

**ASIC**

Australian Securities & Investments Commission

Facsimile

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CHANGE IN SUBSTANTIAL HOLDING – CMI LIMITED

Attached Form 603 regarding:

1. Australian Securities and Investments Commission (ASIC); and
2. CMI Limited (CMI)

James Mason
Lawyer
Emerging, Mining and Resources

ASIC

Form 603Corporations Act 2001
Section 671B**Notice of initial substantial holder**To: Company Name/Scheme **CMI Limited**ACN/ARSN **060 542 553**1. Details of substantial holder (1) **Australian Securities and Investments Commission**
Name **and each of the persons set out in paragraph 1 of Annexure A (together "ASIC")**ACN/ARSN (if applicable) **N/A**The holder became a substantial holder on **10 / 03 / 11****2. Details of voting power**

The total number of votes attached to all the voting shares in the company or voting interests in the scheme that the substantial holder or an associate (2) had a relevant interest (3) in on the date the substantial holder became a substantial holder are as follows:

Class of securities (4)	Number of securities	Person's votes (5)	Voting power (6)
Ordinary Shares	3,112,422	3,112,422	9.22%

3. Details of relevant interests

The nature of the relevant interest the substantial holder or an associate had in the following voting securities on the date the substantial holder became a substantial holder are as follows:

Holder of relevant interest	Nature of relevant interest (7)	Class and number of securities
Refer to paragraph 3 of Annexure A	Refer to paragraph 3 of Annexure A	Refer to paragraph 3 of Annexure A

4. Details of present registered holders

The persons registered as holders of the securities referred to in paragraph 3 above are as follows:

Holder of relevant interest	Registered holder of securities	Person entitled to be registered as holder (8)	Class and number of securities
ASIC	Tinkerbelle Enterprises Pty Ltd ACN 108 336 441	The Commonwealth of Australia	3,112,422 Ordinary Shares
	atf the Leanne Catelean Trust		

6. Consideration

The consideration paid for each relevant interest referred to in paragraph 3 above, and acquired in the four months prior to the day that the substantial holder became a substantial holder is as follows:

Holder of relevant interest	Date of acquisition	Consideration (9)		Class and number of securities
		Cash	Non-cash	
ASIC	10 / 03 / 11	Nil	Nil	3,112,422 Ordinary Shares

6. Associates

The reasons the persons named in paragraph 3 above are associates of the substantial holder are as follows:

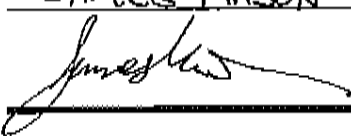
Name and ACN/ARSN (if applicable)	Nature of association
N/A	N/A

7. Addressee

The addresses of persons named in this form are as follows:

Name	Address
Refer to paragraph 7 of Annexure A	Refer to paragraph 7 of Annexure A

Signature

print name **JAMES MASON** Delegate of the Australian Securities & Investments Commission
 sign here  capacity
 date **17.3.2011**

DIRECTIONS

- (1) If there are a number of substantial holders with similar or related relevant interests (eg. a corporation and its related corporations, or the manager and trustee of an equity trust), the names could be included in an annexure to the form. If the relevant interests of a group of persons are essentially similar, they may be referred to throughout the form as a specifically named group if the membership of each group, with the names and addresses of members is clearly set out in paragraph 7 of the form.
- (2) See the definition of "associate" in section 9 of the Corporations Act 2001.
- (3) See the definition of "relevant interest" in sections 608 and 671B(7) of the Corporations Act 2001.
- (4) The voting shares of a company constitute one class unless divided into separate classes.
- (5) The total number of votes attached to all the voting shares in the company or voting interests in the scheme (if any) that the person or an associate has a relevant interest in.
- (6) The person's votes divided by the total votes in the body corporate or scheme multiplied by 100.
- (7) Include details of:
 - (a) any relevant agreement or other circumstances by which the relevant interest was acquired. If subsection 671B(4) applies, a copy of any document setting out the terms of any relevant agreement, and a statement by the person giving full and accurate details of any contract, scheme or arrangement, must accompany this form, together with a written statement certifying this contract, scheme or arrangement; and
 - (b) any qualification of the power of a person to exercise, control the exercise of, or influence the exercise of, the voting powers or disposal of the securities to which the relevant interest relates (indicating clearly the particular securities to which the qualification applies).

See the definition of "relevant agreement" in section 9 of the Corporations Act 2001.
- (8) If the substantial holder is unable to determine the identity of the person (eg. if the relevant interest arises because of an option) write "unknown".
- (9) Details of the consideration must include any and all benefits, money and other, that any person from whom a relevant interest was acquired has, or may, become entitled to receive in relation to that acquisition. Details must be included even if the benefit is conditional on the happening or not of a contingency. Details must be included of any benefit paid on behalf of the substantial holder or its associate in relation to the acquisitions, even if they are not paid directly to the person from whom the relevant interest was acquired.

ANNEXURE A

1. Details of substantial holder

Each of the following persons (together referred to as "ASIC" in this form) is a substantial holder for the purposes of paragraph 1 of this form:

Australian Securities & Investments Commission
Anthony Michael D'Aloisio
The Commonwealth of Australia

3. Details of relevant interests

The nature of the relevant interest each of the following persons (together referred to as "ASIC" in this form) or an associate had in the following voting securities on the date the substantial holder became a substantial holder are as follows:

Holder of relevant interest	Nature of relevant interest	Class and Number of Securities
Australian Securities and Investments Commission	Power to dispose of, or control the exercise of a power to dispose of, the securities vested in the Commonwealth on trust for Tinkerbell Enterprises Pty Ltd (Tinkerbell) under the terms of orders of the Takeovers Panel dated 25 February 2011 (attached at Annexure B). The Takeovers Panel orders, for example, require ASIC to sell the securities and account to Tinkerbell for the proceeds net of costs. These orders were stayed on 25 February 2011 pursuant to interim orders of the Panel (attached as Annexure C). The interim orders ceased following the determination of review proceedings before the Panel as confirmed in the Panel's reasons of 15 March 2011 (see Annexure D). Further details of the circumstances giving rise to the orders are available from the Panel's website at www.takeovers.gov.au .	3,112,422 Ordinary Shares
Anthony Michael D'Aloisio, Chairman, Australian Securities and Investments Commission	Under s608(3) of the <i>Corporations Act 2001</i> , Anthony Michael D'Aloisio has a relevant interest in securities in which the Australian Securities and Investments Commission has a relevant interest because of his capacity to determine the outcome of decisions about financial policies of the Commission in his office as Chief Executive under the <i>Financial Management and Accountability Act 1997</i> .	3,112,422 Ordinary Shares
The Commonwealth of Australia	The securities vested in the Commonwealth on trust for Tinkerbell under orders of the Takeovers Panel dated 25 February 2011 (attached at Annexure B). These orders were stayed on 25 February 2011 pursuant to interim orders of the Panel (attached as Annexure C). The interim orders expired following the determination of review proceedings before the Panel as confirmed in the Panel's reasons of 15 March 2011 (see Annexure D). The Commonwealth has the power to dispose of, or control the exercise of a power to dispose of, the securities and will be the holder of the securities under the Panel's orders. Further details of the circumstances giving rise to the orders are available from the Panel's website at www.takeovers.gov.au .	3,112,422 Ordinary Shares

7. Addresses

The addresses of persons named in this form are as follows:

Name	Address
Australian Securities and Investments Commission	Level 20, 240 Queen Street, Brisbane, QLD 4000
Anthony Michael D'Aloisio	Level 20, 240 Queen Street, Brisbane, QLD 4000
The Commonwealth of Australia	Level 20, 240 Queen Street, Brisbane, QLD 4000
Tinkerbell Enterprises Pty Ltd ACN 109 336 441 as trustee for the Leanne Catalan Trust	25 Toorak Rd, Hamilton, QLD, 4007

ANNEXURE B



Australian Government

Takeovers Panel

**CORPORATIONS ACT
SECTION 657D
ORDERS****CMI LIMITED**

The Panel made a declaration of unacceptable circumstances on 22 February 2011.

THE PANEL ORDERS**Divestment order**

1. The Sale Shares are vested in the Commonwealth on trust for Tinkerbell.
2. ASIC must:
 - (a) sell the Sale Shares in accordance with these orders and
 - (b) account to Tinkerbell for the proceeds of sale, net of the costs, fees and expenses of the sale and any costs, fees and expenses incurred by ASIC and the Commonwealth (if any).
3. ASIC must:
 - (a) retain an Appointed Seller to conduct the sale and
 - (b) instruct the Appointed Seller -
 - (i) to use the most appropriate sale method to secure the best available sale price for the Sale Shares that is reasonably available at that time in the context of complying with these orders, including the stipulated timeframe for the sale.
 - (ii) to provide to ASIC a statutory declaration that, having made proper inquiries, the Appointed Seller is not aware of any interest, past, present, or prospective which could conflict with the proper performance of the Appointed Seller's functions in relation to the disposal of the Sale Shares
 - (iii) unless the Appointed Seller sells Sale Shares on market, that it obtain from any prospective purchaser of Sale Shares a statutory declaration that the prospective purchaser is not associated with any of the Associated Parties
 - (iv) that none of the Associated Parties may directly or indirectly purchase any of the Sale Shares, except to the extent that they are allowed to acquire additional shares under item 9(b) of s611 and the Appointed Seller sells those shares on market and
 - (v) to dispose all of the Sale Shares within 3 months from the date of its engagement.
4. CMI and the Associated Parties must do all things necessary to give effect to these orders, including:
 - (a) doing whatever is necessary to ensure that the Commonwealth is registered with title to the Sale Shares in the form approved by ASIC and

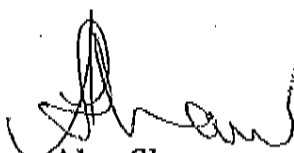
- (b) until the Commonwealth is registered, complying with any request by ASIC in relation to the Sale Shares.
5. The Associated Parties must not otherwise dispose of, transfer, charge or vote any Sale Shares (except those acquired on market under paragraph 3(b)(iv)).
6. None of the Associated Parties may take into account any relevant interest or voting power that any of them or their respective associates had, or have had, in the Sale Shares when calculating the voting power referred to in Item 9(b) of s611 of the *Corporations Act 2001 (Cth)*, of a person six months before an acquisition exempted under Item 9 of s611. Any Sale Shares acquired on market under paragraph 3(b)(iv) must be taken into account in any subsequent calculation for item 9 purposes, taking the date of acquisition as the date they were acquired on market under paragraph 3(b)(iv).

Substantial holding disclosure order

7. The Associated Parties must as soon as practicable give notice of their substantial holding in relation to their voting power in CMI and their association, including disclosing:
- the name of each associate who has a relevant interest in voting shares in CMI
 - the nature of their association
 - the relevant interest of each associate and
 - details of any relevant agreement through which they have a relevant interest in CMI shares.

Interpretation

Term	Meaning
Appointed Seller	An investment bank or stock broker
ASIC	Australian Securities and Investments Commission, as agent of the Commonwealth
Associated Parties	Ms Leanne Catelan and Mr Raymond Catelan or any of their associates
CMI	CMI Limited
on market	in the ordinary course of trading on Australian Stock Exchange and not by crossing or special crossing
Sale Shares	3,112,422 shares held by Tinkerbelle in CMI
Tinkerbelle	Tinkerbelle Enterprises Pty Ltd as trustee for the Leanne Catelan Trust



Alan Shaw
Counsel

with authority of John Keeves
President of the sitting Panel
Dated 25 February 2011

ANNEXURE C



Australian Government

Takeovers Panel

**CORPORATIONS ACT
SECTION 657E
INTERIM ORDERS**

CMI LIMITED

- A. On 22 February 2011, the Panel made a declaration of unacceptable circumstances in relation to the affairs of CMI Limited under section 657A of the Corporations Act 2001 (Cth)
- B. On 24 February 2011, the Panel received a review application
- C. On 25 February 2011, the Panel made orders under section 657D of the Corporations Act 2001 (Cth) (Orders)
- D. On 25 February 2011, the Panel received a request to stay the Orders pending the review.

The President ORDERS:

- 1. That orders 1, 2, 3, 4, 6 and 7 of the Orders are stayed.
- 2. These interim orders have effect until the earliest of:
 - (i) further order of the Panel
 - (ii) the determination of the review proceedings and
 - (iii) 2 months from the date of these interim orders.

A handwritten signature in black ink, appearing to read 'Alan Shaw', is written over a faint circular stamp.

Alan Shaw

Counsel

with authority of Kathleen Farrell

President of the Panel

Dated 25 February 2011

ANNEXURE D



Australian Government

Takeovers Panel

Reasons for Decision
CMI Limited 01R
[2011] ATP 5

Catchwords:

Review – decline to conduct proceedings – association – family – structural links – gift – course of discussions and negotiations – unacceptable circumstances

Corporations Act 2001 (Cth), sections 9, 12, 15, 657EA

GoldLink IncomePlus Limited 04R [2009] ATP 3, Multiplex Prime Property Fund 03R [2009] ATP 23, Tully Sugar Limited 01R [2010] ATP 1

Brockman Resources Limited [2011] ATP 3, Viento Group Limited [2011] ATP 1

Bateman v Newhaven Park Stud Ltd [2004] NSWSC 566, Bank of Western Australia Ltd v Ocean Trawlers Pty Ltd (1995) 16 ACSR 501, Elders IXL v National Companies and Securities Commission [1987] VR 1, Adsteam Building Industries Pty Ltd & Anor v The Queensland Cement and Lime Co-Ltd & Ors (1984) 14 ACLR 456

INTRODUCTION

1. The Panel, David Bennett AC QC, Catherine Brenner and Kathleen Farrell (sitting President), declined to conduct proceedings on an application by Tinkerbelle Enterprises Pty Ltd and Leanne Catelan to review the decision of the initial Panel in *CMI Limited 01*.¹ The review Panel agreed with the initial Panel and considered that there was no reasonable prospect of the review Panel coming to a different conclusion.

2. In these reasons, the following definitions apply.

applicants	Tinkerbelle and Ms Leanne Catelan
CMI	CMI Limited
Farallon	Farallon Capital Pty Ltd
RP Prospects	RP Prospects Pty Ltd
Tinkerbelle	Tinkerbelle Enterprises Pty Ltd as trustee for the Leanne Catelan Trust

FACTS

3. On 6 January 2011, Mr Gerry Pauley and Dr Gordon Elkington, shareholders of CMI, applied for a declaration of unacceptable circumstances. They submitted that, among other things, Ms Leanne Catelan and her father, Mr Raymond Catelan, were associates and that the purchase of 9.22% of CMI by Tinkerbelle as trustee for the

¹ [2011] ATP 4

Takeovers Panel

Reasons - CMI Limited 01R
[2011] ATP 5

Leanne Catelan Trust was made in breach of s606.² The facts in the initial matter are set out in the initial Panel's reasons.³

4. The initial Panel made a declaration of unacceptable circumstances. It considered that Ms Leanne Catelan and Mr Raymond Catelan were associated:
 - (a) under section 12(2)(b) for the purpose of controlling or influencing the conduct of CMI's affairs, or
 - (b) under section 12(2)(c) in relation to the affairs of CMI.
5. The initial Panel said:

A relevant agreement must exist for the purpose of controlling or influencing the composition of a company's board or the conduct of its affairs. Acting in concert must exist in relation to a company's affairs. 'Affairs of a company' are broadly defined and include, among other things, the acquisition and ownership of shares. In our view, Mr Raymond Catelan and Ms Leanne Catelan were acting, or proposing to act, in concert in relation to the acquisition of the 9.22% of CMI acquired from Farallon, or they had or proposed to enter a relevant agreement in relation to the acquisition. With the acquisition of a further 9.22%, the holdings, if aggregated, are almost 50%. In the context of control this is a significant acquisition of a substantial interest in CMI.⁴

And:

Considering the whole of the material, based on our expertise and drawing appropriate inferences, we conclude that Ms Leanne Catelan and Mr Raymond Catelan are not acting independently in relation to the investment by Tinkerbelle in CMI. Either there was an agreement, arrangement or understanding between them for the purpose of the ownership of the 9.22% parcel of shares in CMI or they were acting in concert in relation to the ownership of that parcel or both. In addition, we have no evidence that their relationship has changed since the time the shares were acquired from Farallon.⁵

6. The conclusions of the initial Panel are set out in its reasons.
7. The initial Panel made final orders on 25 February 2011, the effect which included:
 - (a) vesting of the 9.22% of CMI held by Tinkerbelle in the Commonwealth for ASIC to sell and remit the net proceeds to Tinkerbelle, and
 - (b) requiring disclosure of the association between Ms Leanne Catelan and Mr Raymond Catelan.

² References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

³ [2011] ATP 4

⁴ [2011] ATP 4 at [108]

⁵ [2011] ATP 4 at [119]

Takeovers Panel**Reasons - CMI Limited 01R
[2011] ATP 5**

8. The applicants sought a stay of the initial Panel's final orders. On 25 February 2011, the President stayed the initial Panel's orders⁶ to preserve the position pending consideration by a review Panel.

REVIEW APPLICATION

9. By application dated 24 February 2011, Tinkerbell and Ms Leanne Catelan sought a review of the initial Panel's decision.
10. The applicants submitted that the decision of the initial Panel should be set aside because, among other things:
- (a) there was no 'common purpose' or 'shared goal', and no evidence of such, in respect of the affairs of CMI between Mr Raymond Catelan and the applicants (ie, Tinkerbell and Ms Leanne Catelan)
 - (b) there was no evidence adduced as to the possible effect that Tinkerbell's acquisition of Farallon's shares might have on the control of CMI and
 - (c) the basis for concluding that an association existed was expressed in the declaration of unacceptable circumstances in the alternative. Consequently, it was uncertain which of sections 12(2)(b) or 12(2)(c) have been satisfied. Further, the initial Panel did not identify what the terms of the relevant agreement were or how the parties were acting in concert.

DISCUSSION

11. A review Panel can decline to conduct proceedings and allow the initial Panel's decision to stand in an appropriate case.⁷ We do so here. We do not think there is any reasonable likelihood that the review application will result in a different outcome to that of the initial Panel.
12. We have considered the matter on its merits as well as looking at the specific arguments raised. We have considered:
- (a) all the material before the initial Panel including the initial application, the briefs and other communications to the parties, and the submissions and rebuttals
 - (b) the initial Panel's decision email, draft reasons for decision and submissions as to fact and unfair prejudice on the draft reasons and
 - (c) the review application.

⁶ Other than order 5, which generally restricted disposal, transfer, charging or voting of the sale shares

⁷ *GoldLink IncomePlus Limited 04R* [2009] ATP 3, *Multiplex Prime Property Fund 03R* [2009] ATP 23, *Tully Sugar Limited 01R* [2010] ATP 1

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Common Purpose

13. The applicants submitted that there was no 'common purpose' or 'shared goal', or evidence of such, in respect of the affairs of CMI between Mr Raymond Catelan and the applicants.
14. We disagree. The inferences and findings made by the initial Panel indicate a common purpose relating to the ownership of the 9.22% parcel. The evidence allowed clear inferences to be drawn, which the initial Panel drew, and which we would draw as well.
15. We accept that there is no direct evidence of an agreement. But the material very strongly supports the inference that the associated parties were acting in concert. Alternatively, we think it strongly supports the inference that the associated parties had an understanding amounting to a relevant agreement.
16. In *Bateman*,⁸ Barrett J considered a number of association cases and articulated a helpful way to look at the association test. The case concerned an interlocutory hearing to restrain completion of certain transactions under which the company bought back shares from the shareholders and the shareholders bought real estate from the company. The plaintiffs alleged that the resolution to enable the buy-back was ineffective because associates of the relevant shareholders voted in favour. The parties were held not to be associates.
17. The test of association that applied in that case was s15 of the Corporations Act, which includes the test:

15. *The associate reference includes a reference to:*

- (a) *a person in concert with whom the primary person is acting, or proposes to act;*
- (b) ...

18. Barrett J said:

A point to be made at once in relation to these questions is that the mere fact of family relationship should be left to one side. King George V and Kaiser Wilhelm II were first cousins. They did not act in concert between August 1914 and November 1918 and probably at other times as well. In the absence of evidence of agreement or dependency or actual influence implying commonality of action, family relationships, like the personal friendships considered in the Elders IXL case (above), of themselves prove nothing relevant to an inquiry such as the present. (emphasis added)⁹

⁸ *Bateman v Newhaven Park Stud Ltd* [2004] NSWSC 566 (references omitted)

⁹ *Bateman* at [34]. The Elders IXL reference is *Elders IXL v National Companies and Securities Commission* [1987]

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19. The family relationship here involves elements of dependency, as established on the material before the initial Panel. The relationship was also not a "mere fact", but one of a number of facts.
20. Barrett J also said:
- It is against this sixfold factual background, as presented by the plaintiffs, that I must approach the question whether R J Kelly was acting in concert with JWK Nominees Pty Ltd in respect of voting on the s.257D(1)(a) resolution on 26 May 2004. That question may, in light of the case law, be expressed in various ways. Was there an understanding between R J Kelly and JWK Nominees Pty Ltd as to their common purpose or object in relation to the matter of voting? Was there knowing conduct resulting from communication between R J Kelly and JWK Nominees Pty Ltd on the matter of voting, as distinct from corresponding or parallel actions occurring simultaneously? Was there a consensual adoption of an understanding common to R J Kelly and JWK Nominees Pty Ltd on the matter of voting? Was there some mutual contemporaneous engagement in relation to that matter? Alternatively, was there no more than spontaneous and independent action on the part of each?*
21. Having considered that there was nothing of a structural kind beyond the sibling relationship, and no direct evidence of communications or common intentions actually or knowingly shared (as distinct from coinciding), Barrett J was not satisfied of association.
22. In the matter before us, there are structural links as well as the family relationship involving elements of dependency and other facts indicating association. There is the course of discussions and negotiations regarding the acquisition from Farallon. There is the funding of the acquisition. There is the size of the investment (relative to other investments, as it was submitted that it represented, on a cost basis, 65.8% of Ms Catelan's total current share portfolio). There is the coincidence of the acquisition around the time when there was agitation for board change (a very significant factor, we think). There is the fact of a very significant shareholding, in a company of which Ms Catelan's father is CEO and the major shareholder, which would have a significant impact on control. There is the fact that Ms Catelan is employed at CMI and works for her father in the role of Assistant to the Managing Director. A majority of the board at CMI is Mr Raymond Catelan, his nephew Mr Richard Catelan and Mr Danny Herceg who has acted as Mr Raymond Catelan's legal adviser. Two members of the board, Mr Raymond Catelan and Mr Richard Catelan, hold senior management positions also.
23. The initial Panel did not enquire into other shareholdings of Ms Catelan. We noted, however, that in a submission on the supplementary brief, Tinkerbell submitted "*The acquisition of shares from [Farallon] does not represent Ms Catelan's only shareholding. Ms Catelan's share portfolio includes shares in BigAir, CLEVER (subject currently to a takeover by BigAir) and CEC Group in addition to her shareholding in CMI.*" All these shareholdings are in companies in which her father was either involved or had a relevant interest.

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24. *Adsteam*¹⁰ concerned an application to strike out a statement of claim. It was alleged that the understanding in question was that shares would be acquired by one or more of the defendants with a view to ensuring that control of the conduct of the company's affairs would pass to one of them. The court drew on the principles from conspiracy cases, namely that it was extremely unlikely that the plaintiffs would be in a position to adduce direct evidence but, rather, proof rested upon inference deduced from acts done in pursuance of an apparent common purpose. The court said:

Understanding is plainly a word of wide import... My view is that it is sufficiently wide to encompass and subsume the other expressions used in s7(4)(b) [of the Companies (Acquisition of Shares) Code], namely agreement, arrangement and undertaking. In other words, I cannot see that there could be an agreement, arrangement or undertaking independently or the existence of at least an understanding among those involved....

Much the same conclusion is true of the allegation of "acting in concert" in the same paragraph of the pleading and particulars. As at present advised I cannot see that it is possible for persons to "act in concert" towards an end or object, or even simply to act in concert, unless there is at least an understanding between them as to their common purpose or object. The expression in question evokes the notion of joint actors, or perhaps even joint tortfeasors, as to which it is settled that there must be "concerted action to a common end" ... It therefore seems to me that the express reference, whether in the pleadings in this case or in s7(4)(c) itself, to persons "acting in concert" adds little if anything to what is already comprehended by the expression "understanding" in s7(4)(b).

25. The initial Panel drew the inferences that allowed it to conclude that there was a consensual adoption of an understanding common to Ms Leanne Catelan and Mr Raymond Catelan concerning the ownership of the 9.22% parcel of shares acquired from Farallon. In our view, the material allowed them to do so and we would form the same conclusion.
26. *Bank of Western Australia*¹¹ concerned whether a sale of shares on-market was in breach of a Mareva injunction. The injunction allowed for the sale of shares on the stock exchange to anyone who was not a related party or associate of the defendant. The court said:

The phrase "acting in concert" connotes knowing conduct the result of communication between parties and not simultaneous actions occurring contemporaneously. Of course, the statutory definition expands that concept by including a proposal so to act. However, in the context of this case the allegation is of a bilateral arrangement. "Acting in concert" involves at least an understanding between the parties as to a common purpose or object... It is necessary that the understanding should be consensual and that there should be some adoption of it. However, it is not essential

¹⁰ *Adsteam Building Industries Pty Ltd & Anor v The Queensland Cement and Lime Co Ltd & Ors* (1984) 14 ACLR 456 at 459 (references omitted)

¹¹ *Bank of Western Australia Ltd v Ocean Trawlers Pty Ltd* (1995) 16 ACSR 501 (references omitted)

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that the parties are committed to it or bound to support it. An arrangement or understanding can be informal as well as unenforceable and the parties may be free to withdraw from it or to act inconsistently with it notwithstanding their adoption of it... Such an understanding may be proved by inference from the circumstances surrounding the impugned transaction and from what the parties have done as well as by direct evidence....

27. The initial Panel drew inferences from the circumstances and what the parties did (and did not do).

Effect

28. They also submitted that there was no evidence adduced as to the possible effect that Tinkerbell's acquisition of Farallon's shares might have on the control of CMI.
29. When aggregated, the holdings of Ms Leanne Catelan, Mr Raymond Catelan and their interests amount to almost 50% of the shares of CMI. This combined holding clearly has an effect, or potential effect, on the control of CMI.
30. In our view, the acquisition of this substantial interest has a significant effect on the control of CMI. The parcel alone is almost enough to block compulsory acquisition, but more importantly it takes the holdings of the associated parties to almost 50% of CMI. Mr Raymond Catelan's holding of 36%, while a significant control block, could still be defeated, unlikely though that may be. Aggregated, defeat is nigh on impossible.
31. There was no direct evidence of the terms of the understanding. But that is not required. Ms Catelan would have known what was expected of her, namely that she would not work against the interests of her father in respect of the holding of the shares. We infer that she acquired the shares on the basis of such an understanding. In our view the cases do not suggest that this level of 'uncertainty' about the circumstances means that there cannot be an association found.

Alternatives

32. The applicants submitted that the declaration of unacceptable circumstances made by the initial Panel was uncertain because it expressed the association as an alternative (either under s12(2)(b) or s12(2)(c)). The applicants submitted that if s12(2)(b) was relied upon, the initial Panel did not identify the terms of the relevant agreement. If s12(2)(c) was being relied upon, the decision was "*based on nothing more than mere suspicion, prejudice and fantasy.*"
33. In our view, the cases make it clear that there is significant overlap between the concepts of "acting in concert" and "relevant agreement", given that the latter is defined as:

An agreement, arrangement or understanding:

- (a) *whether formal or informal or partly formal and partly informal; and*

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- (b) *whether written or oral or partly written and partly oral; and*
- (c) *the whether or not having legal or equitable force and whether or not based on legal or equitable rights.¹²*

34. Perhaps the alternatives in s12 are intended as degrees of "understanding", or put another way, steps along a continuum.
35. As we understand the initial Panel's reasons, the material is not sufficiently clear to determine definitively where on the continuum the understanding in this case comes to rest. It is at least an "acting in concert" and may well be "a relevant agreement". We may have expressed the alternatives in the declaration slightly differently (namely as a finding of acting in concert and, in the alternative, a finding also of a relevant agreement), but think it is sufficiently clear that a variation is not required.
36. We think the initial Panel identified the understanding sufficiently and it was not based on "suspicion, prejudice and fantasy".

Other grounds of the review

37. The applicants also submitted that, for other reasons, the decision of the initial Panel should be set aside.
38. They submitted that the initial Panel did not convene a conference, which could have resolved many of its concerns. In the initial proceedings, the parties were invited to address whether they wanted a conference. Tinkerbelle submitted that it was not necessary for a conference to be held. In any event, the Panel has previously made findings of association without the need for a conference.¹³
39. We are satisfied as to the association on the basis of the material before us. A conference is not necessary.
40. They also submitted that there were fundamental errors in the findings of fact by the initial Panel in its preliminary findings. The first 'fundamental error' was that Ms Catelan did not work for her father but for CMI. We do not think anything turns on this, and note that the initial Panel made clear the sense in which it used the expression.
41. The second was that Ms Catelan was not dependent on financial contributions from her father but was an independent woman. The initial Panel made a finding in respect of the financial contribution to the acquisition against a background of the evidence concerning Ms Catelan's financial circumstances relating to the acquisition. It was, in our view, sufficient evidence of dependency.
42. The third 'fundamental error' was that the initial Panel found that the gift to Ms Catelan was larger than other gifts by Mr Raymond Catelan to his daughters. This was not an error. It was true. The evidence of a larger gift was to Mr Raymond Catelan's wife, as the initial Panel recognised.

¹² Section 9¹³ See, for example, *Viento Group Limited* [2011] ATP 1, *Brockmann Resources Limited* [2011] ATP 3.

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43. The fourth was a concern that the initial Panel raised regarding the preparation of the deed of gift. The initial Panel said it had been written formally, suggesting that it had been prepared by lawyers but noted Mr Raymond Catelan's submission that he had prepared it using a form he had previously used. It transpired that the deed appeared to be based on the precedent of Herceg Lawyers. The example made the initial Panel more prepared to draw an inference from the other material before it. We do not think anything more turns on this.
44. The last 'fundamental error' was that the initial Panel had misunderstood or misconstrued the interest of potential beneficiaries under a discretionary trust. The point being made was that "*the beneficiary of a discretionary trust does not have a proprietary interest in the property subject to the discretionary trust*" or "*a specific interest in any item of property held by the trust*". But it appears to us that the initial Panel was not seeking to establish such a point. The initial Panel referred to the trusts as an example of a structural link. It therefore did not appear to us that the initial Panel had misunderstood or misconstrued the position. We do not think anything more turns on this.
45. In summary, each preliminary finding that the applicants identified in their review application as a 'fundamental error' was clarified in the initial Panel's reasons (which were not available to the parties until after the review application was made). We think the issues have been adequately addressed by the initial Panel.
46. They also submitted that there were errors of law or policy in the initial Panel's decision. The first 'error' related to the position of beneficiaries under a discretionary trust. We have addressed this above. The second 'error' was that the evidence relied on suggested that the initial Panel did not look at the established criteria for conducting proceedings in association cases, but "*drew unnecessarily negative inferences from the conduct of third parties.*" We do not agree. The association hurdle was met and then, from the material, the initial Panel drew inferences that were not "unnecessarily negative" but are clearly open.
47. The final submission of the applicants was that the initial Panel "*has exhibited an unfair prejudice*" against certain parties, for example by asking when and where the deed of gift was witnessed, by inferring that Mr Raymond Catelan had more involvement in the acquisition than was disclosed, and by its attitude to the initial submission by CMI. We do not agree that any unfair prejudice was displayed.

DECISION

48. For the reasons above, we do not consider that there is any reasonable prospect that the review application will result in a different outcome to that of the initial Panel.
49. Accordingly, we decline to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth). We consider it is not against the public interest to do so.

Orders

50. The initial Panel made orders to require that Tinkerbell's 9.22% interest in CMI be vested in the Commonwealth for ASIC to sell and for disclosure to be made of the

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association between Ms Leanne Catelan and Mr Raymond Catelan. We agree with the orders.

51. The initial Panel made no orders as to costs and we also agree with this decision.
52. As the matter is now determined, the interim orders are lifted.

Kathleen Farrell
President of the sitting Panel
Decision dated 10 March 2011
Reasons published 15 March 2011

Party	Advisers
Tinkerbelle and Ms Leanne Catelan	McCullough Robertson
CMI, Mr Colin Ryan and Mr Danny Herceg	Mallesons Stephen Jaques
Mr Richard Catelan	Not applicable
Mr Gerry Pauley and Dr Gordon Elkington	Not applicable