



In the matter of Alinta Limited 02  
[2006] ATP 14

**Catchwords:**

*Australian Competition and Consumer Commission (ACCC) - Bar charts - broker valuations - content of bidder's statement - correspondence with ACCC - Disclosure in bidder's statement - dividend comparisons - demerger - distribution in specie - equal capital reduction - formatting of charts - implementation risk - intentions - misleading statements - management qualifications and experience - offer premium - procedural fairness - proceedings concluded on basis of undertaking - referral of question of law to court - replacement bidder's statement - restraining dispatch of bidder's statement - supplementary bidder's statement - undertaking - unreasonable certainty*

*Corporations Act 2001 (Cth), sections 231, 256B, 256C, 633 (item 6), 657C, 657D, 657E and 659A*

*Australian Leisure & Hospitality Group Ltd [2004] ATP 19, Southcorp Limited (2005) ATP 4*

*Alinta Limited; The Australian Gas Light Company*

**These are the Panel's reasons for declining the application by The Australian Gas Light Company to make a declaration of unacceptable circumstances and final orders, in relation to the affairs of The Australian Gaslight Company and Alinta Group Holdings Pty Ltd's takeover offer for The Australian Gas Light Company. The Panel decided not to make a declaration of unacceptable circumstances or final orders having received undertakings from Alinta Limited and Alinta Group Holdings Pty Ltd to make additional disclosure to address concerns that the Panel had about some aspects of Alinta Group Holdings Pty Ltd's bidder's statement.**

## SUMMARY

1. These reasons relate to an application (the **Application**) to the Panel made on 3 April 2006 by The Australian Gas Light Company (**AGL**) under section 657C of the Corporations Act 2001 (Cth) (**Act**)<sup>1</sup> in relation to Alinta Limited's <sup>2</sup> (**Alinta**) scrip takeover offer (**Alinta Offer**) for all of the shares in AGL. The proceedings in relation to this Application are referred to as the Alinta 02 Proceedings. On the same day as this Application, AGL made another, separate application which related to Alinta and AGL's proposals for each to make concurrent scrip takeover offers for all of the shares of the other. The proceedings in relation to that application are referred to as the Alinta 01 Proceedings. The Panel has published separate reasons for its decision in the Alinta 01 Proceedings.
2. In its Application, AGL submitted that Alinta's replacement bidder's statement<sup>3</sup> dated 31 March 2006 and dispatched on 8 April 2006 (**Replacement Bidder's Statement**) was inadequate in various ways because it contained certain misleading statements and was misleading by omission in certain respects.

<sup>1</sup> All statutory references in these reasons are to the Act unless otherwise specified.

<sup>2</sup> The Alinta Offer was actually made by Alinta Group Holdings Pty Ltd. Unless stated otherwise, all references to Alinta also refer, where appropriate, to Alinta Group Holdings Pty Ltd.

<sup>3</sup> Alinta had originally lodged a bidder's statement on 26 March 2006. Following correspondence between the solicitors for Alinta and the solicitors for AGL, Alinta lodged the Replacement Bidder's Statement which sought to address some of the points of dispute between Alinta and AGL.

## Takeovers Panel

### Reasons for Decision – Alinta Limited 02

3. Following the Panel's preliminary decision to the parties, Alinta offered, and the Panel accepted, an undertaking to provide additional and corrective disclosure which addressed concerns that the Panel had about some aspects of the Replacement Bidder's Statement.
4. On the basis of Alinta's undertaking to provide additional and corrective disclosure, the Panel concluded the proceedings without making a declaration of unacceptable circumstances or any orders.

## THE PROCEEDINGS

### The Panel & Process

5. The President of the Panel appointed Stephen Creese, David Gonski AO (sitting President) and Teresa Handicott as the sitting Panel (**Panel**) for the proceedings (**Proceedings**) arising from the Application.
6. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
7. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

## APPLICATION

### Background

8. In late 2005, AGL announced a proposal under which AGL's retail energy business would be separated from its infrastructure business and placed into a new company (**Demerger**). AGL proposed to achieve this by a scheme of arrangement, and on 10 February 2006, the Federal Court of Australia (**Court**) made orders to convene a meeting of the shareholders of AGL to consider, and if thought fit, approve the Demerger.
9. On 22 February 2006, Alinta announced to ASX that it had acquired approximately 19.9% of the issued share capital in AGL. At the same time, Alinta also indicated publicly that it wished to discuss with AGL a merger of Alinta and AGL by way of an AGL scheme of arrangement which would then be followed by a separation of the combined entities' infrastructure and energy assets, similar to AGL's original Demerger proposal.
10. On 3 March 2006, Alinta released to ASX details of its merger/demerger proposal.
11. On 12 March 2006, the board of directors of AGL resolved:
  - (a) to reject the Alinta merger/demerger proposal;
  - (b) to make a scrip takeover offer for all of the shares in Alinta (**AGL Offer**), with the intention of subsequently separating the combined energy and infrastructure businesses by undertaking, if the AGL Offer was successful, a demerger of those businesses, but of a different nature to that proposed by Alinta;
  - (c) to withdraw their recommendation to AGL shareholders to vote in favour of the Demerger; and

## Takeovers Panel

### Reasons for Decision – Alinta Limited 02

- (d) to seek the approval of the Court to cancel the scheme meeting in respect of the Demerger.
12. On 13 March 2006, AGL publicly announced that it intended to make a takeover bid for all of the shares in Alinta (**AGL Offer**) on the basis of a ratio of 0.564 AGL shares for every Alinta share with the intention of subsequently separating the energy and infrastructure businesses of the merged entity.
  13. On 14 March 2006, the Court made orders, in effect cancelling the scheme meeting in relation to the Demerger that had been ordered by it on 10 February 2006.
  14. On 20 March 2006, in response to the AGL rejection of Alinta's merger/demerger proposal and the announcement of the AGL Offer, Alinta publicly announced the Alinta Offer which was on the basis of a ratio of 1.773 Alinta shares for 1 AGL share i.e. the reciprocal of exchange rate as offered under the AGL Offer.
  15. On 24 March 2006, Alinta served a bidder's statement dated 24 March 2006 (**Initial Bidder's Statement**) on AGL.
  16. On 29 March 2006, the solicitors for AGL sent to the solicitors for Alinta a letter of complaint in relation to the Initial Bidder's Statement.
  17. On 31 March 2006, the solicitors for Alinta sent a letter to the solicitors for AGL in response to AGL's 29 March 2006 letter and provided a supplementary bidder's statement (**First Supplementary Bidder's Statement**) and the Replacement Bidder's Statement, which addressed or sought to address some of the concerns raised by AGL in its 29 March 2006 letter. Alinta lodged the First Supplementary Bidder's Statement and the Replacement Bidder's Statement with ASIC on the same day i.e. 31 March 2006.
  18. In both its Initial Bidder's Statement and Replacement Bidder's Statement, Alinta set out the following two scenarios in respect of its intentions towards AGL:
    - (a) if Alinta acquired a relevant interest in 50.1% or more, but less than 90%, of the shares in AGL, Alinta would pursue a proposal to separate AGL's energy assets and infrastructure assets. The energy assets would be placed into one company that would be demerged from AGL (**AGL Only Demerger**) by way of an in specie distribution of the shares in the new company to AGL shareholders and an equal capital reduction under section 265C; and
    - (b) if Alinta acquired 100% of AGL, it would pursue a proposal to consolidate the energy assets and infrastructure assets of AGL and Alinta. Alinta would then place the energy assets of both AGL and Alinta into one company that would be demerged from Alinta (by similar in specie distribution to Alinta shareholders and equal capital reduction), leaving Alinta holding the infrastructure assets of AGL and Alinta (**Full Demerger**).

## Application

### *Interim orders sought*

19. AGL sought an interim order under section 657E that Alinta be restrained from dispatching its Replacement Bidder's Statement to AGL shareholders pursuant to

## Takeovers Panel

### Reasons for Decision – Alinta Limited 02

section 633(1) item 6 until the information deficiencies set out in the Application were determined.

#### *Declaration sought*

20. AGL sought a declaration of unacceptable circumstances under section 657A in relation to the affairs of AGL, on the basis of the information deficiencies referred to in the Application.

#### *Final orders sought*

21. AGL sought final orders under section 657D(2) to remedy the alleged information deficiencies referred to in the Application.

#### *Application summary*

22. In summary, AGL submitted that the Replacement Bidder's Statement was inadequate in various ways because it contained certain misleading statements and was misleading by omission in certain respects.

#### Question of Law

23. In its Application, AGL sought that the Panel refer to the Court the following questions of law (**Questions of Law**), pursuant to section 659A:

*“Would AGL (in the case of the AGL Only Demerger) and Alinta (in the case of the Full Demerger) be lawfully entitled to use the procedure in Section 256B of the Corporations Act to implement the Alinta Demergers in the manner set out in the Bidder's Statement?”*

*“Would AGL (in the case of the AGL Only Demerger) and Alinta (in the case of the Full Demerger) be prevented by Section 231 of the Corporations Act from lawfully implementing the Alinta Demergers by way of, inter alia, an in specie distribution of shares in satisfaction of an equal reduction of capital under Section 256B of the Corporations Act and dividend in the manner set out in the Bidder's Statement?”*

#### Disclosure

24. Following negotiations between the parties and the Panel, the Application was narrowed so that the only remaining disclosure issues in the Proceedings were, broadly speaking, in relation to:
  - (a) Alinta's intentions and the mechanics regarding the implementation of the Full Demerger and the AGL Only Demerger;
  - (b) Alinta's management team's qualifications and experience;
  - (c) the risk that the Australian Competition and Consumer Commission (ACCC) may require amendments to those undertakings given by Alinta to the ACCC or further undertakings which could include divestment obligations; and
  - (d) various issues in relation to the “selling section” of the Replacement Bidder's Statement.

## DISCUSSION

### Questions of law

25. AGL submitted that the Questions of Law should be referred to the Court on the basis that Alinta’s proposal to implement the demergers<sup>4</sup> by way of equal reductions of capital under section 256C, relied on an unlawful mechanism.
26. AGL submitted that:
- (a) section 231 requires a person to consent to becoming a member of a company, and the reduction of capital process was not a process by which such consent can be evidenced;
  - (b) a scheme of arrangement is needed whenever a reduction of capital involves a member of the company whose capital is being reduced being compelled to acquire shares in another company;
  - (c) neither the AGL Constitution nor the Alinta Constitution permitted the in specie distribution of shares under the demergers in the manner contemplated in the Replacement Bidder’s Statement; and
  - (d) the legality and implementation of the Alinta Demergers was fundamental to:
    - (i) Alinta’s intentions disclosed in the Initial Bidder’s Statement; and
    - (ii) the structure of, and content of disclosures in, the Replacement Bidder’s Statement.
27. The Panel considered that it might be obliged to refer the Questions of Law to the Court if:
- (a) there was some real (not immaterial) doubt as to the legality of the demerger methods; and
  - (b) the demerger methods proposed by Alinta were the only way that the demergers could proceed and the demergers were essential for the Alinta Offer to proceed.<sup>5</sup>
28. The Panel considered that because:
- (a) it had not been persuaded that the proposed demerger methods were unlawful; and
  - (b) there were other ways of implementing a demerger (for example, by way of a scheme of arrangement) which both parties agreed would be legal; and
  - (c) the demergers were not essential to the Alinta Offer (i.e. if they could not be implemented the takeover could still proceed),
- the issues concerning the demergers could be adequately addressed by disclosure rather than referring the Questions of Law to the Court.

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<sup>4</sup> In these reasons the words “the demergers” means the AGL Only Demerger or the Full Demerger.

<sup>5</sup> This is consistent with the Panel’s approach in the matter of Colonial First State Property Trust Group 03 [2002] ATP 17 where the Panel decided to refer an issue to the court because it was essential to the takeover being able to proceed.

## Takeovers Panel

### Reasons for Decision – Alinta Limited 02

29. The Panel found that if the issues were adequately explained by Alinta to the AGL shareholders they would not be misled into believing that Alinta was representing that it could implement the demergers by the methods proposed free of any execution risk, and would be able to make their decisions on the Alinta Offer in knowledge of the risks and alternative outcomes.

#### Demerger Intentions

30. AGL submitted that throughout the Replacement Bidder's Statement Alinta represented, either expressly, or indirectly because of the approach it took to a number of disclosure issues, that the AGL Only Demerger, or the Full Demerger, would be implemented, and would be implemented by the equal capital reduction mechanism described in the Replacement Bidder's Statement. For example in section 5.5(i) of the Replacement Bidder's Statement Alinta stated:

*"In the event that Alinta acquires 50.1% of the AGL shares, AGL will be split into two new entities: AGL Energy and AGL Infrastructure. AGL Infrastructure represents the existing operations of AGL after the demerger of the energy assets as a new reporting entity, AGL Energy. The remaining AGL operations represent the infrastructure assets and will continue to be listed on the ASX, trading as AGL Infrastructure."*

and later in Appendix 3 of the Replacement Bidder's Statement

*"In addition, the capital reduction would require the approval of AGL shareholders by ordinary resolution (that is, a majority of votes cast in favour of AGL shareholders voting on the resolution). Alinta intends to vote in favour of the capital reduction. If Alinta acquires 50.1% of shares in AGL under the offer, it will be in a position to ensure that the resolution is passed".*

31. AGL submitted that there were real risks that either the demergers would not proceed, or that Alinta would be required to implement them by other mechanisms. AGL submitted that Alinta should advise AGL shareholders of the risks that the demergers would not be implemented in the way described in the Replacement Bidder's Statement and advise of its intentions for AGL and Alinta in the event that it could not implement the demergers in the way described in the Replacement Bidder's Statement.
32. The Panel considered that Alinta's disclosure in the Replacement Bidder's Statement regarding the demergers was misleading or deficient on a number of points:
- (a) the statements made by Alinta regarding its ability to implement the demergers were too absolute because they did not adequately address (specifically in Part C of the Replacement Bidder's Statement) the facts that:
    - (i) the proposed methods might not be used;
    - (ii) it was not possible in the existing circumstances to say that the Full Demerger would be implemented if Alinta decided to continue with the proposed methods, because approval by Alinta shareholders of the Full Demerger would be required for it to proceed (even under the then current proposal);
    - (iii) if the proposed methods were not used, other methods were available but:

## Takeovers Panel

### Reasons for Decision – Alinta Limited 02

- (A) implementation of the demergers under those methods was also not certain because different voting thresholds would be required, and Alinta's shareholding in AGL may not be sufficient to ensure passage of, or Alinta may not be able to vote in support of, the resolutions; and
  - (B) the other methods could potentially have other effects and features (for example, adverse tax consequences); and
- (b) the statements made by Alinta did not adequately address the implications for shareholders if the demergers were, for whatever reason, not able to be implemented at all.
33. Accordingly, the Panel considered that the following additional disclosure to AGL shareholders was required:
- (a) correction of those statements in the Replacement Bidder's Statement that gave the impression that the demergers were certain to be implemented (and implemented by the methods proposed by Alinta);
  - (b) an explanation as to why implementation of the demergers by the proposed methods was not certain (i.e. the risks involved in implementing the demergers by the proposed method);
  - (c) an explanation of other methods available for implementing the demergers if, for whatever reason, the currently proposed demerger method was not adopted;
  - (d) an explanation of:
    - (i) the implementation risks of those other available demerger methods (for example, risks of not obtaining requisite approvals);
    - (ii) the features and effects those other available demerger methods may have (for example, tax consequences); and
  - (e) an explanation of what Alinta intended to do if, for whatever reason, it was unable to implement the demergers.
34. This additional information would assist AGL shareholders to understand that implementation of the proposed demerger method was not guaranteed and that other methods were possible but they each carried their own features and risks.

### Business expertise

35. AGL submitted that because the Alinta Offer was a scrip offer, and because Alinta contemplated that it might acquire between 50.1% and 90% of AGL, AGL shareholders should be given a more detailed description of the qualifications and experience of Alinta's board and management personnel. AGL set out a number of particular areas where it contended that AGL's operations were different to, or more complicated than, Alinta's operations and where Alinta should provide evidence to AGL shareholders that its management was capable of managing AGL's more complex operations.
36. Alinta set out at items 1.7 to 1.12 of the Replacement Bidder's Statement a description of the qualifications and experience of Alinta's board and management. However,

## Takeovers Panel

### Reasons for Decision – Alinta Limited 02

AGL submitted that the descriptions were inadequate and that a failure by the Panel to require Alinta to make further disclosure on its business expertise was directly at odds with the Panel's decision in *Australian Leisure & Hospitality Group Ltd [2004] ATP 19*.

37. The Panel considered that:
  - (a) as a public company, Alinta's management experience and track record was on the public record in other documents outside the Replacement Bidder's Statement<sup>6</sup>; and
  - (b) it had no basis not to accept Alinta's submissions that it had made full disclosure in that respect.
38. Accordingly, the Panel did not consider that Alinta's disclosure in the Replacement Bidder's Statement was misleading in relation to the management team's qualifications and experience and therefore did not consider that Alinta was required to make any additional disclosure.
39. The Panel noted that it was open to AGL to comment on Alinta's management team's qualifications and experience in its target's statement.

#### Competition law disclosure

40. AGL submitted that the statements in section 19.1(b) of the Replacement Bidder's Statement that "*Alinta GH considers that the Offer should not raise any substantive competition concerns in Australia*" was misleading given other statements in the Replacement Bidder's Statement which highlighted the risk that the ACCC may require amendments to those undertakings given by Alinta to the ACCC or further undertakings which could include divestment obligations. Further, AGL submitted that Alinta should be required to disclose any views that Alinta had formed on the risks it highlighted in the Replacement Bidder's Statement.
41. The Panel initially considered that the disclosure made in section 19.1(b) may not have been misleading given that the statement was immediately qualified by the following words "*...that cannot be appropriately dealt with by Alinta providing behavioural undertakings to the ACCC and will use all reasonable endeavours to ensure that ACCC clearance is obtained as soon as possible...*".
42. However, following submissions from the parties, the Panel considered that further disclosure by Alinta was required. In particular, the Panel was concerned that Alinta had not disclosed in the Replacement Bidder's Statement that it had written to the ACCC on 21 and 22 March 2006 providing draft undertakings under section 87B of the Trade Practices Act 1974 and that the ACCC had responded on 23 March 2006 expressing doubt as to whether Alinta's proposed undertakings would be sufficient to mitigate the competition effects arising from the Alinta Offer.
43. The Panel considered that Alinta's disclosure in the Replacement Bidder's Statement was misleading by not disclosing:

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<sup>6</sup> As AGL noted, in *Australian Leisure & Hospitality Group Ltd [2004] ATP 19*, the bidder, Bruandwo, was an unlisted private equity company, and Alinta is a listed public company of 5 years standing.

## Takeovers Panel

### Reasons for Decision – Alinta Limited 02

- (a) the content and nature of the correspondence between Alinta and the ACCC; and
  - (b) in particular, the ACCC's concerns regarding Alinta's draft behavioural undertakings.<sup>7</sup>
44. The Panel considered that in not disclosing this information Alinta was likely to mislead AGL shareholders into believing that ACCC approval (or non-objection) to the Alinta Offer was more likely than was reasonable given Alinta's correspondence with the ACCC.
45. Alinta addressed this concern in the supplementary bidder's statement that it issued pursuant to its undertakings to the Panel (**Second Supplementary Bidder's Statement**) by including a copy of the ACCC's 23 March 2006 letter, an extract of Alinta's letter to the ACCC in response and some further explanatory material.
46. The Panel considered that the circumstances of the Mildura Co-operative Fruit Company Limited [2004] ATP 05 were such that the decision of the Panel in those proceedings was not relevant to these proceedings.

### Complaints from the selling section of the Replacement Bidder's Statement

#### *Illustration of premium over AGL share price*

47. On page 4 of the Replacement Bidder's Statement, Alinta produced a bar chart showing the premium which it said its offer represented to the price or value of AGL shares. The different bars in the chart showed the premium over the value of AGL shares at different points in time and calculated by different methods. Alinta based the premium on a price of \$10.89 per Alinta share which was the price on the trading day prior to the announcement of the Alinta Offer.
48. AGL submitted that the chart was misleading and not reflective of the value of AGL shares in light of the information that had been released to the market leading up to the date of the Replacement Bidder's Statement. AGL submitted that the illustrative premia were inappropriate and misleading because :
- (a) none of the data points chosen sufficiently accounted for information that AGL had released to the market leading up to the date of the Replacement Bidder's Statement;
  - (b) the average analyst valuations used in one of the bars of the bar chart failed to include the most recent broker valuations and therefore was not consistent with the Panel's decision in Southcorp Limited (2005) ATP 4; and
  - (c) calculating the premia based solely on an Alinta share price of \$10.89 was inappropriate because that price had been affected by the earlier announcement of the AGL Offer.
49. The Panel considered that the valuation points chosen by Alinta, and the Alinta share price used, were not unreasonable or misleading, and had been adequately disclosed and explained. Accordingly, corrective disclosure by Alinta was not required and it was open to AGL to comment on the issues with which it had concerns in its target's

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<sup>7</sup> This is consistent with the Panel's decision in Wattyl Limited [2006] ATP 11.

## Takeovers Panel

### Reasons for Decision – Alinta Limited 02

statement. The Panel also did not consider that Alinta's disclosure was inconsistent with the Panel's decision in Southcorp Limited (2005) ATP 4.

#### *Effect of Alinta's on-market purchases*

50. On page 5 of the Replacement Bidder's Statement, Alinta produced a graph of the market price of AGL shares from January 2005 to March 2006. Alinta annotated the chart in relation to a number of actions that either Alinta or AGL had taken during the relevant period. Alinta also set out a statement that it believed its acquisition of 19.9% of the shares in AGL, the announcement of Alinta's previous merger proposal, the Alinta Offer and general speculation of corporate activity in relation to AGL had contributed to increases in AGL's share price since October 2005.
51. AGL submitted that the graph (and its annotations) and the assertions about the reasons for the increase in AGL's share price were misleading because:
  - (a) a bold arrow in the graph next to a period of steeply increasing AGL share price in late 2005 and early 2006 and a corresponding annotation "ALN purchases AGL shares" gave the impression that buying by Alinta was the primary reason for the rise in the AGL share price;
  - (b) Alinta had selected certain significant events and had generalised them; and
  - (c) the statements gave the impression that the AGL share price would fall if the Alinta Offer lapsed.
52. AGL also submitted there was no reasonable basis for Alinta asserting that Alinta's buying in AGL prior to the acquisition of its 19.9% stake in AGL affected AGL's share price, particularly given that AGL's share price did not fall materially during a period in early February 2006 when Alinta sold all of the shares in AGL which it had bought in the "ALN purchases AGL shares" period.
53. In relation to the impact of Alinta's on-market purchases, the Panel considered that corrective disclosure by Alinta was not required as page 5 of the Replacement Bidder's Statement, or the associated text, was not misleading. The Panel considered that it was open for AGL to rebut any of the contentions with which it disagreed in its target's statement.

#### *Total shareholder returns comparison*

54. On page 7 of the Replacement Bidder's Statement, Alinta stated that the return on investment to Alinta's shareholders since Alinta's listing was 455%. A footnote to the large bold statement of 455% total return, noted that this calculation was based on the retail share price of the public offering of \$2.25 and did not reflect the higher price of \$2.45 paid by institutional shareholders nor the price of \$4.38 paid by Aquila Inc and United Energy Ltd to acquire shares in Alinta and certain specific and valuable rights as cornerstone investors.
55. AGL submitted that the total shareholder return for Alinta has not been calculated on an appropriate basis and therefore the relevant statements were misleading. AGL submitted that the total shareholder return should be based on the prices paid by all stakeholders buying in at IPO not just the retail price.

## Takeovers Panel

### Reasons for Decision – Alinta Limited 02

56. The Panel considered that given the fact that retail and institutional shareholders had paid different prices for Alinta shares at the flotation of Alinta, not clearly showing shareholder returns separately for retail shareholders and institutional shareholders was misleading and confusing. The Panel considered that the relevant footnote did not adequately inform AGL shareholders of the two different returns to the two different shareholder groups given the prominence Alinta gave to the headline numbers.
57. The Panel found that Alinta should:
- (a) correct the disclosure on page 7 of the Replacement Bidder's Statement such that it was clear that the 455% return for shareholders was the total return for Alinta's retail shareholders; and
  - (b) also clearly disclose the total return for Alinta's institutional shareholders (i.e. using the starting point of the IPO price for institutions of \$2.45 per share).

#### *Dividend per share comparison*

58. On page 10 of the Replacement Bidder's Statement, under a heading "Better Dividends Moving Forward" Alinta presented a bar chart that compared a number of actual and forecast dividends for AGL.
59. The last, and highest, bar of the chart represented Alinta's forecast for the 2007 dividend to AGL shareholders if the Alinta Offer was successful. Although Alinta made reference to it in a footnote, and Alinta had included other AGL forecast dividends as comparison bars, the chart did not include a bar representing a forecast which AGL had made for its 2007 dividend if the AGL Offer was successful. AGL had forecast that if the AGL Offer was successful, AGL would declare a dividend for 2007 which was the same size as that forecast for 2007 by Alinta if the Alinta Offer was successful.
60. The Panel considered that the graph created an overall misleading impression and that Alinta should either:
- (a) replace the graph with a graph that included a bar displaying AGL's 2007 dividend forecast; or
  - (b) completely remove the graph and explain clearly that the graph had been removed because the Panel considered that without a bar displaying AGL's 2007 dividend forecast it was misleading.
61. The Panel did not consider that the footnote to the graph in the Replacement Bidder's Statement addressed the Panel's concerns.
62. The Panel noted the concerns raised by Alinta in its submissions concerning the assumptions on which AGL's dividend forecast was based. The Panel considered that Alinta may, if it considered it necessary, have noted this issue in a footnote to the revised graph.
63. On pages 10 and 11 of the Replacement Bidder's Statement, Alinta stated that "AGL has stated that a substantial part of the increased dividend forecast is as a result of stand alone cost savings". AGL submitted that the assertions were incorrect. AGL proposed a corrective form of words concerning the basis for its increased dividend forecast.

## Takeovers Panel

### Reasons for Decision – Alinta Limited 02

64. The Panel considered that Alinta should replace the statements on pages 10 and 11 of the Replacement Bidder's Statement asserting that a substantial part of AGL's increased dividend forecast was as a result of stand alone cost savings with the statements proposed in its letter dated 6 April 2006 to AGL.

#### *Dividend per share growth*

65. On page 14 of the Replacement Bidder's Statement, Alinta produced a bar chart under the heading "Alinta and AGL comparative dividend per ordinary share growth for 2001 – 2005 (Based at 2001)". The chart contained two bars for each year from 2001 to 2005 representing Alinta's dividend per share on the one hand and AGL's dividend per share on the other hand. The bars for Alinta's dividend were based on a scale set out on the left hand side of the chart and the bars for AGL's dividend were based on a scale set out on the right hand side of the chart.
66. The bars commenced at a similar height, but because of the different scales used on the left hand side of chart (increasing at 5 cent increments) and the right hand side (increasing at 20 cent increments), the bars representing the Alinta dividend quickly grew to more than twice the height of the AGL dividend, despite the fact that at all times, the AGL dividend per share was larger than the Alinta dividend per share.
67. AGL also submitted that the bar chart failed to include the value of the 30 cents per share special dividend and 50 cents per share capital return declared by AGL in 2005. AGL submitted that a footnote to the chart (which stated that the chart did not include the special dividend and capital return paid by AGL) was not sufficient to remedy the omission.
68. The Panel considered that the graph was confusing and misleading because:
- (a) of the format employed and, in particular, the axes used; and
  - (b) the graph failed to include the 30 cents per share special dividend and 50 cents per share capital return declared by AGL in 2005. The Panel did not consider that the footnote to the chart addressed the Panel's concerns about the special dividend and capital return paid by AGL.
69. Accordingly, the Panel found that Alinta should:
- (a) include a graph that addressed the Panel's concerns; or
  - (b) replace the graph with words that explained what the graph was intended to convey and which described the 30 cents per share special dividend and 50 cents per share capital return declared by AGL in 2005 and included a statement similar to the one described below; or
  - (c) completely remove the graph and explain clearly that the graph had been removed because the Panel considered that it was misleading because:
    - (i) of the format employed and, in particular, the axes used; and
    - (ii) the graph fails to include the 30 cents per share special dividend and 50 cents per share capital return declared by AGL in 2005.
70. Alinta replaced the chart in the Second Supplementary Bidder's Statement with a chart which showed the percentage growth in ordinary dividends for both Alinta and AGL (using a single scale) and also included a separate indicator on the chart for

## Takeovers Panel

### Reasons for Decision – Alinta Limited 02

the special dividend and capital return paid by AGL. Alinta included a statement setting out the Panel's concerns with the original bar chart.

#### *Financial Management*

71. On page 14 of the Replacement Bidder's Statement, Alinta printed a statement in large, bold font that "Alinta has outperformed AGL on most significant financial metrics including earnings per share and dividends per share".
72. AGL submitted that the statement was misleading because AGL's dividends per share had been higher than Alinta's since Alinta had been a publicly listed company and therefore there was no reasonable basis for making that statement.
73. The Panel considered that the statement was misleading. It considered that it could be corrected by Alinta including the word "growth of both" immediately before "earnings per share and dividends per share".

#### **No disclosure on competing bids**

74. The Panel considered that additional disclosure concerning the issue of the two competing scrip bids by Alinta and AGL for each other was required but considered that this matter should be addressed in the Alinta 01 proceedings.

#### **Additional Disclosure Issues**

75. The Panel noted that a number of disclosure issues raised by AGL in its 29 March 2006 letter had been addressed by Alinta in the First Supplementary Bidder's Statement and Replacement Bidder's Statement. The Panel also noted that there were a number of other disclosure issues raised by AGL that were resolved between the parties during the Proceedings.
76. The Panel adopted its usual approach of reviewing issues raised by the applicant in the Application and determining whether or not they were issues on which it should conduct proceedings. In each case where it decided not to address issues in the Brief, the Panel noted the issue and advised parties that it intended not to address the issue. The Panel gave the parties an opportunity to explain why it should not adopt that approach in relation to each of the issues.
77. The Panel considered that there were many areas of disclosure in the Replacement Bidder's Statement where different views were open. The fact that AGL held a different view to those of Alinta did not make Alinta's views or disclosures misleading. Where the Panel considered this to be the case, it advised AGL that it considered that the issues it raised which were suitable for debate and argument and could be raised in the AGL target's statement.
78. The Panel did not consider that AGL should be required to correct misleading statements by Alinta (whether by omission or commission) and did not base any part of its decision on such a premise.

#### *Procedural fairness*

79. AGL raised concerns about the procedural fairness of the Panel's approach in declining to commence proceedings in relation to some aspects of AGL's application without having received submissions from all parties in relation to the issues.

## Takeovers Panel

### Reasons for Decision – Alinta Limited 02

80. The Panel advised the parties that it had formed its views not in the absence of AGL's submissions on the issues, rather, the Panel formed these views having considered the submissions of AGL in the Application, the attachments to the Application, correspondence between the parties on the issues which had been copied to the Panel, preliminary submissions from both parties in the proceedings and extrinsic material relating to the Application. The Panel's Brief advised of the Panel's views on these issues and, as is standard in Panel Briefs, invited parties to make submissions on any issues which the parties considered were not raised or adequately covered in this Brief.
81. The Panel notes that the specific provisions of the ASIC Regulations which describe the process of the Panel issuing a brief clearly state that the Panel is to identify the issues which are to be considered by the Panel in the proceedings.
82. As well as considering the points that AGL raised in the Application, and the correspondence and the preliminary submissions, when the Panel came to make its decision it reviewed each of the issues which it had originally said could appropriately be addressed by AGL in its target's statement, and affirmed those decisions, or having had the benefit of the submissions and rebuttals, required corrective disclosure.
83. For these reasons, the Panel advised the parties that it considered it had afforded proper procedural fairness to the parties.

## DECISION

### Interim order

84. In its Application, AGL sought an interim order that Alinta be restrained from dispatching its Replacement Bidder's Statement to AGL shareholders pending the hearing of the Application by the Panel.
85. The Panel did not consider that allowing dispatch of the Replacement Bidder's Statement was likely to cause any material harm in relation to any of those issues which could not be remedied effectively by additional disclosure (if any) that the Panel required after considering each parties submissions.

### Preliminary decisions

86. On 18 April 2006, the Panel advised the parties that it considered that there were a number of statements in, and omissions from, the Replacement Bidder's Statement (as discussed above) which were sufficiently misleading to give rise to unacceptable circumstances.
87. Accordingly, the Panel invited Alinta to provide the Panel with a draft corrective supplementary bidder's statement to address the issues identified, for the Panel's consideration.

### Undertakings

88. Alinta undertook to the Panel to lodge and dispatch a supplementary bidder's statement (the Second Supplementary Bidder's Statement) , or a replacement bidder's statement, to address the Panel's concerns which were discussed above in the form attached in Appendix A (**Undertakings**).

## **Takeovers Panel**

### **Reasons for Decision – Alinta Limited 02**

#### **Resolution of Alinta 02 Proceedings**

89. Given receipt by the Panel of the Undertakings, the Panel considered that, in accordance with section 657A, it was not against the public interest to decline to make a declaration of unacceptable circumstances.
90. Alinta provided the Panel with a number of drafts of the Second Supplementary Bidder's Statement. Following discussions with Alinta, and comments by AGL, the Panel accepted that the additional and corrective disclosure in the Second Supplementary Bidder's Statement addressed its concerns. The Panel also considered that the Second Supplementary Bidder's Statement would be adequate to address its concerns if provided to AGL shareholders as a supplementary bidder's statement rather than being incorporated in a second replacement bidder's statement. Therefore it agreed to the Second Supplementary Bidder's Statement being dispatched to AGL shareholders rather than a second replacement bidder's statement. Alinta lodged the Second Supplementary Bidder's Statement on 18 May 2006.

#### **Resolution of Alinta 01 Proceedings**

91. While the Alinta 02 proceedings were being considered, the Panel also considered the Alinta 01 Application by AGL concerning the concurrent opposing scrip takeover offers for each other by Alinta and AGL i.e. the Pac-Man bids. Consequent to the Panel's decision in the Alinta 01 Proceedings the parties reached a commercial agreement on 26 April 2006 whereby the competing takeover offers, including the Alinta Offer to which these proceedings related, would be shelved pending AGL and Alinta shareholder approval of the commercial resolution proposed by the two companies.
92. The Second Supplementary Bidder's Statement commenced with advice to AGL shareholders of the commercial resolution and advised AGL shareholders that both companies now recommended that shareholders of both companies should not accept the offers for their shares unless the commercial resolution proposed between the companies did not proceed.

**David Gonski AO**

**President of the Sitting Panel**

**Decision dated 21 April 2006**

**Reasons published 10 October 2007**

## Takeovers Panel

### Reasons for Decision - Alinta Limited 02

#### Annexure A - Alinta Undertakings

##### **Background**

The undertakings set out below (Undertakings) relate to:

1. The off-market takeover bid by Alinta Group Holdings Pty Ltd (Alinta GH) pursuant to which Alinta GH dispatched a bidder's statement, and offers dated 18 April 2006 (Offers) to acquire all of the issued ordinary shares in The Australian Gas Light Company (AGL).
2. The second application made by AGL to the Takeovers Panel (Panel) dated 3 April 2006 (Application).

Unless expressly stated to the contrary, words and phrases defined by the Corporations Act 2001 (Cth) (Act) have the same meaning in these Undertakings.

##### **Undertaking by Alinta GH**

Pursuant to section 201A(1) of the Australian Securities and Investments Commission Act 2001 (Cth), Alinta GH hereby undertakes that it will (subject to the Panel agreeing to a stay of this undertaking pending the determination of any application for review under section 657EA of the Act), lodge and dispatch a supplementary bidder's statement, or a replacement bidder's statement, to address the concerns raised by the Panel in its Preliminary Decision in relation to the Application, in a form approved by the Panel.

##### **Undertaking by Alinta**

Pursuant to s201A(1) of the Australian Securities and Investments Commission Act 2001 (Cth), Alinta Limited hereby undertakes to procure that Alinta GH complies with these undertakings.

Dated April 2006

Signed for and on behalf of Alinta GH by:

Signed for and on behalf of Alinta by: