



In the matter of Alinta Limited 01  
[2006] ATP 15

**Catchwords:**

Bright line test; chilling effect of uncertainty; Competing Offers; Conflicting Control Scenario; consent; content of bidder's statement; control; corporate governance; declaration of unacceptable circumstances; defeating conditions; demerger; directors' duties; disclosure in bidder's statement; dispute; efficient market; final orders; first mover; frustrating action; London Takeover Panel; non-waivable condition; offerees inhibited; orders; Pac Man defence; probative material; reasonable period to consider offers; rival offers; scrip offers; stalemate; Termination Term; Treasury shares; uncertainty due to possible litigation; undertaking; voiding of transfer

Corporations Act – sections 259C, 259E, 602(a), 602(b)(i), 602(b)(ii), 617, 624, 657A(2)(a), 657D, 661A, *Glencore International AG (ACN 114 271 055) v Takeovers Panel* [2006] FCA 274; *Hawker De Havilland Limited*; *Ian Edric Prowse and Westinghouse Brake and Signal Company (Aust.) Limited and: Australian Securities Commission and BTR Plc and BTR Nyllex Limited* 6 ACSR 579 (1991)

Alinta Limited; The Australian Gas Light Company; London Panel on Takeovers and Mergers

**These are the Panel's reasons for making a declaration of unacceptable circumstances and final orders in relation to the affairs of Alinta Limited and The Australian Gaslight Company. The declaration and orders related to the circumstances of Alinta and AGL each making a hostile, scrip takeover offer for the other, and the potential for acceptances and transfers of shares under the Competing Offers to contravene section 259C of the Corporations Act.**

## SUMMARY

1. Following an unsuccessful approach by Alinta Limited<sup>1</sup> (**Alinta**), in which Alinta proposed a merger between Alinta and The Australian Gas Light Company (**AGL**), AGL announced on 13 March 2006, its intention to make a scrip takeover offer for all of the shares in Alinta (**AGL Offer**). On 20 March 2006, Alinta announced its intention to make a scrip offer for all of the shares in AGL (**Alinta Offer**). On 03 April 2006, AGL applied to the Panel for a declaration of unacceptable circumstances and orders in relation to the affairs of Alinta and of AGL.
2. The primary issue before the Panel was that if two companies were making simultaneous takeover offers for each other (**Competing Offers**), and one offeror acquired control of the other<sup>2</sup> then any purported transfer of shares under the second offer would, be void under section 259C of the Corporations Act 2001 (*Cth*)<sup>3</sup>. The second offeror would be precluded from processing acceptances received from the rival target shareholders because of section 259C (**Conflicting Control Scenario**).
3. However, the definition of control in section 259E for the purposes of section 259C is not a bright line test, and whether one or other of the two competing offerors

<sup>1</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>2</sup> AGL cast the problem in terms of it gaining a relevant interest in more than 50.1% of the voting shares in Alinta, but the Panel considered that because of the wording of section 259C the problem was likely to arise at a lower level of shareholding than 50.1%.

<sup>3</sup> All statutory references are to the Corporations Act, unless specifically indicated.

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“controlled” the other at any particular time may well be capable of vigorous dispute and great uncertainty, especially as the Competing Offers were scrip offers and new shares, affecting control of the competing offerors, could be being continuously issued during the period of contested control.

4. The uncertain operation of sections 259C and 259E, the real prospect of dispute, and the expense and delay of obtaining a judicial determination of what effect section 259C had had on the two competing takeover offers would be seriously detrimental to shareholders who had accepted one offer or the other, and possibly both, and the market for control over both companies’ shares.
5. Concern about the possible effects of acceptance transfers being voided, and the uncertainties of determining the control of the two companies, would likely inhibit acceptances of each offer and an efficient market in shares of each offeror.
6. The Panel considered that the above issues gave rise to unacceptable circumstances. The Panel considered that the absence of disclosure in relation to the Conflicting Control Scenario also constituted unacceptable circumstances.
7. The Panel made orders that each offer contain non-waivable defeating conditions that:
  - (a) the offeror acquired more than 50% of its target; and
  - (b) the rival offeror acquired less than 50% of the first offeror.
8. The Panel’s orders allowed a clearly successful offeror (i.e. it achieved over 50% of the shares in its target) to complete its takeover quickly and conclusively if it gained the requisite support and the other offeror did not (i.e. it achieved less than 50% of the shares in its target).
9. The Panel advised both parties, and the market, that it would reserve power to consent to either of the offerors waiving the Panel’s conditions even though the defeating conditions had not been satisfied. This would give the Panel the flexibility to break a stalemate if one developed, or if there was a clear and conclusive outcome available consistent with the law and an efficient, competitive and informed market.

## THE PROCEEDINGS

10. These reasons relate to an application (**Application**) to the Panel from AGL on 3 April 2006 in relation to the affairs of Alinta. The Panel commenced proceedings on 5 April 2006 and sent parties a brief on 7 April 2006. The Panel provided parties with a preliminary decision letter on 13 April 2006 setting out the Panel’s preliminary thoughts on the Application and how it proposed to determine the issues.
11. The Panel proposed undertakings from Alinta and AGL which it considered would remedy the unacceptable circumstances which it had preliminarily found. Alinta advised the Panel that it would not provide the undertakings. Accordingly, on 22 April 2006, the Panel advised the parties of the orders that it proposed to make and sought submissions from the parties. The Panel considered the submissions and made final orders on 23 April 2006.

## THE PANEL

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

## APPLICATION

### Background

15. In late 2005, AGL announced a proposal under which AGL's retail energy business would be separated from its infrastructure business (**Demerger**). AGL proposed to achieve this by a scheme of arrangement, and on 10 February 2006, the Federal Court of Australia made orders to convene a meeting of the shareholders of AGL to consider, and if thought fit, approve the Demerger.
16. On 21 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.
17. On 3 March 2006, Alinta released to ASX details of its merger/demerger proposal with AGL.
18. On 12 March 2006, the board of directors of AGL resolved:
  - (a) to reject the Alinta merger/demerger proposal;
  - (b) to make the 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 in favour of the Demerger; and
  - (d) to seek the approval of the Federal Court to cancel the scheme meeting in respect of the Demerger.
19. On 13 March 2006, AGL publicly announced that it intended to make the 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.

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20. On 20 March 2006, Alinta publicly announced the Alinta Offer which was on the basis of a ratio of 1.773 Alinta Shares for every AGL Share<sup>4</sup>.
21. On 24 March 2006, Alinta served a bidder's statement dated 24 March 2006 on AGL.
22. On 31 March 2006, Alinta lodged with ASIC a supplementary bidder's statement and replacement bidder's statement dated 31 March 2006.

### Declaration and orders sought in the Application

23. AGL sought the following:
  - (a) a declaration of unacceptable circumstances under section 657A in relation to the affairs of Alinta and AGL, on the basis of the circumstances referred to in the Application (i.e. the Alinta Offer);
  - (b) an interim order under section 657E(1) that Alinta be restrained from dispatching its Bidder's Statement until the complaints in the Application were determined;
  - (c) an order under section 657D(2) that the Alinta Offer include the following terms:
    - (i) that Alinta would not declare the Alinta Offer free from the 50.1% defeating condition unless Alinta had acquired a relevant interest in at least 50.1% of the AGL Shares in respect of which the Alinta Offer was made as a result of on-market acquisitions of AGL Shares or the receipt of valid acceptances of the Alinta Offer; and
    - (ii) that the Alinta Offer would immediately terminate if AGL acquired a relevant interest in at least 50.1% of the Alinta Shares in respect of which the AGL Offer was made as a result of on-market acquisitions of Alinta Shares or the receipt of valid acceptances of the AGL Offer. For the avoidance of doubt, in this circumstance Alinta would be required to return any acceptances of its Offer which it had received at this time.
  - (d) an order under section 657D(2) that the AGL Offer include the following terms:
    - (i) that AGL would not declare the AGL Offer free from the proposed defeating condition that "at the end of the Offer Period, AGL has a relevant interest in more than 90% (by number) of Alinta Shares" unless it had acquired a relevant interest in at least 50.1% of the Alinta Shares in respect of which the AGL Offer was made as a result of on-market acquisitions of Alinta Shares or the receipt of valid acceptances of the AGL Offer; and
    - (ii) that the AGL Offer would immediately terminate if Alinta acquired a relevant interest in at least 50.1% of the AGL Shares in respect of which the Alinta Offer was made as a result of on-market acquisitions of AGL Shares or the receipt of valid acceptances of the Alinta Offer. For the avoidance

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<sup>4</sup> The ratio of 1:1.773 is the same as the ratio proposed by Alinta to AGL in its initial merger proposal, and is the converse of the 1:0.564 ration proposed under the AGL Offer. However, Alinta would say that its merger proposal was the initiator of both the offers, so in fact, the ratio in the AGL Offer was reflecting the Alinta Offer not the other way around.

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of doubt, in this circumstance, AGL would be required to return any acceptances to the AGL Offer received at this time.

## UNACCEPTABLE CIRCUMSTANCES

### Section 259C

24. The Panel characterised the primary problem before it as follows:
- (a) there were soon to be two competing takeover offers in the market where AGL was bidding for Alinta and Alinta was bidding for AGL, both offering scrip in themselves;
  - (b) if both the Alinta Offer and AGL Offer were free of defeating conditions, and one offeror (**first offeror**) acquired control (as defined in section 259E) of the other (**second offeror**), section 259C would void any transfer of shares in the first offeror to the second offeror on the acceptance of an offer under the second offeror's offer, by shareholders of the first offeror;
  - (c) however, the definition of control in section 259E for the purposes of section 259C is not a bright line test, and whether one or other of two competing offerors "controlled" the other at any particular time could well be capable of vigorous dispute and great uncertainty, especially as the two offers were scrip offers and new shares affecting control of the rival offerors could be being continuously issued during the period of contested control;
  - (d) the uncertain operation of sections 259C and 259E, the real prospect of dispute, and the expense and delay of obtaining a judicial determination of what effect section 259C had had on the two competing takeover offers would be seriously detrimental to shareholders who had accepted one offer or the other, and possibly both, and the market for control over both companies' shares; and
  - (e) concern about the possible effects of acceptance transfers being voided, and the uncertainties of determining the control of the two companies, would likely inhibit acceptances of each offer and an efficient market in shares of each offeror.
25. In the case of two competing offers, control under section 259E would be exceedingly difficult to assess where the effective control of an offeror had not been tested on the floor of a general meeting and, in the circumstances of Competing Offers, would almost certainly be subject to challenge.

### Circumstances

*Strict (narrower) or purposive (wider) reading of Glencore*

26. The Panel looked at the circumstances that were before it and decided that there were two possible sets of circumstances which might be considered to have an effect on the control or potential control, or an effect on the acquisitions or proposed acquisitions of a substantial interest in either or both of Alinta and AGL.
27. Whether the Panel was able to base its decision on the one or other of the sets of circumstances depended on whether the Panel took a strict (or narrower) reading of

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the decision in *Glencore International AG (ACN 114 271 055) v Takeovers Panel* [2006] FCA 274 (*Glencore*) or whether it took a wider, more purposive reading.

28. The first set of circumstances was the effect, on the shareholders of Alinta and AGL, of the possibility of the Competing Offers leading to a Conflicting Control Scenario.
29. The second set of circumstances was essentially those set out in paragraph 24 above concerning section 259C, i.e. the existence of Competing Offers, where neither Competing Offer contained the type of defeating condition which would prevent or eliminate a Conflicting Control Scenario.

### Current effect on Alinta and AGL shareholders

#### *Circumstances*

30. For the Panel to base its decision on the first set of circumstances i.e. the response of Alinta and AGL shareholders and the reaction of the market, would be consistent with a strict, or narrower, reading of *Glencore*. On that reading, it would only be open to the Panel to make a declaration and orders where the Panel could identify a **current** effect of the relevant circumstances on control, the acquisition of a substantial interest, disruption to the market or adversely affecting shareholders, and would not be open to the Panel to make a declaration and orders **preventing** unacceptable circumstances where the Panel was only faced with the possibility of the circumstances causing an effect.
31. On the evidence before it, the Panel was not confident that the second set of circumstances i.e. the fact of the Competing Offers, and the potential for the Conflicting Control Scenario and the potential for transfers of shares under acceptances being voided by section 259C, currently had an effect on control of Alinta or AGL sufficient to meet the strict, or narrower, reading of *Glencore*.
32. That was because the actual occurrence of the second set of circumstances which would undoubtedly be seriously disadvantageous to a range of persons, was only a possibility. The existence of a Conflicting Control Scenario depended on both offers being declared free of defeating conditions and on both offerors receiving sufficient acceptances to take them into a range where, under section 259E, each offeror could argue that they controlled the other. As a Conflicting Control Scenario was not currently in existence, even though there was a real possibility that a Conflicting Control Scenario could come into existence, on the narrow reading of *Glencore* the Panel could not say that the circumstances of Competing Offers without the type of defeating conditions which the Panel ordered, were currently having an effect, and so could not act to prevent them.
33. However, the Panel considered that that would not apply to the shareholders in Alinta and AGL. The Panel considered that the shareholders who became aware of the issues<sup>5</sup> would look at the possibility of the Conflicting Control Scenario, see that

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<sup>5</sup> The Panel noted that there were two classes of Alinta and AGL shareholders whose actions would likely be affected by the circumstances (in terms of disclosure) before it. The first group included those shareholders who read the contemporaneous media and other reports concerning the Competing Offers. They would be alerted to the prospect, and consequences, of the Conflicting Control Scenario at an early stage. They would likely be inhibited from accepting either offer (for the reasons set out in paragraphs 34 to 37). The second group included those shareholders whose primary information source were the bidder's

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it was a real possibility and see the potential adverse effects on a shareholder who had accepted either offer (i.e. potentially having their shares frozen for a significant period). The Panel considered that the submissions it received in evidence supported these inferences and conclusions.

#### *Effect on control or acquisition of a substantial interest*

34. The Panel considered that Alinta and AGL shareholders, in the face of the possibility of a Conflicting Control Scenario, and particularly the prospect of uncertainty as to when the outcome of the rival offers would be known, and the potential consequent effects on accepting shareholders, would be inhibited from accepting either offer. The Panel considered that the uncertainty and prospect of delay would have a chilling effect on the acceptances of either offer. The Panel considered that deterring AGL shareholders from making decisions whether or not to accept the Alinta Offer, or dispose of the shares in other ways, and affecting the decisions of Alinta shareholders similarly in relation to the AGL Offer would have an effect on control or potential control of Alinta and AGL because it would tend to deny each offeror from acquiring control of the other and would tend to prevent each offeror from acquiring a substantial interest in the other.
35. While it would not be feasible to quantify the effect in terms of percentage voting power, which the Panel considered that even a very strict reading of *Glencore* would not require, nor even to decide firmly that the uncertainty would, of itself, prevent one or other of Alinta and AGL acquiring control, or a substantial interest in the other, the Panel considered that the uncertainty would have an effect that was not immaterial, and that that effect would last until the uncertainty was resolved.
36. The Panel based its view on the submissions of the parties and on the Panel members' experience in takeovers and securities markets. Both parties acknowledged the possibility of a Conflicting Control Scenario arising (although Alinta submitted that the possibility was unlikely). The Panel considered that Alinta and AGL shareholders would likely be confused and uncertain in the face of the possibility of the type of delay and uncertainty that a Conflicting Control Scenario would likely entail.
37. Uncertainty is a material disincentive to shareholders accepting takeover offers. The Panel members considered that this was likely to be a material issue affecting the decisions of Alinta and AGL shareholders.

#### *Purposes of the Chapter*

38. The Panel had regard to the purposes of Chapter 6, as set out in section 602, and the provisions of Chapter 6. The Panel considered that Alinta and AGL shareholders being inhibited from accepting offers which they might otherwise accept, because of uncertainty, and concern over the possibility of their shares being tied up for long

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and target's statements of the relevant offer. Once informed of the prospect, and consequences, of the Conflicting Control Scenario, they would react similarly to the first group. However, unless and until they were informed, they would act in a different manner, because they were unaware of the prospect, and consequences, of the Conflicting Control Scenario. Shareholders in this group would therefore more likely accept either of the Competing Offers but for the information deficiencies that the Panel identified in the Alinta Bidder's Statement (as set out in paragraphs 49 and 50).

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periods in a dispute over Conflicting Control Scenario was not likely to promote an efficient, competitive and informed market for the control of shares in Alinta or AGL. Therefore, the Panel was assured in its view that the circumstances (if the strict, or narrower, reading of *Glencore* were adopted) were unacceptable.

#### *The public interest*

39. The Panel considered that making a declaration of unacceptable circumstances would not be against the public interest. The Panel considered that a declaration of unacceptable circumstances, paving the way for remedial orders to reduce uncertainty and concern for the two bodies of shareholders, would enhance the efficiency of the market for control of the shares in Alinta and in AGL, and assure the shareholders of both companies that they could make their decisions, whether or not to accept the offers made to them, without concern for a Conflicting Control Scenario and the consequences to accepting shareholders. The Panel did not consider that there were any public interest reasons for allowing the Competing Offers to proceed in the form that was put before the Panel or for not making a declaration of unacceptable circumstances.

#### **Conflicting Control Scenario**

##### *Circumstances*

40. For the Panel to base its decision on the second set of circumstances would be consistent with a wider, or purposive, reading of *Glencore*, the Panel's relevant legislation and secondary material. On that reading, it would be open to the Panel to make a declaration and orders preventing unacceptable circumstances where the Panel was faced with a real, and not merely fanciful, possibility of circumstances causing an effect on control, the acquisition of a substantial interest, having regard to the disruption to the market and adverse effects on shareholders.
41. On the evidence before it, the Panel was not confident that the fact of the Competing Offers, and the potential for the Conflicting Control Scenario and the potential for transfers of shares under acceptances being voided by section 259C, currently had an effect on control of Alinta or AGL sufficient to meet the strict, or narrower, reading of *Glencore*. However, the Panel was convinced that a Conflicting Control Scenario would have an adverse effect on the efficient, competitive and informed market for control of the shares in Alinta and AGL because of the significant likelihood of prolonged and difficult litigation and dispute over control of the two companies.

##### *Effect*

42. The Panel considered what the effect of the Conflicting Control Scenario might be on control or potential control of AGL or Alinta, or the acquisition, or proposed acquisition, of a substantial interest in AGL or Alinta. The Panel considered the evidence before it in submissions, public announcements by the parties, and the experience and knowledge of the three sitting members.
43. The Panel was convinced that if the two offers were declared to be free of defeating conditions, and each offeror acquired shares which could be argued to give it control over the other, it was highly likely that:
- (a) there would be prolonged disputes and litigation;

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- (b) neither offeror would be prepared to release acceptances of shares until such time as the issues had been resolved;
  - (c) accepting shareholders would be unable to deal with their shares, for example, they would not be able to sell their shares on-market, or accept any rival offer by a third party; and
  - (d) control of Alinta and AGL would be uncertain and unable to be resolved until the disputes and litigation concerning sections 259C and 259E were resolved.
44. The Panel considered that this would likely prevent either offeror from gaining clear control of the other for some period of time and would inhibit either offeror from acquiring a substantial interest in the other.

#### *Purposes of the Chapter*

45. The Panel had regard to the purposes of Chapter 6, as set out in section 602, and the provisions of Chapter 6. The Panel considered that the possibility of a Conflicting Control Scenario arising was not likely to promote an efficient, competitive and informed market for the control of shares in Alinta or AGL. The Panel considered that the circumstances that a Conflicting Control Scenario might arise, because the Competing Offers did not contain defeating conditions which would prevent a Conflicting Control Scenario, were in conflict with the purposes of the Chapter set out in section 602 that acquisition of control over the shares of Alinta and AGL take place in an efficient, competitive and informed market. Therefore, the Panel was assured in its view that the circumstances (if the wider, or purposive reading of *Glencore* were adopted) were unacceptable.

#### *The public interest*

46. The Panel considered that making a declaration of unacceptable circumstances would not be against the public interest. The Panel considered that a declaration of unacceptable circumstances, paving the way for remedial orders to reduce the prospect of a Conflicting Control Scenario arising would enhance the efficiency of the market for control of the shares in Alinta and in AGL, and the Competing Offers. The Panel considered that this would assure the shareholders of both companies that they could make their decisions, whether or not to accept the offers made to them, with greater certainty and without concern for a Conflicting Control Scenario and the consequences to accepting shareholders. The Panel did not consider that there were any public interest reasons for allowing the Competing Offers to proceed in the form that was put before the Panel or for not making a declaration of unacceptable circumstances.

## DISCLOSURE

47. The Alinta Bidder's Statement contained no disclosure about the possibility of a Conflicting Control Scenario arising, nor the potential for, and effect of, acceptance transfers being voided (**information deficiencies**). The Panel considered that this was material information which had the potential to affect shareholders' decisions and which they needed to be able to assess the merits of the Alinta Offer and the AGL Offer.

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#### *Circumstances*

48. The Panel considered that the information deficiencies constituted circumstances which would, or would likely, have an effect on control or potential control of Alinta and AGL, or the acquisition, or proposed acquisition, of a substantial interest in Alinta and AGL.

#### *Effect*

49. The Panel considered that the information deficiencies would, or would likely, cause those AGL shareholders who relied primarily on the respective bidder's statements to make decisions whether or not to hold their shares, accept the Alinta Offer, or dispose of the shares in other ways on the basis of misleading and inadequate information. The Panel considered that this would have an effect on control of Alinta and AGL because those shareholders who would likely have been deterred from accepting the Alinta Offer and AGL Offer had they known of the possibility and effects of the Conflicting Control Scenario would more likely accept the offers made to them, moving control towards the offeror and facilitating the offeror's proposed acquisition of a substantial interest.
50. AGL suggested that it would have been difficult, and probably impossible, for either AGL or Alinta to explain, in a clear and concise manner, the issues surrounding the Competing Offers and Conflicting Control Scenario such that shareholders could understand them. The Panel did not accept this submission.

#### *Purposes of the Chapter*

51. The Panel had regard to the purposes of Chapter 6, as set out in section 602, and the provisions of Chapter 6. The Panel considered that the information deficiencies were likely to detract from an efficient, competitive and informed market for the control of shares in Alinta or AGL and were likely to cause Alinta and AGL shareholders not to have enough information to enable them to assess the merits of either proposal i.e. the Alinta Offer or AGL Offer. The Panel considered that the information deficiencies were thus in conflict with the purposes of the Chapter set out in section 602. Therefore, the Panel was assured in its view that the circumstances (if either reading of *Glencore* were adopted) were unacceptable.

#### *The public interest*

52. The Panel considered that making a declaration of unacceptable circumstances would not be against the public interest. The Panel considered that a declaration of unacceptable circumstances, paving the way for remedial orders to remedy the information deficiencies would give the shareholders of Alinta and AGL enough information to enable them to assess the merits of the Alinta Offer and AGL Offer (at least in respect of the possibilities of a Conflicting Control Scenario) and would enhance the efficiency of the market for control of the shares in Alinta and in AGL. The Panel did not consider that there were any public interest reasons for allowing the Competing Offers to proceed in the form that was put before the Panel or for not making a declaration of unacceptable circumstances in relation to the information deficiencies.

## DISCUSSION

### *Directors' duties or other ways of determining the outcome*

53. It was suggested to the Panel in the proceedings that leaving resolution of a Conflicting Control Scenario to the operation of section 259C, legal remedies and the directors' duties of the Alinta and AGL boards would be adequate. It was submitted that "if both bidders act appropriately", the Conflicting Control Scenario would be unlikely to arise in circumstances where there is any prospect that the AGL Offer might become unconditional.
54. However, the submissions that the Panel received did not convince it that it taking no action, and leaving the determination of a section 259C problem to the courts if one arose, would lead to a timely resolution of disputed control of AGL or Alinta shares.
55. The Panel considered that there were scenarios where both sets of directors might, in good faith, believe they were entitled to declare their offers free from defeating conditions.
56. For example, if both offerors believed that their offers were in the best interests of their shareholders, and the other bid was not currently near a level of acceptances which might afford the rival offeror control, the directors of either offeror might feel that it was in their own shareholders' best interests to declare their offer free of defeating conditions to encourage a flow of acceptances to take their bid to a controlling position before the rival bid approached a level which might be considered to be a controlling position under section 259E.
57. In addition, the Panel considered that leaving resolution of the issues to the courts would leave AGL and Alinta shareholders with material concerns that if they accepted either offer, their shares may be tied up for a long period of litigation, leaving them unable to deal with their shares.
58. The Panel considered that this possibility meant that it was not open to the Panel to leave the resolution solely to the directors' duties obligations of the two rival boards.
59. It was suggested that this was not a major concern, because the shareholders would retain ownership of the shares throughout the court proceedings. However, the Panel considered that this was not a factor which would assure AGL or Alinta shareholders that they could accept either offer with confidence and that their shares would not be tied up for a long period.

### *Conditionality threshold*

60. The Panel considered that a formal, and bright line, control threshold was appropriate in the particular circumstances of these two competing takeovers. Therefore, it set the transition threshold under its orders at 50%, being a level which is objectively determinable, and at which there could be no argument as to control.
61. Setting the Conflicting Control Scenario in terms of section 259C (and therefore section 259E) would introduce the potential for dispute between parties as to whether or not either of the offerors controlled the other, and if so, at what point in time. The definition of control in section 259E for the purposes of section 259C is not a bright line test, and whether one or other of two competing offerors "controlled"

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the other at any particular time may well be capable of vigorous dispute and great uncertainty.

62. In the case of two competing offers, control under section 259E would be exceedingly difficult to assess where the effective control of an offeror had not been tested on the floor of a general meeting and, in the circumstances of Competing Offers, would almost certainly be subject to challenge.
63. The Panel took note of ASIC's and AGL's submissions concerning the uncertainty associated with using either the section 259E test or a 40% threshold for determining control and which offer should be allowed to proceed to unconditionality.
64. Although section 259C may operate at a lower percentage, the Panel's proposal was intended to replace the operation of section 259C and to reflect the decision of the holders of a majority of shares in one company to sell to the other company, at the bid terms or closely connected terms<sup>6</sup>. The Panel considered that its ability to consent to an offeror freeing its bid from defeating conditions once the result of the offers was clearer was sufficient to address any concerns about the 50% test being too inflexible or too high.

#### *Stalemate*

65. The Panel recognised that under the defeating conditions which its orders required, circumstances could arise where both offers could fail, or be prevented from being declared free of defeating conditions. This could happen if there was no clear winner: for example, each offer received acceptances for less than 50%, or each offer received acceptances for more than 50%.
66. One of the issues put before the Panel was that it should map out, prior to the offers commencing, a roadmap for a number of situations which might arise in the contest between the two companies other than the clear outcome which the Panel's current orders allow. However, neither of the two companies was able to give the Panel any certainty about the range of circumstances which might arise as the two takeover offers proceeded. Nor could either company provide any assurance that the Panel could specify now, solutions which would avoid uncertainty and complication outside the single type of scenario which the Panel's orders allow to proceed to a clear and timely result in keeping with an efficient, competitive and informed market.
67. In the absence of any certainty as to what the landscape might look like, the Panel advised both parties that it would accept undertakings, or make orders, which facilitated a clear outcome but would not attempt to determine in advance, what arrangements should be accepted in any of the uncertain outcomes. The Panel considered it would be undesirable for it to prescribe a mechanism in advance

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<sup>6</sup> If Alinta gained control over AGL it would be at least in part because of the 19.9% of AGL which it initially acquired on-market. However, because of the action of section 621(3) the value, or terms, which Alinta paid in acquiring the 19.9% were closely related to the value, or terms, which Alinta offered in the Alinta Offer so it would be safe for the Panel to look at Alinta's total holding in assessing whether a majority of AGL shareholders had considered the terms of the Alinta Offer sufficiently attractive to give Alinta control of AGL.

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where, in effect, it would decide the outcome where shareholders of the two companies had not demonstrated a decisive preference.

68. Therefore the Panel's orders allowed for an offer to be freed from all defeating conditions only where one offeror had gained unarguable control and the other had not. The Panel advised both parties that it would wait until the actual circumstances were clear before deciding where the interests of an efficient, competitive and informed market lay in the range of circumstances which might eventuate where neither of the offerors had conclusively won. The Panel's ability to consent to either of the offerors freeing their offers from conditions allowed it the flexibility to review the circumstances after the offers had proceeded and the outcomes become clearer. The Panel advised the parties and the market that it was prepared to use its discretion to break a stalemate if one developed, or if there was a clear and conclusive outcome available consistent with the law and an efficient, competitive and informed market.
69. However, to give some guidance, the Panel noted at least one type of circumstances where it might be proper to consent. Such an example might be if each offeror had "acquired" more than 50.1% of the shares in the other offeror at a time when neither could declare their offer free of defeating conditions. In such a case the defeating condition that the other bidder not acquire more than 50% would prevent each bidder's offer from completing i.e. a stalemate. However, if subsequently, one offeror could but the second could not, declare its bid free of defeating conditions because of an externally controlled condition, that may be an appropriate case for the Panel to allow the first offeror to declare its offer free of defeating conditions, despite the second offeror having also acquired more than 50% under its offer and triggering that defeating condition in the first offer.

#### *Probative material*

70. The Panel relied on the submissions and rebuttals of the parties as the probative material on which it should make its decision. The Panel considered that this was consistent with the clear intention of the legislature in codifying the procedures for the conduct of Panel proceedings in Division 3 of the Australian Securities and Investments Commission Regulations 2001, and the clear intent of the legislature that the Panel base its decisions on the submissions it received in proceedings from parties to the proceedings. The Panel considered that it could properly rely on the submissions of the boards of Alinta and AGL as representing the interests of their shareholders<sup>7</sup>. Each party had an opportunity, if it wished, to produce evidence, such as expert opinions.
71. The Panel also took into account, when assessing the probative value of the submissions of parties, that section 199 prohibits false or misleading information in submissions to the Panel, and that contravention of section 199 is a criminal offence.
72. The Panel did not consider it feasible or practical, in the circumstances before it, for it to seek, as additional probative evidence, submissions from Alinta or AGL

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<sup>7</sup> Hawker De Havilland Limited; Ian Edric Prowse and Westinghouse Brake and Signal Company (Aust.) Limited and: Australian Securities Commission and BTR Plc and BTR Nylex Limited 6 ACSR 579 (1991) at 41.

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shareholders as to their likely intentions if properly informed of the possibility of the Conflicting Control Scenario and possible consequences. The Panel considered that:

- (a) the time which would be required to inform Alinta and AGL shareholders properly (given that the Panel considered that they had been inadequately informed so far), and to allow them to consider and respond to any Panel requests for submissions, would be too long;
- (b) it would be impractical and infeasible for the Panel or any other agency to receive and assess submissions from tens of thousands of Alinta and AGL shareholders; and
- (c) such enquiries fell clearly outside the directions and intentions of the legislature in setting the statutory timeframes of the Panel and the directions of the Panel's legislation to conduct its proceedings as fairly, with as little formality and in as timely a manner as a proper consideration of the matters before it permit.

### Composition of Alinta and AGL shareholder populations

73. One of the issues which the Panel considered in assessing the likelihood of the possibility of a Conflicting Control Scenario arising was that of the composition of the two bodies of shareholders. If there was a very significant overlap between the two shareholder bodies, as will frequently be the case for companies at the top of the Australian share market, the prospect of those significant shareholders accepting both bids would be low i.e. the controlling joint body of shareholders would determine which of AGL and Alinta would control the merged body.
74. However, if there was little or no material overlap of the two shareholder bodies, the possibility of each shareholder body deciding to accept the rival body became materially more real, and a possibility that the Panel should address.
75. The submissions received by the Panel indicated that the effective overlap was likely to be less than 12%. On that basis, the Panel decided that it could not properly ignore the prospect of each of Alinta and AGL acquiring sufficient shares in the other for the prospect of control under section 259E being open to argument.

## OTHER ISSUES

76. In the application, AGL raised a number of other issues in relation to the Competing Offers and the Conflicting Control Scenario. The Panel raised the issues in the Brief and received detailed submissions on them. In considering the submissions, the Panel decided that the resolution it proposed would either deal with them adequately, or make them irrelevant. The following is a brief description of the other issues which were raised and the reasons that the Panel did not need to address them in its final orders.

### Terminating the unsuccessful offer

77. AGL suggested that the Panel should require or order that each offer have a term that it would terminate in the event of the first offeror receiving sufficient acceptances to give it a relevant interest in more than 50.1% of the other offeror (**Termination Term**).

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78. AGL put forward two primary reasons for this, the first was to reduce market confusion and to provide a clear cut off of the unsuccessful offer. The second was to allow shareholders of the successful offeror to regain control of shares they had accepted into the unsuccessful offer, in circumstances where control of both companies had recently been decided and shareholders would likely wish to have ready access to their shares to make investment decisions in the light of the changed circumstances.
79. The Panel decided it would not be necessary to require either offer to be subject to any form of Termination Term. In part, this was because of potential problems which a Termination Term might pose, and in part because it considered one would not be necessary.
80. The Panel considered that the ability of a successful offeror to cause the unsuccessful offeror, as a controlled entity, to apply to ASIC for consent to withdraw the rival offers would be adequate to address concerns which had previously suggested a Termination Term would be desirable. The Panel assumed that any successful offeror would do so promptly to allow shareholders who had accepted the unsuccessful bid to deal with their shares promptly. In addition, the Panel's orders would prevent any prolonged dispute and potential litigation over "control" and would also ensure that shareholders who had accepted into the unsuccessful of the Competing Offers would receive control of their shares back in a timely manner.
81. Adverse issues which a Termination Term might generate included whether:
- (a) any Termination Term should only operate where the first offeror was also currently willing and able to declare its offer free of defeating conditions (disregarding any Conditionality Term) and actually did so;
  - (b) a Termination Term should be waivable under any circumstances;
  - (c) a Termination Term would contravene, or be voided by, section 624; and
  - (d) such a contravention, or voiding, would be capable of being resolved by either an ASIC modification of section 624, or a Panel order requiring each offeror to insert a Termination Term into their offer.

#### First past the post

82. A Termination Term (when implemented with a Conditionality Term<sup>8</sup>) would effectively impose a first past the post success regime for the two Competing Offers i.e. the first offeror to reach 50.1% would be successful and the other offeror's bid would, or must, fail and terminate.
83. The Panel explored the implications and possible effects of an express "first past the post" regime. The regime which the Panel adopted in its orders is, in essence, a first past the post regime, but without a Termination Term.
84. Such a regime has significant potential to impose the sort of time and other pressures on offerees that section 624 is intended to prevent. The Panel considered how it

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<sup>8</sup> The Panel's final orders impose a Conditionality Term i.e. neither offeror may declare its offers to be free from defeating conditions unless it had acquired more than 50% of its target and the other offeror had acquired less than 50% of it.

## Takeovers Panel

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might implement a first past the post regime without also negating the purpose of section 624.

85. The primary mechanism that the Panel considered to address this was to require that there be a minimum period during which both offers were open before either offer could be declared free of defeating conditions. This would ensure that target shareholders had a reasonable period in which to consider the offers<sup>9</sup>. They would also be less likely to be susceptible to pressure tactics from either offeror pressing them to accept immediately because of the risk of losing the benefits of the offer if the other offeror was successful.
86. In the circumstances before it, the Panel considered that there would be an adequate time for both groups of shareholders to consider their options with good information about the two different proposals before them, even though the two bidder's statements had not yet been published. Although the AGL Offer was announced earlier than the Alinta Offer, the Alinta Bidder's Statement was dispatched to AGL shareholders before the AGL Bidder's Statement. Both offers were scrip offers which offered shares in companies which would contain identical assets<sup>10</sup>. Therefore, the Alinta Bidder's Statement contained much the same information as the AGL Bidder's Statement would be required to contain, the differences relating principally to the different management visions and track records. In addition, both offerors had conducted significant media and other communications to their shareholders setting out the issues before them under the Competing Offers, and the share exchange ratio proposed under each offer was essentially the same.
87. The Alinta Offer was open until 31 May 2006 and the AGL Offer<sup>11</sup> was due to be dispatched by 13 May 2006 at the latest. On that basis, the Panel considered that there would be an adequate period during which both offers would be open without any Panel order, and both Alinta and AGL shareholders would have had a much longer period to consider the Competing Offers.
88. The Panel considered that shareholders of both companies knew the terms of both offers. Shareholders of AGL were free to choose whether or not to:
- (a) accept the Alinta Offer;
  - (b) wait to see whether the Alinta shareholders accepted the forthcoming AGL Offer; or
  - (c) sell their shares on-market.
89. In its considerations, the Panel recognised, as it has in previous decisions, that the Australian takeovers regime does not have any inbuilt mechanism, or indeed

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<sup>9</sup> However, the minimum periods which the Panel considered were all less than one month.

<sup>10</sup> Whether Alinta acquired AGL, or the other way around, the ultimate company in both cases would hold the same assets (subject to the different demerger plans), and therefore the shares offered as consideration by both Alinta and AGL would have essentially identical underlying assets. Therefore, the information about the assets underlying the shares offered by each of the bidders would be essentially similar, so AGL and Alinta shareholders would gain information from the Alinta Bidder's Statement, despite the AGL Bidder's Statement not being dispatched for some time.

<sup>11</sup> The AGL Offer was announced on 13 March 2006, and the AGL Bidder's Statement was lodged with ASIC on 24 April 2006.

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expressed policy, for imposing any minimum period during which rival offers must be open. The issue arises whenever there are competing offers (whether there are two offerors making takeover offers for the same target, or, in this more unusual case, where offeror and target are bidding for each other). Unlike other regimes, such as the UK, Australia does not seek to align offer periods for rival bids. While the Competing Offers scenario is somewhat different from the scenario of two rival bids for the same target, the issues are reasonably analogous, and the Panel applied the current regime of the takeovers chapter that the minimum statutory periods set out in the Act will be enough to allow a rival offeror to present a counter offer to shareholders and shareholders are assured of a reasonable period to consider each offer.

#### **First in-best dressed**

90. It was submitted to the Panel that a proper way of resolving the Conflicting Control Scenario would be to allow the first moving offeror to conduct its offer alone and without competition, and to require the second moving (or reactive) offeror not to pursue its offer until a result had been achieved in the first offer. The only example where the UK Takeover Panel had considered a Competing Offers scenario was put forward as a precedent for the Panel to follow.
91. The Panel considered the proposal, but considered that the circumstances before it made equitably determining which offeror was the first mover infeasible.

#### **Issue of shares during bid – s617, 661A, funding under the offers, share spiral**

92. AGL submitted that there were a number of issues which would cause problems if both offers were allowed to be declared free of defeating conditions and both offerors commenced issuing shares on acceptance of their offers.

*s617*

93. AGL noted that section 617 would not allow AGL to extend its offer to shares issued by Alinta as consideration for completed acceptances of the Alinta Offer, without ASIC relief (and vice versa for the Alinta Offer).
94. AGL submitted that the requirement for Alinta to issue Alinta shares to accepting AGL shareholders under the Alinta Offer and for AGL to issue AGL shares to accepting Alinta shareholders under the AGL Offer would have adverse market implications both where the Alinta Offer and the AGL Offer extended to shares and where the Alinta Offer and AGL Offer did not extend to shares issued under the competing offer. For example, if either offeror sought relief to allow it to offer for the newly issued shares, and that offeror included a cash component in its offer, ensuring that the offeror had adequate funds to meet its obligations would be very difficult with a moving number of target shares.
95. As noted above, the Panel considered that its orders would prevent the concerns raised by AGL by providing that shares in an offeror would only be issued if that offeror was successful.

s661A

96. AGL submitted that section 661A may prevent a successful offeror from compulsorily acquiring all of the shares in the target, because shares issued by the rival offeror as consideration for completed acceptances of its offer would not be “securities in the bid class”, without ASIC relief.
97. The Panel did not agree with the contention, but considered that its orders would prevent the concerns arising.

#### **Treasury shares**

98. AGL submitted that shares which an unsuccessful offeror had acquired if its offer had been allowed to be declared free of defeating conditions would cause the successful offeror to acquire potentially a large number of “treasury shares”<sup>12</sup> in the event that the unsuccessful offeror had acquired unconditionally a significant, but not controlling, interest in the successful offeror prior to the successful offeror’s offer being declared unconditional and a Termination Term operating.
99. The Panel considered that the issue of future treasury shares would be adequately dealt with under the existing provisions of Part 2J.2 and therefore did not require consideration by the Panel.

#### **Corporate governance**

100. AGL raised the question of corporate governance for the successful offeror in the event that the unsuccessful offeror had acquired unconditionally a significant, but not controlling, interest in the successful offeror.
101. The Panel also considered that the issue of future corporate governance would be adequately dealt with under existing corporate governance provisions and practices and therefore did not require consideration by the Panel.

## **DECISION**

#### **Declaration**

102. The Application was in relation to the affairs of both AGL and Alinta, in addition, the circumstances identified in the Application affected the affairs of both AGL and Alinta. Because the Alinta Offer was a scrip offer, with AGL shareholders potentially owning 75% of the enlarged Alinta, the unacceptable circumstances also related to the control of Alinta and the proposed acquisition of a substantial interest in Alinta by AGL shareholders.
103. The Panel considered that the circumstances which it identified in relation to the affairs of Alinta, as a consequence of:
  - (a) the effects of the Alinta Offer and the AGL Offer on the affairs of Alinta;
  - (b) AGL shareholders potentially acquiring control of, or a substantial interest in, Alinta under the Alinta Offer;
  - (c) AGL potentially acquiring control of Alinta under the AGL Offer; and

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<sup>12</sup> Treasury shares being, in this case, shares in its controlling company held by an entity which it would be required to cease to hold under section 259D(1).

## Takeovers Panel

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- (d) the effect of the possibility of a Conflicting Control Scenario on the decisions of Alinta shareholders responding to the AGL Offer and the efficient competitive and informed market for control of Alinta shares,

were sufficiently connected and related to the Application and the circumstances it identified, that the Panel could make a declaration of unacceptable circumstances in relation to the AGL Offer for Alinta and the affairs of Alinta as well as the Alinta Offer and the affairs of AGL.

#### *Effect on Alinta and AGL shareholders - Conflicting Control Scenario*

104. As set out in paragraphs 26 to 46 above, the Panel considered that the possibility of a Conflicting Control Scenario, and the potential consequent effects on accepting shareholders, would inhibit AGL shareholders from accepting the Alinta Offer and Alinta shareholders from accepting the AGL Offer. The Panel considered that deterring AGL shareholders from making decisions whether or not to hold their shares, accept the Alinta Offer, or dispose of their shares in other ways, would have an effect on control or potential control of AGL and Alinta because it would inhibit Alinta acquiring control of AGL and would inhibit Alinta acquiring a substantial interest in AGL. The Panel considered that the circumstances would have the same effect on Alinta shareholders and the affairs and control of Alinta.
105. It appeared to the Panel that the circumstances of the Alinta and AGL shareholders being thus inhibited, having regard to the effect of the circumstances on control of AGL and Alinta, were unacceptable. The Panel considered that it was unacceptable for the efficient, competitive and informed market for control of shares in Alinta and AGL to be affected this way.
106. The Panel had regard to the purposes of Chapter 6, the other provisions of Chapter 6 and whether or not it would be against the public interest to make a declaration of unacceptable circumstances. The Panel considered that the circumstances were in conflict with the purposes of the Chapter set out in section 602 that acquisition of control over the shares of Alinta and AGL take place in an efficient, competitive and informed market. The Panel declared that the circumstances constituted unacceptable circumstances.

#### *Disclosure*

107. The Panel considered that information on the potential effects of a Conflicting Control Scenario and the potential operation of section 259C was information that was material to the decisions of AGL shareholders whether or not to accept the Alinta Offer. The Panel considered that the information would have made AGL shareholders more reluctant to accept the Alinta Offer, than they would have been when the Alinta Bidder's Statement suffered from the information deficiencies. As noted above, because the Alinta Offer was a scrip offer, with AGL shareholders potentially owning 75% of the enlarged Alinta, the unacceptable circumstances also related to the control of Alinta and the proposed acquisition of a substantial interest in Alinta by AGL shareholders.
108. The Panel considered that the information deficiencies would have an effect on control of Alinta and AGL because shareholders who would have been deterred from accepting the Alinta Offer and AGL Offer had they known of the possibility of

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the Conflicting Control Scenario would more likely accept the offers made to them, moving control towards the offeror and facilitating the offeror's proposed acquisition of a substantial interest.

109. The Panel had regard to the purposes of Chapter 6, the other provisions of Chapter 6, and whether or not it would be against the public interest to make a declaration of unacceptable circumstances. The Panel considered that the information deficiencies conflicted with the purposes of the Chapter set out in section 602 that acquisition of control over the shares of Alinta and AGL take place in an efficient, competitive and informed market and shareholders are given enough information to enable them to assess the merits of a proposal (in this case the Alinta Offer). The Panel declared that the circumstances of the information deficiencies constituted unacceptable circumstances in relation to the affairs of AGL and the affairs of Alinta.

### Orders

110. The Panel considered that it was appropriate to make orders which protected the rights and interests of Alinta and AGL shareholders who were affected by the circumstances which the Panel identified as unacceptable, or which ensured that the Alinta Offer and AGL Offer proceeded as if the unacceptable circumstances had not occurred.
111. The Panel assessed the effects on Alinta and AGL shareholders and their rights and interests, which the possibility of a Conflicting Control Scenario and information deficiencies caused or were likely to cause. The Panel considered that the shareholders of Alinta and AGL were the persons primarily affected by the possibility of a Conflicting Control Scenario and the information deficiencies, while the general market for Alinta and AGL shares were also affected by the possibility of a Conflicting Control Scenario and the information deficiencies.

### *Conflicting Control Scenario*

112. The Panel considered that the most appropriate way of protecting the rights and interests of Alinta and AGL shareholders who were affected by the circumstances which the Panel identified as unacceptable, or ensuring that the Alinta Offer and AGL Offer proceeded as if the possibility of a Conflicting Control Scenario had not occurred, was to order that the Alinta and AGL offers each be subject to non-waivable defeating conditions that would prevent the Conflicting Control Scenario eventuating.
113. The Panel considered that the ability it retained to consent to waiving of the defeating conditions gave the Panel the flexibility to break a stalemate if one developed, or if there was a clear and conclusive outcome available consistent with the law and an efficient, competitive and informed market. The Panel considered that this flexibility, and the fact that it had been clearly disclosed and explained to the market, reduced any adverse effects of its orders on Alinta and AGL.
114. The legislature requires under section 624 that an offer be extended by two weeks if an offeror's voting power in a target increases to more than 50% in the last week of an offer. The Panel considered that the fact of an offer being successful, or the Panel allowing an offeror to free its offer from the Panel's defeating conditions, was very material information, analogous to the information content to which section 624

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applies. Therefore, the Panel considered it appropriate to make a consequential or ancillary order that in such circumstances, the successful offeror ensure that its offer remain open for at least two weeks after the relevant event.

115. The Panel considered that the orders that it made were the minimum which were required to protect the rights and interests of Alinta and AGL shareholders who were affected by the circumstances which the Panel identified as unacceptable, or ensure that the Alinta Offer and AGL Offer proceeded as if the unacceptable circumstances had not occurred. The Panel had originally considered a significantly more complicated and restrictive outcome in the Panel's brief. However, consideration of the submissions put before it indicated that the Panel could achieve a regulatorily acceptable result with less intervention if it made only the orders which it finally made.

#### *Information deficiencies*

116. The Panel considered that the most appropriate way of protecting the rights and interests of Alinta and AGL shareholders who were affected by the circumstances which the Panel identified as unacceptable, or ensuring that the Alinta Offer and AGL Offer proceeded as if the information deficiencies had not occurred, was to order that Alinta and AGL make appropriate disclosure to correct the information deficiencies.

#### *Balancing the effects*

117. The Panel assessed the magnitude of the effects on Alinta and AGL shareholders of the unacceptable circumstances and the magnitude of the effects of its orders on those shareholders. It considered that the orders were proportionate to the effects of the unacceptable circumstances on the Alinta and AGL shareholders and were proportionate in ensuring that the Alinta and AGL Offers proceeded as if the unacceptable circumstances had not occurred.
118. The Panel considered the magnitude of the effects on Alinta and AGL shareholders of the unacceptable circumstances and the magnitude of the effects of its orders on Alinta and AGL. It considered that the adverse effects of the orders on Alinta and AGL were proportionate to the effects of the unacceptable circumstances on the Alinta and AGL shareholders and were proportionate in ensuring that the Alinta and AGL Offers proceeded as if the unacceptable circumstances had not occurred.

#### *Unfair prejudice*

119. The Panel considered the effects of its proposed orders and whether or not any person would be unfairly prejudiced. The primary persons likely to be adversely affected were Alinta and AGL. AGL submitted that it supported the proposed orders. ASIC made no submissions in relation to the Panel's proposed orders. Alinta submitted that it, and Alinta and AGL shareholders, would be adversely affected because the Panel's orders, in requiring that the successful offeror acquire more than 50%, would ensure a stalemate arose.
120. The Panel considered that its advice to the parties and the market of its retained power to resolve a stalemate (even where the defeating conditions had not been

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satisfied), if that appeared in the public interest, adequately addressed Alinta's stated concern.

121. The Panel considered that both Alinta and AGL should have foreseen the possibility of a Conflicting Control Scenario arising, from an early stage. The Panel was alerted to the possibility shortly after the announcement of the AGL Offer, and it considers it likely that both Alinta and AGL were likely to have considered the possibility from the time of Alinta's initial approach to AGL with the merger/ demerger proposal. Given that, the Panel considered that each of Alinta and AGL contributed in part to the occurrence of unacceptable circumstances by not including the type of defeating conditions which the Panel proposed to order, in their offers from the outset. On that basis, the Panel was less inclined to consider that its orders were likely to prejudice any person unfairly.
122. Having considered the parties' submissions on its proposed orders, the Panel was not satisfied that any person would be unfairly prejudiced by its proposed orders.

#### *Orders*

123. The Panel ordered that:

- (a) the Alinta Offer and AGL Offer each be subject to defeating conditions which have the following effect, and from which the offers are not able to be freed without the Panel's consent:
  - (i) that, the offeror acquired more than 50% of shares in the target; and
  - (ii) that the target acquired less than 50% of the shares in the offeror;
- (b) each offer remained open for at least two weeks from the date it was free from all defeating conditions; and
- (c) each offeror disclose in plain terms in its bidder's statement (approved by the Panel):
  - (i) the effect and operation of the Panel's orders; and
  - (ii) the problems that the Panel's orders were intended to avoid.

Any party to the proceedings could apply for further orders amending, supplementing or clarifying the Panel's orders.

124. The Panel did not receive any application for an award of costs, and made no order for costs.

#### *Alternative orders and undertakings proposed by Alinta*

125. Alinta put forward a number of different undertakings or orders which it submitted would:
- (a) not interfere with the conduct of either offer any more than is necessary to ensure observance of Part 2J.2.;
  - (b) avoid uncertainty as to the point at which control would be acquired for the purposes of section 259C;

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- (c) ensure that an offeror who has enough acceptances to give control could declare its offer unconditional without concerns about potential invalidity under section 259C;
  - (d) avoid situations in which the Panel's proposed conditions would prevent without good reason an offeror declaring its offers unconditional where there was no risk of invalidity under section 259C, for example, because the other bid was certain to lapse.
126. While the Panel was interested in a resolution which affected the market the least, it considered that Alinta's proposed undertakings did not in fact reduce the effect of the undertakings/orders on the market. This was because the proposed undertakings left the possibility of a Conflicting Control Scenario arising, or, in later versions, still required the Panel to make a determination at a subsequent point in time as to whether the issue or transfer of shares under one of the competing proposals would be void under section 259C and therefore, on a practical basis, required the Panel to make a determination as to whether allowing an offeror to declare its offer free from defeating conditions would open the way for a Conflicting Control Scenario.
127. Given the fact that the parties could not describe for the Panel the complete range of scenarios in which the undertakings would allow an offeror to declare its offer free from defeating conditions, the Panel did not consider that the undertakings would remedy the adverse effect of the possibility of a Conflicting Control Scenario on the market for control of shares in Alinta and AGL and on the shareholders of Alinta and AGL.
128. The Panel specifically announced to the market that it had reserved the power to allow either offeror to free its offer from the Panel's defeating conditions (even though the defeating conditions had not been satisfied), and described the circumstances and reasons why it had reserved the power and why it might use the power. The Panel did not consider that the market would take it that the Panel's orders were inflexible or would likely lead to a stalemate of mutual defeat of the Competing Offers.
129. Given that the parties were not able to convince the Panel that the proposed undertakings were materially more advantageous than the Panel's proposed orders, and the proposed undertakings would require the Panel to exercise similar discretion in most cases to the reserve power which the Panel's orders retained for it, the Panel did not see any persuasive reason to replace its proposed orders with the undertakings proposed by Alinta.
130. In addition, AGL declined to agree to the undertakings Alinta proposed. Rather, AGL submitted that the Panel's proposed orders were proper, for similar reasons to those of the Panel.

## Undertakings

### *Initial undertakings*

131. At an early stage of the proceedings, the parties offered, and the Panel accepted, undertakings from AGL and Alinta that neither would declare their offer free from defeating conditions until the Alinta 01 proceedings (and any review of the Panel's

## **Takeovers Panel**

### **Reasons for Decision –Alinta Limited 01**

decision the proceedings) had been determined. As those undertakings maintained the status quo to allow the Panel to consider the Application the Panel decided not to make the interim order requested by AGL.

#### *Panel's preliminary proposed undertakings*

132. The Panel initially proposed an outcome under which both parties would offer undertakings to the Panel in relation to their takeover offers which would ensure the type of clear and timely outcomes which the Panel considered desirable for an efficient, competitive and informed market. Alinta declined to provide the undertakings requested by the Panel, instead, offered undertakings which Alinta submitted would provide an acceptable outcome in circumstances where the clear and unarguable outcome which the Panel considered desirable had not eventuated. However, the Panel considered that the Alinta proposals could allow outcomes which were not in the interests of an efficient, competitive and informed market.
133. AGL offered to provide the undertakings which the Panel requested.
134. In the absence of both parties providing undertakings which the Panel was able to accept, the Panel considered that it would be most efficient to make essentially identical orders which regulate both bids identically rather than make orders in relation to one bid and accept AGL's offers of undertakings in relation to its bid.

**David Gonski AO**

**President of the Sitting Panel**

**Decision dated 23 April 2006**

**Reasons published 10 October 2007**



## Corporations Act Section 657A

### Declaration of Unacceptable Circumstances

#### In the matter of Alinta Limited 01

#### WHEREAS

##### Competing offers

- A. On 31 October 2005 The Australian Gaslight Company (**AGL**) announced its intention to propose to its shareholders that AGL demerge its energy and infrastructure assets into separate listed companies, by way of a scheme of arrangement.
- B. On 22 February 2006 Alinta Limited (**Alinta**) announced that it (or a subsidiary) had acquired, on market, 19.9% of the issued voting shares in AGL.
- C. On 3 March 2006 Alinta announced its intention to propose a merger with AGL, with a subsequent demerger of the combined business into separate, listed, energy and infrastructure companies.
- D. On 13 March 2006 AGL announced its intention to make a full scrip takeover offer for Alinta (**AGL Offer**), with the intention of conducting a demerger of the combined business into separate, listed, energy and infrastructure companies. Thus AGL is proposing to acquire control of, and a substantial interest in, Alinta.
- E. On 20 March 2006 Alinta Group Holdings Pty Ltd (a wholly owned subsidiary of Alinta, **Alinta GH**) announced its intention to make a full scrip takeover offer for AGL (**Alinta Offer**), with the intention of conducting a demerger of the combined business into separate, listed, energy and infrastructure companies. Thus Alinta GH is proposing to acquire control of, and a substantial interest in, AGL.
- F. On 31 March 2006 Alinta GH lodged and served a supplementary bidder's statement and a replacement bidder's statement (**Alinta Bidder's Statement**).

##### Application

- G. On 3 April 2006 the Takeovers Panel (**Panel**) received an application from AGL under section 657C of the Corporations Act 2001 (Cth) (**Corporations Act**)<sup>13</sup> in relation to the affairs of AGL and Alinta.

##### Voiding of acceptance transfers

- H. If both the Alinta Offer and AGL Offer were free of defeating conditions, and one bidder (**first bidder**) acquired control (as defined in section 259E) of the other (**second bidder**) section 259C would void any transfer of shares in the first bidder to

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<sup>13</sup> All section references in this declaration are to sections of the Corporations Act, unless otherwise specified.

the second bidder on the acceptance of an offer under the second bidder's offer, by shareholders of the first bidder.

- I. However, the definition of control in section 259E for the purposes of section 259C is not a bright line test, and whether one or other of two competing offerors "controlled" the other at any particular time may well be capable of vigorous dispute and great uncertainty, especially as the two offers are scrip offers and new shares affecting control of the rival bidders may be being continuously issued during the period of contested control.
- J. The uncertain operation of sections 259C and 259E, and the expense and delay of obtaining a judicial determination of what effect section 259C had had on the two competing takeover offers would be seriously detrimental to shareholders who had accepted one offer or the other, and possibly both, and the market for control over both companies' shares.
- K. Concern about the possible effects of acceptance transfers being voided, and the uncertainties of determining the control of the two companies would likely inhibit acceptances of each offer and an efficient market in shares of each offeror.

#### **Disclosure**

- L. The Alinta Bidder's Statement does not adequately disclose the potential for, and effect of, acceptance transfers being voided (**information deficiencies**).

#### **Unacceptable circumstances - voiding of acceptance transfers**

- M. The possibility of acceptance transfers being voided, if both the Alinta Offer and AGL Offer are able to be free of defeating conditions at the same time, gives rise to unacceptable circumstances in relation to the affairs of AGL and Alinta by inhibiting AGL shareholders from making decisions whether or not to hold their shares, accept the Alinta Offer, or dispose of the shares in other ways, and affecting the decisions of Alinta shareholders similarly in relation to the AGL Offer.

#### **Unacceptable circumstances - disclosure**

- N. The information deficiencies give rise to unacceptable circumstances in relation to the affairs of AGL by causing AGL shareholders to make decisions whether or not to hold their shares, accept the Alinta Offer, or dispose of the shares in other ways on the basis of misleading and inadequate information and causing the market for control of AGL shares not to be efficient competitive and informed.

#### **Unacceptable circumstances**

- O. The Panel considers that the circumstances are unacceptable circumstances having regard to the effect of the circumstances on:
  - (a) the control or potential control of AGL and of Alinta; and
  - (b) the proposed acquisition of a substantial interest by Alinta GH in AGL, and by AGL in Alinta.
- P. The Panel considers that it would not be against the public interest to make a declaration of unacceptable circumstances.

Under section 657A of the Corporations Act, the Panel declares that:

- (a) each of the Alinta Offer and AGL Offer being capable of being free, or declared free, of defeating conditions at the same time, where this may cause voiding of acceptance transfers, constitutes unacceptable circumstances in relation to the affairs of AGL and the affairs of Alinta; and
- (b) the information deficiencies constitute unacceptable circumstances in relation to the affairs of AGL.

**David Gonski AO**

**President of the Sitting Panel**

**Dated 22 April 2006**



**Corporations Act  
Section 657D  
Alinta Orders**

**In the matter of Alinta Limited 01**

Pursuant to:

- (a) section 657D of the *Corporations Act 2001* (Cth) (the **Act**); and
- (b) a declaration of unacceptable circumstances in relation to the affairs of The Australian Gas Light Company (**AGL**) and Alinta Limited (**Alinta**) made by the Takeovers Panel (**Panel**) on 22 April 2006 under section 657A of the Act,

and WHEREAS:

Alinta Group Holdings Pty Limited (**Alinta GH**) has made off market offers dated 18 April 2006 in relation to all of the fully paid ordinary shares in AGL (**AGL Shares**), and those offers are contained in Alinta GH's bidder's statement lodged with the Australian Securities and Investments Commission (**ASIC**) on 31 March 2006, (and may be varied in accordance with the Act); and

the offers and the bidder's statement relate to Alinta GH's off-market takeover offer for AGL (**Offer**),

the Takeovers Panel HEREBY ORDERS that:

- (a) the offers and any contracts resulting from acceptances of the offers are varied, as at the date of these orders, by the insertion of defeating conditions which have the following effect, and from which the offers are not able to be freed by Alinta GH without the prior consent of the Panel:
  - (i) that, Alinta GH (including its related bodies corporate) acquires more than 50% of AGL Shares; and
  - (ii) that at the time that condition (c)(i) above is fulfilled and all other defeating conditions to the offers have been permanently fulfilled or the offers declared free of them, AGL (including its related bodies corporate) has acquired less than 50% of the issued fully paid ordinary shares in Alinta;

where the shares that Alinta GH (including its related bodies corporate) "acquires" in AGL comprise:

- (iii) AGL Shares of which Alinta GH (including its related bodies corporate) is the beneficial owner;
- (iv) AGL Shares for which Alinta GH has acceptances under the Offer; and

## Takeovers Panel – Alinta Orders – Alinta 01

- (v) AGL Shares subject to an acceptance facility, under which the collection agent is, at the time, currently required under the shareholders' instructions to send acceptances under the Offer for shares in the acceptance facility to Alinta GH, (and the reverse applies, mutatis mutandi, for ascertaining the shares that AGL (including its related bodies corporate) has "acquired" in Alinta);
- (b) if the offers are declared free from all defeating conditions (or all remaining defeating conditions are permanently fulfilled) before Alinta GH gives notice under section 630(3) of the Act, Alinta GH must ensure that the offer period for the Offer remains open for at least two weeks from the date it declares the offers and any contracts resulting from acceptances of the offers free from all defeating conditions (or all remaining defeating conditions are permanently fulfilled);
- (c) the offer period of the Offer be extended for two weeks from the scheduled close of the Offer if Alinta GH (including its related bodies corporate) acquires (where acquires has the same meaning given in order (c) above) more than 50% of AGL Shares, and the offers and any contracts resulting from acceptances of the Offer are free from all defeating conditions (or all remaining defeating conditions are permanently fulfilled), after it gives notice under section 630(3) of the Act;
- (d) Alinta GH send to each AGL shareholder a document (the form and content of which has been approved by the Panel) which describes in plain terms:
  - (i) the effect and operation of these orders, and similar orders made in relation to the takeover offers which AGL has announced for all of the fully paid ordinary shares in Alinta (**AGL Orders**); and
  - (ii) the problems that these orders and the AGL Orders are intended to avoid; and
- (e) Alinta must procure that Alinta GH complies with these orders.

Any party to these proceedings may apply for further orders amending, supplementing or clarifying these orders.

**David Gonski AO**

**President of the Sitting Panel**

**Dated 23 April 2006**



**Corporations Act  
Section 657D  
AGL Orders**

**In the matter of Alinta Limited 01**

Pursuant to:

- (a) section 657D of the *Corporations Act 2001* (Cth) (the **Act**); and
- (b) a declaration of unacceptable circumstances in relation to the affairs of The Australian Gas Light Company (**AGL**) and Alinta Limited (**Alinta**) made by the Takeovers Panel (**Panel**) on 22 April 2006 under section 657A of the Act,

and WHEREAS:

AGL announced on 13 March 2006 an intention to make an off-market takeover Offer (**Offer**), and off-market offers, in relation to all of the fully paid ordinary shares in Alinta (**Alinta Shares**),

the Panel HEREBY ORDERS that:

- (a) AGL make the offers and any contracts resulting from acceptances of the offers to be subject to defeating conditions which have the following effect, and from which the offers are not able to be freed by AGL without the prior consent of the Panel:
  - (i) that, AGL (including its related bodies corporate) acquires more than 50% of Alinta Shares; and
  - (ii) that at the time that condition (c)(i) above is fulfilled and all other defeating conditions to the offers have been permanently fulfilled or the offers declared free of them, Alinta (including its related bodies corporate) has acquired less than 50% of the issued fully paid ordinary shares in Alinta;

where the shares that AGL (including its related bodies corporate) “acquires” in Alinta comprise:

- (iii) Alinta Shares of which AGL (including its related bodies corporate) is the beneficial owner;
- (iv) Alinta Shares for which AGL has acceptances under the Offer; and
- (v) Alinta Shares subject to an acceptance facility, under which the collection agent is, at the time, currently required under the shareholders’ instructions to send acceptances under the Offer for shares in the acceptance facility to AGL,

(and the reverse applies, *mutatis mutandi*, for ascertaining the shares that Alinta (including its related bodies corporate) has “acquired” in AGL);

## Takeovers Panel - AGL Orders - Alinta 01

- (b) if the offers are declared free from all defeating conditions (or all remaining defeating conditions are permanently fulfilled) before AGL gives notice under section 630(3) of the Act, AGL must ensure that the offer period for the Offer remains open for at least two weeks from the date it declares the offers and any contracts resulting from acceptances of the offers free from all defeating conditions (or all remaining defeating conditions are permanently fulfilled);
- (c) the offer period of the Offer be extended for two weeks from the scheduled close of the Offer if AGL (including its related bodies corporate) acquires (where acquires has the same meaning given in order (c) above) more than 50% of Alinta Shares, and the offers and any contracts resulting from acceptances of the Offer are free from all defeating conditions (or all remaining defeating conditions are permanently fulfilled), after it gives notice under section 630(3) of the Act;
- (d) AGL disclose in plain terms in its bidder's statement (the form and content of the disclosure having been approved by the Panel):
  - (i) the effect and operation of these orders, and similar orders made in relation to the takeover offers which Alinta has made for all of the fully paid ordinary shares in AGL (**Alinta Orders**); and
  - (ii) the problems that these orders and the Alinta Orders are intended to avoid;
- (e) AGL procure that any subsidiary which makes the offers complies with these orders.

Any party to these proceedings may apply for further orders amending, supplementing or clarifying these orders.

**David Gonski AO**

**President of the Sitting Panel**

**Dated 23 April 2006**

## Alinta's Proposed Undertaking

The following is the text of Alinta's initial proposed undertaking which it put forward as an alternative to the Panel's preliminary decision letter. Alinta proposed that it and AGL would give reciprocal undertakings.

Alinta undertakes that it will not allow its offers to become unconditional without the prior consent of the Panel unless:

- (a) AGL has a relevant interest in less than 40% of Alinta shares at the time the offers are declared free of all unfulfilled defeating conditions ("unconditional"); and
- (b) Either:
  - (i) The AGL shares in which Alinta has a relevant interest together with any shares held in an acceptance facility established in relation to Alinta's offers account for at least 40% of AGL shares at the time the offers are declared unconditional; or
  - (ii) All takeover contracts that exist or may subsequently arise as a result of acceptances received prior to the close of the offer can be completed without any issue or transfer of shares that would be void under section 259C of the Corporations Act and Alinta has given at least 24 hours notice to AGL that it proposes to rely on this paragraph to declare its offers unconditional;

**and**

AGL will not allow its offers to become unconditional without the prior consent of the Panel unless:

- (a) Alinta has a relevant interest in less than 40% of AGL shares at the time the offers are declared free of all unfulfilled defeating conditions ("unconditional"); and
- (b) Either:
  - (i) The Alinta shares in which AGL has a relevant interest together with any shares held in an acceptance facility established in relation to AGL's offers account for at least 40% of Alinta shares at the time the offers are declared unconditional; or
  - (ii) All takeover contracts that exist or may subsequently arise as a result of acceptances received prior to the close of the offer can be completed without any issue or transfer of shares that would be void under section 259C of the Corporations Act and AGL has given at least 24 hours notice to Alinta that it proposes to rely on this paragraph to declare its offers unconditional.