



**In the matter of Australian Pipeline Trust 01
[2006] ATP 27**

Catchwords:

Review of ASIC decision; Eggleston principles; equal opportunity to share in benefits; efficient market; informed market; failure to disclose to the market; control; competition for control; consideration of current effect on control of likely future circumstances; control premium; likely effect of circumstances; potential control; relevant interest; substantial holding; uncertainty of circumstances; voting power; unfair prejudice; declaration of unacceptable circumstances; orders; interim orders; divestment orders

ASIC Policy Statement 51; ASIC Policy Statement 92

Guidance Note 2

Corporations Act sections 602, 606, 609(7), 611 item 14 item 17, 655A, 656A, 657A, 657C, 657D

Australian Pipeline Trust, Australian Pipeline Limited; Alinta Limited; Petronas Australia Pty Limited; The Australian Gas Light Group

These are the Panel's reasons for making a declaration of unacceptable circumstances and final orders, and declining to vary a declaration of ASIC under section 655A of the Corporations Act 2001 (Cth)¹, in response to an application by Australian Pipeline Trust under sections 656A and 657C in relation to its affairs. In part, the application sought a declaration of unacceptable circumstances in relation to the acquisitions of 10.25% of the units in Australian Pipeline Trust by Alinta Limited on and from 16 to 22 August 2006. The application also sought a review of a decision of ASIC to grant relief to Alinta Limited under section 655A in respect of Alinta Limited's possible acquisition of a relevant interest in Australian Pipeline Trust as a result of a Merger Implementation Agreement.

SUMMARY

1. These reasons relate to an application (the **Application**) to the Panel from Australian Pipeline Limited (**APL**) (in its capacity as responsible entity of Australian Pipeline Trust) and Australian Pipeline Trust (together **APT**) on 21 August 2006 under sections 656A and 657C in relation to the affairs of APT.
2. The Application related to:
 - (a) a Declaration (**ASIC Declaration**) dated 3 July 2006, made by the Australian Securities and Investments Commissions (**ASIC**) under section 655A(1)(b), that omitted and replaced section 609(7) in a modified form as it applied to Alinta in respect of the Merger Implementation Agreement (**MIA**) dated 22 June 2006 between Alinta Limited (**Alinta**), The Australian Gas Light Company (**AGL**), AGL Energy Limited and Alinta Mergeco Limited; and
 - (b) the acquisitions of 10.25% of the units in APT by Alinta on and from 16 to 22 August 2006 (**Acquisitions**).
3. In respect of the ASIC Declaration, APT submitted that:
 - (a) ASIC should not have granted the ASIC Declaration at all;

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

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- (b) if it had granted the ASIC Declaration ASIC should have made it a condition of the relief that Alinta not acquire any further units in APT;
- (c) ASIC failed to properly take into account of the objectives of Chapter 6 set out in section 602 (broadly “Eggleston Principles”) in granting the ASIC Declaration; and
- (d) APT was not afforded procedural fairness as it was not consulted by ASIC prior to the making of the ASIC Declaration, nor notified by ASIC of the decision or of APT's rights for review of the ASIC Declaration after the ASIC Declaration was made.

4. In respect of the MIA APT submitted that:

- (a) the MIA restricted disposal by AGL of the 30% of the units in APT which AGL held (**AGL Parcel**), and therefore gave Alinta a relevant interest in the AGL Parcel;
- (b) the MIA restricted disposal of the AGL Parcel for more than the four months permitted under the ASIC Declaration; and
- (c) the MIA was not conditional on the certain things, including a scheme of arrangement approved by the Court under Part 5.1 taking effect, required by the ASIC Declaration,

and therefore the MIA did not fit within the terms of the ASIC Declaration, and the relevant interest in the AGL Parcel which the MIA gave to Alinta was not disregarded under the ASIC Declaration.

5. In respect of the Acquisitions, APT submitted that:

- (a) given Alinta had voting power by virtue of the MIA in 30.0% of APT at the time of the Acquisitions, which increased to 40.25% because of the Acquisitions, Alinta contravened section 606(1)(c)(ii) by making the Acquisitions; and
- (b) Alinta, pursuant to the forthcoming schemes of arrangement proposed between Alinta and AGL (**Schemes**) being implemented, appeared to be seeking to obtain control of APT without making a takeover offer to all APT unitholders; in breach of the Eggleston Principles whereby all shareholders are provided with an opportunity to participate.

6. The Panel considered that the Acquisitions, when taken in context of the ASIC Declaration, the Schemes and the AGL Parcel), were likely to have an effect on the control or potential control of APT by:

- (a) affecting the prospect of any person considering whether to offer to acquire the existing holding of APT, or any part of it, or to make a bid for APT; and
- (b) increasing the control, or potential control, of APT which Alinta held (or would hold on the implementation of the Schemes) from 30% to 40.25%.

7. The Panel was also concerned that APT unitholders were not informed of a proposal under which Alinta intended to acquire up to 19.9% of APT units in circumstances where, if the Schemes were approved, Alinta would then hold more than 40% of the units in APT. The Panel also noted that APT unitholders would not all have the opportunity to participate in the benefits flowing from the Acquisitions because the

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Acquisitions (under Alinta's analysis) would necessarily be limited to less than 20% of the units in APT.

8. In light of the Panel's determinations in relation to the circumstances leading up to and surrounding the Acquisitions, and the Schemes, the Panel made a declaration of unacceptable circumstances under section 657A and orders under section 657D. The declaration is set out in Annexure A and the orders are set out in Annexure B.

THE PROCEEDINGS

The Panel & Process

9. The President of the Panel appointed Graham Bradley (Deputy President), Teresa Handicott and Nerolie Withnall (Sitting President) as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
10. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
11. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

Background

APT

12. APT is a listed managed investment scheme which holds gas pipelines, gas storage and processing facilities and high voltage transmission facilities as assets. APT was "spun out" of AGL, and listed on ASX, in 2000, at which stage AGL retained its 30% interest and Petronas acquired its 10.98% interest. APT submitted that apart from the three major unitholders, APT's unitholders are mainly small retail investors with a wide dispersion of the units. As at 22 August 2006, the major unitholders in APT were as follows:
 - (a) The Australian Gas Light Group - 30%;
 - (b) Petronas Australia Pty Limited - 10.98%; and
 - (c) Alinta - 10.25%.
13. As at 22 August 2006, APT's responsible entity APL was 50% owned by AGL, and AGL had an option over the shares in APL that it did not hold. A subsidiary of AGL, Agility Management P/L, provides operations and maintenance, and other services for APT's gas transmission assets.

AGL/Alinta Merger

14. In late 2005, AGL had proposed a demerger of its energy and infrastructure businesses by way of a scheme of arrangement. Alinta then approached AGL with a proposal to merge the two entities and then conduct a similar demerger as AGL had proposed for itself. AGL rejected Alinta's proposal. Alinta had also acquired, on-market, 19.9% of AGL and indicated that it may commence a hostile, off-market scrip takeover bid for AGL, which it announced on 20 March 2006. AGL had earlier announced a hostile, off-market, scrip takeover bid for Alinta.

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15. On 26 April 2006 AGL and Alinta announced that they had signed a binding heads of agreement to merge their infrastructure assets, including the AGL Parcel, subject to the implementation of the Schemes (**Heads of Agreement**).
16. Alinta advised the Panel that the heads of Agreement lapsed on 31 May 2006 because it had been a term of the Heads of Agreement that Alinta and AGL enter into a MIA by 31 May 2006, and Alinta and AGL had not done so.
17. On 1 June 2006, Alinta and AGL executed the first version of the MIA which formalised the Heads of Agreement. That agreement lapsed on 21 June 2006 because a condition of the agreement that Alinta and AGL enter into a Transaction Implementation Deed (**TID**) by 21 June 2006 had not been met. On 22 June 2006, Alinta and AGL executed a number of documents including the second MIA. Alinta advised the Panel that the second MIA was identical to the first, with the only exception being that the clause requiring entry into the TID by 21 June 2006 had been amended to require Alinta and AGL to have entered into the TID by 22 June 2006.

ASIC Declaration

18. On 29 June 2006, Alinta applied to ASIC for relief under section 655A in respect of Alinta's possible acquisition of a relevant interest in APT as a result of the MIA. With its application, Alinta provided ASIC with a copy of a draft instrument, the MIA and a copy of a letter dated 2 June 2006 from the CEO of Alinta to the CEO of AGL concerning disposal and voting of the AGL Parcel. Alinta did not provide ASIC with any other documents relating to the implementation of the Schemes.
19. On 3 July 2006, ASIC made the ASIC Declaration. The effect of the ASIC Declaration was to include a scheme of arrangement as one of the things on which an agreement could be conditional, and therefore section 609(7) would exclude the relevant interest which a person would otherwise acquire by the agreement. The ASIC Declaration also extended the period for which the agreement might restrain disposal from three months to four months from the date of the agreement. See Annexure C.

ACCC Undertakings

20. On 3 August 2006, the ACCC accepted undertakings from Alinta (**ACCC Undertaking**) under which, Alinta undertook (amongst other things):
 - (a) to take all steps necessary to preserve the business of APT as a viable going concern;
 - (b) not to propose or consent to any sale or transfer of the assets of APT to Alinta (or any of its related bodies corporate); and
 - (c) following the implementation of the AGL/Alinta Merger, to divest within a specified period (amongst other things):
 - (i) all of the units Alinta holds in APT²; and
 - (ii) all of the shares it holds in APL, and any rights or options to acquire shares in APL or units in APT.

² At the time of the ACCC undertaking, the only relevant units were those in the AGL Parcel, but the undertaking was not limited in any way to the AGL Parcel.

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Acquisitions

21. Between 16 August 2006 and 22 August 2006, Alinta made the Acquisitions.
22. On 17 August 2006, Alinta announced the first of the Acquisitions and advised the market that it was investing in APT to provide it with greater flexibility and value in regard to complying with the ACCC Undertaking or any amended undertakings that it may negotiate with the ACCC over ensuing weeks.
23. On 17 August 2006, the CEO of Alinta, Robert Browning, stated in an Open Briefing that “at this stage there is no intention to make a full takeover.” Mr Browning also stated that the price of \$5.00 per APT unit that Alinta had paid represented “a significant premium” but that “this has been necessary to secure the stake we sought”.

APT takeover bid for GasNet

24. On 22 August 2006, APT announced its intention to make a cash offer to acquire all of the stapled securities in GasNet Australia Group.
25. On 31 August 2006, APT announced an institutional placement and a Security Purchase Plan to existing APT unitholders to reduce gearing, to partly restore financing flexibility and to partly fund current acquisitions and development opportunities. APT proposed to raise approximately \$200 million by the institutional placement and Security Purchase Plan, or approximately an additional 15-18% of its existing capital.

APPLICATION

Declaration sought

26. APT sought a declaration of unacceptable circumstances in relation to the Acquisitions on the basis that the Acquisitions gave rise to unacceptable circumstances because either or both:
 - (a) of the effect of the Acquisitions on control or potential control of APT; and
 - (b) the Acquisitions constituted or gave rise to a contravention of section 606.

Review sought

27. APT sought a review of the ASIC Declaration. APT sought a revocation ab initio, or a variation, of the ASIC Declaration.

Final orders sought

28. APT sought the following orders in relation to the ASIC Declaration:
 - (a) that the ASIC Declaration be revoked ab initio; or, in the alternative,
 - (b) that it be amended to operate in respect of the MIA and relevant related documents and, amongst other restrictions, to restrict Alinta from acquiring any further APT units and to prohibit Alinta from voting at any APT general meeting.
29. In respect of the declaration under section 657A in relation to the Acquisitions, APT sought the following orders:

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- (a) The legal title to and beneficial ownership of the units that Alinta acquired under the Acquisitions (**Acquired Units**) be vested in ASIC by the transfer of the Acquisitions by the holders to ASIC, to sell the Acquired Units by bookbuild and account to Alinta its Related Bodies Corporate and their associates (as appropriate) for the proceeds of sale, net of the costs, fees and expenses of the sale (including the costs, fees and expenses incurred by ASIC in complying with this order (and appropriate ancillary orders)).
- (b) Alinta, its Related Bodies Corporate and their associates be restrained from participating in that bookbuild or otherwise acquiring any interest in the Acquisitions.

Interim orders sought

30. APT sought interim orders that, pending final determination by the Panel of the Proceedings, Alinta be restrained from acquiring further APT units, disposing of their existing APT units, voting their APT units or entering into any cash settled equity swaps relating to any APT units.

DISCUSSION

ASIC Declaration

Application for ASIC relief

31. APT submitted that the ASIC Declaration was granted based on an incomplete and/or misleading application by Alinta. APT submitted that:
 - (a) if Alinta intended to make the Acquisitions, it should have told ASIC this; and
 - (b) even if Alinta had no intention to acquire more units in APT at the time of the ASIC Declaration application, it should have made it clear to ASIC that it was seeking relief that would permit it to do so.
32. APT submitted that the relief requested from ASIC was only necessary if Alinta was proposing to make the Acquisitions and that Alinta had not raised such an issue with ASIC in the application for relief.
33. Alinta submitted both to the Panel and in its application to ASIC, that the ASIC Declaration was limited technical relief. Alinta also submitted to the Panel that it was inherent in the ASIC Declaration that the applicant was free to acquire further APT units as if it held no relevant interest in APT. Alinta did not however, canvass or raise this issue in its submissions to ASIC in relation to its application for the ASIC Declaration.
34. It contended that it was not relevant or necessary for it to canvass before ASIC various possibilities and hypothetical steps which might be available to Alinta
35. Alinta submitted that as at the date of its application for the ASIC Declaration, Alinta had not formed an intention to bid for or acquire control of APT. It submitted that around the time of the Alinta board meeting on 17 July 2006 (at which the Alinta board first considered the possible acquisition of the further units prior to the implementation of the Schemes and gave "in principle" approval to management pursuing the acquisition of up to 10% of units in APT), Alinta and its advisers began

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substantive work on a structure under which Alinta could acquire additional units in APT and at the same time satisfy ACCC concerns. Alinta submitted that it did not communicate these intentions to ASIC because it did not consider that they were relevant to relief contained in the ASIC Declaration which did not prevent Alinta making additional acquisitions and in circumstances where ASIC had not indicated that there might be concern if Alinta made such acquisitions.

36. The Panel considered that Alinta should have either expressly raised the possibility of the Acquisitions (or similar acquisitions) with ASIC at the time Alinta applied for the ASIC Declaration (if it had that intention at that time), or when Alinta decided to rely on the ASIC Declaration to make the Acquisitions.
37. The Panel noted that APT had written to Alinta shortly after Alinta advised that it had commenced the Acquisitions, advising Alinta that APT considered that the Acquisitions contravened both the letter and spirit of the Corporations Act and requesting that Alinta cease any further acquisitions of APT units, and that Alinta had continued acquiring APT units after this correspondence until the date of the Panel's interim orders.
38. The Panel agrees with the objectives and requirements of ASIC's Policy Statement 51 (Applications for relief) that full and open ventilation of relevant issues is required of applicants for ASIC relief in order to allow ASIC to give proper consideration of applications and to give proper effect to the policy of the legislation. Applicants to ASIC should, if anything, err on the side of more rather than less disclosure, especially (as in this case) where the relief sought is relatively novel and where the relevant circumstances have no clear precedent.

Procedural Fairness

39. APT submitted that in granting the ASIC Declaration, ASIC had failed to comply with its own Policy Statements 51 (Applications for relief), 57 (Notification of Rights of Review) and 92 (Procedural Fairness to third parties) in that it did not afford APT a fair hearing concerning its decision to make the ASIC Declaration and having made it, did not give APT notice of the decision nor of APT's right to have the ASIC Declaration reviewed by the Panel, even though ASIC's decision was likely to adversely affect APT (and its unitholders)³.
40. Alinta submitted that APT's argument in relation to procedural fairness was highly technical and that, in accordance with the Panel's Guidance Note 2, a flaw in ASIC's decision making process was not itself enough for the Panel to vary an ASIC decision or make a decision in substitution.
41. ASIC submitted that it was an oversight by ASIC that APT was not provided an opportunity to make submissions on Alinta's relief application.
42. The Panel considered that any lack of consultation by ASIC of APT was cured by the opportunity APT had to make submissions concerning the ASIC Declaration in these proceedings. This approach was substantially agreed to by the parties.

³ APT also noted that Alinta had also failed to advise APT of either its application for, or the granting of, the ASIC Declaration.

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Material prejudice suffered by APT unitholders

43. APT submitted that the material prejudice suffered by the unitholders of APT as a result of the ASIC Declaration included:
 - (a) control of APT had passed to Alinta in circumstances where no control premium was paid and/or made available to all unitholders of APT;
 - (b) Alinta had effectively locked out any other person from bidder for units in APT; and
 - (c) no competitive pricing tension for APT units would be available for the benefit of APT's unitholders.
44. Alinta submitted to the Panel, as it had in the original application to ASIC, that APT unitholders did not suffer material prejudice as a result of the ASIC Declaration as: "the ASIC Declaration simply put beyond doubt that Alinta did not acquire a relevant interest in APT as a result of the MIA."
45. ASIC submitted that it was arguable that the ASIC Declaration would result in material prejudice being suffered by the APT unitholders as the ASIC Declaration allowed Alinta to acquire a relevant interest in the APT units earlier than it could otherwise have under the existing exclusions in section 611. The prejudice was that APT unitholders would not have the opportunity to participate in the benefits flowing from the upstream acquisition or to provide informed consent to that transaction. However, ASIC submitted that no more prejudice resulted under the ASIC Declaration than would result under the unmodified section 609(7) if the upstream transaction were conducted by way of an item 7, section 611 resolution.

Referring the ASIC Declaration back to ASIC

46. During the proceedings the Panel asked parties whether any or all of the issues raised in the Application in relation to the ASIC Declaration could be appropriately resolved by the Panel referring the ASIC Declaration back to ASIC.
47. ASIC submitted that it cannot retrospectively modify its declarations and therefore could only modify the ASIC Declaration to prevent further acquisitions from occurring in the future. It also noted that any modification of the ASIC Declaration by ASIC would need to be subjected to appropriate internal consideration.
48. Based on ASIC's inability to modify its declarations retrospectively and the fact that the Panel was able to make orders restraining Alinta from acquiring further APT units as well as orders requiring divestment of the Acquired Units if it made a declaration of unacceptable circumstances, the Panel considered that it would not serve any real purpose for it to refer the ASIC Declaration back to ASIC for reconsideration.

Should the ASIC Declaration have been made?

49. In its preliminary submissions and in its formal submissions, Alinta submitted that: "the ASIC Declaration merely addressed a highly technical argument that the MIA might have been deemed to give rise to a relevant interest on a legalistic interpretation of the agreement and the relevant provisions of Chapter 6". It further submitted that a modification of this kind to extend section 609(7) to schemes of

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arrangement was now relatively standard relief, and had been granted on several occasions before.

50. APT submitted that Alinta was incorrect in its statement that the ASIC Declaration was “relatively standard relief”. Other than the three instances identified by ASIC since 2000, APT submitted that it could not locate any other examples of similar relief since July 2001. APT also submitted that the three examples were not forms of relief related to downstream interests and did not modify subsection 609(7)(c) in terms of the extension of the three month period to four months and it was not aware of ASIC having previously done so.
51. APT also submitted that the ASIC Declaration should not have been granted, even if it had a condition preventing further acquisitions of APT units, as the MIA gave Alinta the power to control the exercise of a power to dispose of the AGL Parcel and hence gave Alinta a relevant interest in the AGL Parcel.
52. Alinta submitted that the ASIC Declaration confirmed Alinta’s lack of any existing voting power in APT. Alinta submitted that even without the ASIC Declaration, Alinta had no practical control over the units in the AGL Parcel in any event as the MIA did not confer on Alinta any true or actual measure of control over the AGL Parcel.
53. Alinta submitted that since acquisitions under the exception in item 7 of section 611, and acquisitions under mergers effected by scheme of arrangement are relevantly analogous, it made sense that ASIC should grant relief to facilitate acquisitions that arise merely by virtue of an agreement to implement a scheme, by extending the application of section 609(7) to agreements concerning the implementation of mergers involving an upstream company to be effected under a scheme of arrangement.
54. Alinta also submitted that the relevant question for Panel consideration was not what ASIC should have done, but what the Panel considered was the correct decision for it to make in light of the circumstances prevailing at the time of its review. The Panel accepted that this approach was appropriate in the circumstances before it and noted the references that Alinta supplied in relation to the question. However, the Panel considered that in the circumstances before it, varying the ASIC Declaration would have no effect on the Acquisitions and would be less effective in addressing any issues in relation to the Acquisitions than a Panel declaration and any appropriate orders. For the reasons set out below, and on the basis of the circumstances before it at the time when it came to consider the ASIC Declaration, the Panel decided not to vary the ASIC Declaration.

Relief not commonplace

55. In response to Alinta’s submission that the ASIC Declaration was relatively standard relief, the Panel noted that in submissions it was accepted that:
 - (a) although ASIC had previously granted three somewhat similar modifications of section 609(7), only one of these had related to a possible downstream acquisition (and that relief had been granted to Alinta in relation to a transaction in relation to different companies);

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- (b) in the one closely analogous case, no downstream acquisitions had been made by the upstream acquirer in reliance on the relief; and
- (c) there were no precedents where acquisitions in the downstream company similar to the Acquisitions had been allowed or disallowed which the Panel should take into consideration.

Retrospective variation of ASIC Declaration

56. The Panel considered that it was not desirable for the Panel to make a retrospective variation of the ASIC Declaration where the effect of doing so would make previously lawful conduct unlawful. The Panel noted Alinta's submission that it had relied on the relief provided by the ASIC Declaration, and that it would be unreasonable for the Panel now to vary the ASIC Declaration after Alinta had relied on the relief, as an argument as to why the Panel should not make any retrospective variation of the ASIC Declaration.
57. The Panel also noted Alinta's submission that it had been entitled to rely on the relief provided by the ASIC Declaration. However, in respect of this latter submission, the Panel considered that whether or not a person is "entitled" to rely on any relief provided by ASIC will depend on the adequacy of the information provided to ASIC when ASIC granted the relief and whether or not relevant new circumstances have arisen since that time.
58. The Panel concluded that varying or modifying the ASIC Declaration at the time of its Proceedings would not remedy any unacceptable circumstances which the Panel found. Had the application been brought to the Panel prior to the Acquisitions, variation or revocation of the ASIC Declaration may have been a practical path for the Panel to take. Under the circumstances before the Panel, there were no steps that the Panel could make in relation to the ASIC Declaration that would remedy the consequences of the ASIC Declaration. Therefore it did not revoke or vary the ASIC Declaration.

Primary relief – allow MIA

59. The Panel did not disagree with the relief given to Alinta insofar as it allowed Alinta and AGL to enter into the MIA provided Alinta had applied to ASIC prior to gaining a relevant interest in the AGL Parcel⁴. ASIC advised in its reasons for decision that it had granted the relief primarily because it considered that an agreement conditional on approval of a scheme of arrangement was sufficiently analogous to shareholder approval under item 7 of section 611 to grant relief of the kind that Alinta sought.
60. The Panel considered that ASIC's view on this was reasonable, but it considered that it would have been appropriate for any ASIC relief in Alinta's circumstances to contain an express requirement, or condition, that Alinta acquired no further units in APT between the time of entering into the Heads of Agreement (or any agreement

⁴ The Panel noted ASIC's submission that the better view was that the MIA did give Alinta a relevant interest in the AGL Parcel. However, because the Panel did not address the section 606 aspects of the Application it did not have to decide whether or not such relief, if required, was required prior to Alinta and AGL entering the Heads of Agreement or prior to either of the MIAs.

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which gave Alinta a relevant interest in more than 20% of the units in APT) and approval of the Scheme.

Purpose of section 609(7)

61. The Panel considered that the exception set out in section 609(7) was not intended to allow a person, such as Alinta, to enter into an agreement with an upstream company, under which it could restrain disposal of shares in a downstream company, in anticipation of being able later to acquire a relevant interest in the shares under an exception under section 611, and, under the shelter of section 609(7), acquire further shares in the downstream company to increase or consolidate control in the downstream company.
62. In passing, the Panel acknowledged Alinta's submissions that the chain of agreements (26 April 2006 Heads of Agreement, 1 June 2006 MIA and 22 June 2006 MIA) was broken between 31 May 2006 and 1 June 2006 and between 21 June 2006 and 22 June 2006 and that technically AGL's disposal of the AGL Parcel was only actually restricted, by any agreement to which the ASIC Declaration related, for a continuous period from 22 June 2006 to 9 October 2006. However, the Panel was concerned that the restraint on disposal of the AGL Parcel appeared to have occurred in fact from 26 April 2006 to 9 October 2006, a period of over five months, rather than the statutory period of three months, or the four month period specified in the ASIC Declaration⁵.

Unacceptable circumstances – section 657A(2)(b) - Contravention of section 606

63. The Panel considered that the determination of whether or not the Acquisitions constituted a contravention of section 606 was likely to involve significant legal analysis and interpretation, in particular of the terms of a range of complex documents relating to the Schemes. The Panel considered that the type of legal analysis that the particular circumstances of these proceedings would be likely to require did not sit easily with the requirement in the Panel's legislation to conduct its proceedings "with as little formality" and "in as timely manner" as a proper consideration of the matters before the Panel permitted, where the Panel considered that it could properly consider the matter from the perspective of the Acquisitions' effect on control or potential control of APT. The Panel considered that if circumstances required it to do so, it was open to it to return to the question of contravention of section 606 and undertake the legal analysis and interpretation required, and the Panel was prepared to do so if necessary.
64. The Panel considered that it would be required to consider similar issues of public policy and the matters to which the Panel must have regard under section 657A(3) if it found that the Acquisitions constituted a contravention of section 606, as it would be required to consider if it found that the Acquisitions had had an effect on control or potential control of APT or had an effect on the acquisition, or proposed acquisition of a substantial interest in APT. The Panel also considered that it was highly likely that the considerations as to remedy would be similar in both cases.

⁵ The Panel notes that it did not receive or review the Heads of Agreement in these proceedings.

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65. Accordingly, the Panel considered that pursuing the issue of a possible contravention of section 606 was less useful than considering the questions of the appropriateness of the terms of the ASIC Declaration and of the unacceptability or otherwise of the circumstances constituted by the Acquisitions.
66. On that basis, the Panel did not seek to determine whether the Acquisitions did or did not breach section 606.
67. Alinta supported this approach. However, APT did not support the approach and after the Panel announced its decision to make a declaration of unacceptable circumstances on 4 September 2006⁶, APT commenced proceedings in the Federal Court⁷ on 6 September 2006 seeking a declaration and orders from the court that Alinta had breached section 606 by entering into the Heads of Agreement or the MIA, and by making the Acquisitions. The application to the Federal Court was heard at the same time as Alinta's application under the Administrative Decisions (Judicial Review) Act for review of the APT 01R Panel's decision.
68. After considering the submissions and rebuttals in the proceedings, the Panel determined that the circumstances surrounding, and leading up to the Acquisitions were unacceptable circumstances having regard to the effect of the Acquisitions on control or potential control of APT, and it could make appropriate orders on the basis of such a declaration to remedy the unacceptable circumstances.

Unacceptable circumstances – section 657A(2)(a) – Effect on Control of APT

Control

APT

69. APT submitted that by virtue of the Acquisitions and the MIA, Alinta had acquired a relevant interest in approximately 40.25% of APT. This resulted from Alinta's ability to control the disposal of the AGL Parcel (30%), plus the Acquisitions (approximately 10.25%).
70. APT submitted that control of APT had passed to Alinta in circumstances that were not competitive for the following reasons:
 - (a) no control premium was paid and/or made available to all unitholders of APT;
 - (b) Alinta had effectively locked out any other person from bidding for units in APT; and
 - (c) no competitive pricing tension for APT units would now be available.
71. APT submitted that the purposes of Chapter 6 had been offended because:
 - (a) control of APT had passed in an uninformed market (section 602(a));

⁶ The Panel made a declaration of unacceptable circumstances on 4 September. Alinta announced its intention to seek judicial review of the Panel's decision to make a declaration of unacceptable circumstances on the same day. APT announced its decision to make its section 606 contravention application to the court on 6 September 2006. The Panel made orders in these proceedings on 7 September 2006 and Alinta announced its intention to seek review of the Panel's orders on 9 September 2006.

⁷ In the Matter of Alinta Limited ACN 087 857 001 In the Federal Court of Australia, New South Wales Registry, No. NSD 1710 of 2006.

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- (b) unitholders in APT who sold the first 4% (of the total 10.5%) of APT to Alinta did not know (at the time of the sale) the identity of the acquirer of this substantial interest in APT. Alinta only made an announcement after it had acquired the 4%, in contravention of sections 602(b)(i) and 606(1)(c)(ii);
- (c) unitholders in APT were not given a reasonable time to consider what Alinta was proposing, nor enough information to enable APT unitholders to assess the merits of Alinta's proposal, by its actions, to take control of APT. Alinta had merely stepped into the market and said that it would acquire a limited parcel of APT units (section 602(b)(ii) and section 602(b)(iii)); and
- (d) in the trading following Alinta's announcement, not all unitholders of APT had a reasonable and equal opportunity to participate in the Acquisitions by which Alinta acquired a substantial interest in (and further control over) APT (sections 602(a) and (c)).

Alinta

- 72. Alinta submitted that as AGL held approximately 30% of APT units, which already constituted a blocking stake in relation to any person considering making a takeover bid for APT, Alinta's acquisition of approximately 10% did not have a material effect on control, or the market for control, of APT or units in APT.
- 73. Alinta submitted that the Schemes should not be construed as a proposed acquisition of a substantial interest in APT, rather they should be looked at as the merger of Alinta and AGL with the acquisition of the AGL Parcel being merely incidental.
- 74. Alinta also submitted that there was considerable uncertainty that any aggregation of Alinta's and AGL's interests in APT would occur as the Schemes remained subject to separate approvals of shareholders of Alinta and AGL and to satisfaction of other substantive conditions. There remained a degree of hostility between the parties to the MIA and the possibility that either party or its shareholders may not ultimately support the Schemes, and there were other market events that could disrupt the implementation of the Schemes.

Discussion

- 75. The Panel considered that the Acquisitions, when taken in context of the MIA, the ASIC Declaration, the proposal for the Schemes to be implemented, and the AGL Parcel, were likely to have an effect on the control or potential control of APT.
- 76. The Panel considered that if the Schemes were approved, the Acquisitions would increase Alinta's post-merger voting power in APT from 30% to 40.25%. The Panel considered that an increase from 30% to 40.25% was a real and significant increase in the level of control Alinta would be able to exercise if the Schemes were implemented and that was a real and significant effect on control or potential control, of APT.
- 77. The Panel considered that while the AGL Parcel of 30% may have been something of a deterrent to a potential bidder for APT, the acquisition by Alinta of the additional 10% would have been an additional and further deterrent to any such possible acquirer and would likely have put APT beyond the reach of any rival bidder.

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78. The Acquisitions were likely to have a current, deterrent effect on any rival bidder considering making a takeover offer for APT or other control transaction. Although the Schemes were not certain to be approved, the Panel considered, in its expert opinion, that the restrictions on disposal in the MIA coupled with the Acquisitions and the prospect of the Schemes being approved, and Alinta moving from 10% to 40.25% voting power, was likely to have an effect on the intentions of any person considering whether to offer to acquire the existing holding of AGL, or any part of it, or to make a takeover bid for APT at the current time.
79. The Panel also considered that the Acquisitions were likely to have an effect on control of APT in the event that the Schemes were approved, in which case APT's voting power in APT would be 40.25% rather than 30%⁸. The Panel considered such an increase to be a material increase in the control that Alinta would be able to exercise on the management and other aspects of APT.

Substantial interest

80. APT submitted that both the Acquisitions and the proposed acquisition of the AGL Parcel by Alinta under the proposed Schemes were substantial interests in APT.
81. Alinta submitted that the implementation of the Schemes (if it occurred) should not be taken to be a proposed acquisition of a substantial interest in APT. It submitted that implementation of the schemes would fundamentally involve acquisition of substantial interests in AGL and Alinta by Alinta Mergerco Limited. The fact that interests in APT might be aggregated was not fundamental to the proposal. Moreover, whether or not that gave rise to a substantial interest in APT would depend on the interests of Alinta and AGL at implementation. .
82. The Panel considered that each of the Acquisitions and the Schemes constituted the acquisition, or proposed acquisition, of substantial interests in APT.

Uninformed market

83. APT submitted that the Acquisitions:
- (a) meant that control of APT had passed in a market that was not fully informed of Alinta's intentions at the relevant time.
 - (b) were undertaken in a way that certain APT selling unitholders did not know the identity of the person (Alinta) who was proposing to acquire a substantial interest in APT.
84. The Panel was concerned that APT unitholders were not informed of a proposal under which Alinta intended to acquire up to 19.9% of APT units (as advised to the Panel) in circumstances where, if the Schemes were approved, Alinta would then hold more than 40% of the units in APT.

Equal opportunity to participate

85. Alinta made the Acquisitions at an average price close to \$5.00 per unit. That was approximately 20% above the average closing price for APT units on ASX in the days prior to Alinta's first acquisitions on 16 August 2006. The Panel considered that the

⁸ Based on the number of APT units on issue at the time of the Acquisitions.

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APT unitholders who sold their units to Alinta had received a significant benefit. Mr Browning's comment about the Acquisitions being made at a premium confirmed this. The Panel considered that not all APT unitholders would have the opportunity to participate in the benefits flowing from the Acquisitions because, accepting Alinta's proposition as to the effect of the MIA or the effectiveness of the ASIC Declaration, Alinta would be prohibited from acquiring more than 20% of units in APT. If APT's proposition as to the effect of the MIA and the effectiveness of the ASIC Declaration were accepted then Alinta would be prohibited from acquiring any APT units.

86. On either basis not all APT unitholders would be able to benefit from the higher prices paid by Alinta in circumstances where Alinta had acquired the substantial interest under the Acquisitions and was reasonably likely to acquire (or cement control over) a further substantial interest on the implementation of the Schemes i.e. the AGL Parcel.

Uncertainty

87. Alinta submitted that it was not appropriate for the Panel to speculate as to the effects of circumstances which might not occur i.e. the implementation of the Schemes. Alinta submitted that implementation of the Schemes was not certain to occur and that it was therefore inappropriate for the Panel to aggregate the Acquisitions with the AGL Parcel when considering the effect of the Acquisitions on control or potential control of APT.
88. Alinta cited the decision of Emmett J in *Glencore International AG v Takeovers Panel* (2006) (*Glencore*) as a restriction on the Panel "speculating" as to possible effects of the Acquisitions.
89. The Panel accepted Alinta's submissions that implementation of the Schemes was not certain but did not consider that the uncertainty that Alinta raised was sufficient for the Panel to ignore the likelihood of the Schemes being implemented. The Panel did not consider that Alinta provided any evidence that suggested that the market, or rival acquirers, would ignore the Schemes when assessing the possibility of acquiring control of APT. Indeed, the Panel considered that Alinta itself had emphasised the likelihood of the Schemes being approved when Mr Browning had stated in a Media Release on 17 August 2006 when announcing the Acquisitions

"While Alinta and AGL shareholder approval of the Schemes is not certain..... We believe the merger with AGL's infrastructure assets is so compelling for our shareholders that their support is likely".

Therefore, the Panel considered that it was appropriate to look towards the effect of the Schemes being approved when assessing the effect of the Acquisitions on control or potential control of APT. The Panel considered that this is precisely what real markets do and it would be severely detrimental to the interests of APT unitholders if the Panel refused to look at the realities of control or potential control of APT.

90. The Panel considered that it should look at real possibilities when assessing the effect of the Acquisitions on potential control of APT, not possibilities that were of low or immaterial probability, but there was no evidence before the Panel that implementation of the Schemes was of low or immaterial probability.

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91. The Panel did not accept Alinta's characterisation of Emmett J's decision. The Panel considered that it was clear from Emmett J's decision that it was open to it to consider what was likely to occur if the circumstances complained of had or had not occurred. Indeed, the Panel considered that the *Glencore* decision indicated that it was necessary for the Panel to undertake such "speculation" (or consideration as to the likely effect of the circumstances).

Downstream acquisition exception

92. Alinta submitted that the Panel should take the policy underlying item 14 of section 611 as approving the Acquisitions because "the downstream exemption allows aggregation of interests regardless of the size of the holdings of the upstream company and the upstream acquirer". Alinta submitted that the purpose of the item 14 exception is to "ensure there is a free market in the upstream company's securities and therefore an efficient market in the securities of the upstream company".
93. The Panel accepted Alinta's submissions that the exception in item 14 of section 611 is intended to ensure that the market for control of an upstream company (in this case AGL) is efficient and competitive. The Panel also accepted that item 14 would have excepted the aggregation of any pre-existing holding of APT held by Alinta with the AGL Parcel on implementation of the Schemes.
94. However, the Panel did not consider that an ASIC modification that allowed further acquisitions of securities by Alinta in the downstream company (i.e. APT) after entry into the Heads of Agreement or MIA had any relevance to the efficient market for securities of AGL as Alinta had submitted.
95. The Panel considered that it was not acceptable for a proposed acquirer of an upstream company to enter into an agreement (such as the MIA) which restricts disposal of a parcel of securities in the downstream company, and then acquire further securities in the downstream company, where the two parcels would be aggregated on implementation of the Schemes, if the proposed acquirer would not be entitled to make the downstream acquisitions on implementation of the Schemes.
96. The Panel considered that this was contrary to the purpose of the exception in item 14 and a basis for considering the circumstances were unacceptable and a matter to be taken into consideration under section 657A(3) if the Panel was considering exercising its powers under section 657A.

Control of APT

97. Alinta submitted that control of APT was not one of the main purposes of its proposed merger with AGL. It pointed to the fact that the AGL Parcel constituted only 6.5% of the assets Alinta would acquire under the merger.
98. The Panel accepted Alinta's submission that control of APT was not one of the main purposes of the proposed merger with AGL and that that was not a basis for criticising the ASIC Declaration.
99. However, the Panel considered that the Acquisitions, in the context of the proposed merger and the MIA, and Alinta's statements about its intentions in its announcements to the media and the market, indicated an intention and a move to acquire control or increase control of APT by Alinta.

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Unacceptable Circumstances

100. APT submitted that unacceptable circumstances had arisen as Alinta was proposing to acquire control of APT (which was likely to be solidified following the implementation of the Schemes) in breach of the Eggleston principles and without an offer being made to all APT unitholders or APT unitholder approval having been obtained.
101. Alinta submitted that the possibility that it “may be deemed to acquire an interest in AGL’s units in APT Parcel if the Schemes are implemented” did not affect Alinta’s current ability to acquire APT units. Alinta submitted that its position was no different from any person who, with no stake in an entity, buys up to 20% knowing that any subsequent acquisitions will need to be made in accordance with a specific legislative exemption. The expectation that Alinta may subsequently acquire APT units pursuant to an exception in item 14 of section 611 (as well as the scheme exemption in item 17) did not affect the legality of the Acquisitions or support an argument that they were against the policy of Chapter 6.
102. The Panel did not accept Alinta’s submissions on this point.

Substantial holding notices

103. The Panel noted that Alinta lodged substantial holding notices on 2, 7 and 22 June 2006 relating to relevant interests it may have in the AGL Parcel as a consequence of the two MIAs. The 7 June 2006 substantial holding notice corrected an error concerning the number of units on issue by APT and the number of units held by AGL.
104. The 7 June 2006 substantial holding notice also corrected a failure by Alinta to lodge a substantial holding notice after 26 April 2006 on which date Alinta entered into the Heads of Agreement and Alinta acquired more than 20% of AGL under its takeover bid for AGL. Alinta’s 7 June 2006 substantial holding notice did not disclose the date on which Alinta acquired 20% or more of AGL and at which date it therefore acquired a relevant interest in the AGL Parcel through section 608(3)(a). The Panel considered that the 7 June 2006 substantial holding notice, when correcting the failure of Alinta to lodge a substantial holding notice after 26 April 2006, should have included the date on which Alinta gained a relevant interest in the AGL Parcel.

DECISION

Interim orders

105. On 22 August 2006, following submissions from the parties in relation to APT’s request for interim orders, the Panel made interim orders ordering Alinta (and its associates) not to:
 - (a) acquire any relevant interest in any further APT units;
 - (b) dispose of any relevant interest in any APT units acquired in the Acquisitions, other than in a manner approved by the Panel;
 - (c) enter into, buy, dispose of terminate or otherwise deal with any cash settled equity swap or other synthetic, economic or derivative transaction connected or relating to any APT units; and

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- (d) exercise any rights attaching to any APT units acquired in the Acquisitions on, including voting any of those APT units at a general or extraordinary meeting of APT unitholders.
106. On 31 August 2006, following the announcement of APT's proposed capital raising, Alinta requested a variation of the interim orders to prevent APT issuing further securities, other than on a pro rata basis, until the Panel had concluded proceedings. If the Panel refused this request, Alinta requested that the Panel's existing interim orders be amended to permit Alinta to participate in any capital raising by APT pro rata to its existing 10.25% holding.
107. In response to Alinta's request, the Panel varied the interim orders to permit Alinta and its related bodies corporate or associates to acquire APT units under the bookbuild and institutional placement announced by APT on 31 August 2006, sufficient to maintain, but not exceed, Alinta's percentage voting power that it had acquired under the Acquisitions i.e. 10.25% of APT. The Panel advised Alinta that it would vary the interim orders on the basis that any units acquired by Alinta under the institutional placement would be subject to the interim orders and to any final orders which the Panel made (if any) in relation to the APT units which Alinta had acquired under the Acquisitions. These new units acquired were subsequently covered by both the Panel's interim and final orders.

Review of ASIC Declaration

108. For the reasons set out above, the Panel determined not to revoke or vary the ASIC Declaration.

Declaration

109. The Panel decided that the Acquisitions, the circumstances leading up to them and the circumstances existing at the time of the Acquisitions (including the fact of the proposed Schemes), appeared to it to be unacceptable having regard to the effect, or alternatively, the likely effect, of the circumstances on:
- (a) the control, or potential control of APT; and
 - (b) the acquisition, or proposed acquisition, of a substantial interest in APT.

Public interest

110. The Panel considered that it was not against the public interest for it to make a declaration of unacceptable circumstances.
111. For the reasons given above, the Panel considered that the unitholders of APT had been adversely affected by the effect of the circumstances on the competition for control of APT. In addition, the Panel considered that it was likely that unitholders of APT would be adversely affected if the Schemes were approved.
112. The Panel considered that APT is a significant listed entity and that it would be against the public interest for the confidence of investors in the Australian securities market to be harmed by Alinta being allowed to consolidate the potential control which it was likely to gain via the Schemes, by making the Acquisitions where the circumstances appeared to the Panel to be unacceptable.

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113. Alinta raised several issues in its submissions about confidence in investment in Australia being harmed if a lawful transaction, which Alinta submitted the Acquisitions was, were overturned by the Panel. The Panel did not accept that a declaration of unacceptable circumstances and orders to remedy the unacceptable circumstances would have any adverse effect on investment in Australia given the circumstances surrounding the Acquisitions.
114. The Panel considered it was in the public interest for a substantial interest in APT (a large, retail based, listed entity) to be acquired in an efficient competitive and informed market, and it was against the public interest for such a substantial interest to be acquired where its acquisition may have adverse effects on the other unitholders in APT.
115. The Panel considered that it was desirable for the interests of the unitholders in APT who had been affected by the unacceptable circumstances to be protected by the Panel making a declaration of unacceptable circumstances and then making orders to remedy the unacceptable circumstances.
116. The Panel considered that it would be in the public interest to remedy the effect of the unacceptable circumstances on the efficient, competitive and informed market for control of the units in APT, by making a declaration of unacceptable circumstances and appropriate orders.

Section 657A(3)

117. In considering whether or not to make a declaration of unacceptable circumstances, the Panel considered the matters set out in section 657A(3), including the purposes of the Takeovers Chapter set out in section 602 and the other provisions of Chapter 6. The Panel considered that it was desirable for:
 - (a) unitholders of APT to know the identity of any person who was proposing to acquire a substantial interest in APT, especially where the substantial interest of the Acquisitions was likely to be aggregated with the additional substantial interest of the AGL Parcel;
 - (b) unitholders in APT to have a reasonable and equal opportunity to participate in any benefits accruing through Alinta's proposed acquisition of a substantial interest by way of the Acquisitions; and
 - (c) the acquisition of control of APT and units in APT to take place in an efficient, competitive and informed market.

The Panel considered that these issues were more important where the substantial interest of the Acquisitions was likely to be aggregated in Alinta's hands with the additional substantial interest of the AGL Parcel if, as seemed a real possibility, the Schemes were approved.

118. The Panel considered the purposes and objectives of the relevant provisions of the Corporations Act which Alinta cited in support of its submissions i.e. section 609(7) and items 14 and 17 of section 611. The Panel considered that the circumstances were unacceptable when considered in light of the purposes of those provisions.
119. Having considered the purposes of section 602 and the other provisions of Chapter 6, the Panel decided that it was appropriate to exercise its powers to make a declaration

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that the Acquisitions and the circumstances leading up to and surrounding them constituted, or gave rise to, unacceptable circumstances in relation to the affairs of APT.

Orders

120. Consequent to making the declaration of unacceptable circumstances, the Panel considered that it would be desirable to make orders to protect the interests of APT unitholders who had been affected by the unacceptable circumstances. The Panel considered that APT unitholders had been adversely affected by the Acquisitions in that the Acquisitions affected the prospect of any person considering whether to offer to acquire the existing holding of APT, or any part of it, or to make a bid for APT. The Panel also considered that the interests of APT unitholders had been adversely affected by the lack of information and opportunity to participate in circumstances where Alinta had acquired a substantial interest in APT. The Panel considered that the aim of an efficient competitive and informed market for units in APT had been impaired. The Panel considered that the magnitude of these effects was significant in relation to the affairs of APT.
121. The Panel considered the effects set out above and decided that controlled divestiture of the Acquired Units would be the most direct, effective and efficient method of remedying the adverse effects of the Acquisitions. The Panel considered that this would remedy the effects on the unitholders of APT and on the market for control of APT units. The Panel considered other orders (including those proposed by Alinta, see below) but considered that divestiture would be the appropriate remedy.
122. The Panel considered the harm which its proposed orders would have on any person, and specifically Alinta. The Panel acknowledged that its orders may cause some prejudice to Alinta, especially given the price per APT unit which Alinta had paid under the Acquisitions. However, the Panel considered that any prejudice which the orders caused would not unfairly prejudice Alinta. The Panel considered this because, inter alia:
 - (a) it considered that Alinta should have advised ASIC of its intention to acquire further APT units when Alinta applied for the ASIC Declaration (if it had the intention at that time), or when Alinta decided to rely on the ASIC Declaration to make the Acquisitions;
 - (b) the terms of the orders had been drafted with a view to minimizing any harm or loss to Alinta by the sale of the Acquisition units;
 - (c) any prejudice caused to Alinta would be as a consequence of remedying the effects of the Acquisitions on APT unitholders; and
 - (d) Alinta was not prevented by the orders from making a takeover offer for all of the units in APT and could therefore negate any potential harm by making a takeover offer for all units in APT.
123. The Panel considered that the harm from the effects of the unacceptable circumstances caused to APT unitholders warranted the orders which it proposed. It considered that the orders were proportionate and effective in redressing the effects of the Acquisitions on APT unitholders while minimising any prejudice to Alinta,

Takeovers Panel

Reasons for Decision – Australian Pipeline Trust 01

and the Panel was not satisfied that any prejudice which the orders might occasion to Alinta would be unfair.

124. The Panel invited submissions from parties in relation to its proposed orders i.e. that the Acquired Units be vested in ASIC for sale by a bookbuild where Alinta, AGL, Petronas and their associates were prohibited from acquiring any of those APT units (**Initial Proposed Orders**).
125. In its submissions on the orders which the Panel proposed, Alinta proposed alternative orders that would have permitted Alinta to retain the Acquired Units if it made a takeover offer for all of the units in APT, subject to Alinta agreeing to accept the Acquired Units into a higher unconditional takeover bid made by any third party (**Alinta Proposed Orders**). Alinta submitted that the Alinta Proposed Orders would remove the risk that Alinta would be unfairly prejudiced by being forced to sell its units in circumstances where the Scheme were not implemented and no aggregation of interests occurred.
126. After considering submissions from the parties in relation to the Alinta Proposed Orders, and considering several sets of revisions, the Panel decided that the alternative orders would be too complex for the Panel to administer and that the market would likely have difficulty in understanding them. The Panel also considered that divestment orders would best protect the interests of the APT unitholders.
127. Accordingly, on 7 September 2006, the Panel made final orders in the form set out in Annexure B that the Acquired Units be vested in ASIC for sale by bookbuild or into an unconditional takeover bid for all of the units in APT. The Panel considered that it was also appropriate that final orders should not restrict Alinta from making a takeover bid of all of the units in APT, as any competition for control of APT would be to the benefit of APT unitholders.
128. The Panel made no order for costs.

Stay of Orders in relation to divestment

129. On 5 September 2006, the Panel received an application from Alinta for review of the decision made by the sitting Panel in the Proceedings. Accordingly, the Panel considered it appropriate to stay those parts of its orders which related to vesting of the Acquired Units and sale by ASIC until the Panel appointed in relation to the review application had time to consider the application. However, those parts of the Panel's orders which maintained the status quo while the review Panel was considering the application before it were operative immediately.

Nerolie Withnall

President of the Sitting Panel

Decision dated 3 September 2006

Reasons published 29 November 2006



Annexure A- Declaration

**Corporations Act
Section 657A
Declaration of Unacceptable Circumstances**

In the matter of Australian Pipeline Trust

WHEREAS

Background

1. On 22 June 2006, Alinta Limited (**Alinta**) and The Australian Gas Light Company (**AGL**) executed a Merger Implementation Agreement (**MIA**) to merge their infrastructure assets, including AGL's holding of 30% in Australian Pipeline Trust, subject to the implementation of schemes of arrangement between Alinta and AGL (**Schemes**).
2. On 3 July 2006, the Australian Securities and Investment Commission (**ASIC**) made a Declaration pursuant to paragraph 655A(1)(b) of the Corporations Act that omitted and replaced section 609(7) of the Corporations Act in a modified form as it applied to Alinta in respect of the MIA.
3. Between 16 August 2006 and 22 August 2006, Alinta acquired approximately 10.25% of the units in Australian Pipeline Trust (**Acquisitions**).

Application

4. The Takeovers Panel (**Panel**) received an application dated 21 August 2006 from Australian Pipeline Limited (in its capacity as responsible entity of Australian Pipeline Trust) and Australian Pipeline Trust (together **APT**) in relation to the Acquisitions.

Unacceptable Circumstances

5. The Panel finds the Acquisitions constituted the acquisition of a substantial interest in APT.
6. The Panel also finds the Acquisitions, when taken in context of the relief granted by ASIC, the forthcoming Schemes and the existing holding of 30% in APT by AGL, are likely to have an effect on the control or potential control of APT.
7. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances.
8. The Panel has considered the desirability of the acquisition of control of units in APT taking place in an efficient, competitive and informed market, and other purposes of the Takeovers Chapters as set out in section 602 of the Corporations Act. Having considered these issues, the Panel has decided to make a declaration under 657A of the Corporations Act that the Acquisitions are unacceptable circumstances having regard to the effect of the Acquisitions on the acquisition of a substantial interest in APT by Alinta and the control or potential control of APT.

Nerolie Withnall
President of the Sitting Panel



Dated 2 September 2006
Annexure B – Final Orders

Corporations Act
Section 657D
Final Orders

In the matter of Australian Pipeline Trust

Pursuant to section 657D of the Corporations Act 2001 (**Act**) and pursuant to a declaration of unacceptable circumstances made by the Panel on 3 September 2006, the Takeovers Panel HEREBY ORDERS:

Divestment order

- (1) that the legal title to and beneficial ownership of the Sale Units be vested in the Australian Securities and Investments Commission (**ASIC**) by the transfer of the Sale Units from Alinta to ASIC, for ASIC to:
 - (a) sell the Sale Units; and
 - (b) subject to any requirement arising under a Tax Law, account to the persons who, immediately before the making of this order, were the registered holders of the relevant Sale Units for the proceeds of sale, net of the costs, fees and expenses of the sale and any costs, fees and expenses incurred by ASIC, or which ASIC reasonably incurs, or estimates it will incur, in complying with these orders (even where those costs, fees or expenses are incurred in relation to any earlier unsuccessful attempt to sell the Sale Units). If ASIC considers there to be a reasonable doubt as to whether a requirement has arisen under a Tax Law, ASIC is not required to so account for that proportion of the proceeds relating to the apparent requirement until it has determined whether a requirement has, in fact, arisen;
- (2) that Alinta and its agents do all things necessary to give effect to the transfer under order (1);
- (3) that ASIC retain an investment bank or licensed stock broker (**Appointed Seller**) which:
 - (a) ASIC considers to be appropriately licensed to conduct the sale; and
 - (b) provides to ASIC a statutory declaration that, having made proper inquiries, the Appointed Seller is not aware of any interest, past, present, or prospective which could conflict with the proper performance of the Appointed Seller's functions in relation to the disposal of the Sale Units;
- (4) that ASIC will instruct the Appointed Seller:
 - (a) to sell the Sale Units by a bookbuild or into an unconditional takeover bid for all units in APT (**Unconditional Bid**);
 - (b) to seek to maximise the sale price of the Sale Units;

- (c) that none of the Parties may acquire or buy any of the Sale Units other than pursuant to an acceptance by the Appointed Seller into an Unconditional Bid;
 - (d) that unless the Appointed Seller sells Sale Units by accepting into an Unconditional Bid, it obtain from any prospective purchaser of Sale Units a statutory declaration or statement in accordance with rule 7.1(c) of the Panel's Rules for Proceedings that it is not associated with any of the Parties;
- (5) without limiting ASIC's ability to seek further orders, that ASIC seek further orders from the Panel if the Appointed Seller is unable to dispose of the all of the Sale Units within 6 weeks from the date of engagement of the Appointed Seller, without, in its reasonable opinion acting as expert, unduly depressing the market price of APT units;

Acquiring, disposing and voting restriction orders

- (6) Alinta not to:
- (a) acquire any relevant interest in any further APT units;
 - (b) purchase any units in APT;
 - (c) dispose of any relevant interest in any Sale Units, other than in a manner approved by the Panel;
 - (d) enter into, buy, dispose of, terminate or otherwise deal with any cash settled equity swap or other synthetic, economic or derivative transaction connected or relating to any APT units or the price of APT units;
 - (e) exercise any rights attaching to any Sale Unit, including voting any of those Sale Units at a general or extraordinary meeting of APT unitholders;
 - (f) agree or give any right to require it to do anything referred to in paragraphs (6)(a) to (e) above;
- (7) that each Party and ASIC have the liberty to apply for further orders in relation to the matters covered by orders (1), (2), (3), (4), (5) and (6);

Period for which orders have effect

- (8) that the orders in paragraphs (1) to (5) are stayed until further order by the Takeovers Panel; and
- (9) that the orders in paragraph (6) remain in effect until the earlier of:
- (a) completion of the sale of the Sale Units by the Appointed Seller; or
 - (b) further order by the Takeovers Panel.

Nothing in these orders prevents Alinta making a takeover bid for all APT units.

Schedule 1 - Glossary

Alinta means Alinta Limited, its related entities and its associates.

AGL means the Australian Gas Light Company.

APT means Australian Pipeline Trust.

associate has the meaning given to that term by sections 12, 15 and 16 of the Act with the modification that in sub-paragraph 12(2)(a)(ii) the expression “a body corporate” is replaced by the expression “an entity” and “entity” has the meaning given in section 64A;

Parties means Alinta and AGL and their associates.

Sale Units means Alinta's 10.25% holding in APT acquired on and between 16 and 21 August 2006, and APT units acquired by Alinta under the placement bookbuild conducted by APT on 31 August 2006 and 1 September 2006.

Tax Law means the *Income Tax Assessment Act 1936* (Cth), the *Income Tax Assessment Act 1997* (Cth) or any other law of the Commonwealth relating to taxation law.

Dated 7 September 2006

Nerolie Withnall
President of the Sitting Panel