated Parties are accepted and

c. All the accepting shareholders have been paid.

5. If QNA or an associate proposes to make a takeover bid under Order 4:

a. QNA and its associates must ensure that the proposed bidder provides ASIC with all reasonable assistance requested by ASIC and

b. Should ASIC be unable to settle terms or disclosure with the proposed bidder, either ASIC or the proposed bidder may refer the issue to the Panel for determination.

6. In these orders the following terms have the corresponding meaning:

Acquisition Shares 3,328 shares in TPC held:

(a) As to 3,107 shares, by CDLI or an associate and

(b) As to 221 shares, by QNA or an associate

Associated Parties CDLI, CDLH, Closeridge, QNA and each of their respective associates

CDLH Coeur de Lion Holdings Pty Ltd

CDLI Coeur de Lion Investments Pty Ltd

Closeridge Closeridge Pty Ltd

QNA Queensland North Australia Pty Ltd

TPC The President’s Club Limited

# Grounds of Review

1. The grounds of application filed by the applicants and relied on at the hearing were relatively lengthy. Materially, they are as follows:

1. …

2. …

3. …

4. The declaration of unacceptable circumstances and the decision to extend time were made in circumstances where there was a breach of the rules of natural justice.

5. Further, and in the alternative, in determining that the application was made in time the Panel made an error of law in construing s 657B(a) of the Act as referring to continuing circumstances and not to the occurrence of the circumstances represented by the acquisitions by QNA in July 2011 and March 2012.

6. Further, and in the alternative, the Panel made the decision to extend time when there was no evidence or other material to justify doing so.

7. In making the declaration of unacceptable circumstances the Panel made an error of law in finding that the acquisition by QNA of 98% of the shares in Lion Holdings contravened s.606 of the Act.

8. The Panel made findings and acted upon them in making the declaration of unacceptable circumstances (arising out of the acquisition in July 2011) when there was no evidence or other material to justify doing so

9. The declaration of unacceptable circumstances was an improper exercise of the power conferred on the Panel by the Act in that the Panel took into account irrelevant considerations (at paragraph 107 of its reasons).

9A. The Panel made an error of law by stating conclusions without identifying and providing reasons which set out the findings of fact and reference to the evidence on which those findings were based (in paragraph 107 of its reasons).

10. In making the declaration of unacceptable circumstances the Panel made an error of law in finding that the acquisition by QNA, in March 2012, of 221 shares in the President’s Club contravened s. 606 of the Act.

11. In making the declaration of unacceptable circumstances (arising out of the acquisition in March 2012) the Panel (at paragraph 108 of its reasons):

i. Did not make any finding as to or identify the effect on the matters required by s657A(2) of the Act as preconditions to the making of the declaration;

ii. Accordingly, the declaration was not authorized by the Act.

12. Alternatively, the Panel made findings and acted upon them in making the declaration of unacceptable circumstances (arising out of the acquisition in March 2012) when there was no evidence or other material to justify doing as to the effect that the circumstances have had, are having, will have or are likely to have on:

i. The control, or potential control, of the President’s Club;

ii. The acquisition, or proposed acquisition, by a person of a substantial interest in the President’s Club.

13. The Panel made a finding and acted upon it that the shares and villa interests were “effectively stapled” and could only be transferred together when there was no evidence or other material to justify this finding.

14. In making the declaration of unacceptable circumstances and in the orders then made, the Panel made an error of law in concluding that it had jurisdiction to make orders which extended to villa interests.

15. The orders made by the Panel under s 657D of the Act were an improper exercise of the power because the nature of orders made was so unreasonable that no reasonable person could have so exercised the power and because the Panel failed to take into account the matters required by s 657D (2), and in failing to provide reasons which set out the findings of fact and reference to the evidence on which those findings were based.

16. Further the orders made by the Panel insofar as they are directed to entities other than the first and second applicants, and in particular the third applicant as an “associated Party” within the meaning of the Orders, were made in circumstances where there was a breach of the rules of natural justice and s 657D

17. The decision by the third respondent not to revoke the direction appointing Mr Ewen Crouch, as sitting President of the panel, involved a breach of the rules of natural justice.

1. As the applicant concedes there is some degree of overlap in respect of some of these grounds of review. It is convenient to group them as appropriate, and consider them accordingly.

# Grounds 4, 5 and 6: timing of declaration of unacceptable circumstances

1. The applicants submit that the application to the Panel by The President’s Club for a declaration of unacceptable circumstances was out of time, and for that reason the decision of the Panel should be set aside. In particular, the applicants submit that although the second acquisition of shares of which The President’s Club complains took place in March 2012, the application to the Panel was made more than two months later on 26 June 2012, and was therefore out of time in the absence of an extension of time granted by the Panel pursuant to s 657C(3)(b) of the Corporations Act. To the extent that the Panel concluded that the circumstances were ongoing beyond March 2012 – because the applicants continued to hold the relevant shares – the applicants claim that the Panel fell into error in forming this view and deciding to conduct the proceedings.
2. Further, the applicants submit that the Panel denied them procedural fairness in extending the period of time for bringing the application before it without giving them notice of its intention to extend time, and without taking into account relevant considerations which bear upon a decision to extend time.

## Consideration

1. Section 657B and s 657C(3) of the Corporations Act respectively impose limits on the power of the Panel to make a declaration of unacceptable circumstances, and the competence of a party to apply for such a declaration. These sections provide:

**657B When Panel may make declaration**

The Panel can only make a declaration under section 657A within:

(a) 3 months after the circumstances occur; or

(b) 1 month after the application under section 657C for the declaration was made;

whichever ends last. The Court may extend the period on application by the Panel.

**657C Applying for declarations and orders**

…

(3) [**When an application may be made**] An application for a declaration under section 657A can be made only within:

(a) two months after the circumstances occurred or;

(b) a longer period determined by the Panel.

1. The Panel’s decision to extend time was communicated first to the parties in an email from Ms Nicole Graham of the Panel to the parties on 18 July 2012, when the parties were informed that:

The Panel has met and is minded to declare that unacceptable circumstances exist in relation to the affairs of President’s Club.

…

**Extension of time**

The Panel considers that the circumstances of the acquisitions by QNA in or around July 2011 and March 2012 are continuing. For the avoidance of doubt, the Panel has extended the time for the application to be made by President’s Club, under s657C(3)(b) to 26 June 2012.

1. In its decision the Panel stated:

[40] In our view, there are alleged in the application contravention of the Corporations Act which are ongoing circumstances. Alternatively, in case it should be necessary we extended the time for making the application to the date on which it was made. On the alternative basis, we had one month within which to make a declaration, if one was to be made.

### Decision of Panel in the alternative to extend time to The President’s Club to make application pursuant to section 657C(3)(b)

1. That the Panel is empowered by s 657C(3)(b) to extend the time in which an application for a declaration of unacceptable circumstances can be made beyond the two months prescribed by s 657C(3) is clear. However it is also clear that in doing do the Panel is required to accord procedural fairness to parties: s 195(4) ASIC Act, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 367 per Deane J, cf *Jackamarra v Krakouer* (1998) 195 CLR 516 at 522, *CP Ventures Pty Ltd v Withnall* [1999] FCA 1437. Further, and specifically, the Panel must give each person to whom a proposed declaration relates, each party to the proceedings and ASIC the opportunity to make submissions in relation to the matter: s 657A(4) Corporations Act. This would, in my view, include making submissions as to whether an extension of time ought be granted by the Panel.
2. It appears from [40] of the Panel’s Reasons for Decision (“reasons for decision”) that the Panel, out of an abundance of caution, granted The President’s Club an extension of time to make its application for a declaration of unacceptable circumstances. In my view however, were such an extension of time necessary, the manner in which the Panel made this decision was contrary to the rules of natural justice. The decision was made cursorily, without providing the applicants the opportunity to make submissions in relation to such an order, and without reasons provided by the Panel. This can be contrasted with, for example, the careful consideration of a similar issue in the decision of the Panel in *Re Austral Coal Limited* [2005] ATP 14. In particular I note the comments of the Panel at [18] of *Austral Coal* where the Panel (correctly, in my view) observed:

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

1. In the reasons for decision before me it is not clear why the Panel decided that it was appropriate that time be extended to The President’s Club pursuant to s 657C(3)(b) to make its application.
2. In its submissions ASIC contends that QNA could have raised the issue of extension of time in response to the Panel’s email of 18 July 2012. However it is difficult to identify the utility of such a complaint by QNA at that time, when the Panel had already informed the parties that it had extended time to The President’s Club to make its application for a declaration of unacceptable circumstances.
3. Unless it was unnecessary for the Panel to extend time to The President’s Club to make its application because the relevant circumstances were ongoing (as the Panel actually concluded), the application was out of time and the Panel ought not to have conducted proceedings as it did.

### Ongoing Circumstances

1. If it were open to the Panel to find that there were ***ongoing*** unacceptable circumstances, such that the unacceptable circumstances existed at the time of the declaration by the Panel, it was not necessary for the Panel to grant an extension of time to The President’s Club to make its application for a declaration. The application would not have been time-barred by s 657C(3)(a), and the decision of the Panel to conduct the proceedings was within its jurisdiction.
2. The primary complaints of the applicants in this respect however are that:
* The Panel made an error of law in construing “circumstances” in s 657B(a) of the Corporations Act as referring to ongoing circumstances rather than the transactions in July 2011 and March 2012 when QNA acquired the relevant shares in the President’s Club; and
* The Panel failed to provide reasons for its conclusion that the circumstances were ongoing.
1. I will examine each of these issues in turn.

### Did the Panel err in law in finding that there were ongoing unacceptable circumstances?

1. Historically, the Panel has taken a broad view of “circumstances” for the purposes of its power to declare circumstances unacceptable (or not) pursuant to s 657A of the Corporations Act. Certainly in a number of decisions the Panel has found, on the facts of those cases, that unacceptable circumstances were ongoing. So, for example, in *Re Trysoft Corporation Limited* [2003] ATP 26 the Panel observed in the context of those particular facts:

[98] In these proceedings, the Panel considered that the relevant circumstances for the purposes of section 657C(3) of the Act were:

(a) the continued existence of the Agreements, the acquisitions of relevant interests under them and the associations existing pursuant to them, which had resulted in a breach of section 606 that had not been remedied; and

(b) the continuing failure by Mr Wong and the Shareholders to comply with their obligations under section 671B of the Act.

[99] ***These circumstances were still continuing as at the date of the Application***, and so the Panel concluded that it had jurisdiction to hear the Application without the need to exercise its power under section 657C(3) to extend the period for making the Application.

(Emphasis added, footnotes omitted.)

1. In *Re Anzoil NL* [2002] ATP 19 the Panel observed, in the course of discussing the relevant facts:

[65] The evidence establishes clear contraventions of section 606 by IGM and Capersia, involving the purchase of a substantial interest at an 80% premium to market and offers to acquire more shares, which would have resulted in Capersia having voting power of not less than 30%, connected with proposals to change the board and intervene in the conduct of the company’s affairs. We are satisfied that these breaches, the willingness of the parties to carry forward the purchase from IGM by means other than the Agreement and the continued acting in concert regarding the composition of the Anzoil board constitute ongoing unacceptable circumstances in relation to the affairs of Anzoil.

1. In *Re LV Living Limited* [2005] ATP 5 at [128] the Panel concluded that the following matters constituted unacceptable circumstances in relation to the affairs of LV Living Ltd:

(a) the acquisition of shares in LV Living by each of Mr West, Peridon and ACP in breach of section 606;

(b) the on-market acquisitions of shares by Lidcombe and Mr Radford after 29 December 2004 in breach of section 606;

(c) in light of the acquisitions referred to in paragraphs (a) and (b), ***the continued holding by the Peridon Parties, ACP and the ACP Transferees of voting power in LV Living in excess of 20%***; and

(d) the failure by the persons listed in Annexure D to lodge substantial holding notices which complied with the requirements of Chapter 6C.

(Emphasis added.)

1. That the Panel considers that it has broad powers to make a declaration of unacceptable circumstances is noted in the Panel’s *Guidance Note 1 - Unacceptable Circumstances* (http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance\_notes/current/001.htm) paragraph 17.
2. In this case, the Panel concluded at [40] that there were alleged in the application contraventions of the Corporations Act which were ongoing circumstances, and to that extent a declaration of unacceptable circumstances could be made without an extension of time.
3. That the Panel is a finder of facts, including the existence or otherwise of contraventions of the Corporations Act, and, in particular cases, unacceptable circumstances, in the context of Ch 6 of the Corporations Act, is clear: cf *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 574. Errors of fact made by the Panel in reaching a particular conclusion are generally not susceptible to challenge by way of judicial review. However it is also clear that if the Panel has made findings of fact as a result of an error of law, for example misconceiving the factual issue which it must ultimately determine, those findings are reviewable. In *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77 Brennan J observed in the context of considering an appeal from a decision of the Administrative Appeals Tribunal:

The error of law which an appellant must rely on to succeed must arise on the facts as the AAT has found them to be or it must vitiate the findings made or ***it must have led the AAT to omit to make a finding it was legally required to make***. There is no error of law simply in making a wrong finding of fact.

1. In my view it was open to the Panel to find that there were ongoing unacceptable circumstances, and indeed the Panel found that the unacceptable circumstances alleged by The President’s Club were ongoing. In forming this view I make the following observations.
2. First, I note comments of the Panel in *Brickworks Limited (No.1)* [2000] ATP 6 where the Panel said:

[30] A circumstance is distinct from the act or event which brings it into existence: circumstances are the relatively persistent background against which acts and events occur.

(Emphasis added.)

1. I accept the accuracy of this statement. Indeed, I am satisfied “circumstances” do not necessarily equate to an event or a specific transaction or transactions. Relevantly I note the following definition of “circumstances” in the Macquarie Dictionary:

2. (*usually plural*) the existing condition or state of affairs surrounding and affecting an agent: forced by circumstances to do a thing.

1. Further, in *Alinta* members of the High Court appeared to accept that “circumstances” in the takeovers context could extend to a general state of affairs relevant to a corporation rather than specific events. For example, at 552 Gleeson CJ said:

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.

(Emphasis added.)

1. Further, at 597 Kiefel and Crennan JJ observed:

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.

(Emphasis added.)

1. Comments of the High Court in *Alinta* in these cases as well as the Panel’s Guidance Note reflect s 657A(1) which empowers the Panel to declare circumstances in relation to ***the affairs of a company*** to be unacceptable circumstances.
2. Second, for the time limits prescribed by s 657B and s 657C to have meaning, there must be some certainty associated with definition of those “circumstances” to which the application relates and in respect of which a declaration of unacceptable circumstances may be made pursuant to s 657A. An absence of certainty in this respect would rob the time limits of any practical effect, and would cause ongoing uncertainty in the market in respect of the affairs of the particular company. However, these time limits should also be construed in conjunction with s 657A(2) which limits circumstances which may be declared unacceptable. So, for example, s 657A(2)(c) states that circumstances may only be unacceptable because they:

(i) Constituted, constitute, will constitute, or are likely to constitute a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C; or

(ii) Gave or give rise to, or will or are likely to give rise to, a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C.

1. In this respect, it appears that s 657A(2)(c) contemplates there being circumstances in particular cases which are in existence at the time of the application or indeed the declaration, in that the section specifically refers to presently-existing circumstances which – for example – ***constitute*** or ***give rise to*** a contravention of the legislation. Further, the reference in s 657A(2)(c) to circumstances which “constituted” or “constitute” a contravention suggests that the legislature recognised that a contravention could be ongoing rather than fixed to a particular point in time. The breadth of the terms of s 657A(2)(c) similarly supports a broad interpretation of the term “circumstances” for the purposes of Ch 6, and is consistent with the natural meaning of “circumstances” as set out earlier in this judgment.
2. A similar point may be made about s 657A(b) and (c) which refer to the effect the circumstances have had, are having, will have or are likely to have on control of the company or in relation to the company.
3. Third, the decision of the Panel should also be considered in light of the application made by The President’s Club which was before it. In its application The President’s Club had claimed, in summary, that the circumstances in respect of which it sought a declaration were as follows:
* QNA and its associates had breached and *continued to be in breach of* s 606 of the Corporations Act.
* There were extensive and material deficiencies in the bidder’s statement lodged by QNA with ASIC.
* QNA had breached and *continued to be in breach of* s 631 and s 633 of the Corporations Act.
* The circumstances giving rise to a breach of s 606 first occurred at the time of the first acquisition of shares, and those circumstances were continuing because QNA continued to hold a relevant interest in the company.
* The circumstances giving rise to a breach of s 631(1) first occurred on 12 June 2012 when QNA failed to lodge a complying bid within two months of making a public proposal to make a takeover bid.
* The circumstances giving rise to a breach of s 633(1) first occurred on or about 7 June 2012 when QNA failed to dispatch a complying bidder’s statement to The President’s Club shareholders.
* The balance of the circumstances first occurred when the bidder’s statement was lodged with ASIC on 12 April 2012.
* QNA had failed to lodge a replacement bidder’s statement, which circumstances were continuing.
1. The circumstances claimed by The President’s Club were clearly far broader than the share acquisitions in July 2011 and March 2012. It is appropriate to read the decision of the Panel, which found in favour of The President’s Club, with the application before it.
2. Fourth, as I have already observed, in order to make a declaration of unacceptable circumstances within the context of Ch 6 of the Corporations Act, those circumstances must be identified with some certainty. In Annexure A to the reasons for its decision (being the Declaration of Unacceptable Circumstances), the Panel declared:

[10] It appears to the Panel that the circumstances of the first acquisition are unacceptable having regard to:

• (a) the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:

▪ (i) the control, or potential control, of TPC or

▪ (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in TPC and

• (b) the purposes of Chapter 6 set out in section 602 and

• (c) because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6.

[11] Further it appears to the Panel that the circumstances of the second acquisition are unacceptable having regard to:

• (a) the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:

▪ (i) the control, or potential control, of TPC or

▪ (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in TPC and

• (b) the purposes of Chapter 6 set out in section 602.

1. It is clear that the acquisitions of shares in July 2011 and March 2012 were at the core of claimed unacceptable circumstances in relation to the state of affairs of the company. However, it also appears from the terms of the declaration that the Panel was not confining the declaration to the specific transactions in which the relevant shares were acquired in July 2011 and March 2012. The Panel clearly considered that “***the circumstances of***” those acquisitions were unacceptable. In order to identify “the circumstances of” those acquisitions it is necessary to have regard to the reasons of the Panel.
2. Materially at [25]-[30] the Panel said:

[25] On 12 April 2012, QNA lodged a bidder’s statement with ASIC. Its proposed bid was for all the shares in TPC and corresponding villa interests and was unconditional.

[26] On 24 April 2012, QNA withdrew the bidder’s statement.

[27] On 11 May 2012, ASIC extended the time for QNA to make a bid.

[28] On 21 May 2012, it lodged a replacement bidder’s statement. Under its replacement bidder’s statement, QNA proposed to make an offer to purchase all the shares in TPC and all villa interests. The bidder’s statement said on the front page:

*The bid is being made for both your shares and your Villa Interest. It is not possible to accept the bid in relation to your shares only or in relation to your Villa Interest only*.

[29] On page 1 the following statement appeared:

*While there is no formal stapling of your President’s Club Shares to your Villa Interest, it is likely that you have executed a deed poll which obliges you to sell your shares if you sell your Villa Interest to the same person. Also, clauses 6(b) and 6(c) of the Constitution require that a member of President’s Club must own a Villa Interest and a member’s shareholding is limited to the number of Villa Interests owned*.

[30] At the time of the application, QNA had not dispatched offers to shareholders. It has since indicated that it will not do so.

1. At [103] the Panel said:

[103] It appears to us that the circumstances of the acquisition of TPC shares in July 2011 are unacceptable having regard to:

(a) the effect that we are satisfied the circumstances have had, are having, will have or are likely to have on:

(i) the control, or potential control, of TPC or

(ii) the acquisition, or proposed acquisition, by a person of a substantial interest in TPC and

(b) the purposes of Chapter 6 set out in section 602 and

(c) because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6.

1. After referring to observations of the High Court in *Alinta*, the Panel continued at [107]:

[107] The contravention of section 606 in this case gave effective control of TPC to QNA without other shareholders having an opportunity to decide if that should occur and without them having a reasonable and equal opportunity to participate in any benefits accruing to QNA through the proposal to acquire a substantial interest in TPC. We note that now a follow-on bid will not occur. We also agree with the application by TPC that the effect of the circumstances was that they were likely to inhibit an efficient, competitive and informed market in TPC shares since shareholders were not given information necessary for them to assess the merits of the proposal before it occurred. Further, in our view, based on our experience, any control premium for the shares of the remaining shareholders must now be considered unlikely, or at least significantly reduced in likelihood.

(footnote omitted.)

1. Further at [110] after referring to the second acquisition of shares in March 2012, the Panel observed:

[110] It appears to us that the circumstances of QNA’s subsequent purchases in reliance on the ‘creep’ provision in item 9 of section 611 are unacceptable. While they may not have involved a contravention, reliance was, in our view, based on a contravention (namely, the initial acquisition). ***The subsequent acquisitions consolidated QNA’s control of TPC***. Moreover, had the initial acquisition been made by a takeover bid, the subsequent acquisitions would have occurred in circumstances in which the shareholders had information and a reasonable and equal opportunity to participate in any benefits. As it happened, the shareholders sold their shares (and villa interests) to QNA at different prices.

1. The acquisitions of shares in July 2011 and March 2012 were clearly, in the view of the Panel, contraventions of the Corporations Act. However as the reasons of the Panel also demonstrate, they were contraventions which:
* Were ongoing, in that the applicants continued to maintain a relevant interest in those shares.
* Had created a continuing state of affairs in respect of The President’s Club where the remaining shareholders were faced with a situation where QNA had achieved, and could continue to exercise, effective control of the company, without shareholder approval, or without the advantage of shareholders receiving an open bid.
* Had created a state of affairs where a takeover bid by QNA for the remaining shares would have ameliorated the situation faced by the shareholders, but QNA had failed to make the bid despite preparation of two bidder’s statements (one of which was revoked in May 2012), and that state of affairs was continuing.
1. These circumstances were clearly distinguished by the Panel from the effects of the circumstances to which the Panel had regard, including the impact on the market and the control premium for the shares of the remaining shareholders. The Panel did identify the circumstances with certainty - namely the ongoing state of affairs in respect of the company created by the acquisitions of interests in shares in The President’s Club by the applicants in July 2011 and March 2012. In its submissions ASIC states:

The applicants’ contention that the relevant circumstances had all occurred by March 2012 at [33] focuses upon the facts giving rise to the circumstances, as opposed to the circumstances the subject of the application for a declaration.

1. I agree, and take the view that the applicants’ contention is, to that extent, flawed.
2. It follows that, in my view, it was open to the Panel and the Panel was entitled to make a finding that the application by The President’s Club had been made at a time when unacceptable circumstances were ongoing.
3. I do not consider that this view deprives the time limits prescribed by s 657B and s 657C of their meaning and effect. Obviously, there may be instances before the Panel where circumstances are not ongoing and the time limits will have commenced to run. However the facts before the Panel in this case support a finding that the relevant state of affairs was continuing and that the application was not time-barred. It follows that it was unnecessary for the Panel to grant The President’s Club an extension of time to make its application.

### Reasons and submissions

1. The applicants claim that it is not clear from the reasons of the Panel why it concluded that the unacceptable circumstances were ongoing and therefore why the Panel was empowered to make a declaration.
2. It is well-settled that inadequate reasons given by an administrative body in respect of a decision can constitute an error of law: *Adams v Yung* (1998) 83 FCR 248 at 288, 301, *Oberhardt v Department of Education, Employment and Workplace Relations* (2008) 174 FCR 157. However I note it is equally settled that, in reviewing the reasoning of an administrative body, the Court should not be concerned with looseness in language, nor unhappy phrasing, and that:

The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error.

(*Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287.)

1. Further, as the High Court observed in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272:

These propositions are well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.

1. In this case, while the basis for decision of the Panel could perhaps have been more clearly articulated, it is also clear from its reasons for decision why the Panel considered the unacceptable circumstances before it to be ongoing. In particular, I note that the basis of the application of The President’s Club was ongoing unacceptable circumstances created by conduct of the applicants, and the reasons of the Panel were framed in those terms. A captious approach to examination of the reasons of the Panel is, as the High Court has observed in respect of judicial review of administrative decisions generally, improper.
2. Finally, I note the Panel’s observation at [120] that QNA had been permitted to participate fully in the Panel’s proceedings and had done so with legal representation throughout. In such circumstances the finding of the Panel that there had been ongoing unacceptable circumstances could have been no surprise to the applicants.
3. It follows that grounds 4, 5 and 6 are not substantiated.

# Ground 7

1. The applicants contend that the Panel erred in concluding that the July 2011 acquisition of shares was a contravention of s 606 of the Corporations Act.
2. The key finding of the Panel with which the applicants take issue was [91] where the Panel said:

[91] “Voting power” is a concept defined by section 610. It looks only at the number of votes attached to the shares in which a person or their associate has a relevant interest. It is not concerned with the practicalities of whether the person can in fact cast those votes.

1. Importantly the Panel continued at [92]-[93]:

[92] A person’s voting power in a company is the percentage of the votes attached to voting shares in that company in which the person (with their associates) has relevant interests. Although CDLI’s covenant to ASIC largely prevented it from exercising the votes attached to approximately 31.4% or more of the shares it held (because it could vote only 10%), those votes remained attached to the shares.

[93] Therefore, in our view, at all relevant times CDLI’s relevant interest in those shares constituted 41.4% of the voting power in TPC, despite the covenant in the deed poll.

1. Earlier in its reasons the Panel had observed:

[83] In our view, CDLI has a relevant interest constituted by power to exercise the right to vote the shares. The fetter on voting arose entirely from the covenant in the deed poll, and not at all from TPC’s constitution. The rights attached to the shares as set out in TPC’s constitution are the same as for all voting shares (in contrast to the 5 Subscriber Shares).

1. In summary the applicants submit:
* Although in July 2011 QNA acquired a relevant interest in 41.4% of the issued voting shares of The President’s Club, this did not mean that result in an increase in the ***voting power*** indirectly controlled by QNA from below 20% to more than 20%.
* The deed poll prevented Lion Investments from exercising more than 10% of the voting power in The President’s Club, and this deed poll remained in effect immediately after the purchase by QNA of the shares in Lion Holdings in July 2011.
* The deed poll was directly relevant to the issue of voting power, but was not treated as such by the Panel.
* The Panel’s conclusion at [91] was inconsistent with the language of s 610 of the Corporations Act.
* The exercise of a right under a deed poll is not itself a “transaction”.
* The key issue was whether the votes could be cast. In this case they could not be cast because of the terms of the deed poll.
1. In response, The President’s Club submits that:
* The argument that the July 2011 acquisition was not a contravention of s 606 was actually a challenge to a mixed conclusion of fact and law of the Panel, namely that:

o the Panel should have had regard to evidence (that is the deed poll by Lion Investments in favour of ASIC) in order to make a finding that Lion Investments could not in fact have cast more than 10% of the votes in The President’s Club; and

o that finding of fact should have led the Panel to find that the voting power acquired by QNA was only 10% and therefore no contravention.

* alternatively the Panel correctly applied s 610 by having regard to votes which the shareholder was legally entitled to vote in respect of each share held. The deed poll between Lion Investments and ASIC could only be enforced by ASIC by application to Court: s 601QA(3).
* The constitution of The President’s Club is legally binding as between the company and Lion Investments, and determines the votes that Lion Investments is legally able to cast at a general meeting of the company. The deed poll is not legally binding as between the company and Lion Investments.
* In any event, if the deed poll meant that Lion Investments could only cast 10% of shares in The President’s Club, that situation changed when the deed poll came to an end on 13 March 2012. At this point the contravention of s 606(1) was complete.
1. Further, ASIC submits that s 610(1), in defining “voting power” by reference to a formula, is not concerned with limitations which a person may have placed on their right to exercise the total number of votes which they hold, and that there is nothing in s 610(2) to the contrary. I note that The President’s Club adopted this submission.

## Consideration

1. Materially s 606 of the Corporations Act provides as follows:

**606 Prohibition on certain acquisitions of relevant interests in voting shares**

*Acquisition of relevant interests in voting shares through transaction entered into by or on behalf of person acquiring relevant interest*

(1) A person must not acquire a relevant interest in issued voting shares in a company if:

(a) the company is:

(i) a listed company; or

(ii) an unlisted company with more than 50 members; and

(b) the person acquiring the interest does so through a transaction in relation to securities entered into by or on behalf of the person; and

(c) because of the transaction, that person’s or someone else’s voting power in the company increases:

(i) from 20% or below to more than 20%; or

(ii) from a starting point that is above 20% and below 90%.

*Note 1: Section 9 defines* ***company*** *as meaning a company registered under this Act.*

*Note 2: Section 607 deals with the effect of a contravention of this section on transactions. Sections 608 and 609 deal with the meaning of* ***relevant interest****. Section 610 deals with the calculation of a person’s voting power in a company.*

*Note 3: If the acquisition of relevant interests in an unlisted company with 50 or fewer members leads to the acquisition of a relevant interest in another company that is an unlisted company with more than 50 members, or a listed company, the acquisition is caught by this section because of its effect on that other company.*

…

…

1. Section 610 defines “voting power” as follows:

**610 Voting power in a body or managed investment scheme**

*Person’s voting power in a body or managed investment scheme*

(1) A person’s ***voting power*** in a designated body is:

Person’s and associate’s votes x 100

Total votes in designated body

where:

***person’s and associates’ votes*** is the total number of votes attached to all the voting shares in the designated body (if any) that the person or an associate has a relevant interest in.

***total votes in designated body*** is the total number of votes attached to all voting shares in the designated body.

*Note: Even if a person’s relevant interest in voting shares is based on control over disposal of the shares (rather than control over voting rights attached to the shares), their voting power in the designated body is calculated on the basis of the number of votes attached to those shares.*

*Counting votes*

(2) For the purposes of this section, the number of votes attached to a voting share in a designated body is the maximum number of votes that can be cast in respect of the share on a poll:

(a) if the election of directors is determined by the casting of votes attached to voting shares-on the election of a director of the designated body; or

(b) if the election of directors is not determined by the casting of votes attached to voting shares-on the adoption of a constitution for the designated body or the amendment of the body corporate’s constitution.

*Note: The Takeovers Panel may decide that the setting or varying of voting rights in a way that affects control of a designated body is unacceptable circumstances under section 657A*.

(3) If:

(a) a transaction in relation to, or an acquisition of an interest in, securities occurs; and

(b) before the transaction or acquisition, a person did not have a relevant interest in particular voting shares but an associate of the person did have a relevant interest in those shares; and

(c) because of the transaction or acquisition, the person acquires a relevant interest in those shares;

then, for the purposes of applying section 606 to the transaction or acquisition, the person’s voting power is taken to have increased because of the transaction or acquisition from what it would have been before the transaction or acquisition if the votes attached to those shares were disregarded to what it was after the transaction or acquisition (taking the votes attached to those shares into account).

(4) Disregard the operation of section 613 in working out a person’s voting power in a designated body.

*When a designated body is a managed investment scheme*

(5) For the purposes of the application of this section in relation to a designated body that is a managed investment scheme:

(a) a reference to voting shares in the designated body is taken to be a reference to voting interests in the scheme; and

(b) a reference to the election of directors of the designated body is taken to be a reference to:

(i) if the scheme is a registered scheme-the appointment of a responsible entity for the scheme; or

(ii) if the scheme is not a registered scheme-the appointment of a person to the office (by whatever name it is known) in relation to the scheme that corresponds most closely to the office of responsible entity of a registered scheme; and

(c) a reference to the designated body’s constitution is taken to be a reference to the scheme’s constitution.

*Meaning of designated body*

(6) In this section:

***designated body*** means:

(a) a body; or

(b) a managed investment scheme.

1. In my view ground 7 of the amended application is not substantiated. I have reached this view even assuming that ground 7 raises an error of law rather than a mixed question of fact and law on the part of the Panel and is therefore a valid ground of review in this Court.

### Voting power notwithstanding covenant in deed poll

1. I am not persuaded that the voting power within the meaning of s 610 of the Corporations Act attached to those shares in which QNA acquired a relevant interest in July 2011 was limited by the deed poll executed by Lion Investments in favour of ASIC. I have formed this view for the following reasons.
2. First, in this context it is important to recognise that the constitution of a company constitutes a contract as between the company and its members pursuant to s 140 of the Corporations Act, and that it is the constitution which confers rights on members including the right to exercise votes attached to shares: *Hickman v Kent or Romney Marsh Sheep-Breeders Association* [1915] 1 Ch 881 at 900, *Re Ballarat Brewing Company* (1977-78) CLC 40-344, *Fernlake*, *Registrar of Aboriginal Corporations v Barker* (1997) 81 FCR 53, *Re Austinmer Bowling Club Ltd (in liq); Russell v Rodden* (2008) 67 ACSR 183.
3. Second, as explained by Williams J in *Grimwade v Federal Commissioner of Taxation (No 2*) (1949) 78 CLR 199at 206:

The right to vote has been said to be a right of property, and it is a right that in general a shareholder can exercise in general meeting as he thinks best in his own interests. He can also enter into a contract for valuable consideration which the court will enforce by an injunction to exercise or not to exercise his right to vote in general meeting as the other contracting party may direct: *Pender v. Lushington* (1877) 6 Ch D 70; *Greenwell v. Porter* (1902) 1 Ch 530; *Puddephatt v. Leith* (1916) 1 Ch 200.

1. This principle has been affirmed in more recent times in decisions including *Kavalee v Burbidge* [1998] NSWSC 111, *Heydon v NRMA Ltd* (2000) 51 NSWLR 1at [198] and *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* [2005] NSWSC 1005 at [162]-[163].
2. Third, while limitations on voting rights in respect of shares may be enforced by the Court by way of injunction or other relief, any such limitations do not abrogate the right of the member to exercise voting rights vis-à-vis the company. An example of the operation of this principle may be seen in *Campbell Investment (Aust) Pty Ltd v Arnotts Ltd* (1993) 9 ACSR 660. Materially in that case a heads of agreement was entered between the plaintiff (“Arnotts”) and the defendant (“Campbells”). Clause 7.1 of those heads of agreement provided:

In the event of the acquisition of 14.9% of Arnotts shares by Campbells:

• Subject to Arnotts’ articles of association (which at present limit the number of directors to 10), Campbells shall be entitled to up to but not more than two representatives on the board of directors of Arnotts. Present Arnotts’ directors will remain in office and the board will be expanded as necessary; it would be the intention for there to be a total of 10 Arnotts’ directors by 31 December 1985; and

• Campbells shall not exercise its voting power (in excess of 14.9%) as a shareholder in Arnotts to seek, or to obtain, control of the board of directors of Arnotts except where Campbells’ fundamental interest as a substantial shareholder is threatened - eg as third party seeks or gains control of Arnotts.

1. After acquiring shares in Arnotts, Campbells commenced proceedings in the Supreme Court of New South Wales seeking declarations that any restraint upon Campbells imposed by clause 7.1 of the heads of agreement would terminate once Campbells’ shareholding in Arnotts exceeded a certain percentage. At first instance Windeyer J found that Campbells was not bound by clause 7.1 of the heads of agreement. Importantly for the purposes of the issue presently before me, Campbells argued before his Honour that clause 7.1 was unenforceable by reason of r 3K(2)(a) or r 3K(3) of the *Australian Stock Exchange Official Listing Rules*. At 671 his Honour said:

Rule 3K(2)(a) provides that voting rights in respect of shares of listed companies shall be on a one for one basis in other words members are entitled to one vote for each share held. Rule 3K(3) provides that a holder of ordinary shares shall be entitled to be present and to vote at any general meeting in respect of any shares or shares held by that member. I do not think that the agreement amounts to breach of the Rule; neither can I see that the case of *Whitehouse v Carlton Hotel Pty Ltd* (1986) 162 CLR 285; 70 ALR 251 has any bearing on this matter although the plaintiff said it did. That decision set aside an allotment of shares made for an improper purpose whereas the question in issue here is whether there is conflict between the agreement and the Listing Rules. As I said at the start it was not argued that the company had no concern in how its shareholders voted, or that it had no power to enter into an agreement one major reason for which would appear to be to keep the non Campbell directors, or those persons selected by them from time to time, in power. ***Shareholders have power to bind themselves by contract to vote or not vote in a particular way***; *Greenwell v Porter* [1902] 1 Ch 530; *Puddephatt v Leith* [1916] 1 Ch 200; and although those cases refer of course to contracts between shareholders it was not argued that a contract between company and shareholder was invalid but only that in this case it breached the Listing Rules. ***But all that the agreement does is to regulate the way in which votes can be cast; it does not disenfranchise the shareholder from voting and in my view there is no breach of the Listing Rule***.

(Emphasis added)

1. His Honour then considered at 672 whether clause 7.1 was inconsistent with the constitution of Arnotts and said as follows:

The plaintiffs argued that after the agreement was made the shares were purchased whereupon a contract under seal came into existence between the purchaser and Arnotts in accordance with the articles of association. This is of course clear from s 170 of the Corporations Law. Article 73 of the articles of association of Arnotts provides that at a meeting on a show of hands every member present in person or by proxy shall have one vote for each shares held. This contract between shareholder and company is said to prevail over the agreement as it is later in time. For the reasons I have given in respect of the Listing Rules I do not consider there is any conflict …

1. An appeal against his Honour’s decision was allowed (*Arnotts Ltd v Campbell Investment (Aust) Pty Ltd* (1993) 9 ACSR 675) however findings of the primary judge concerning the entitlement of Campbells to vote were not disturbed. As Sheller JA explained at 689:

The respondents further argued that if cl 7(1) has the meaning contended for by Arnotts or, perhaps, in any event, it offends the Australian Stock Exchange Listing Rules 3K(2)(a) …

Windeyer J rejected this argument for reasons with which I agree. The voting rights in respect of Campbells’ fully paid shares are on a one for one basis. The holder of the shares is entitled to be present and to vote at any general meeting in respect of the shares. The rules do not prohibit shareholders binding themselves by contract to vote or not to vote in a particular way; see the cases referred to by Windeyer J.

1. Similarly in *Fernlake* in circumstances where a third party was the equitable owner of half of the shares in the company but was not registered as a shareholder in respect of those shares, Lee J observed at 602:

Quite rightly, the company and shareholders are entitled to treat the registered shareholder, for all intents and purposes, as the owner of the shares and as the person entitled to exercise any rights in respect of those shares. ***The obligations which the shareholder chooses to create between himself and a third party cannot possibly affect that position.***

(Emphasis added.)

1. Fourth, the definitions of “voting share” in s 9 and “voting power” in s 610 of the Corporations Act are broad. It is not in dispute that the shares held by Lion Investments in The President’s Club were “voting shares”. Section 610(1) defines “voting power” by reference to the total number of votes attached to all the voting shares in the designated body (if any) in which the person or associate has a relevant interest, and extends this definition to circumstances where the person’s relevant interest in voting shares is based on control over disposal of the shares rather than control over voting rights attached to the shares. While s 610(2) refers to the number of votes attached to a voting share in a designated body as being the maximum number of votes that ***can*** be cast in respect of the share on a poll, reading s 610(2) with s 610(1) I am not satisfied that the verb “can” should be qualified by reference to any limits the member may have voluntarily placed on its right to exercise the total number of votes held.
2. Further, s 608, in defining “relevant interests in securities” provides (materially):

*Basic rule--relevant interest is holding, or controlling voting or disposal of, securities*

(1) A person has a relevant interest in securities if they:

(a) are the holder of the securities; or

(b) have power to exercise, or control the exercise of, a right to vote attached to the securities; or

(c) have power to dispose of, or control the exercise of a power to dispose of, the securities.

It does not matter how remote the relevant interest is or how it arises. If 2 or more people can jointly exercise one of these powers, each of them is taken to have that power.

*Extension to control exercisable through a trust, agreement or practice*

(2) In this section, power or control includes:

…

(b) power or control that is, or can be, exercised as a result of, by means of or by the revocation or breach of:

(i) a trust; or

(ii) an agreement; or

(iii) a practice; or

(iv) any combination of them;

whether or not they are enforceable; and

(c) power or control that is, or can be made, subject to restraint or restriction.

1. Reading s 608 with s 610 it is very clear that “voting power” in respect of securities includes circumstances where exercising voting power would be either in breach of an existing agreement or could be restrained by lawful process.
2. In her submissions on behalf of ASIC Ms Mitchelmore submitted (in summary) that:
* an interpretation otherwise would mean that a person could purchase shares in a company which took their holding from 19% to 80% without breaching s 606, provided they signed a deed poll not to vote shares which exceeded 19%; and
* this result is contrary to the focus of s 610(1) on the number of votes attaching to the shares and the objects of Ch 6.
1. I agree.
2. Finally, in this case Lion Investments held 41.4% of the shares of The President’s Club, and executed a deed poll in favour of ASIC in which Lion Investments covenanted that it would not vote more than 10% of the votes it could cast except with ASIC’s consent or in relation to a winding up of the time share scheme. It is common ground that this deed poll was executed as a condition of the grant of an exemption by ASIC from registration of the scheme under Ch 5 of the Corporations Act.
3. It is also clear that because of the transaction in which QNA acquired shares in Lion Investments in July 2011, QNA also acquired a relevant interest in the shares held by Lion Investments in The President’s Club. Notwithstanding that Lion Investments had covenanted that it would not exercise in excess of 10% of the total votes in The President’s Club, and that ASIC could have taken legal action to enforce that covenant, Lion Investments (and through it QNA) was entitled to vote all of its shares and could not be prevented by company itself from doing so. It follows that it was because of the July acquisition that QNA acquired the shares in Lion Investments, it acquired voting power in respect of 41.4% of the issued share capital of The President’s Club.
4. This conclusion was clearly reached by the Panel, which at [84] noted:

CDLI had power to vote the shares in breach of the deed, after revoking the deed (as happened), or with ASIC’s consent.

1. In a footnote to this statement, the Panel observed:

TPC could not have disregarded such a vote on the basis that it was cast in breach of an obligation owed to ASIC: *Re Fernlake Pty Ltd* (1994) 13 ACSR 600.

1. There is no error attendant upon this conclusion of the Panel. The acquisition of shares in July 2011 by QNA in Lion Investments, which in turn held 41.4% of the shares in The President’s Club, contravened s 606 of the Corporations Act.

### Revocation of the deed poll effective 13 March 2012

1. In any event, even if the deed poll executed by Lion Investments limiting votes it could cast did have the effect of limiting voting power for the purposes of s 610, I accept the submission of the second respondent that QNA’s contravention of s 606(1) was complete when the deed poll came to an end on 13 March 2012. I am also satisfied in this case that QNA’s voting power in The President’s Club increased “because of” the July 2011 acquisition of shares, notwithstanding the delay in the activation of the power to exercise the votes and also notwithstanding that the revocation of the deed poll was an intermediary step in that activation.
2. Ground 7 is not substantiated.

# Grounds 8, 9 and 9A

1. Cumulatively these grounds of review raise five general issues, all relating to the July 2011 acquisition and the Panel’s finding that circumstances relating to this acquisition constituted unacceptable circumstances. In ground 8 the applicants claim that, in three separate ways, there was no evidence to support the Panel’s declaration of unacceptable circumstances, which constitutes an error of law pursuant to s 5(1)(h) of the ADJR Act. In ground 9 the applicants claim that the declaration of unacceptable circumstances was an improper exercise of the Panel’s power in contravention of s 5(1)(e) of the ADJR Act in that at [107] of its reasons the Panel took into account irrelevant considerations. In ground 9A the applicants claim that the Panel made an error of law in [107] by stating conclusions without identifying and providing reasons contrary to s 657A of the Corporations Act.
2. It is appropriate to consider each ground of review in turn.

## Ground 8: no evidence that the other shareholders in The President’s Club were denied an opportunity to participate in “any benefits accruing to QNA” in respect of shares and interests in the villas or that the acquisition by QNA would be likely to inhibit an efficient, competitive and informed market in The President’s Club

1. In summary, the applicants submit that:
* The Panel is required by s 657A(6) of the Corporations Act to provide reasons for its findings.
* Although the Panel is a specialised body, it cannot speculate without any foundation for its conclusion. The reasons must reveal that there is evidence before the Panel to enable it to be reasonably satisfied that the relevant effects are established.
* While QNA displaced the previous company which owned ultimately Lion Investments so that effective control of The President’s Club passed to QNA without other shareholders having an opportunity to decide if that should occur or having a reasonable opportunity to participate in any benefits accruing to QNA, there is no evidence or statement in the reasons of the Panel demonstrating that:

o there is some material difference to the other shareholders between Lion Investments being owned by the prior ultimate holding entity rather than QNA; or

o there was any benefit accruing to QNA or any benefit beyond that which was enjoyed by the former ultimate holding company.

* There is no statement of reasons or evidence identifying “the efficient competitive and informed market” in shares in The President’s Club or the impact on that market of the July 2011 transaction.
* The Panel assumed that there was a control premium for the remaining shareholders which was at least considerably reduced, however this was neither proved nor explained in the reasons.
* It was wrong to treat the interests in the shares and the Villa Interests as if they were one piece of property – they were actually separate pieces of property.
1. This ground of review is opposed by the respondents on the basis that, inter alia:
* It actually seeks to re-agitate the merits of the matters considered by the Panel, and
* The Court requires there to be a complete dearth of evidence or other material to warrant a finding of “no evidence” and therefore an error of law, which is not the case in these proceedings.
* In any event, the findings of the Panel in relation to contravention of s 602(c) were expressions of opinion, for which no specific evidence was required.

### Consideration

1. Key observations of the Panel relevant to this ground of review were as follows:

• at [107] the Panel found:

The contravention of section 606 in this case gave effective control of TPC to QNA without other shareholders having an opportunity to decide if that should occur and without them having a reasonable and equal opportunity to participate in any benefits accruing to QNA through the proposal to acquire a substantial interest in TPC. We note that now a follow-on bid will not occur. We also agree with the application by TPC that the effect of the circumstances was that they were likely to inhibit an efficient, competitive and informed market in TPC shares since shareholders were not given information necessary for them to assess the merits of the proposal before it occurred. Further, in our view, based on our experience, any control premium for the shares of the remaining shareholders must now be considered unlikely, or at least significantly reduced in likelihood.

• At [110] the Panel said:

Moreover, had the initial acquisition been made by a takeover bid, the subsequent acquisitions would have occurred in circumstances in which the shareholders had information and a reasonable and equal opportunity to participate in any benefits. As it happened, the shareholders sold their shares (and villa interests) to QNA at different prices.

(footnotes omitted.)

• At [118] the Panel said:

Control of TPC effectively passed without a reasonable and equal opportunity being provided to all shareholders to participate in any benefits accruing from a proposal under which QNA acquired control of, or a substantial interest in, TPC. Furthermore, the acquisition of control over voting shares occurred in contravention of section 606 and therefore not in an efficient competitive and informed market.

1. This ground of review, and indeed the relevant comments of the Panel, relate to the terms of s 602(a) and (c) of the Corporations Act which describes the purposes of Ch 6 of the Act as including 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) …

(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.

1. Section 602 of the Corporations Act sets out by way of general principles the purpose of the takeovers provisions of that Act. It reflects the “equality of opportunity” principle explained by the Company Law Advisory Committee (Eggleston Committee) in its *Second Interim Report on Disclosure of Substantial Shareholdings and Takeovers Bids* (1969), as follows:

16. We agree with the general principle that if a natural person or corporation wishes to acquire control of a company by making a general offer to acquire all the shares, or a proportion sufficient to enable him to exercise voting control, limitations should be placed on his freedom of action so far as is necessary to ensure:

(i) that his identity is known to the shareholders and directors;

(ii) that the shareholders and directors have a reasonable time in which to consider the proposal;

(iii) that the offeror is required to give such information as is necessary to enable the shareholders to form a judgment on the merits of the proposal and, in particular, where the offeror offers shares or interests in a corporation, that the kind of information which would ordinarily be provided in a prospectus is furnished to the offeree shareholders;

(iv) that so far as is practicable, each shareholder should have an equal opportunity to participate in the benefits offered.

1. Importantly, s 657A(2) of the Corporations Act provides that the Panel can only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances are unacceptable having regard to the purposes of Ch 6 set out in s 602.
2. Section 5(1)(h) of the ADJR Act upon which this ground of review is based requires there to be ***no*** evidence or other material to justify the making of the decision. This provision should be read with s 5(3) of the ADJR Act, which provides:

(3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

1. Ground 8 raises a number of complex issues for consideration. However, in my view this ground of review was not substantiated.

## General Observations

1. First, it is clear that a key objective of the legislature in establishing the Panel was that it should use its expertise to determine takeovers disputes quickly and efficiently (Explanatory Memorandum to the Corporate Law Economic Reform Program Bill; *Glencore International AG v Takeovers Panel* (2006) 151 FCR 77 at 107). As the respondents correctly submit, it is necessary to keep in mind that the Panel is an expert administrative body which does not conduct formal hearings or receive evidence as do Courts. As Gleeson CJ observed in *Alinta* at 552 in relation to the Panel’s consideration of s 602:

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 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.

1. Second, as is clear from the case law, in order to substantiate an error of law due to lack of evidence within the meaning of s 5(1)(h), there must be **no** evidence from which the decision-maker could reasonably be satisfied that the particular matter was established. This plain reading of s 5(1)(h) has been recognised by the High Court in numerous decisions (*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 357, *Minister for Immigration v Rajamanikkam* (2002) 210 CLR 222 at 233, 251). In this regard and for the purposes of s 5(1)(h), s 5(3) of the ADJR Act contemplates that a decision-maker may be entitled to take notice of facts. Further, and significantly, s 5(3) provides:

(3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

1. This aspect of the case of the applicant appears to focus on s 5(1)(h) and s 5(3)(a).

## Section 602(c)

1. Third, I am not persuaded by the submissions of the applicant that there was no evidentiary basis upon which the Panel could reach the view it took in respect of s 602(c). While there is authority to the effect that the Panel should engage in some well-founded speculation when it is endeavouring to determine what would have happened if relevant circumstances did not exist, including benefits the opportunity of which other members have been deprived (*Cemex Australia Pty Ltd v Takeovers Panel* (2009) 177 FCR 98 at 119-120, *Australian Pipeline Ltd v Alinta Ltd* (2006) 237 ALR 158 at [148]) in this case:
* The Panel noted at [118] that there had been no proposal put to the shareholders of the company in relation to QNA acquiring 41.4% of the shares in the President’s Club in July 2011, including no proposal put to those other shareholders for the acquisition of their shares at the price paid by QNA in respect of the Lion Holdings’ controlled stake. In relation to s 602(c) the Panel need only be satisfied that the other shareholders of the company were denied a reasonable and equal ***opportunity*** to participate in any benefits accruing to the QNA through its acquisition of shares in The President’s Club. It was clearly open to the Panel on the material before it upon which they could be (and evidently, were) satisfied that the other shareholders of The President’s Club had not had the opportunity to approve or otherwise of QNA’s proposal to acquire control of Lion Holdings and its shares in The President’s Club.
* It is not in dispute that as a result of the July 2011 acquisition QNA acquired a significant and potentially controlling parcel of shares in The President’s Club. Certainly the Panel took the view that this acquisition also conferred voting power in those shares on QNA. Although the Panel did not specifically so note, as a general proposition it is clear that the acquisition of a relevant interest in a significant parcel of voting shares in a company in itself confers benefits on the acquirer of such shares. It is trite to note that the statutory threshold of 20% of voting power prescribed by s 606(1)(c) is predicated on a legislative assumption that 20% of voting power affords a potentially controlling interest in a corporate entity. The view taken by the Panel of the manner in which QNA acquired 41.4% of the voting shares in The President’s Club was based on the material before it.
* I am not persuaded by the suggestion in the submissions of the applicants that there was no real impact on the other shareholders of the company in circumstances where one substantial shareholder in The President’s Club was “substituted” for another, and to that extent it was immaterial to the other shareholders of the company that QNA acquired control of the relevant shares in July 2011 instead of the previous ultimate owner Lend Lease. The law recognises the importance of the disclosure of the identity of the bidder in a takeover (s 602(b)(i) Corporations Act) and the right of the market to be informed of such details (s 602(a)). Indeed the Panel noted at [129] that within a reasonably short period of time QNA had acted to revoke the deed poll provided by Lion Investments (under previous ownership) which had limited voting power in relation to those shares. This action clearly had a significant effect on the practical exercise of voting power in the company following the July acquisition of the shares by QNA, in such a manner that the Panel concluded was to the potential detriment of the other shareholders.
* At [131] the Panel referred to the absence of a reasonable and equal opportunity for remaining shareholders to exit compared to those who had already sold out in the circumstances surrounding the July 2011 acquisition. That this was the case appeared clear on the material before the Panel (including the fact that no subsequent takeover bid from QNA had eventuated).
* Finally the Panel is entitled to use its judgment based on the material before it when it is endeavouring to determine what would have happened if relevant circumstances did not exist: *Cemex* at 119-120.

## Stapled securities

1. Fourth, I am not persuaded by the submissions of the applicant that there was no evidentiary basis upon which the Panel could find that the shares in The President’s Club and the Villa Interests were effectively stapled.
2. While of relatively recent emergence in corporate markets compared with shares, it cannot be said that the concept of stapled securities is new. A basic but helpful description can be found in Lipton P, Herzberg A and Welsh M, *Understanding Company Law* (17th ed, Lawbook Co, 2014) where the learned authors observe at [8.30]:

A stapled security involves two or more different types of securities that are contractually linked and cannot be traded separately. They often comprise a trust unit and a share in a related management company. The trust owns assets and the related company manages the trusts asset portfolio.

1. Stapled securities have been recognised by Courts at the highest level in this country (for example, see *Mills v Federal Commissioner of Taxation* [2012] 87 ALJR 53), have been the subject of publications by the corporate regulator (for example ASIC *Consultation Paper 217 Presentation of financial statements by stapled entities*, October 2013), and as property under certain conditions can be quoted on the Australian Securities Exchange (http://www.asx.com.au/regulation/rules/asx-listing-rules.htm). Further, stapled securities have been the subject of consideration and decision by the Panel on numerous occasions (for example *Lantern Hotel Group* [2014] ATP 6, *Hastings Diversified Utilities Fund* [2012] ATP 1, *Babcock & Brown Communities Group* [2008] ATP 25, *Grand Hotel Group* [2003] ATP 34, *Colonial First State Property Trust Group* [2002] ATP 17, *Infratil Australia Ltd (No 2)* [2000] ATP 1). As an expert body specialising in takeovers law, it would be surprising if the Panel could not swiftly and efficiently identify sophisticated investment vehicles in the nature of stapled securities.
2. The Panel discussed in some detail the facts before it relating to question whether the shares and Villa Interests were “stapled”. So, for example at [7]-[16] of the reasons for decision the Panel observed:

[7] At the time of the application, each shareholder in TPC owned a parcel of 13 ordinary shares and a corresponding one quarter interest, as tenant in common, in a lot in either “The President’s Club Golf Community Titles Scheme” or “The President’s Club Tennis Community Titles Scheme” (each a “villa interest”).

[8] A shareholder may own more than one parcel of shares and corresponding villa interest.

[9] The constitution of TPC provides, in clause 6(a):

The qualification for membership of the Company shall be that the applicant is a Co-Owner and shall at all times whilst he or she desires to remain a Member be a Co-Owner.

[10] Co-Owner means tenant in common of a lot on the Plan.

[11] By a complicated set of interlocking agreements, a purchaser of one timeshare interest must become both:

(a) a member of TPC, holding 13 shares and

(b) the registered proprietor of a corresponding one-quarter interest in a Golf Title or Tennis Title (ie in a particular villa).

[12] A purchaser is also required to execute two further documents:

(a) a deed poll, which binds them, if selling their villa interest, to sell the corresponding shares in TPC to the same person and

(b) an assignment of a letting pool agreement, under which their villa interest is made available with others as part of a pool.

[13] TPC is the tenant under two leases for 80 years (with additional 80 year options) covering all the villa interests and all the common property in the particular development. Administration of the timeshare rights, and the letting pool, is provided for under a Resort Administration Agreement. Under TPC’s constitution members agree to comply with lawful commands, directions, rulings etc of the resort administrator made under the Resort Administration Agreement. The leases were granted by CDLI before any sales, and the villa interests are interests in the reversion on the leases of the lots.

[14] The right to the timeshare derives from the TPC shareholding, since the constitution of TPC includes at clause 8:

… The holder for the time being of a share in the capital of the Company shall be entitled to exercise his or her Entitlement during the period specified in Schedule 1 ...

[15] “Entitlement” is defined to mean:

the entitlement of a Member to occupy one Residential Apartment including all fixtures, fittings and equipment therein, in the Presidents Site for a (sic) Entitlement Week to which his or her share relates and to use the Resort Facilities of the Resort.

[16] TPC may decline a transfer of shares unless (among other things) the transferee complies with the qualifications for membership (clause 92 of the constitution). These include that the applicant is a Co-Owner (clause 6).

(footnotes omitted.)

1. In this case the Panel’s conclusions that the shares in The President’s Club and the Villa Interests were effectively stapled securities can be seen in particular in the following paragraphs of the Panel’s reasons for decision:

[66] While complicated, in our view the arrangement is in effect a ‘stapling’ of the shares and corresponding villa interests. The shares can only be transferred together with the corresponding villa interests. The right to use the villa is conferred by rights attached to the shares. Indeed, the way the rights are enjoyed is by a ‘stapled entitlement’. It is clear that this was the intention of the development.

[67] Thus, the allocation of the price between a villa interest and the related shares is arbitrary. It is commercially unrealistic to treat the shares and villa interests separately. The acquisitions to which this matter relates were of both shares and villa interests. Any bid for TPC would also have to relate to the villa interests as well as the shares.

[68] Accordingly, any offer for a parcel of shares would have to be made together with an offer for the corresponding villa interest. We did not accept QNA’s submission as to jurisdiction.

[69] While this arrangement was made more complicated by CDLI, as developer of the time share scheme, not having entered into all the agreements and arrangements (including the deed poll) that buyers entered, and entering into a different deed poll in favour of ASIC, this does not change the position in our view. It is clear that it was intended for all the time shares to be sold off and therefore every owner to be in the same position. Indeed, QNA submitted that:

... The deed polls were only intended to regulate **secondary sales** of the Timeshare Scheme, and there would have been no commercial purpose in the developer (the vehicle for which was CDLI) to have bound itself through such arrangements.

(Original emphasis.)

[70] …

[71] QNA submitted that the quote above (paragraph 69) supported the view that the shares and villa interests were not stapled and could be transferred separately. But QNA’s acquisition of control over CDLI did not involve the stapling arrangements, whereas all the other actual and proposed transactions under discussion are secondary sales.

[72] Moreover, QNA pointed out that there had been such a transfer. This was a transfer during the Panel proceedings of a villa interest from CDLI to Mr Palmer himself, the shares remaining with CDLI, which he controls. This transfer was possible because the stapling does not bind the Land Titles Office. It does not show that a parcel of shares could be transferred without the corresponding villa interest.

[73] TPC submitted:

Co-owners grant an 80 year lease (with an 80 year option to renew) to [TPC], appoint [TPC] as their agent (pursuant to article 112), waive their rights under Part V of the Property Law Act 1974 (Qld) (article 102) and commit to adhering to the Resort Administration Agreement (article 114). Accordingly, Co-owners have no substantive rights to the villas except as derived from their “Entitlement” as a [TPC] shareholder. It is simply not correct to assert that the rights of an owner of a villa interest can be enjoyed independently of any rights accruing to a holder of [TPC] shares.

[74] We agree. For this reason as well we consider the shares and villa interests to be effectively stapled. Accordingly we consider that we have jurisdiction to make orders which extend to the villa interests as well as the related shares.

1. It is not a contentious issue that the Panel is both entitled and required to find facts based on the material before it: *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 187, *Alinta* at 584. I am satisfied that the reasons of the Panel disclose material before the Panel, including material specifically brought to its attention by the applicants, which provided an evidentiary foundation for its conclusion that the shares in The President’s Club and the Villa Interests were effectively stapled. In my view the submissions of the applicants in this regard were effectively an invitation to the Court to reconsider the merits of their case before the Panel, which invitation the Court ought properly refuse.

## Section 602(a)

1. Fifth, I am not persuaded by the submissions of the applicant that there was no evidentiary basis upon which the Panel could find that the acquisition by QNA was likely to inhibit an efficient, competitive and informed market in The President’s Club.
2. First, conclusions of the Panel in respect of whether acquisitions took place in an efficient, competitive and informed market are a matter of judgment of the Panel based on its expertise and the material before it. It is uncontroversial that all parties presented detailed submissions to the Panel in respect of this matter. As the Full Court observed in *Cemex* at 119-120, in relation to a claim of “no evidence” supporting the findings of the Panel with respect to s 602(a) of the Corporations Act:

[135] As Emmett J said at first instance in *Australian Pipeline Ltd v Alinta Ltd* (2006) 237 ALR 158 at [148], the Panel must engage in speculation when it is endeavouring to determine what would have happened if relevant circumstances did not exist. He continued:-

Having regard to the panel’s expertise, the making of a judgment as to whether potential bidders would be deterred, is not beyond the panel’s function as contemplated by s 657A(2)(a).

[136] ***Those observations apply equally to the expertise of the Panel to make a judgment as to the effect on the market***.

(Emphasis added.)

1. Second, as I have already noted in relation to the manner in which the Panel had regard to s 602(c), in discharging its function the Panel is not expected to accept evidence in the manner of a court of law. Particularly in relation to the issue raised by s 602(a), Gleeson CJ in *Alinta* at 551-552 summarised the position as follows:

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.

(Emphasis added.)

1. Third, in any event as the Panel noted at [107] there was material before it to support a finding that shareholders in The President’s Club were not given information necessary for them to assess the merits of the July 2011 acquisition before it occurred. It was clearly open to the Panel to find that events relating to the July 2011 acquisition had not occurred in an efficient, competitive and informed market for shares in the company.

## Control premium

1. Sixth, I am not persuaded by the submissions of the applicant that there was no evidentiary basis upon which the Panel could find that any control premium for the shares of the remaining shareholders must now be considered unlikely or at least significantly reduced in likelihood.
2. Payment of a control premium by a bidder is usual under a takeover bid. As succinctly explained by French J in *In the matter of Phosphate Resources Limited* [2005] FCA 1705 at [57]:

In order to achieve acceptance from sufficient shareholders to gain control of the company, a takeover bid would typically be priced at a premium above market value of the company shares at a date immediately prior to the takeover announcement.

1. The evidence before the Panel disclosed circumstances where (through Lion Investments) QNA had acquired a substantial interest in The President’s Club which was acquired (in the view of the Panel) in contravention of s 606 of the Corporations Act. QNA had failed to follow up this acquisition with a bid for the remaining company shares. The Panel took the view that in those circumstances there had been, at best, a reduction of any control premium. In my view this was a matter properly for the Panel. The contentions of the applicants in respect of the Panel’s findings are in the nature of re-agitation of the merits of the case, which is not a matter for this Court.
2. Further, the applicants contend that the reasons of the Panel were flawed in that they failed to identify how there was a control premium, its worth, and how it was affected in the circumstances when after the July 2011 transaction Lion Investments continued to hold 41.4% of the shares in The President’s Club as Lion Investments had prior to July 2011. However this submission is itself fundamentally flawed in that it fails to address a critical issue, namely that as a result of the July 2011 transaction a relevant interest in 41.4% of the shares in The President’s Club ***was acquired by*** QNA. Indeed it appears uncontroversial that a key (if not the entire) purpose of relevant events in July 2011 was for QNA to acquire a relevant interest in those shares. Any suggestion by the applicants that there was no change in the control of voting power in respect of the 41.4% of shares because those shares continued to be held by Lion Investments after July 2011 is, in my view, specious in light of the facts before the Panel.

## Opinion rather than finding of facts

1. Finally, and in the alternative, Mr O’Donnell QC for the second respondent submitted that in any event s 5(1)(h) and s 5(3) of the ADJR Act are not relevant in circumstances where the decision-maker simply needs to form an opinion rather than reach conclusions based on facts. In this case the respondents submit that the conclusions reached by the Panel concerning s 602(a) and (c) constituted an opinion as to the likely effect of QNA acquiring control without informing the shareholders and without the shareholders having a vote.
2. In *Telstra Corporation Ltd v Seven Cable Television Pty Ltd* (2000) 102 FCR 517 the Full Court considered a ground of review in which the applicant claimed an error of law in respect of a decision of the Australian Competition and Consumer Commission, in the following terms:

[8] His Honour the trial judge erred in not deciding that there was no evidence or other material to justify the making of the decision, within the meaning of and for the purposes of sections 5(1)(h) and 5(3)(a) and/or 5(3)(b) of the *Administrative Decisions (Judicial Review) Act 1977*, in relation to:

(a) the finding that the principal advantage of declaration is likely to be increased competition by niche service providers in those households which are already subscribers to an existing service.

(b) The finding that competition will be promoted to a noticeable extent by the 1999 Declaration.

1. At 553 the Full Court rejected this aspect of the claim on the basis that:

this ground identifies conclusions that are not factual matters at all, but rather are matters of value judgment.

1. In *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 Weinberg J considered relevant authorities on this point. At 587 after noting the interaction of s 5(1)(h) and s 5(3) of the ADJR Act, his Honour noted the facts before him, in particular:

However, as the RBA correctly submitted, s 8 of the PSR Act, which sets out the matters to which the RBA must have regard in determining whether a particular action is or would be in the public interest, does not specify any particular matter that must be “established” before the RBA can designate a payment system. Rather, the section requires the RBA, in determining whether or not designation would be in the public interest, to have regard to the desirability of payment systems being, in its opinion, “efficient” and “competitive”. A provision couched in such subjective terms does not leave much scope for the operation of s 5(3)(a).

(Emphasis added.)

(see also *Saint v Holmes* (2008) 170 FCR 262at [122]-[123] and *Adultshop .Com Ltd v Members of the Classification Review Board* [2007] FCA 1871 at [185].)

1. In the case before me the Panel was required by s 657A to have regard to the purpose set out in s 602. In my view (as was the case in respect of the relevant legislation considered in *Australian Retailers Association*) the terms of s 602(a) and (c) are in such subjective terms as to leave little (if any) room for the operation of s 5(1)(h) and s 5(3) of the ADJR Act. While I have already expressed satisfaction that conclusions reached by the Panel concerning s 602(a) and (c) had an evidentiary foundation, in the alternative I accept the submissions of the second respondent that it is also open to me to find that conclusions drawn by the Panel were drawn as a matter of opinion, and that the “no evidence” rule has no place.

## Ground 9: Declaration an improper exercise of power because Panel took into account irrelevant considerations

1. This ground of review focuses on [107] of the Panel’s reasons.
2. The applicants did not address this ground of review in either written or oral submissions, although in the amended application itself the applicants repeat and rely on the matters set out in ground 8.
3. Section 657A(2) provides, *inter alia*, that the Panel can only declare circumstances to be unacceptable if the Panel considers that circumstances are unacceptable having regard to the effect the Panel is satisfied the circumstances have had, are having, will have or are likely to have on the control or potential control of the company or the acquisition or proposed acquisition by a person of a substantial interest in the company. The Panel is also required to have regard to the purposes of Ch 6 of the Corporations Act set out in s 602, to whether the Corporations Act has been, will be, or is likely to be contravened, and to policy considerations the Panel considers relevant. Further, s 657A(3) provides in exercising its powers under s 657A the Panel may have regard to any other matters it considers relevant.
4. In light of the broad remit of the Panel conferred by s 657A, I am unable to identify how the matters discussed by the Panel at [107] of its decision constituted irrelevant considerations. Matters relating to:
* the contravention of s 606;
* effective control of The President’s Club;
* the missed opportunity of the other shareholders to decide if the July 2011 acquisition should occur;
* the lack of a reasonable and equal opportunity accorded to the other shareholders to participate in any benefits;
* the absence of a follow-up bid by QNA in respect of remaining shares in the company;
* the likely inhibition of an efficient, competitive and informed market in shares in the company; and
* the likely absence or reduction in any control premium for the shares of the remaining shareholders.

are all, in my view, relevant considerations for the Panel in determining whether a declaration of unacceptable circumstances was justified.

1. This ground of review is not substantiated.

## Ground 9A: statement of conclusions by the Panel without identifying and providing reasons which set out findings of fact and reference to the evidence on which those findings were based

1. Extensive additional submissions were filed by the applicants and the second respondent in relation to this ground of review. In summary the applicants contended that:
* The Panel must be satisfied of one or more of the criteria stipulated in s 657A(2)(a), (b) or (c) in order to make a declaration of unacceptable circumstances.
* The Panel is not entitled to state opinions without articulating in its reasons the findings of fact which underpin those opinions.
* In forming an opinion the Panel has done no more than recite the language contained in s 657A(2)(a) and 2(b) in determining that the acquisitions in July 2011 and March 2012 were unacceptable. The “reasons” stated by the Panel merely state conclusions without findings of fact and without identifying the weight, significance or importance of those conclusions.
* In forming an opinion under s 657A(2)(b) the Panel was required to make specific findings of fact as to the definition of the market, the market for shares in the company, or impact on the market, or the nature and the extent of a control premium.
* In relation to its conclusions relating to s 602 the Panel has done no more than “pick up” the formal language found in s 602(a) and (c) to justify its conclusions.

### Consideration

1. It has been said repeatedly that Courts should not adopt an overzealous attitude towards review of reasons given by administrative bodies. In this context the Full Court of this Court in *Dornan v Riordan* (1990) 24 FCR 564 at 567 noted the importance of the Court sensibly interpreting the duty of an administrative tribunal to provide reasons, and the fact that the obligation of a tribunal would not be breached by a failure of the Tribunal to deal with every argument which may have been raised in proceedings before it or with every possibility that could be adverted to. Notwithstanding this principle, I note and accept the converse point made by the applicants, namely that the Court should not turn a blind eye to an abject failure of a tribunal to provide reasons for a decision in circumstances where the tribunal is required to do so. Indeed this point was also made in *Dornan* at 574 where their Honours accepted that the decision of the tribunal in that case was tainted by error of law where there had been a substantial breach of the tribunal’s duty to state the reasons for its determination.
2. More recently in *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 88 ALJR 52 the High Court noted that there was no free-standing common law duty in an administrative body to give reasons for making a statutory decision, and that the content of the statutory duty defines the statutory standard that a written statement of reasons must meet to fulfil it. The question of adequacy of reasons pursuant to a statutory duty to produce reasons is answered by reference to principles of statutory construction. To that extent their Honours considered that general observations drawn from cases decided in other statutory contexts and from academic writing about functions served by the provision of reasons for making administrative decisions are of limited utility (at 61 [45]). However their Honours then went on to note that two issues were of particular significance in determining by implication the standard required of a written statement of reasons in order to fulfil the duty imposed on the relevant tribunal by the legislation in question, namely:
* the nature of the function performed by the tribunal in forming and giving an opinion in respect of the question before it; and
* the objective within the scheme of the legislation of requiring the tribunal to give a written statement of reasons for the opinion (at 61 [46]).
1. Notwithstanding the general caution of the High Court concerning application of general observations from other cases to different factual circumstances, in my view these two issues are useful points in considering the nature of the reasons to be provided by the Panel in this case.
2. Section 657A(6) of the Corporations Act imposes a statutory obligation on the Panel to provide reasons for making a declaration of unacceptable circumstances. This obligation is enhanced by s 25D of the *Acts Interpretation Act 1901* (Cth) which provides:

Where an Act requires a tribunal, body or person making a decision to give written reasons for the decision, whether the expression “reasons”, “grounds” or any other expression is used, the instrument giving the reasons shall also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

1. Little official commentary exists as to why the Panel is required to provide a written statement of its reasons for making a declaration of unacceptable conduct. Of historical interest and relevance is the view of the Joint Select Committee on Corporations Legislation in its April *1989 Report* (AGPS, Canberra), formed prior to the enactment of predecessor legislation and in relation to the proposed role of an earlier version of the Panel. In particular the Committee said:

5.26 It is important that findings by the Panel are publicised and provide complete detail of the matters canvassed before the Panel, the reasons for the Panel’s decision whether to declare conduct unacceptable, or to not find conduct unacceptable and to ensure that a consistent body of principles is developed.

1. Obvious justifications for the publication of reasons pursuant to s 657A of the Corporations Act include the public nature of the declaration, the public interest in ensuring that the market is informed in respect of developments concerning those particular securities, the impact the declaration itself may have on the market, reputational issues relevant to key parties, and to promote consistency in decision-making in the Panel.
2. The role of the Panel as a specialist expert administrative body, its powers and duties under the Corporations Act, and the nature of the matters with which it deals all heavily impact upon its approach to decision-making. It is useful to remember that, as observed by Crennan and Kiefel JJ in relation to the Panel in *Alinta* at 598 [173]:

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 interests …

1. The exercise of the power of the Panel does require, as the applicants submit, findings of fact, however it is also clear that any findings of fact made by the Panel will be closely intertwined with the value judgments and opinions reached by the Panel as an expert body in relation to the legal rights and obligations of parties (*Precision Data Holdings Ltd v Wills* at 189).
2. Moreover, I do not accept the submissions of the applicants concerning the relevance (or more precisely, lack thereof) of matters discussed in *Telstra Corporation Ltd v Seven Cable Television* at [135]-[137]. That case concerned, *inter alia*, the power of the Australian Competition and Consumer Commission in certain circumstances to declare that a specified “eligible service” was a “declared service” under s 152AL(3) of the *Trade Practices Act 1974* (Cth). A declaration under s 152AL(3) could only be made if certain circumstances existed, including the ACCC was to be satisfied that the making of the declaration would promote the long-term interest of end-users (the LTIE) of carriage services or of services provided by means of carriage services (s 152AL(3)(d)). In determining whether a particular thing promoted the LTIE, the ACCC was required to have regard to the extent to which the thing was likely to result in the achievement of specified objectives, including the objective of promoting competition in markets for listed services (s 152AB(2)(c)), and encouraging the economically efficient use of, and economically efficient investment in, the infrastructure by which listed services were supplied (s 152AB(2)(e)).
3. At 552 [135] the Full Court noted:

On behalf of FOXTEL it is submitted, particularly in the context of niche programming, that the ACCC was, as noted above, bound to take into account the size of the markets for niche programming and the existing state of competition in that market; and that, when assessing this particular state of competition, it was “necessary” that the ACCC make an assessment of, *inter alia*, the nature and extent of that market.

1. Their Honours continued:

[136] We cannot accept the argument which, in our opinion, seeks impermissibly to substitute a different statutory scheme. There was no obligation imposed on the ACCC under this legislation to make any specific finding on any particular market or sub-market. Rather, the statutory function was expressed in the more general language of the extent of the achievement of the objective stated in s 152AB(2)(c). Although this provision mentions “market”, the central idea there expressed is the achievement of the objective of the promotion of competition in this area. This is a far more generalised notion than the specific issue of market definition. Clearly, “competition” and “market” are related concepts, and, as has been said, it can be expected that in performing its function here, the ACCC would, and did, refer to the market, but in a general way. In our view, the ACCC’s approach accorded with the provisions of the statutory scheme. Put differently, there was nothing in the legislation which bound the ACCC to make the specific findings on market definition, especially in connection with niche programming, contended for by FOXTEL.

[137] In short, in our opinion, this aspect of FOXTEL’s challenge is, in truth, an impermissible attempt to obtain judicial review by an attack of the ACCC’s process of reasoning on the facts or the merits …

1. In the case before me the Panel was considering an application for a declaration of unacceptable circumstances in which it was alleged that QNA had acquired a large parcel of shares in contravention of s 606 of the Corporations Act, and against a background where QNA had also failed to progress a takeover bid for the remaining shares in the company. It was in this context that the Panel had regard to requisite circumstances in s 602 of the Corporations Act, including the purpose of Ch 6 and the concepts of both market and control. The Corporations Act does not require the Panel, in forming a view as to whether circumstances are unacceptable, to do otherwise than make general findings in respect of such issues as the market and the control premium. This is a matter of judgment for the Panel in light of the material before it including the submissions of the parties.
2. In any event, and contrary to the submissions of the applicants, I am not satisfied that the reasons for decision of the Panel failed to disclose any facts upon which the declaration of unacceptable circumstances were based, nor am I persuaded that the Panel was merely asserting the matters of which it was required to be satisfied without pointing in its reasons to supporting factual foundations. In particular:
* I agree with the submissions of the second respondent that, in order to form a requisite opinion under s 657A(2), the Panel was not required to make factual findings:

o in some way calculating the size, scope or nature of the market for shares in The President’s Club;

o measuring the impact on the market for those shares of relevant events; or

o in some way calculating the size and extent of a control premium.

1. I have already noted earlier in this judgment that conclusions of the Panel in respect of whether acquisitions took place in an efficient, competitive and informed market were a matter of judgment of the Panel based on its expertise and the material before it. In my view *Cemex* and *Alinta* support this view.
* There was clearly evidence before the Panel that the July 2011 acquisition took place in an environment where other shareholders of the company were not informed, and had no opportunity to participate in any benefits which might have flowed from the change in control of that significant parcel of shares. The Panel made findings that this was so, on the basis of that evidence. As I have already indicated earlier in this judgment, this finding supported the conclusions reached by the Panel at [107]-[108] of its reasons.
* The Panel clearly concluded on the material before it that there had been a contravention of the Corporations Act, and that as a result the circumstances were unacceptable having regard to that contravention ([75]-[98], [103], [107]).
1. This case is not analogous to *Dornan* where the Court found that the reasons were so deficient that it was impossible to ascertain whether there was any other error in the decision-making process. The Panel clearly summarises the relevant facts in over 30 paragraphs of reasons, and then in an additional 60 paragraphs discusses relevant facts before it. The actual decision is set out in over 20 paragraphs of reasons. While the length of reasons of any decision-maker does not conclusively demonstrate logic and thoroughness (cf *Dornan*) it can (and does in this case) indicate a thoughtful and reasoned approach by the Panel to the issues before it. It is also clear that the conclusions reached by the Panel in [107]-[108], which the applicants attack as superficial and without factual foundation, must actually be read in the context of the broader discussion of the Panel in its quite detailed and lengthy reasons.
2. In conclusion, I am satisfied that the reasons given by the Panel for its conclusion that a declaration of unacceptable circumstances was warranted were adequate considering the nature of the Panel’s function and the importance of providing reasons for its decision as required by s 657A(6).
3. Ground 9A is not substantiated.

# Grounds 10, 11 and 12: declaration of unacceptable circumstances by reference to the March 2012 acquisition

1. These grounds of review relate to the March 2012 acquisition of shares in The President’s Club by QNA. Materially, the Panel concluded that the circumstances of this acquisition were unacceptable.
2. The applicants did not make any submissions in relation to ground 10, which is not surprising given that ground 10 is predicated on the claim that the Panel found the March 2012 acquisition had contravened s 606 of the Corporations Act and the Panel specifically noted that the March 2012 acquisition was not a contravention of the Corporations Act ([110] of the reasons for decision). Indeed, the applicants acknowledged this point in their submissions.
3. In ground 11 the applicants take issue with the Panel’s view that the circumstances of the March 2012 acquisition were unacceptable. Ground 12 raises issues similar to those canvassed in ground 8 in relation to the lack of evidence, but in relation to the March 2012 acquisition.
4. In relation to grounds 11 and 12, the applicants’ claim, in summary, that there was no attempt by the Panel in its reasons to identify that the addition of another 2.9% of the shares acquired in March 2012 made any relevant material difference to the extent of control exercised by QNA over the company. I reject this submission. At [110] of the reasons the Panel states:

[110] It appears to us that the circumstances of QNA’s subsequent purchases in reliance on the ‘creep’ provision in item 9 of section 611 are unacceptable. While they may not have involved a contravention, reliance was, in our view, based on a contravention (namely, the initial acquisition). ***The subsequent acquisitions consolidated QNA’s control of TPC. Moreover, had the initial acquisition been made by a takeover bid, the subsequent acquisitions would have occurred in circumstances in which the shareholders had information and a reasonable and equal opportunity to participate in any benefits. As it happened, the shareholders sold their shares (and villa interests) to QNA at different prices***.

(Emphasis added, footnotes omitted.)

1. In forming this view, the Panel also had regard to the decision of Emmett J in *Brierley Investments Limited v Australian Securities Commission* (1997) 78 FCR 255. In that case his Honour noted:

A very small proportion of the issued share capital of a company might be material or significant in particular circumstances (at [262]).

1. The Panel also relied upon comments of his Honour that an interest not greater than 3% was capable of being a substantial interest (at 263) and the following observation of his Honour at 266:

Having regard to the clear policy of [item 9 of section 611 Corporations Act], arbitrary though it may be, the ASC and the Panel would be slow to make a declaration where an acquisition is made in accordance with [item 9 of section 611] and relates to a small proportion of the issued B shares in a company. Nevertheless, I do not consider that, simply because conduct is authorised by [item 9 of section 611], it is not capable of constituting unacceptable circumstances.

1. The Panel clearly made findings relevant to such matters as QNA’s control over voting shares in The President’s Club (by reference, for example, to the consolidation of QNA’s control following the March 2012 acquisition) and whether this acquisition took place in an informed market, matters referred to by s 657A of the Corporations Act. So far as whether there was evidence to justify these conclusions, I refer to my earlier comments in this judgment concerning the process by which the Panel forms judgments based on its own expertise in light of the material and submissions before it.
2. In my view grounds 10, 11 and 12 are not substantiated.

# Grounds 13 and 14: Stapled securities

1. Ground 13 raises similar issues to those canvassed in ground 8 in relation to whether there was evidence to support a finding by the Panel that the shares and Villa Interests the subject of the March 2012 acquisition were effectively stapled. Consistently with my earlier findings in this judgment relating to the issue of whether the securities were stapled, I am satisfied that the shares and Villa Interests acquired in March 2012 were similarly stapled. Ground 13 has not been substantiated.
2. Issues raised in ground 14 were not the subject of submissions either written or oral. I am satisfied that it has not been substantiated.

# Grounds 15 and 16: OrderS – Wednesbury unreasonableness and breach of rules of natural justice

1. In ground 15 the applicants claim that the orders made by the Panel pursuant to s 657D were an improper exercise of its power because (in summary):
* the orders were unreasonable;
* the Panel failed to take into account the matters required by s 657D(2); and
* the Panel failed to provide reasons which set out the findings of fact and reference to the evidence on which the findings were based.
1. In ground 16 the applicants claim that the orders of the Panel were in breach of the rules of natural justice, particularly so far as concerned Mr Palmer.
2. Section 657D of the Corporations Act empowers the Panel to make an order under s 657D(2) if it has declared circumstances to be unacceptable under s 657A. It must not make an order if it is satisfied that the order would unfairly prejudice any person.
3. The Panel has broad powers under s 657D(2), limited only by paragraphs (a)-(d) of that section. Specifically the section provides:

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

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

regardless of whether it has previously made an order under this subsection or section 657E in relation to the declaration. The Panel may also make any ancillary or consequential orders that it thinks appropriate.

1. The Panel made six orders, of which five were substantive and the sixth a series of definitions. In summary, the Panel ordered that:
2. The associated parties (meaning Lion Investments, Lion Holdings, Closeridge, QNA and their respective associates) must not exercise any voting rights that attach to the shares in The President’s Club acquired by Lion Investments in July 2011 and QNA directly in March 2012.
3. The associated parties must not make further acquisitions of a relevant interest in shares in The President’s Club except as described
4. The associated parties must not dispose of, transfer or charge any of the shares acquired in July 2011 or March 2012 except as described.
5. Orders 1, 2 and 3 cease if *(inter alia*):
* QNA or an associate made an offer for all shares in The President’s Club pursuant to a takeover bid complying with Ch 6 of the Corporations Act under specific terms; and
* no less than 50 % of the offers made for shares not already held by associated parties are accepted; and
* all accepting shareholders have been paid.
1. If QNA proposes to make a takeover bid, QNA and its associates must provide reasonable assistance to ASIC.
2. The Panel gave detailed reasons for these orders ([125]-[141]).
3. The applicants take issue with the orders of the Panel because, they claim, in summary:
* The Panel made orders affecting Mr Palmer without first giving him an opportunity to make submissions. Further, the Panel did not consider whether its orders would affect Mr Palmer.
* The orders do not seek to ensure a takeover bid or proposed bid proceeds in a way it would have proceeded if the circumstances had not occurred as required by s 657D(2)(b). The conditions for the discharge of the primary orders are that a bid is made which is one with particular features, however there is no evidence or finding that those features would have been present in bid made if the July 2011 and March 2012 acquisitions had not occurred.
* The orders also require the bid to be for the Villa Interests, however the Corporations Act does not govern the making of offers for interests in land.
* The orders capriciously select the price to be offered. In particular, the Panel has concluded – without evidence – that in effect all villas are the same, so as to conclude (because QNA had previously purchased some Villa Interests for $65,000) that that is the price which must be offered for all Villa Interests. This is notwithstanding that each villa is unique, and that in any case there are two types of villas (namely Golf Villas and Woodland Villas). It follows that every combination of shares and unique Villa interests were not part of one bid class.
* The Panel imposed a complete freeze on disposals and acquisitions as well as denuding all shares held by Lion Investments of voting rights. Indeed, the terms of the Panel’s orders are framed in terms of punishing a wrongdoer rather than protecting the rights and interests of the shareholders, in particular the “freezing” of the votes.
* The orders made far exceed the proper scope of s 657D and should be set aside.
1. It is useful to address each of these points.

## Mr Palmer

1. As I have already noted, the Panel’s orders were clearly framed as applicable to “the associated parties”, defined in order 6 as Lion Investments, Lion Holdings, Closeridge, QNA and each of their respective associates. It is trite to note that, for the purposes of determining the number of shares over which a person can exercise control, any shares controlled by his or her associates are also counted (s 610(1) Corporations Act).
2. Orders 2(c) and 3(b) specifically name Mr Palmer, and while allowing him to proceed with the acquisition of shares corresponding to Lot 64 on BUP 8874 acquired by Mr Palmer from Lion Investments, order 3(b) prohibits him from disposing of those shares without the consent of the Panel.
3. I am not satisfied that the Panel has exceeded its powers in crafting its orders to apply to the associates of QNA, including Mr Palmer.
4. First, it is clear that the manner in which the case was conducted before the Panel was that the parties must have expected that any orders made by the Panel would affect ***QNA and its associates*** (including Mr Palmer). So, for example:
* It is clear that Mr Palmer is an associate of QNA, Lion Investments, Lion Holdings or Closeridge, indeed it appears that he is a director and ultimate owner of QNA and Closeridge. At [21] of its reasons the Panel notes that Mr Palmer is so associated.
* Not surprisingly, the covenant in the deed poll executed by Lion Investments in respect of its voting interests in The President’s Club clearly extended beyond Lion Investments to its associates, and when Mr Palmer (through QNA and Closeridge) acquired an interest in Lion Investments that covenant applied to him.
* The application by The President’s Club under s 657C(2) dated 26 June 2012 named potentially interested parties as Mr Palmer and Mr Geoffrey Smith as directors of QNA, and sought orders against QNA and its associates.
* Correspondence between the legal representatives of the parties prior to the formal proceedings identified a potential bid by “entities associated with Clive Palmer (“Palmer Entities”) (for example letter from King & Wood Mallesons to Ashurst Australia dated 22 June 2012). There is no suggestion that this description was not disputed, at any time by the applicants.
* There was considerable correspondence between the Panel and the solicitors for the applicants in relation to a newspaper article in The Age newspaper published on or around 5 July 2012 which referred to “Mr Palmer’s” legal action in the Panel.
* The relationship between Mr Palmer and Lion Investments, and his control over actions involving Lion Investments, was recognised in submissions put by QNA to the Panel. For example, in Submissions to the Supplementary Brief on Orders prepared provided to the Panel by the solicitors for the applicants on or about 23 July 2012 the applicants submit:

… As QNA has brought to the Panel’s attention in its submissions on the draft Declaration of Unacceptable Circumstances:

…

f. CDLI/Clive Palmer wrote to the shareholders prior to the EGM (see copy of that letter dated 28 February 2012 attached to QNA’s submissions in respect of the draft Declaration of Unacceptable Circumstances dated 20 July 2012):

…

1. Second, it is also clear that proceedings before the Panel contemplated the involvement of Mr Palmer and other Board members of QNA in making decisions for QNA in those proceedings, and it was equally reasonable for the Panel to infer that Mr Palmer and the Board of QNA were kept informed of the proceedings. So, for example an email from the solicitors for the applicants to the Panel dated 13 July 2013 materially contained the following statements:

Further to our telephone conversation a short time ago, on behalf of our clients, QNA and CDLI, we are instructed to request that the Panel please consider extending the deadline within which our client must provide its submission by 24 hours until 10am (Melbourne time) on Tuesday 17 July 2012 for the following reasons.

1. …

2. At least one of the members of QNA’s board (who is integral in respect of this matter) is otherwise engaged and will completely disposed of for the duration of the weekend until approximately 1pm on Monday. We expect that other board members may also be unavailable at certain times over the weekend. Of course the Panel would understand that this matter is being taken very seriously by QNA. of [sic] supreme importance for all concerned that QNA’s board members are fully informed, properly advised and given adequate time to digest all relevant matters in order to forge a way forward.

1. Material before the Court shows that the Panel granted the request for the extension of time on the same day.
2. Similarly, in an email dated 5 July 2012 from HopgoodGanim (the solicitors acting for the applicants) to the Panel, Mr Burge of HopgoodGanim informed the Panel that he was endeavouring to take instructions from his clients, however “some of their respective directors are currently travelling and are therefore difficult to contact”.
3. Third, in the Process Letter from Mr Allan Bulman, Director of the Panel, to the solicitors for The President’s Club, ASIC and QNA dated 26 June 2012, Mr Bulman wrote:

(f) Tell us of anyone else who may be affected who may not have a copy of the application.

1. No notification was provided to the Panel by the applicants’ solicitors of “anyone else who may be affected” who did not have a copy of the application (for example, Mr Palmer).
2. Fourth, notwithstanding that orders of the Panel would clearly affect associates of QNA (including Mr Palmer) no submissions were ever put to the Panel that this prospect was unfair to those associates.
3. Fifth, it appears that the orders 2(c) and 3(b) of the Panel sought to ***accommodate*** Mr Palmer’s interests, at the request of the solicitors for the applicants.
4. Sixth, and importantly, s 657D(1) requires the Panel to give each person to whom the proposed order would be directed an opportunity to make submissions to the Panel about the matter. Proposed orders were sent by the Panel on 18 July 2012 to solicitors for The President’s Club, ASIC, QNA, and Lion Investments, and those parties were invited to make submissions by 19 July 2012. The proposed orders were expressed to apply to QNA and its associates. In my view, by communicating with the solicitors for The President’s Club, ASIC, QNA, and Lion Investments the Panel discharged its duty under s 657D(1). I agree with the submissions of Mr O’Donnell QC for The President’s Club and Ms Mitchelmore for ASIC that the proposed orders would affect anyone who comes within the expression “associate” of QNA, and it would indeed undercut the clear purpose of Ch 6 of the Corporations Act (which contemplates the efficient and expeditious conduct of Panel proceedings) to require as a matter of natural justice that the Panel give separate notice to anyone who might conceivably come within the relationship of “associate” to the named parties.
5. Finally no formal invitation was made by the Panel to Mr Palmer to make submissions. However conversely no submission was made to the Panel by the applicants that orders should not extend to associates of QNA, including Mr Palmer, in circumstances where the extension of orders to associates of nominated parties was clearly in the contemplation of the Panel.
6. In the circumstances I have outlined I am unable to identify any manner in which natural justice has been denied to Mr Palmer. As Gleeson CJ observed in *Minister for Immigration and Multicultural and Indigenous Affairs v Lam* (2003) 214 CLR 1 at [37]:

Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.

(cf *Hasran v Minister for Immigration and Citizenship* (2010) 183 FCR 413at [42].)

## Whether orders ensure a takeover bid or proposed bid proceeds in a way it would have proceeded if the circumstances had not occurred

1. This issue may be disposed of quickly. Contrary to the submissions of the applicants, the Panel did not purport to make orders which would ensure that a takeover or proposed takeover proceeded as it would have if the circumstances had not occurred. The Panel made this clear at [126] where it said:

The Panel is empowered to make ‘any order’ if 4 tests are met:

…

(d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons, or ensure that a takeover or proposed takeover proceeds as it would have if the circumstances had not occurred. The proposed takeover is no longer proceeding. The orders protect the rights and interests of other shareholders in TPC.

1. The paragraphs of s 657D(2) are expressed as options – it is not necessary for the Panel to make any order it considers appropriate to satisfy all of the limbs of s 657D(2), or bear all the components of s 657D(2)(a)-(d). The Panel made it clear in its reasons that the orders it intended to make were designed to protect the rights and interests of other shareholders in The President’s Club, as contemplated by s 657D(2)(a). It was entitled to do this (cf *Glencore International AG v Takeovers Panel* at 104 [116]).

## Villa Interests

1. I am not satisfied that it was beyond the power of the Panel to seek to control the making or the content or form of the making of an offer to buy a lot in a scheme related to real property. Chapter 6 of the Corporations Act regulates the acquisition of control over voting shares in listed companies or unlisted companies with more than 50 members, the voting shares in listed bodies, and voting interests in listed managed investment schemes. The relevant shares in The President’s Club were unlisted, but they were stapled with Villa Interests. The Panel formed the view that:
* the shares could only be transferred together with the corresponding villa interests;
* the right to use the villa was conferred by rights attached to the shares;
* the way the rights were enjoyed was by a “stapled entitlement”.
1. Orders concerning stapled securities involving interests in real property are clearly within the jurisdiction of the Panel: *Seabrook, in the matter of the Takeovers Panel & the Corporations Act 2001* (Cth) [2002] FCA 1219, *Investa Properties Limited, in the matter of Investa Properties Limited* [2007] FCA 1104.

## Capricious price

1. I am not satisfied that the price and the inclusion of both the shares and Villa Interests caught by order 3 were capriciously determined by the Panel or otherwise unreasonable as claimed by the applicants. The process of reasoning of the Panel can be summarised as follows:
* The Panel recognised that there were different types of villas (Panel reasons at [126]).
* Of the 17 parcels of shares and Villa Interests acquired by QNA in March 2012, eight were at prices up to $60,000 and nine were at $65,000 (Panel reasons at [23]).
* In the proceedings before the Panel The President’s Club sought final orders to the effect that QNA raise the offer price per share to $1 and the price per Villa Interest to $65,000, being the highest price paid in the preceding 4 months.
* At [110] the Panel noted:

... had the initial acquisition been made by a takeover bid, the subsequent acquisitions would have occurred in circumstances in which the shareholders had information and a reasonable and equal opportunity to participate in any benefits. As it happened, the shareholders sold their shares (and villa interests) to QNA at different prices.

1. The Panel also noted in footnote 34 to its decision:

Submissions that different villas were worth different amounts were made by QNA ***although we note that it proposed a bid (before withdrawing) at a single price for each parcel of shares and the corresponding villa interests that it did not already own.***

(Emphasis added.)

1. At [128] in discussing its orders the Panel said:

The restrictions cease if QNA makes an unconditional bid for all the other shares (and corresponding villa interests) at no less than the highest price it paid in March 2012 and it receives acceptances for at least 50.1% of the shares in which QNA does not have a relevant interest. ***Such bid must be on terms otherwise no less favourable than those of the bid which QNA proposed in April 2012***, and ASIC must not have objected to the terms or documentation of the bid.

(Emphasis added.)

* The Panel formed the view that the orders did not unfairly prejudice QNA (at [129]).
* The Panel made these orders in circumstances where it decided not to ***require*** QNA to proceed with its announced bid and with an offer price of not less than $1 per share and $65,000 per villa interest, but to “freeze” acquisitions or disposals of shares in The President’s Club by QNA and the associated parties unless QNA or an associate made an offer for all shares in a takeover bid where the offer price was not less than $65,103 for each parcel of shares and corresponding villa interest.
1. The Panel clearly formed the view that its orders ought deal with both the shares and the Villa Interests. In my view it was open to the Panel to form the view that, in light of its finding of unacceptable circumstances, such orders would appropriately protect the rights and interests of other shareholders in The President’s Club ([126]).

## Freezing of votes

1. The Panel ordered a “freeze” on QNA and the associated parties in relation to the acquisition and disposal of shares in The President’s Club, except as prescribed in orders 2(a)-(c) and 3(a) and (b), and subject to orders 4 and 5. I am not satisfied that these orders are unreasonable, or framed in terms of punishing QNA and its associates rather than protecting the rights and interests of the other shareholders. The Panel clearly considered that orders in this respect were protective of those rights and interests, particularly in light of:
* The view taken by the Panel that unacceptable circumstances existed and had not been remedied, and that the situation before the Panel had been brought about by actions of QNA.
* The fact that Lion Investments had revoked the covenant in the deed poll limiting the number of votes it was entitled to cast.
* The flexibility built in to the orders in respect of acquisitions and disposals with the Panel’s consent, and the carve-out in relation to certain transactions involving Mr Palmer.
* The rejection by the Panel of more draconian orders sought by The President’s Club, including mandating a takeover bid by QNA of The President’s Club and that the voting freeze in respect of QNA’s shares in the company continue unless and until QNA made a bid and received acceptances for 100% of the shares in the company.

## Conclusion

1. I have already noted that s 657D(2)(a) confers broad powers on the Panel to, *inter alia*, make orders that it thinks appropriate to protect those rights or interests, or any other rights or interests, of any person, or group of persons, who have been or are being affected, or will be or are likely to be affected, by the circumstances once the Panel has declared the circumstances to be unacceptable. The Panel must satisfy itself that the order it makes is appropriate to protect the rights or interests of the relevant person or persons (*Cemex* at 122 [160]) and in this case it clearly did so. Similarly, the Panel must not make an order if it is satisfied that it would unfairly prejudice any person, and the Panel gave consideration to this issue at [129]. The Panel gave reasons for having reached its view that the orders were appropriate, which in my view were appropriate to the purpose identified in s 657D(2)(a). No error of law appears from the reasoning of the Panel in formulating these orders.
2. Grounds 15 and 16 are not substantiated.

# Ground 17: Apprehended bias

1. The claim of the applicants as found in ground 17 can be summarised as follows:
* At all material times Mr Ewen Crouch, the sitting President of the Panel, was Chairman of Partners at law firm Allens Linklaters.
* Allens Linklaters has acted for a member of the CITIC Group of companies since 2011 in an ongoing matter against Mineralogy Pty Ltd, a company controlled by Mr Palmer and of which Mr Palmer was a director.
* Between March 2011 and June 2012 Mineralogy Pty Ltd was not represented by solicitors, and partners and solicitors of Allens Linklaters in Melbourne, Sydney and Perth had direct dealings with Mr Palmer and others at Mineralogy Pty Ltd.
* Mr Crouch did not declare this matter at the time of his appointment to the Panel.
* These facts give rise to a reasonable apprehension of bias in Mr Crouch in respect of the Panel’s decision.
1. The leading Australian case dealing with principles of apprehended bias is *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337. In that case the High Court heard two appeals together – one case concerning circumstances where a judge had declared his interest in a trust which owned shares in a bank which had funded litigation against a bankrupt party but the judge declined to recuse himself from hearing the case, and another case involving a judge who had inherited shares in a litigant bank between the completion of the trial and delivery of judgment. The High Court held that in neither case could bias be established. At 344 [6] Gleeson CJ, McHugh, Gummow and Hayne JJ explained relevant principles in the following terms:

Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.

(footnotes omitted.)

1. At 345 their Honours continued:

[7] … There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) might not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. ***The question is one of possibility (real and not remote), not probability***. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors actually influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror.

[8] The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. ***There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits***. The bare assertion that a judge (or juror) has an “interest” in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

(Emphasis added.)

1. In this case it could be said that the position of Mr Crouch as Chairman of Partners of a law firm which had dealings with Mr Palmer and one of his companies might lead Mr Crouch, in his role as President of the Panel to decide The President’s Club application other than on its legal and factual merits. However I am not persuaded of the logical connection between Mr Crouch’s role with Allens Linklaters and the feared deviation from meritorious consideration of the application by Mr Crouch. Rather, from the material before the Court it appears that:
* The dispute between the CITIC companies (which Allens Linklaters represents) and Mineralogy Pty Ltd concerns something completely unrelated to the matter before the Panel (I understand – and it does not appear to be in dispute – that this dispute concerns claims for payment of royalties by the CITIC companies to Mineralogy Pty Ltd in relation to an iron ore mine in the Pilbara region of Western Australia).
* Neither QNA nor any entity associated with the matter before the Panel is a party to the dispute between the CITIC companies and Mineralogy Pty Ltd.
* No reason has been advanced how Mr Crouch could be seen to advance the interests of the CITIC companies in their dispute with Mineralogy Pty Ltd should he (with the other members of the Panel) decide the matter before the Panel adversely to QNA and its associates.
* No reason has been advanced how Mr Crouch could personally financially benefit from a decision of the Panel adverse to QNA and its associates.
* There is no evidence that Mr Crouch had any involvement in or knowledge of the firm’s dealings with Mineralogy Pty Ltd or Mr Palmer.
1. In light of these points I consider there is no basis on which a fair-minded lay observer might reasonably apprehend that Mr Crouch might not bring an impartial mind to the resolution of the application before the Panel.
2. Finally, and in any event, to paraphrase observations of Heerey J in *Vietnam Veterans’ Association of Australia ((NSW Branch) Inc) v Gallagher* (1994) 52 FCR 34 at 44 when considering a similar situation, this ground of review proceeds on the assumption that the decision of Mr Crouch was the decision of the Panel, and vice versa. However as was the case in *Gallagher*, in this matter there is no evidence before the Court to suggest that the views of the other members of the Panel would be determined by the views of Mr Crouch. I am satisfied that a fair-minded bystander would form the same view.
3. Ground 17 is not substantiated.

# COSTS

1. As none of the grounds of review have been substantiated, it is appropriate to dismiss the application.
2. Earlier this week, I invited the parties to provide written submission as to costs, or to advise me if they preferred to make oral submissions as to costs. As Buchanan J explained in *Tristar Steering and Suspension Australia Ltd v Industrial Relations Commission of New South Wales (No 2)* (2007) 159 FCR 274 at 280:

The Court expects parties to deal with issues relating to costs in a timely and efficient way. Normally this means that the Court should be in a position to deal with the question of costs in its judgment unless there is a particular reason to reserve that question for later, and separate, consideration.

1. No party indicated a preference to make oral submissions, or made any submission that there was a particular reason to reserve the question of costs for later consideration. All parties provided written submissions with respect to costs.
2. As a general proposition costs follow the event: *Oshlack v Richmond River Council* (1998) 193 CLR 72, *Howards Storage World Pty Ltd v Haviv Holdings Pty Ltd* (2010) 182 FCR 84. In their written submissions the applicants accepted this consequence as between themselves and the second respondent in the event that the applicants were unsuccessful, with the exception of any costs incurred by the second respondent in respect of the hearing of 13 February 2013. At that hearing the Court heard the joinder application brought by ASIC. The applicants submitted that the second respondent had no interest in that matter and therefore should not be entitled to any associated costs.
3. Otherwise:
* In relation to the first and third respondents, the applicants submitted that they played a limited role in the proceeding and that they should bear their own costs.
* In relation to ASIC, which intervened for the purpose of effectively representing the first respondent as contradictor in order to ensure issues in the proceeding were fully canvassed, the applicants submitted that the intervention was unnecessary given the presence of the second respondent which was already a party and a contradictor. Further the submissions of the fourth respondent were sufficiently alike to those of the second respondent, that its role could not be considered separate and discrete.

## Consideration

1. The award of costs is in the discretion of the Court or Judge: s 43(2) *Federal Court of Australia Act 1976* (Cth). In my view the applicants should be liable for the costs of all respondents, including in relation to the hearing of 13 February 2013.
2. In relation to the first and third respondents I note the so-called *Hardiman* principle, explained by the High Court in *R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13 at 35-36 in the following terms:

There is one final matter. Mr Hughes was instructed by the Tribunal to take the unusual course of contesting the prosecutors’ case for relief and this he did by presenting a substantive argument. In cases of this kind the usual course is for a tribunal to submit to such order as the court may make. The course which was adopted by the Tribunal in this court is not one which we would wish to encourage. If a tribunal becomes a protagonist in this court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted. The presentation of a case in this court by a tribunal should be regarded as exceptional and, where it occurs should, in general, be limited to submissions going to the powers and procedures of the Tribunal.

1. The first and third respondents made plain at the hearing that their submissions were made in accordance with the *Hardiman* principle. However in my view this was not a reason to limit the costs to which they would otherwise be entitled: *Kaycliff Pty Ltd v Australian Broadcasting Tribunal* (1989) 19 ALD 315 at 316. This is particularly so in circumstances where they were both named as respondents by the applicants, where they appropriately made submissions as to the statutory role and procedures of the Panel, and where they were both available to assist the Court.
2. In relation to ASIC, I do not accept the submission of the applicants that it should be denied its costs in this proceeding.
3. First, ASIC has an interest in the application of provisions of Ch 6 of the Corporations Act, and in particular in ensuring that acquisitions of substantial interests or control take place in accordance with the principles set out in s 602 of the Corporations Act (cf observations of Middleton J in *Xat Ky v Australvic Property Management Pty Ltd (No 2)* [2007] FCA 1785 at [22], where his Honour ordered that ASIC be entitled to an award of costs).
4. Second, the first and third respondents assumed only a limited role in the proceeding, and ASIC sought to be joined to the proceeding to ensure that all substantive legal issues were fully canvassed with the benefit of its assistance, as the proper contradictor. This was the proper role for ASIC to play in this proceeding. I do not accept that the second respondent could be seen to in any way represent the interests of the first and third respondents, or act as a contradictor in their interests.
5. Finally, I reject the applicants’ submission that ASIC’s arguments were sufficiently alike to those of the second respondent such that it could not be contended that its role was separate and discrete. The submissions of Ms Mitchelmore for ASIC were helpful in considering issues before the Court. Indeed I note that the second respondent adopted certain submissions made by ASIC (transcript 30 July 2013 p 65 ll 30-31, 46-47).
6. In relation to the costs of the second respondent incurred by attendance at directions and the hearing of the joinder application on 13 February 2013, I am not persuaded that the second respondent had no interest in attending Court on that day. It is not unreasonable for a respondent to proceedings to take an interest in others being joined to the proceedings including where the corporate regulator has applied to join in anticipation of being a fellow contradictor. In my view such costs should follow the event.

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| I certify that the preceding two hundred and thirty-eight (238) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier. |

Associate:

Dated: 5 June 2014