



**In the matter of Alinta Limited 01R
[2006] ATP 19**

Catchwords:

Review of Panel decision – competing takeover bids – change in circumstances – undertakings – Australian Stock Exchange – unconditional – relevant interests – Conflicting Control Scenario – information deficiencies – acceptance transfers – judicial determination – non-waivable defeating conditions – Heads of Agreement – Merger Implementation Agreement – schemes of arrangement – Negotiated Outcome – 50% minimum acceptance conditions – public statements – revoked orders.

Corporations Act 2001 (Cth), sections 259C, 657EA, 657E(4)(b)

These are the Panel’s reasons for its decision to revoke the declaration of unacceptable circumstances and orders made by the sitting Panel in Alinta 01 [2006] ATP 14.

SUMMARY

1. These reasons relate to an application (the **Application**) to the Panel made on 26 April 2006 by Alinta Limited and its wholly owned subsidiary Alinta Group Holdings Pty Ltd (together **Alinta**) under section 657EA of the Corporations Act 2001 (Cth).
2. The Application sought to review the decision of the sitting Panel in Alinta 01 [2006] ATP 14 (**Initial Panel**) to make a declaration of unacceptable circumstances and final orders.
3. The review Panel in these proceedings (**Panel**) determined that the very significant events which had occurred since the Initial Panel’s decision meant that there was no current basis for the continuation of a declaration of unacceptable circumstances.
4. As a result, the Panel decided under section 657EA(4)(b)¹ to set aside the decision of the Initial Panel to make a declaration of unacceptable circumstances and revoke the orders made by the Initial Panel.
5. The Panel noted that parties could return to the Panel if the currently proposed arrangements between Alinta and AGL did not come to fruition and the concerns which were raised before the Initial Panel become enlivened again.

THE PROCEEDINGS

The Panel & Process

6. The President of the Panel appointed Mr. John Fast, Mr. Norman O’Bryan SC and Professor Ian Ramsay (sitting President) as the sitting Panel (**Panel**) for the proceedings (**Proceedings**) arising from the Application.
7. The Panel adopted the Panel’s published procedural rules for the purposes of the Proceedings.

¹ Unless otherwise specified, all statutory references are to the Corporations Act.

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8. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

Background

AGL

9. AGL is an Australian public company which is listed on Australian Stock Exchange Ltd. (**ASX**).

Alinta

10. Alinta is an Australian public company which is listed on ASX.

Competing Offers

11. Following unsuccessful discussions between Alinta and AGL in relation to a proposed merger between Alinta and AGL, AGL announced on 13 March 2006 its intention to make a scrip takeover offer for all of the shares in Alinta (**AGL Offer**).
12. On 20 March 2006, Alinta announced its intention to make a scrip offer for all of the shares in AGL (**Alinta Offer**).

Initial Panel Decision

13. On 3 April 2006, AGL made an application to the Initial Panel in relation to the AGL Offer and the Alinta Offer.
14. AGL described the primary issue before the Initial Panel as being:
 - (a) “if AGL were to receive sufficient acceptances to give it a relevant interest in more than 50% of Alinta’s Shares; and
 - (b) Alinta’s Offer is unconditional; and
 - (c) a takeover contract under Alinta’s Offer completes so that AGL Shares are transferred to Alinta,

then any purported transfer of the AGL Shares to Alinta under Alinta’s Offer would be void under section 259C. Alinta would be precluded from processing acceptances received from AGL shareholders because of section 259C (**Conflicting Control Scenario**). “ AGL acknowledged that the reverse concern would apply to the AGL Offer.

15. The Initial Panel found that concern about the possible operation of section 259C and the delay in obtaining judicial determination of what effect 259C had on the two offers would likely inhibit acceptances of each offer and an efficient market in shares of each offeror.
16. The Initial Panel considered that this would have an effect on control of both companies and give rise to unacceptable circumstances.
17. The Initial Panel considered that Alinta Bidder’s Statement did not adequately disclose the potential for, and effect of, acceptance transfers being voided under section 259C in the event of a Conflicting Control Scenario. The Initial Panel described this as “information deficiencies” in the Alinta Bidder’s Statement. The Initial Panel considered that the information deficiencies gave rise to unacceptable

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circumstances due to their effect on control of AGL and the proposed acquisition of a substantial interest in AGL by Alinta.

Initial Panel Orders

18. On 23 April 2006, the Initial Panel made orders that:
 - (a) each offer contain non-waivable defeating conditions that:
 - (i) the offeror acquire more than 50% of its target; and
 - (ii) the rival bidder acquire less than 50% of the first offeror;
 - (b) offers under the successful offer remain open for at least two weeks after the offer had been declared free of defeating conditions; and
 - (c) Alinta and AGL send a document to target shareholders describing in plain terms:
 - (i) the effect and operation of the Initial Panel's orders; and
 - (ii) the problems that the Initial Panel's orders were intended to avoid.
19. The Initial Panel advised both parties, and the market, that it would reserve power to consent to either of the bidders waiving the Panel's conditions. 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.

Recent Events

20. On 26 April 2006, Alinta and AGL announced that they had entered into a binding Heads of Agreement (**HoA**) to work together to draft and sign a Merger Implementation Agreement (**MIA**).
21. Under the proposed MIA, Alinta and AGL would each propose schemes of arrangement to their respective shareholders to transfer assets between Alinta and AGL so as to merge their respective infrastructure businesses and make other structural arrangements (**Negotiated Outcome**).
22. The HoA provided that in the period up to 31 May 2006 (or such other time as AGL and Alinta agree in writing) (**Sunset Date**) both AGL and Alinta agreed:
 - (a) that their respective offers would not be freed from defeating conditions;
 - (b) that Alinta would procure that its directors recommend to Alinta shareholders that they do not accept the AGL Offer and request that AGL shareholders do not accept the Alinta Offer; and
 - (c) that AGL would procure that its directors recommend to Alinta shareholders that they do not accept the Alinta Offer and request that Alinta shareholders do not accept the AGL Offer.
23. On 26 April 2006, Alinta issued a press release specifically recommending that Alinta shareholders should take no action in respect of the AGL Bidder's Statement and that AGL shareholders should take no action in respect of the Alinta Bidder's Statement.
24. On 26 April 2006, AGL issued a press release specifically recommending that AGL shareholders should take no action in respect of the Alinta Bidder's Statement and

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that Alinta shareholders should take no action in respect of the AGL Bidder's Statement

REVIEW APPLICATION

25. The Application sought review of the Initial Panel's decision. Alinta submitted that the orders made by the Initial Panel (**Orders**) were inappropriate since:
- (a) If the proposed schemes proceed and receive all necessary approvals, intervention by the Panel will be unnecessary. Unless and until there is an event which frees the parties from their obligations under the Negotiated Outcome, there will be no risk of either the Alinta Offer or the AGL Offer becoming unconditional. Accordingly there is no immediate risk of invalidity under section 259C, and no present need for the Orders.
 - (b) If the proposed schemes do not proceed, or are not approved, the regime which the Orders impose of mutual non-waivable 50% minimum acceptance conditions will be of critical importance, but may be inappropriate for the changed circumstances which then apply.

DISCUSSION

Change in Circumstances

26. The Panel's power to make decisions under its review power in section 657EA is a de novo review power. In undertaking review proceedings, the Panel looks anew at the decision of the original application, based on the circumstances before the Review Panel at the time it makes its decision.
27. Accordingly the Panel reviewed the circumstances before it to determine whether there had been any events which had occurred, or circumstances which had changed since the decision of the Initial Panel which the Panel should take into account.
28. The Initial Panel had determined that the circumstances before it meant that there was a real possibility that a Conflicting Control Scenario would arise and that that possibility would likely inhibit acceptances of each offer and an efficient market in the shares of each offeror, and that this would have an effect on the control, or potential control, of the two companies.
29. The Panel found that the Negotiated Outcome had significantly changed the circumstances from those that existed when the Initial Panel made its decision.
30. The Panel considered that the terms of the HoA providing that the AGL Offer and Alinta Offer would not be freed from defeating conditions before the Sunset Date lessened the possibility of a Conflicting Control Scenario arising and removed any real likelihood that the possibility of the Conflicting Control Scenario eventuating would inhibit acceptances of the two offers. If the possibility of the Conflicting Control Scenario no longer had an effect on Alinta and AGL shareholders, there was no longer a basis for a finding that unacceptable circumstances existed. Indeed the Panel considered that, if the proposed MIA were to be entered into by AGL and Alinta, the Offers would be made redundant.

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31. Following the signing of the HoA, the directors of both companies made clear and definite public statement of their intention to work towards the achievement of the MIA on behalf of the shareholders.
32. In a media release on 26 April 2006, AGL Chairman, Mark Johnson, made the following statements in relation to the Negotiated Outcome:
 - (a) “We are very pleased that we have been able to reach this superior result for our Shareholders.”
 - (b) “The Board of AGL will unanimously recommend this agreed transaction as it is in the best interests of AGL Shareholders and it had been agreed that Alinta’s board will do the same.”
33. In a media release on 26 April 2006, Alinta CEO, Bob Browning, made the following statements in relation to the Negotiated Outcome:
 - (a) “Alinta has always believed that a negotiated outcome offers the greatest potential to crystallize immediate value for our shareholders and minimize execution risk and uncertainty.”
 - (b) “Alinta’s Board and management believe that this outcome offers the best result for our shareholders of all the proposals put forward by both Alinta and AGL”.
34. The Panel considered that, as a consequence of the public statements above endorsing the Negotiated Outcome and the two boards’ recommendations to shareholders to take no action in relation to the offers, the offers were effectively stalled and the possibility of a Conflicting Control Scenario had been further reduced.
35. Accordingly, the possibility of a Conflicting Control Scenario had no current effect on the decisions of Alinta’s or AGL’s shareholders, and therefore it had no current effect on control or potential control of either Alinta or AGL.
36. The Panel considered that the factual substratum which existed at the time the Initial Panel made its decision no longer existed to support the declaration of unacceptable circumstances.
37. Similarly, the Panel considered that there was no longer an ongoing information deficiency in the two bidder’s statements as to the potential for a Conflicting Control Scenario.

Possible future unacceptable circumstances

38. In making its decision, the Panel noted that it had not been required to make, and had not made, any decision or finding in relation to the Initial Panel’s decision, because of the different circumstances before it compared to the circumstances before the Initial Panel.
39. In their submissions to the Panel, the parties raised the possibility of negotiations between them failing in relation to the MIA. If that occurred, the parties advised the Panel, both companies would likely seek to pursue their respective offers, in a similar manner as before the entry into the HoA. On that basis, it was possible that the same concerns which were brought before the Initial Panel could arise again.

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40. The Panel noted that if circumstances similar to those before the Initial Panel arose again, any person would be free to apply to the Panel for a declaration of unacceptable circumstances in relation to the then existing circumstances and the Panel would consider the circumstances then prevailing and the interests of Alinta and of AGL shareholders anew. The decision of this Review Panel does not preclude any such future application to the Panel, which would be determined on the facts and circumstances which were found to exist at that time.

DECISION

Revocation of declaration of unacceptable circumstances

41. The Panel considered that the HoA, and the subsequent advice that had been provided to Alinta and to AGL shareholders pursuant to the terms of the HoA, had materially changed the circumstances before it, compared to the circumstances which came before the Initial Panel.
42. Given the change of circumstances, and after considering the submissions and rebuttals in the Alinta 01R proceeding and the Alinta 01 proceedings, the Panel, under section 657EA(4)(b), determined to set aside the decision of the Initial Panel to make a declaration of unacceptable circumstances.
43. The Panel consequently revoked the orders which the Initial Panel made to address the unacceptable circumstances identified by it.

Orders

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

Undertakings

45. The Panel noted that AGL and Alinta voluntarily offered undertakings to the Panel that neither bidder would free their offers from defeating conditions without giving the Panel and the other company, 7 days notice of its intention to do so.

Professor Ian Ramsay

President of the Sitting Panel

Decision dated 9 May 2006

Reasons published 10 October 2007