Takeovers Panel

In the matter of Australian Pipeline Trust 01R
[2006] ATP 29

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; relevant interest; substantial holding; voting power; unfair prejudice; control premium; 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, 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 in relation to an application by Australian Pipeline Trust under sections 656A and 657C of the Corporations Act 2001 (Cth)[1] into its affairs. Alinta Ltd sought review (under section 657EA) of the decision by the initial Panel in relation to APT's application. 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 August 2006 to 22 August 2006. The Panel decided to make a declaration of unacceptable circumstances on the basis:

(a) of the effect of the Acquisitions on the control or potential control of APT; and

(b) that the Acquisitions caused, or gave rise to, a breach of s 606.

The Panel made orders vesting the units acquired by Alinta under the Acquisitions in ASIC for ASIC to sell and remit the proceeds to Alinta.

THE PROCEEDINGS

1. These reasons relate to an application (the Review Application) to the Panel from Alinta Limited (Alinta) for review of a decision by the Panel on 2 September 2006 to make a declaration of unacceptable circumstances and a further decision by the Panel on 6 September 2006 to make orders vesting in ASIC units in Australian Pipeline Trust which Alinta had acquired. The initial Panel's (Initial Panel) decision related to an application (Initial Application) by 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 Initial Application related to:

   (a) the Declaration made by ASIC 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 Merger

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

Implementation Agreement dated 22 June 2006 between Alinta, The Australian Gas Light Company (**AGL**), AGL Energy Limited and Alinta Mergeco Limited (**MIA**) (**ASIC Declaration**); and

(b) the acquisitions of 10.25% of the units in APT by Alinta on and from 16 August 2006 to 22 August 2006 (**Acquisitions**).

3. The Review Application, being made under section 657EA, only related to the Initial Panel's decisions concerning the Acquisitions.

4. In summary, in respect of the Acquisitions, APT submitted that:

   (a) given Alinta had voting power by virtue of the MIA in 40.25% of APT at the time of the Acquisitions, Alinta contravened section 606(1)(c)(ii); 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 in breach of the Eggleston Principles whereby all shareholders are provided with an opportunity to participate.

The Panel & Process

5. The President of the Panel appointed David Gonski AO (Sitting President), Marian Micalizzi and Ian Ramsay (Deputy President) as the sitting Panel (**Panel**) for the proceedings (the **Proceedings**) arising from the Review Application.

6. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.

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

Background

APT

8. As at 22 August 2006, the major unitholders in APT were as follows:

   (a) 30% AGL;

   (b) 10.98% Petronas Australia Pty Limited; and

   (c) 10.25% Alinta.

   The Panel understands that, except as set out above, the remainder of APT's units are widely held by predominantly retail shareholders who each hold not more than 1% parcels of APT units.

AGL/Alinta Merger

9. 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 proposals. Alinta had also acquired, on-market, 19.9% of AGL and indicating 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.

10. On 26 April 2006, AGL and Alinta announced that they had signed a binding heads of agreement to merge their infrastructure assets (the "infrastructure assets" included the 30% of APT units held by AGL (**AGL Parcel**)) subject to the implementation of the Schemes (**Heads of Agreement**).
11. Alinta advised the Panel that on 26 April it had received acceptances under its takeover bid for AGL such that its voting power in AGL increased above 20%. Alinta's increase in voting power in AGL to above 20% caused Alinta to be deemed to have acquired a relevant interest in the AGL Parcel under section 608(3)(a). That acquisition of a relevant interest in the AGL Parcel increased its voting power in APT from 0% to 30% however, the acquisition of that 30% relevant interest in APT fell within the exception in item 14 of section 611.
12. Alinta advised the Panel that its relevant interest in AGL fell below 20%[2] on 4 August 2006 and thus, on that date, it lost the relevant interest in the AGL Parcel it was deemed to have under section 608(3)(a).
13. Alinta advised the Panel that the Heads of Agreement lapsed on 31 May 2006 because it was a term of the Heads of Agreement that the MIA be entered into by Alinta and AGL by that date, which had not occurred.
14. On 1 June 2006, Alinta and AGL executed the first Merger Implementation Agreement (**MIA**) which formalised the implementation procedures for the merger which was proposed under the Heads of Agreement. On 21 June 2006, the first MIA lapsed due to Alinta and AGL not having entered into additional transaction documents before 21 June 2006, which was a term of the MIA.
15. On 22 June 2006, Alinta and AGL executed the second MIA which, Alinta submitted, was identical to the first MIA with the exception of a later date for execution of additional transaction documents.

ASIC Declaration

16. 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 the AGL Parcel as a result of the MIA (**ASIC Relief**).
17. On 3 July 2006, ASIC modified the terms of section 609(7), (**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.

Acquisitions

18. On 17 July 2006, the Alinta board approved in principle Alinta purchasing up to 10% of APT.

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[2] Alinta did not advise the Panel how Alinta's relevant interest in AGL fell below 20% at that time.

19. On 2 August 2006, the Alinta board approved financing documents to acquire up to 19.9% of APT.
20. Between 16 August 2006 and 22 August 2006, Alinta made the Acquisitions.
21. On 17 August 2006, Alinta announced that it was investing in APT to provide it with greater flexibility and value in regard to complying with undertakings it had given to the ACCC on 2 August 2006 to sell all units in APT it acquired under the Schemes within approximately 12 months of the date of the Schemes, or any amended undertakings that it may negotiate with the ACCC[3] over ensuing weeks[4].
22. Also 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 offer."[5]

APT takeover bid for GasNet

23. On 22 August 2006, APT announced its intention to make a cash offer to acquire all of the stapled securities in GasNet Australia Group.

Interim orders imposed

24. On 22 August 2006 the Initial Panel made interim orders, among other things, restraining Alinta from acquiring further units in APT until the proceedings were completed. The Initial Panel repeated the effect of the interim orders in the final orders it made, but only for the period until the Schemes were implemented or the MIA lapsed.

Institutional placement

25. APT announced its intention to conduct, on 31 August 2006, 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. Alinta participated in the placement (with the consent of the Initial Panel (which varied the interim orders to allow Alinta to participate in the placement) to avoid prejudice to Alinta in the event that the Initial Panel found that there were no unacceptable circumstances as a consequence of the Acquisitions) to maintain its percentage voting power at 10.25%. The Initial Panel's agreement to Alinta participating in the placement was conditional on any units in APT that Alinta acquired under the placement being subject to the same decision as the units Alinta acquired under the Acquisitions. AGL did not participate in the placement and its percentage voting power was diluted from approximately 30% in APT to approximately 26%.

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[3] Australian Consumer and Competition Commission.
[4] Media Release published on ASX by Alinta 17 August 2006.
[5] "Open briefing" by corporatefile.com.au on 17 August and published by Alinta to ASX on 17 August 2006.

APPLICATION

Declaration of Initial Panel

26. Under the Initial Application APT sought a declaration of unacceptable circumstances in relation to the Acquisitions in the circumstances in which they occurred.

Final orders sought

27. In respect of the declaration in relation to the Acquisitions, APT sought the following orders in the Initial Application:
    (a) that the legal title to and beneficial ownership of the units acquired as part of the Acquisitions be vested in ASIC by the transfer of those units by the holders to ASIC, to sell the 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)); and
    (b) Alinta, its Related Bodies Corporate and their associates be restrained from participating in that bookbuild or otherwise acquiring any interest in the units acquired as part of the Acquisitions.

Interim orders sought

28. In the Initial Application APT sought interim orders that, pending final determination by the Initial Panel of the initial 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.

Review sought

29. Under the Review Application, Alinta sought a review of the Initial Panel's Declaration and orders. Therefore, under section 657EA, the Review Panel was required to conduct a review of the Initial Panel's decision and after conducting that review, the Review Panel may vary the decision reviewed, set aside the decision reviewed or set aside the decision reviewed and substitute a new decision based, however, on the circumstances existing at the time of the Review Panel's proceedings.

30. However the Review Panel did not consider the application for interim orders as the Initial Panel had made final orders which still applied, and the Review Application did not relate to the interim orders.

DISCUSSION

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

31. The Panel considered whether or not:
    (a) the entry into the MIA; or
    (b) the Acquisitions,

constituted, or gave rise to, a contravention of section 606.

MIA

32. APT submitted to the Panel that Alinta had contravened section 606 because of entering into the MIA.

33. As described above (see paragraph 11), at the time of entry into the MIA (either 1 or 22 June 2006) Alinta had already had a relevant interest in APT of 30% by the operation of section 608(3)(a) since 26 April 2006. Because it had voting power in AGL of more than 20% (arising from acceptances under its takeover bid for AGL), Alinta was deemed to have a relevant interest in all of the APT units held by AGL (section 608(3)(a)) and consequently, that relevant interest gave rise to Alinta having voting power in relation to all of those units (section 610).

34. Therefore, although the Panel considered that entry into the MIA (either 1 or 22 June 2006) gave Alinta a relevant interest in the AGL Parcel, by virtue of Alinta having power to restrain disposal of the APT units (see the discussion below, paragraphs 44 to 50) the acquisition of that relevant interest in that *same parcel of APT units* did not increase Alinta's voting power in APT. Therefore it did not cause Alinta to contravene section 606 (which is contravened (in relevant part) where a person acquires a relevant interest in voting shares/units and because of the transaction, that person's or someone else's voting power in the company/scheme increases from a starting point that is above 20% to below 90%).

35. Had Alinta not acquired a relevant interest in the AGL Parcel on 26 April 2006, the Panel considered that Alinta would have breached section 606 on 1 June and again on 22 June 2006 by entering into the MIA. As set out below, the Panel considered that the MIA did give Alinta a relevant interest in the AGL Parcel (see the discussion below, paragraphs 44 to 50). Alinta could not, on either 1 June or 22 June, rely on section 609(7)[6] because section 609(7) at that time did not include a "scheme of arrangement" as one of the things on which "an agreement" (under which a person obtains a relevant interest in securities) could be conditional and fall within the provision. ASIC advised Alinta expressly at the time of granting the ASIC Declaration that the ASIC Declaration did not protect or undo any previous acquisition of a relevant interest in the AGL Parcel.

36. On this basis, the Panel did not accept APT's submission that Alinta contravened section 606 at the time it entered into the MIA (either on 1 June or 22 June) , and the issue was not part of the Panel's decision.

Heads of Agreement

37. APT submitted that entry into the Heads of Agreement between Alinta and AGL on or about 26 April 2006, had breached section 606 by causing Alinta to acquire a relevant interest in the AGL Parcel. However, the Panel did not regard itself as having to make a decision on the question because:

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[6] Prior to any modification by ASIC on 3 July 2006

(a) Alinta advised that the Heads of Agreement had expired on 31 May 2006 because it had been a term of the Heads of Agreement that it would expire if the MIA was not executed by 31 May 2006;

(b) Alinta advised that it had acquired voting power of more than 20% in AGL on 26 April 2006 giving it a relevant interest in the AGL Parcel under section 608(3)(a); and

(c) Alinta and AGL entered into the two versions of the MIA on 1 and 22 June 2006 respectively, and the MIA was the primary document operating to give Alinta a relevant interest in the AGL Parcel at the time of the Panel's proceedings.

38. Therefore, in relation to any breach of section 606 which may have been caused by Alinta and AGL entering the Heads of Agreement:

(a) it was a matter of timing during the day of 26 April 2006 (i.e. whether the Heads of Agreement was entered into earlier or later in the day than Alinta received the relevant acceptance(s) of its takeover bid for AGL which gave it voting power of more than 20% in AGL); or

(b) the effect of it lapsed on 31 May 2006 when the Heads of Agreement lapsed; or

(c) the effect of it was overtaken by the entry into the MIA.

39. In any of the cases above, the Panel did not consider that the breach, or its effects, would have been material enough to give rise to unacceptable circumstances at the time of the current proceedings, and the issue was not part of the Panel's decision.

Acquisitions

40. APT submitted that in making the Acquisitions, Alinta breached section 606.

41. In essence, the Acquisitions would constitute, or give rise to, a contravention of section 606 if the MIA gave Alinta a relevant interest in the AGL Parcel, and Alinta failed to gain the benefit of the ASIC Declaration because the MIA did not fall within the terms of the ASIC Declaration.

42. The Panel considered that the MIA did give Alinta a relevant interest in the AGL Parcel and that Alinta did not comply with the conditions of the ASIC Declaration (because the MIA was not an agreement which satisfied the terms of the ASIC Declaration). Because the MIA did not limit the time within which AGL was restricted from disposing of the AGL Parcel, the MIA did not fall within the terms of section 609(7)(c) as modified by the ASIC Declaration, and the ASIC Declaration did not require the relevant interest in the AGL Parcel (obtained under the MIA) to be disregarded.

43. Therefore when Alinta's relevant interest in AGL fell below 20% on 4 August (see paragraph 11), Alinta's relevant interest and voting power in APT did not reduce to nil. Although Alinta lost the relevant interest it held in the AGL Parcel via section 608(3)(a), the Panel considered that Alinta still held a relevant interest in the AGL Parcel under the MIA. Thus, when Alinta came to make the Acquisitions on 16 to 22 August 2006, its relevant interest and voting power in APT was still 30% (not 0%, as would have been the case if the MIA was an "an agreement" to which the modified section 609(7) applied).

Did Alinta acquire a relevant interest in the AGL Parcel because of the MIA - Section 3.1(g)(ii) of the MIA

44. Section 3.1(g)(ii) of the MIA is a condition that, essentially, AGL not dispose of assets whose book value, in aggregate, is greater than $45 million, prior to 8.00 a.m. on the Second Court Date in relation to the AGL Infrastructure Business (as those terms are defined in the MIA). The value of the AGL Parcel is close to $450 million. On that basis, the Panel considers that section 3.1(g)(ii) effectively restrained AGL from disposing of the AGL Parcel.

45. Section 3.1(g)(ii) is subject to an exception that AGL may not make such a disposal without the consent of Alinta (not to be unreasonably withheld). On that basis, Alinta had the power to consent or refuse to allow AGL to dispose of the AGL Parcel. Alinta highlighted that its consent was not allowed to be unreasonably withheld. The Panel does not consider that the condition that Alinta's consent "not be unreasonably withheld" removed Alinta's power to control disposal. The purpose of the clause was to restrain disposals (of a certain value) of the "AGL Infrastructure Businesses" (which included the AGL Parcel) until the Schemes had been implemented. The Panel considered that the circumstances in which Alinta would give its consent to disposal of parts of the AGL Infrastructure Businesses would have been limited and exceptional in the context of the MIA and the Schemes. The circumstances when Alinta's refusal to give such consent would have been unreasonable would similarly have been limited and exceptional. This is because the Panel considers that the purpose of the MIA was to keep the assets of the AGL Infrastructure Businesses intact, for the benefit of Alinta, until the implementation of the Schemes.

46. Alinta also submitted that under the terms of the MIA it did not have actual control over the disposal of the AGL Parcel because the MIA gave it no contractual rights to enforce conditions such as 3.1(g)(ii), only a right to withdraw from implementing the Schemes if a condition, such as 3.1(g)(ii) was breached by AGL. Alinta submitted that it only had a power to influence the disposal of the AGL Parcel, not control it.

47. The Panel considered that Alinta's submissions did not reflect the reality of the situation. The Panel notes clause 3.9 of the MIA which provides that "*to the extent within their control … AGL and Alinta agrees to use best endeavours to implement the AGL Scheme and the Alinta Scheme as soon as practicable and, in particular, to procure that each of the conditions precedent … is satisfied*". In the event AGL disregarded clause 3.1(g)(ii) and sold the AGL Parcel, the Panel considered that Alinta could have taken action to enforce clause 3.9 of the MIA which provided a clear element of control over AGL's ability to dispose of the AGL Parcel. Furthermore, the Panel did not accept that AGL would dispose of assets worth only 6.6% of the total assets it would contribute to the merger if the consequence was that Alinta may rescind the entire merger agreement.

48. Alinta emphasised to the Panel a number of times in the proceedings that Alinta and AGL were not on harmonious relations and that negotiations over implementation of the merger were fierce and determined. In that environment, the Panel further considers that AGL would feel constrained to adhere to the terms of the MIA lest its bargaining power be reduced. In addition, Alinta made it clear to the Panel, as the

Panel is sure that it has made clear to AGL, that if the merger does not proceed, Alinta had taken care to ensure that it has remained in a position to recommence its hostile takeover bid for AGL.

49. Finally, the Panel wrote to AGL asking how it had treated the AGL Parcel since the entry into the MIA. AGL replied that it felt constrained under the MIA not to dispose of assets worth more than $45 million without obtaining Alinta's consent.[7] AGL advised that, it intended to keep the AGL Parcel as an asset of the AGL Infrastructure Business until the Schemes are implemented or the transaction documents have terminated. Whilst the Panel noted that AGL's interpretation was not entirely determinative of whether Alinta in fact controlled the exercise of a power to dispose of the AGL Parcel, it was consistent with the Panel's interpretation of the MIA outlined above and rebutted Alinta's assertion that AGL considered that it was free to dispose of the units.

50. For the above reasons, the Panel considered that section 3.1(g)(ii) of the MIA gave Alinta both effective and actual power to control the disposal of the AGL Parcel. APT put forward a number of other arguments as to why the MIA, and other related documents, gave Alinta a power to control the disposal of the AGL Parcel. Some of them applied through the operation of section 3.1(g)(ii) of the MIA and others applied through the operation of different provisions. The Panel considered that once it had established that section 3.1(g)(ii) of the MIA gave Alinta power to control the disposal of the AGL Parcel, it did not need to make further enquiries to prove or disprove the proposition in relation to the other provisions.

<u>Was the MIA an agreement which satisfied the terms of the ASIC Declaration? - Section 3.1(a) of the MIA</u>

51. The Panel considered that the MIA was not an agreement which satisfied the terms of the modified section 609(7). The Panel considered that this was because the modified section 609(7)(c) required that "the agreement" (which gave Alinta the relevant interest in the AGL Parcel, namely, the MIA) not restrict disposal of the relevant securities for more than four months from the date when the agreement was entered into.

52. It is important to note that the ASIC Declaration relates to the MIA only. No other agreement is referred to in the ASIC Declaration and the MIA is the agreement which gives Alinta the relevant interest in the AGL Parcel. In addition, Alinta provided only the 1 June MIA and a side letter of 2 June 2006 to ASIC in making its application for the ASIC Declaration.

53. There is no specific provision in the MIA which sets a date beyond which AGL is free to dispose of assets with a book value of over $45 million (such as the AGL Parcel). Instead, the MIA sets a "Sunset Date", being the date by which the Schemes must be implemented, and after which, if the Schemes are not implemented AGL's obligations lapse. If the Schemes are not implemented, the parties' obligations (and specifically AGL's obligations not to dispose of assets under section 3.1.(g)(ii) of the MIA) persist, until the Sunset Date. The Sunset Date is 31 December 2006. This is a

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[7] All parties were copied on the written correspondence to and from the Panel and AGL.

date more than four months after Alinta and AGL entered into the MIA on 22 June 2006.

54. The MIA works as follows:

(a) Section 3.1(a) of the MIA states that it is a condition precedent to the obligations of the parties to implement the mergers, that the AGL Scheme and the Alinta Scheme (as defined in the MIA) become "Effective" before the "Sunset Date".

(b) Effective is defined in the MIA to mean coming into effect pursuant to section 411(10), of the order of the Court made under sections 411(4)(b) and 411(6) in relation to the relevant scheme.

(c) Section 3.1(g)(ii) of the MIA prohibits disposal of assets prior to 8.00 a.m. on the morning of the Second Court Date (as defined in the MIA, it is the date on which the Court's approval under section 411(4)(b) is sought and granted. The Panel notes that it is not the date "set" by the Court for the hearing, but the date on which the hearing actually occurs). After the Court grants its approval under section 411(4)(b) and makes the appropriate order, the Court's order may be lodged with ASIC, and the Schemes become Effective. There is no specific time specified in the MIA (being the agreement for the purposes of the modified section 609(7), which gives Alinta a relevant interest in the AGL Parcel) within which the Second Court Date must be held. However, for the Schemes to become Effective, the Second Court Date must be on or before 31 December 2006. If it has not been so held, the MIA, as currently drafted, will lapse.

55. Thus, on its terms, the MIA was an agreement which gave Alinta a relevant interest in the AGL Parcel and which restricted the disposal of the AGL Parcel. But it was not an agreement which limited the period within which AGL was restricted from disposing of the AGL Parcel to a period of less than four months. On the terms of the MIA, at the relevant times, AGL was restricted from disposing of the AGL Parcel until 31 December 2006, or such earlier time as the Second Court Date occurred. The Second Court Date was not set, nor could it be determined from the MIA at any time. Therefore, the MIA was not an agreement which satisfied the terms of the modified section 609(7). Thus, when Alinta commenced the Acquisitions on 16 August 2006, it had voting power of 30% in APT and the Acquisitions took its voting power to approximately 40.25%, which constituted or gave rise to a contravention of section 606.

56. Alinta submitted that the MIA came within the provisions of the modified section 609(7) because the Court, on 28 August 2006, had called the second scheme hearing date for 9 October 2006 and that this was a date within four months of the entry into the MIA.

57. The Panel does not accept that the ex-post setting of a proposed date for the Court's consideration of approval of the Schemes is evidence that at the time of entry into the MIA on 22 June 2006 or the date of the ASIC Declaration (3 July 2006), or on the date at which the relevant interest under section 608(3) lapsed, or on the date of the Acquisitions on 16-22 August 2006, the MIA came within the terms of the modified section 609(7). Neither the date for the scheme meetings, nor the second court hearing had been set at any of those critical earlier times. The date for confirmation

is still not fixed, and it is clearly open to Alinta or AGL to approach the Court and seek a later date for the second, confirmatory hearing[8].

58. The only material dates contained in the MIA which are relevant to determining whether or not the MIA came within the terms of the modified section 609(7) are the date of entry (22 June 2006 at the latest) and the date until which the terms of the MIA imposed the obligation on AGL not to dispose of assets worth more than $45 million (i.e. the AGL Parcel) which was 31 December 2006.

59. It may be argued that once the Second Court Date was set, the MIA came within the terms of the modified section 609(7). However, the Panel rejects this interpretation as the Second Court Date is not the date "set" for the hearing, but the date on which the hearing actually occurs. Even if the Panel is wrong and it was the case that once the Second Court Date was set, the MIA came within the terms of the modified section 609(7) (which is not certain because the Second Court Date may well be changed by the court on the application of Alinta and/or AGL, and would still not be written into the MIA), at the date of the Acquisitions the MIA did not fall within the modified section 609(7) and the setting of the Second Court Date could not retrospectively cure or negate the breach of section 606 caused by Alinta making the Acquisitions on 16 to 22 August 2006.

Breach of section 606

60. Accordingly, when Alinta acquired 10.25% of APT under the Acquisitions, its voting power increased from a starting point of 30% (which it obtained under the MIA, and was never disregarded under the ASIC Declaration) to 40.25% (when it made the Acquisitions). This constituted, or gave rise to, a contravention of section 606 because Alinta acquired (under the Acquisitions) a relevant interest in the 10.25% of voting units in APT and because of that transaction, its voting power in APT increased from a starting point that was above 20% (namely, 30%) to below 90% (namely, 40.25%).

61. On the above basis, the Panel considers that the circumstances (namely, the Acquisitions, in the context in which they occurred) were unacceptable because they constituted or gave rise to a contravention of section 606 (section 657A(2)(b)).

Unacceptable circumstances – section 657A(2)(a) – effect on control or potential control

62. The Panel considered that even if the ASIC Declaration was effective to relieve Alinta of the relevant interest it acquired under the MIA, and the Acquisitions did not give rise to a contravention of section 606, that only has the consequence that section 657A(2)(b) does not apply to the Acquisitions. However, it does not prevent section 657A(2)(a) from applying. Accordingly, the Panel also considered whether the Acquisitions (in the context in which they occurred) constituted unacceptable circumstances under section 657A(2)(a). The Panel decided that they did because (in broad summary) the Acquisitions, when considered in the context of the AGL Parcel, the Schemes, and the relevant interest in the AGL Parcel that Alinta would obtain following implementation of the Schemes, had, or were likely to have:

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[8] In this context, the Panel notes in Alinta's submissions in relation to orders (dated 21 September), Alinta highlighted a potential delay in receipt of a tax ruling (a condition precedent to the Schemes).

(a) increased the degree of control Alinta will have over APT if the Schemes were approved; and

(b) increased the likelihood of Alinta controlling APT i.e. affected the potential control of APT; and

(c) further deterred any rival bidders who may have considered bidding for control of APT prior to the Schemes.

The Acquisitions (in the context in which they occurred) were unacceptable having regard to the effect of the circumstances on control, or potential control, of APT. The manner in which the Acquisitions occurred was not conducive to an efficient, competitive and informed market for the control of securities of APT and all APT unitholders did not have a reasonable and equal opportunity to share in the benefits which may flow from the Acquisitions.

Schemes are as yet uncertain

63. Alinta emphasised a number of times in its submissions that the Schemes were not certain to proceed and that Alinta had no power to ensure or require that the Schemes were passed and implemented. Therefore, Alinta submitted, consideration of the Acquisitions based on the possibility of Alinta acquiring, permanently, the AGL Parcel was uncertain, speculative and no basis for considering that the Acquisitions (when considered post implementation of the Schemes) might have any effect on control or potential control of APT.

64. The Panel accepted Alinta's submissions that the Schemes were not certain to be approved by Alinta and AGL shareholders, or to be implemented. However, the Panel noted that, in considering whether there were unacceptable circumstances for the purpose of section 657A(2)(a) (where the Panel is required to have regard to the effect of the circumstances on the control, *or potential control*, of APT) the Panel considered that it was part of its function to assess the likelihood of the Schemes taking effect. The Panel considered that since there was no apparent opposition to the Schemes it was open to the Panel to conclude, based on the facts known to the Panel (set out in paragraphs 65 and 66) that it was likely the Schemes would take effect.

65. The Schemes were the product of long and hard work by the management of both Alinta and AGL. The possibility of the rival takeover bids being revived should have been highly undesirable for both companies, given the difficulties which had emerged when they had been commenced (including significant Takeovers Panel proceedings (*Alinta Limited 01, Alinta Limited 01R, Alinta Limited 02*). The Schemes were strongly recommended by the boards of both companies. Both companies appeared to have been re-rated positively by the market in anticipation of the Schemes being implemented. Both companies had been "in play" since early March, and apart from some small market speculation about the intentions of Babcock & Brown in acquiring a small stake in Alinta, there had been no serious rival bidders for either company.

66. Given the above factors, the Panel considered it clear that approval of the Schemes was a very real prospect at the time of the Acquisitions. The Panel considered that it should take account of that prospect in assessing whether or not the Acquisitions (in

the context in which they occurred) were unacceptable having regard to their effect on control or potential control of APT, particularly since the market was not aware of any reason why it should consider implementation of the Schemes to be in jeopardy (and the boards of both Alinta and AGL had given their recommendation to shareholders to support the Schemes and that recommendation had not changed).

67. The Panel is required, as recognised in *Glencore International AG v Takeovers Panel* (2005) 54 ACSR 708 and *Glencore International AG v Takeovers Panel* (2006) ACSR 753 (the **Glencore decisions**), to consider what is likely to have happened if the circumstances had not occurred. In the Glencore decisions all of the circumstances had occurred in the past at the time the Panel was asked to consider whether Glencore's non-disclosure of the existence of certain cash settled equity swaps and certain holdings of shares in Austral Coal Limited would have had an effect on the control or potential control of Austral Coal. Therefore it was appropriate for the Panel to look at what the effect of the circumstances *had been*. In the current circumstances, given that any contest for control of APT has not yet played out, the requirement for the Panel to look at the effects of the Acquisitions on potential control of APT requires it to look to the future and assess the likely effects of the Acquisitions in the future i.e. their effect on potential control, as well as those effects on control of APT which are currently likely to have occurred.

68. The Panel is also required to look at the effect of the Acquisitions on the current market for control of APT. In considering that, the Panel is required to look at the likely effects of the Acquisitions on the decisions of persons who might have sought to acquire control of APT if the Acquisitions had not taken place. It is "*plain common sense*"[9] that those persons will look forward and anticipate the likely effects of the Schemes and look to the probability of the Schemes being implemented when assessing whether or not to seek to acquire control of APT. Therefore, the Panel must look at the effects, or likely effects, of the Acquisitions, in light of the prospect of the Schemes being approved and implemented, on potential rival acquirers. The Panel considers it is necessary for the Panel to consider such likelihood (i.e. the likelihood of the Schemes being implemented) when considering whether or not circumstances have an effect on control or *potential control* of a company where that control or potential control is currently evolving and where market participants do take views and act on their expectations of future events.

Control or potential control

69. The Panel considered that the Acquisitions, when considered in the context of the AGL Parcel, the Schemes, and the relevant interest in the AGL Parcel that Alinta would acquire after implementation of the Schemes (if implemented) had, or would likely have had, an effect on the control or potential control of APT.

70. It should be noted that APT is a listed Managed Investment Scheme which exists in the form of a trust. The trustee of the trust is its "responsible entity" (**Responsible Entity**). In the Panel's experience, a material portion of the value to most acquirers of a Listed Managed Investment Scheme is the management rights, obtained via control of the Responsible Entity. Unlike a listed company, the board of directors of the

[9] Olsson J *Samic v Metals Exploration Ltd (1993) 11 ACLC 717.*

Responsible Entity are appointed by the shareholders of the Responsible Entity. The scheme's board (i.e. the directors of the Responsible Entity) are not elected by its unitholders and are not subject to re-election by rotation (cf listed companies, see ASX Listing Rule 14.4)[10].

71. The Responsible Entity or manager of the trust may be removed by unitholders holding a simple majority of units (i.e. 50%). With the AGL Parcel apparently closely tied to Alinta, there was only 70% of APT which was available to a rival acquirer. Given the very largely retail holding of units in APT, control of the large majority of those units might be acquired via an offer recommended by the management of APT. However, after the Acquisitions, Alinta "had its foot on" 40% of APT[11]. Acquiring 50 out of the remaining 60% of the units in APT would be a considerably harder task than acquiring 50 out of the remaining 70% prior to the Acquisitions.

72. The Panel considers that the existence of the AGL Parcel may have deterred some potential bidders for APT, especially given that there had been no indication that AGL was free to dispose of the AGL Parcel to the highest bidder in the period between Alinta and AGL entering the Heads of Agreement on 26 April 2006 and the implementation of the Schemes. However, the Panel considers that any such potential bidders would have been further, and materially, deterred from seeking to acquire the AGL Parcel, or gain control of APT, by the Acquisitions, and that the Acquisitions did themselves materially reduce the possibility of any other person bidding for, or gaining control of, APT.

73. Alinta submitted that AGL was free to dispose of the AGL Parcel after entry into the Heads of Agreement and the MIAs, and that the MIAs stated that Alinta could not unreasonably withhold its consent. For the reasons set out below, the Panel does not consider that that argument has merit, and does not consider that the market would have taken the view that AGL was free to do so. Given that the market would reasonably have considered that Alinta "had its foot on" the AGL Parcel (the Panel notes Alinta's substantial holding notice lodged on 2 June and corrected on 7 June which notified the market of Alinta's relevant interest in the AGL Parcel arising through the terms of the MIA which was attached to the notice)[12], the market would

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[10] The Panel notes that Australian Pipeline Limited in its capacity of current responsible entity of APT has executed a deed poll in favour of APT unitholders that affords them the right to elect or nominate directors of the board of the responsible entity of APT. Further, Australian Pipeline Limited's constitution provides for retirement by rotation of certain of its directors.

[11] The phrase "had its foot on" was a phrase used by APT in submissions. The Panel has adopted the phrase in its reasons as it considers it is a good description of the nature of Alinta's interest in the AGL Parcel, that is, that both the market, APT and (according to the Panel's decision) Alinta considered that for all intents and purposes, Alinta had power to control the disposal of the parcel, and it was unavailable to go to any other person without Alinta's consent.

[12] The substantial holder notice provides "*At the present time (a) Alinta may have a relevant interest under section 608(1)(c) of the Corporations Act in 55,779,086 units (currently 20% of the voting power in APA) by reason of Alinta impliedly having the power to control the exercise of AGL's power to dispose of the 55,779,086 units under the MIA; and (b) but for section 609(7) of the Corporations Act, Alinta may also be taken under section 608(1)(c) of the Corporations Act, to have a relevant interest in a further 27,889,544 units (currently 10% of the voting power in APA) …*". The Panel notes that section 609(7) would not have applied to the 10% parcel of APT Units because it was not modified at that time.

reasonably have considered that Alinta had acquired 10% of the stock of 70% that was actually available (and increased its foothold from 30% to 40%), rather than 10% of the stock of 100% of APT that was theoretically available. On that basis, the Panel does not consider that the market perceived that AGL was free to dispose of the AGL Parcel and accordingly, the Acquisitions in this context had, or were likely to have had, a deterrent effect on the prospects of a rival offer for APT.

74. If Alinta and AGL really believed that the MIA did not restrict AGL from disposing of the AGL Parcel to the highest bidder during the period between entering into the Heads of Agreement and the implementation of the Schemes, the Panel considers that they would, or could, have clearly stated this to the market at the time. Neither Alinta nor AGL made any clear announcement to the market, or potential rival acquirers of the AGL Parcel that AGL was essentially free to sell the AGL Parcel to the highest bidder, as Alinta has now submitted to the Panel. Alinta and AGL were both conspicuously, and the Panel can only assume deliberately, silent on that issue at those critical dates when the market was assimilating the information about the proposed mergers, the Heads of Agreement and the MIA. The Panel considers that the absence of this clear statement, together with the Panel's conclusions regarding Alinta's "foot on" the AGL Parcel (see paragraph 75 to 82), left the market under the impression that Alinta and AGL had agreed that Alinta would acquire the AGL Parcel (which was part of what the Schemes were trying to achieve – see footnote 13). The fact that there was no such clear statement made to the market was a factor which added to the Panel forming the view that the parties held the view that clause 3.1(g)(ii) of the MIA restricted AGL's ability to dispose of the AGL Parcel (and AGL and Alinta also thought that this was the case). Therefore, for the above reasons it is reasonable for the Panel to decide that the Acquisitions did have an effect on control of APT.

<u>Indications of Alinta's "foot on" the AGL Parcel</u>

75. The Panel noted the releases made by Alinta and AGL to the market concerning the entities to come out of the Schemes (including those on 26 April 2006). In those releases, control of the 30% of APT was clearly included as one of the assets, and benefits, of the "New Alinta" [13].

76. The Panel noted the public undertakings given by Alinta to the ACCC, and the publicity surrounding Alinta's negotiations with the ACCC over the AGL Parcel which reinforced, to the Panel, APT's importance to Alinta.

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[13] See the following media releases:

- Alinta media release, 26 April 2006, entitled "Alinta merges with AGL's Infrastructure Assets – Multi-billion merger is earnings, dividend accretive for Alinta shareholders" states on page 2 "*Alinta will acquire AGL's infrastructure and management assets of … Australian Pipeline Trust (30%)*";
- AGL media release, 26 April 2006, entitled "AGL's Infrastructure Merger with Alinta – delivering AGL's plans for growth in shareholder value" states on page 3 "*Alinta … will own AGL's … 30% of Australian Pipeline Trust*"; and
- In the joint AGL and Alinta media release, 26 April 2006, entitled "Creating Australia's Leading Energy and Infrastructure Companies" shows, in the "post-merger" diagram on page 6, that Alinta's 67% of the combined Alinta-AGL group includes "*Gas Transmission Pipelines … Australian Pipeline Trust (30%)*".

77. The Panel noted AGL's response to the Panel's letter of Monday 18 September 2006, in which AGL acknowledges that it took no steps to solicit offers in the market for the AGL Parcel because of what it considered were its obligations under the MIA.

78. The Panel noted the media coverage of the Schemes which consistently indicated that Alinta "had its foot on" the AGL Parcel (see footnote 13).

79. Alinta submitted that it did not, at the time of the Panel's proceedings, have control over APT, and cited the actions of the APT board in bringing the proceedings before the Panel in support of this. Alinta submitted that this independent action of the APT board was evidence that its acquisition of 10.25% of APT had no effect on the control of APT. As noted above, the Panel considered that it should consider the significance and effect of the Acquisitions in light of the proposed Schemes and the effects of the Acquisitions on potential acquirers of APT and its units. The current actions of the APT board, before Alinta had had any opportunity to exercise voting power of any APT units, were not regarded as having any weight in relation to the question before the Panel.

Control via management

80. As discussed above, control of a Listed Managed Investment Scheme is frequently synonymous with control of the management of the scheme, and that control of the management of the scheme is frequently highly desirable to a potential acquirer. The Panel considers that given Alinta itself is a significant manager of infrastructure assets, and that Alinta noted in its bidder's statement in its bid for AGL, and in the documents for the Schemes, that such management rights were highly profitable and a core part of Alinta's business plan, the management rights to APT would be highly desirable to Alinta as well.

81. If Alinta had not made the Acquisitions, and had completed the Schemes and acquired the AGL Parcel, it would still have been likely to carry any vote in relation to change of the manager of APT. The Panel considers that this would still be the case, even though the likelihood may be slightly lessened because of AGL not taking part in the Placement and Book-Build on 31 August 2006 and the percentage voting power of the AGL Parcel in APT falling from 30% to 26%. Following the Acquisitions (and assuming the Schemes were implemented), the prospect of Alinta being able to carry the vote in relation to the changing of manager of APT, even in the face of significant unitholder opposition would be markedly increased. Holding 30% of the votes in APT (by virtue of relevant interests it would obtain under the MIA following the Schemes), and assuming 100% of the votes are cast, Alinta could not be outvoted if less than 50% of the remaining 70% of unitholders voted against it. Holding 40% (which would have been its voting power after the Acquisitions and implementation of the Schemes), 50% of the remaining 60% of unitholders would need to vote against it for Alinta not to be able to carry a vote on changing the manager.

82. The Panel considered that the Acquisitions, on this basis would also likely have an effect on the control or potential control of APT.

Purposes of Chapter 6

Section 609(7)

83. The Panel considered that the Acquisitions did not meet the purposes of the legislature in introducing section 609(7). The explanatory extrinsic material in relation to section 609(7) states that the provision was introduced to allow persons to enter into agreements to acquire securities, subject to the approval of the shareholders of the relevant company, where, under the previous legislation those persons risked breaching the previous equivalent of section 606.

84. The extrinsic material does not expressly refer to disregarding a relevant interest in a downstream company, although logically, such a relevant interest does need to be disregarded (either expressly or indirectly) because there would be no point in disregarding a relevant interest in shares in, say AGL, if by entering into a pre-acquisition agreement, the proposed acquirer breached section 606 by acquiring a relevant interest in the AGL Parcel by reason of section 608(3). Under section 609(7), unmodified, the Panel considered that the members of the company whose shares were the subject of the agreement would have an opportunity to vote on the proposed acquisition of shares in their company. Thus, any change in control or acquisition of a relevant interest which was temporarily exempted under section 609(7) would be subject to approval or rejection by the shareholders affected, and the purposes of Chapter 6, as set out in section 602 would be upheld.

85. If a person entered into an agreement to acquire more than 20% of a company which was conditional on shareholder approval under Item 7 of section 611, the relevant interest which would otherwise arise would be disregarded by the provisions of section 609(7). On that basis, the person could, prior to the meeting of the company's shareholders to approve the acquisition under item 7 of section 611, acquire further shares in the company (but within the 20% threshold under section 606). However, for the person to be able to rely on the approval of shareholders under Item 7 of section 611, the further purchases between entry into the agreement and the meeting would need to be disclosed to the shareholders of the company so their approval could be based on adequate and proper information. If not, there would be a real risk that the approval would be invalid, having been based on incomplete disclosure.

86. If the further acquisitions were disclosed properly to the company's shareholders they would then approve the original conditional acquisition in the knowledge of the total percentage voting power which the person would gain in their company and in the knowledge of the degree of control that the person would gain of their company.

87. Under the Acquisitions, the unitholders in APT were not informed, and had no right to approve the increased voting power in APT which the Acquisitions were likely to give Alinta, over and above the acquisition of voting power in the AGL Parcel which would occur under Item 14 or 17 of section 611 if the Schemes were approved.

88. Under the Acquisitions, Alinta sought to take advantage of the broadened exemption which ASIC had provided under the ASIC Declaration, to acquire units in APT:

    (a) where absent the ASIC Declaration it would have been prevented from doing so while the MIA was in place and Alinta controlled the disposal of the AGL Parcel; and

(b) where the APT unitholders would not be given:

(i) information to enable them to assess the merits of the proposal under which Alinta would acquire a substantial interest in APT; or

(ii) the opportunity to approve or reject the increase in control over the level of the AGL Parcel.

89. The Panel considers that Alinta's purported use of the widening of section 609(7) afforded by the ASIC Declaration meant that the circumstances were unacceptable circumstances, and were against the purpose and intention of Parliament's introduction of section 609(7). Even if Alinta had the benefit of the ASIC Declaration, it was at risk of having the Acquisitions declared to be unacceptable circumstances if it took advantage of the ASIC Declaration to make further acquisitions of APT units where the APT unitholders would not have an opportunity to approve or reject the additional acquisitions or sufficient information to assess the Acquisitions.

Section 602

90. The Panel considered the Acquisitions, in the context of the MIA and the proposed Schemes, and in the light of the purposes of Chapter 6 as set out in section 602. The Panel is required to have regard to those purposes under section 657A(3). The purposes are, relevantly:

> to ensure that:
>
> (a) the acquisition of control over:
>
> (i) the voting shares in a listed company, or an unlisted company with more than 50 members; or
>
> (ii) the voting shares in a listed body; or
>
> (iii) the voting interests in a listed managed investment scheme;
>
> takes place in an efficient, competitive and informed market; and
>
> (b) the holders of the shares or interests, and the directors of the company or body or the responsible entity for the scheme:
>
> (i) know the identity of any person who proposes to acquire a substantial interest in the company, body or scheme; and
>
> (ii) have a reasonable time to consider the proposal; and
>
> (iii) are given enough information to enable them to assess the merits of the proposal; and
>
> (c) as far as practicable, the holders of the relevant class of voting shares or interests all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the company, body or scheme;

91. The Panel considers that the Acquisitions did not promote an efficient competitive or informed market for the acquisition of control over units in APT, nor were APT unitholders provided with sufficient information to assess the merits of the Acquisitions in the context of the MIA and the Schemes, nor did the Acquisitions

afford all unitholders in APT a reasonable and equal opportunity to participate in the benefits offered by Alinta (i.e. $5.00 per unit) when Alinta made the Acquisitions.

92. Importantly, the Panel considers that the interests of APT unitholders suffered, against the purposes of Chapter 6, by any contest for control being largely closed off by the Acquisitions, when considered in the context of the MIA and the Schemes, as explained in the body of these reasons. The Panel considers that the prospect for a higher rival bid, and the benefits of such an offer to APT unitholders, was reduced by the Acquisitions.

93. The Panel considers that where Alinta was seeking to acquire a substantial interest in APT by way of the Acquisitions, the market for APT units should have been adequately informed of the proposal to allow an efficient and competitive contest for control of APT units, and APT itself.

94. In addition, the Panel considers that the increased control, or potential control over APT which the Acquisitions gave to Alinta should have taken place in circumstances where the unitholders of APT knew that Alinta, as a significant player in the Australian energy infrastructure industry was proposing to make an acquisition of a substantial interest in APT via the Acquisitions, and should have been given adequate information on the effect and merits of the Acquisitions for APT and its unitholders. This would have allowed them to assess the merits of acquiring or disposing of their APT units and the value of their APT units. Similarly, the Panel considers that the APT unitholders were given no information to enable them to assess the merits of the proposed acquisition of a substantial interest in APT by Alinta.

95. Further, the Panel considered that Alinta acquired a substantial interest in APT, that would have an effect on control, or potential control, of APT, in circumstances where all unitholders of APT did not have had a reasonable and equal opportunity to participate in the benefits (at a minimum the $5.00 per unit paid by Alinta to some APT unitholders).

<u>ASIC Relief</u>

96. The Panel considers that Alinta should have informed ASIC at the time of seeking the ASIC Declaration, that it intended to seek to acquire more units in APT in reliance on the ASIC Declaration. Alternatively, if Alinta did not have any intention at the time of seeking the ASIC Declaration of making further acquisitions of APT units in reliance on the ASIC Declaration (for which Alinta provided no firm evidence to the Panel), Alinta should have advised ASIC at the time it formed the intention to acquire such units and ASIC would have had an opportunity to consider whether Alinta could continue to rely on the ASIC Declaration and to consider whether it was appropriate to revoke or modify the ASIC Declaration in light of the new intentions.

97. The issue of whether ASIC had all relevant information on which to make a proper decision was further complicated by ASIC's failure to consult APT prior to granting the ASIC Declaration.

98. Alinta submitted that it did not need to have advised ASIC of any intention to acquire more APT units at the time of seeking the ASIC Declaration, or at the time its intentions changed thereafter if that were the case. The Panel does not accept this

argument. The Panel considers that such an approach is contrary to the clear policy expressed by ASIC in its Policy Statement 51 where ASIC requires full and clear disclosure by applicants to ensure that ASIC has a clear view of the regulatory consequences of any application for relief and is able to assess the net regulatory benefit of granting the application for relief.

99. Alinta also submitted that the relief granted under the ASIC Declaration was almost routine and that there were clear precedents. The Panel does not accept these submissions. There was only one clear precedent for the ASIC Declaration, and that had been granted to Alinta three years previously. Alinta had not relied on that modification to make any further acquisitions in the downstream entity.

100. Alinta was not able to provide any examples of a person acquiring additional securities in similar reliance on section 609(7), whether modified or unmodified.

101. The Panel considers that Alinta should have disclosed its intention to acquire further units in APT to ASIC. Had it done so ASIC may well have made it a condition of the ASIC Declaration that Alinta not acquire any units in APT prior to the implementation of the Schemes or the MIA lapsing, and in the Panel's view this would have been appropriate.

102. The Panel notes that section 606 applies to control and regulates the acquisition of control of companies by regulating the <u>acquisition</u> of relevant interests which results in an increase in persons' voting power. At the time Alinta approached ASIC for the ASIC Declaration Alinta had legally acquired a relevant interest in the AGL Parcel, by virtue of crossing 20% voting power in AGL under Alinta's takeover bid for AGL (under section 608(3)(a)). That is, at the time Alinta entered into the MIA, and at the time Alinta approached ASIC, there was no need for Alinta to seek relief because any relevant interest it acquired under the MIA was not a transaction "*because of which [Alinta's] voting power in [APT] increased … from a starting point that is above 20% and below 90%*"[14]. Provided Alinta's voting power in AGL stayed above 20%, it could merely have relied on the section 608(3) acquisition of the relevant interest (and the resulting voting power in the AGL Parcel) until the Schemes were completed (noting that any subsequent acquisition of a relevant interest would have had **no** effect on its voting power).

103. It was also relevant to the Panel that the ASIC Declaration did not operate retrospectively (and this was expressly communicated to Alinta). Accordingly, it only operated to relieve future contraventions of 606 to which it applied, which would have been likely to arise from further acquisitions of APT units.

Additional submissions of Alinta

<u>Items 14 and 17 of section 611</u>

104. Alinta submitted that the Acquisitions were in accordance with the policy and intention of the legislature when it introduced Item 14[15] of section 611, in a wider

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[14] Section 606(1)

[15] Although the majority of Alinta's submissions focussed on the policy underlying Item 14, the better view appears to be that the acquisition of the relevant interest and voting power in APT by Alinta on approval of the Schemes would be exempted from the prohibition in section 606 by Item 17 of section 611 which

form than its predecessors. Alinta submitted that the acquisitions could not therefore be found to be unacceptable.

105. Item 14 exempts, relevantly, from the prohibition in section 606, acquisitions in a company (the **Downstream Company**) that result from another acquisition of relevant interests in voting shares in a company (the **Upstream Company**) that is included in the official list of Australian Stock Exchange Limited (as AGL is). The legislative policy of Item 14 is to ensure that the market for control of the securities of the Upstream Company, and for control of the Upstream Company, is not adversely affected by the Upstream Company holding securities of the Downstream Company. In doing so the legislature has consciously put the interests of the security holders of the Downstream Company behind the interests of the security holders of the Upstream Company to a certain extent.

106. The purpose of Item 14 is not to facilitate persons such as Alinta acquiring or increasing their control or potential control over a Downstream Company, such as APT. Under Item 14, control of the Downstream Company may pass, with a change of control of the Upstream Company without the Downstream Company shareholders being given the normal protections of Chapter 6 or section 602. This is the legislature putting the interests of the shareholders in the Downstream Company behind those of the Upstream Company referred to above, and this has been done by the legislature to ensure the efficient market for control of the Upstream Company. However, there is clear indication in the explanatory memoranda and the relevant extrinsic material (for the Corporations Act and its preceding legislation) that the legislature was concerned that the exemption set out in Item 14 not be abused and the intent of Chapter 6 not be avoided.[16] In part, it is the role of the Takeovers Panel to ensure this, and protect the interests of the shareholders of the Downstream Company, by declaring that circumstances are unacceptable where the provision is being used other than for the legislature's intended purpose.

107. The unitholders in APT should have been aware that acquisition of control of AGL (in a manner allowed under Chapter 6) would mean that a significant degree of control of APT would pass without them being given a say, and without them having the direct benefit of the protections and purposes set out in section 602. They

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specifically relates to schemes of arrangement, and under the decision in *Re Stockbridge Ltd* (1993) 9 ACSR 637 the predecessor to Item 17 was held to apply to a downstream acquisition as a consequence of a scheme of arrangement. For simplicity, the Panel refers in the discussion above only to Item 14. It does not consider that the policy underlying the two provisions differs or conflicts with each other.

[16] ASC Policy Statement 71 (Downstream Acquisitions) related to section 629 of the Corporations Law (the predecessor to section 611, item 14 of the *Corporations Act*) and describes the situations in which the then ASC would be minded to grant relief to permit section 629 to allow downstream acquisitions of Australian companies as a result of upstream acquisitions of shares in foreign companies. It notes that unrestricted relief (without any acquisition or voting restrictions and without a requirement to make a downstream bid) would not be granted where control of the downstream company is one of the main purposes of the takeover or merger of the upstream body corporate.

A similar statement is expressed in NCSC Policy Statement 157 in relation to section 12(k) of the Companies (Acquisition of Shares) Act and Codes (the predecessor to section 629) – "*an example of an acquisition that the Commission will not consider to be acceptable is the case where the substantial holding in the downstream company is the principal asset of the upstream target corporation and the proposed upstream acquisition is designed to gain control of the downstream company without having to make offers to the shareholders of that company.*"

should have been aware of this because AGL held the 30% of APT in the AGL Parcel from the date at which APT was listed and publicly floated. Similarly, unitholders in APT should have been aware that a person holding units in APT could increase or consolidate: their interest in; and degree of control of APT, if they acquired control of AGL, because of the provisions of Item 14. However, unitholders in APT should not have expected that a person could gain control over 30% of APT via an agreement such as the MIA and then, under the protection of section 609(7) actively acquire more units in APT, with the apparent intention of gaining control over APT, prior to the implementation of the Schemes and where the person would not be able to make the same acquisitions after the implementation of the schemes and the lapsing of the effects of section 609(7).

Pre-merger acquisition

108. Alinta submitted that if it had acquired 10% of APT prior to entry into the MIA, the further acquisition of a relevant interest in the AGL Parcel would have been exempted under Item 14. The end result would have been the same as Alinta entering into the MIA and then making the Acquisitions. Alinta submitted that if the first set of circumstances was clearly within the provisions of the Corporations Act then there was no proper policy or regulatory reason for the Panel to consider the current circumstances to be unacceptable.

109. The Panel rejects Alinta's submissions and considers that the analogy is flawed. Firstly, because the Acquisitions proceeded in a very different manner to that hypothesised by Alinta in its analogy. Secondly, as discussed above, the Panel considers that Item 14 was introduced in its current form to ensure that the market for control of the Upstream Company securities is efficient and that pre-existing holdings in the Downstream Company should not inhibit the efficient and competitive market for the Upstream Company or be used to make the Upstream Company takeover proof. The Panel considers that Item 14 was not introduced to facilitate acquisition of control of the Downstream Company.

110. The Panel considers that an intention, or purpose, of the acquirer to acquire control of the Downstream Company would be evidence that the purpose of Item 14 was being abused.

111. The Panel acknowledges that determining the intention or purpose of an acquirer may not always be easy to ascertain. However, in the current circumstances it does not appear so. The efforts which Alinta has gone to to acquire control, or consolidate its potential control, over APT appear to the Panel to be a firm indication that control of APT is, was, or has become, a significant part of the attraction of AGL and the purpose of acquiring AGL's infrastructure assets. The Panel considers that, in the context of APT, 30% and certainly 40%, would equate to control (particularly in light of the significant retail holding).

112. For the reasons set out above, the Panel considers that control of APT was part of the purpose of the Schemes.

<u>Pre-bid stake</u>

113. Alinta submitted that the Acquisitions were analogous to a person proposing to make a takeover bid for a company, acquiring a pre-bid stake, and therefore should not be considered to constitute unacceptable circumstances.

114. The Panel did not accept Alinta's submissions and considered that the analogy that Alinta made was flawed.

115. An acquisition of a pre-bid stake prior to a takeover bid will be limited to circumstances where the prospective bidder acquires no more than 20% of the target (unless under one of the exemptions in section 611 and the circumstances of that acquisition are not unacceptable). Under the Acquisitions, Alinta was likely to acquire voting power of 40% (or 50% if its stated intention of acquiring 19.9% of APT units under the Acquisitions had been achieved (see paragraph 18)) upon implementation of the Schemes, without any consideration of the acquisition of a substantial interest in APT by its unitholders and directors, and without all unitholders of APT having a reasonable and equal opportunity to share in the benefits which may flow from Alinta gaining effective control of APT. The effect of which is that the remaining unitholders of APT have not had a reasonable and equal opportunity to dispose of their units in an efficient and competitive market because the market for potential control of APT has been resolved by the circumstances leading up to, and including, the Acquisitions.

Unacceptable circumstances

116. The Panel considers that in the context in which the Acquisitions occurred, the Acquisitions had an effect on the control or potential control of APT for the reasons set out above. It appears to the Panel that the circumstances of the Acquisitions are unacceptable having regard to the effect of the Acquisitions and the relevant factors in section 657A(3).

Public interest analysis in relation to section 657A(2)(a) and (b)

117. The Panel considers that it would not be against the public interest to make a declaration of unacceptable circumstances in relation to the Acquisitions and the circumstances in which they occurred and their effect on the affairs of APT under both paragraphs (a) and (b) of section 657A(2).

Section 657A(2)(b)

118. The Panel considered that compliance with the provisions of the Act is important for the confidence and efficiency of Australia's securities markets, especially where that compliance relates to significant control issues for major Australian listed entities. On that basis, it would not be in the public interest to decline to make a declaration of unacceptable circumstances in relation to circumstances that gave rise to a contravention of section 606 in relation to APT (which the Panel considers is a cornerstone provision of Chapter 6)[17].

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[17] The Panel in Taipan Resources NL (No 9) [2001] ATP 4 provided (at paragraph 38) "*Section 606 is one of the cornerstone provisions of Chapter 6 of the Law. It provides that, except in certain circumstances, a person must not acquire interests in a listed company if that person's interests, aggregated with those interests of associated persons,*

119. The Panel also considered that persons seeking modifications or exemptions from ASIC should be careful to ensure that they abide by the strict terms of the exemption or modification granted by ASIC. In this case, Alinta should have ensured that the MIA fell within the terms of the ASIC Declaration or should have restrained form making the Acquisitions, and it would not be in the public interest to decline to make a declaration of unacceptable circumstances where Alinta had not so ensured that it had complied with the Act.

120. The Panel considered that the purposes of Chapter 6 would not be advanced by allowing the breach of section 606 to stand. The Panel considers that it would advance the purposes of Chapter 6, and be in the interests of an efficient, competitive and informed market for control of the securities of APT, for it to make a declaration of unacceptable circumstances in relation to the Acquisitions and the consequential breach of section 606.

Section 657A(2)(a)

121. The Panel considered the purposes of Chapter 6 when determining whether or not to make a declaration of unacceptable circumstances on the basis of the unacceptable circumstances under section 657A(2)(a)(i). The Panel considered that the Acquisitions were detrimental to the purposes of Chapter 6 and that making a declaration of unacceptable circumstances and final orders would advance the interests of an efficient competitive and informed market for control of the securities of APT.

122. The Panel considered that the Acquisitions were not in accordance with the purposes of item 14 of section 611 nor the purposes of Chapter 6, and therefore the Panel should make a declaration of unacceptable circumstances in relation to the unacceptable circumstances that it found in relation to the Acquisitions.

DECISION

Declaration

123. The Panel considered that it was desirable for the acquisition of control of APT to take place in an efficient, competitive and informed market. Having considered the purposes of section 602, the Panel decided to make a declaration that the Acquisitions constituted, or gave rise to, unacceptable circumstances in relation to the affairs of APT.

Orders

124. Consequent to making the declaration of unacceptable circumstances, the Panel considered that it would be desirable to make orders to protect the interests of unitholders (other than Alinta) whose interests had been affected by the unacceptable circumstances. The Panel considered that the interests of APT unitholders had been adversely affected by the Acquisitions in that the Acquisitions

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would exceed 20% of the listed company. It is critical that this prohibition is complied with in order for the acquisition of control over a listed company to take place in an efficient, competitive and informed market in accordance with the other provisions of Chapter 6. A contravention of section 606 will therefore, by its very nature, generally be contrary to the principles set out in section 602."

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.

125. In its application for review of the Panel's decision to make orders (**Initial Panel's Orders**), dated 6 September 2006, Alinta made various submissions, namely that:

    (a) the Initial Panel's Orders did not create an environment which encouraged a genuine offer to all unitholders by anyone (including Alinta);

    (b) although the Initial Panel's Orders allowed a person who had made an unconditional bid to acquire units under the bookbuild, it was unrealistic to presume that this would occur as it would require a bidder to announce a bid which was unconditional and obtain funding on the chance that ASIC would still have the units by the time that offers under its bid were dispatched;

    (c) if a bid did not eventuate, the bookbuild would have a depressing effect on the price of APT's units, unfairly prejudicing APT unitholders and Alinta. Retail unitholders would be particularly prejudiced given their inability to participate in the bookbuild; and

    (d) if the Orders were designed to enable Alinta or any other person to make a takeover offer and acquire the units under the bookbuild, then the bookbuild was a fruitless exercise which merely incurred unnecessary costs.

126. Alinta submitted that any unacceptable circumstances would have been more appropriately addressed by orders which:

    (a) resulted in the 10.25% holding going to the bidder who makes the highest takeover offer to all APT unitholders; and

    (b) allowing Alinta to retain the holding if the Schemes were not implemented and no aggregation of interests in APT occurred.

127. The Panel's brief had invited submissions from parties in relation to:

    (a) orders sought by APT in its original application in the APT01 proceedings;

    (b) alternative orders proposed by Alinta;

    (c) the Initial Panel's Orders; and

    (d) any other orders.

128. In its submissions, Alinta set out the reasons why it considered that the Initial Panel's Orders went beyond what was necessary to remedy any unacceptable circumstances. Alinta submitted that the Review Panel's orders should:

    (a) encourage competition for control of APT and facilitate a takeover offer for all of the units in APT; and

    (b) not unfairly prejudice unitholders in APT (both retail and institutional), Alinta or any other person.

129. On these bases, Alinta submitted that there was no basis for orders which would require Alinta to dispose of its 10.25% holding when it was not yet known whether it would acquire an interest in the AGL Parcel under the Schemes (an outcome which would not be known until after the relevant Scheme meetings and further Court

approval). Furthermore, Alinta submitted that there was no basis for orders which, following implementation of the Schemes, would require the AGL Parcel to be accepted into another person's bid for APT.

130. Alinta submitted that the "alternative orders" that it had proposed to the APT 01 Panel would address any unacceptable circumstances that the Panel may have found. Under the alternative orders, Alinta would be permitted to retain the APT units it acquired under the Acquisition if it made a takeover offer for all of the units in APT, subject to Alinta agreeing to accept the APT units it acquired under the Acquisitions into a higher unconditional takeover bid made by any third party (unless it matched that offer) (**Alternative Orders**). Alinta submitted that the Alternative Orders would remove the risk that Alinta would be unfairly prejudiced by being forced to sell its units in circumstances where the Schemes were not implemented (and which were not certain of being implemented) and no aggregation of its interests with the AGL Parcel had occurred.

131. APT submitted that the Initial Panel's Orders (if amended according to APT's submissions to the Initial Panel) were the appropriate orders to be made in the light of the unacceptable circumstances.

132. Following its finding of unacceptable circumstances, the Panel provided the parties with a draft of the Review Panel's orders (**Review Panel's Orders**) which were, broadly, in the same terms as the Initial Panel's Orders. The material changes were that they:

    (a) permitted a nominee to receive the sale proceeds of the units being sold (**Sale Units**);

    (b) included Alinta Infrastructure Holdings as an "associate" of Alinta (and consequently restricted Alinta Infrastructure Holdings in the same way as they restricted Alinta);

    (c) permitted a takeover bid into which the Sale Units could be sold to be conditional upon prescribed occurrences;

    (d) restricted Alinta from relying on any relevant interest in the Sale Units when calculating its "creeping" power (under section 611, item 9); and

    (e) applied a time limit to the restriction on certain dealings in APT units until the earlier of the expiry of the MIA and implementation of the Schemes.

133. Alinta submitted that, without having been given a copy of the Panel's reasons, it was not in a position to make substantive submissions on the Review Panel's Orders. However, Alinta proposed various mechanical changes to the Review Panel's Orders. The Panel considered that Alinta should reasonably be able to make submissions on the proposed orders given that:

    (a) Alinta had considered itself capable of providing detailed submissions on the proposed orders in the APT01 proceedings, despite having no materially greater information on which to base submissions;

    (b) Alinta had received all submissions and other documentation during the APT01R proceedings, so it had received all material on which the Panel's decision was based;

(c) on 20 September 2006, shortly after the Panel notified parties of its decision, the Panel provided the parties with an email setting out, a description of the unacceptable circumstances which identified, in broad terms, the unacceptability resulting under section 657A(2)(a) (that is, the breach of section 606) and under section 657A(2)(b) (outlining the circumstances that had an effect on control or potential control of APT); and

(d) the Panel did not consider that its fully drafted reasons for declaring the circumstances of the Acquisitions to be unacceptable were necessary to determine the orders that were appropriate or in making an assessment regarding whether they caused any person unfair prejudice.

134. APT submitted that the Review Panel's Orders (with its further amendments):

(a) protected the interests of APT unitholders which have been adversely affected by the unacceptable circumstances;

(b) were proportionate when measured against the harm to APT unitholders;

(c) did nothing more than put Alinta back in the position it would have been in had it not breached the letter and spirit of the law; and

(d) were clear, simple, direct and easily enforceable (consistent with *McCann v Pendant Software Pty Ltd*).

135. The Panel considered the submissions of the parties as to the mechanics of the Review Panel's Orders. The material matters raised were:

(a) Alinta submitted that the appointed seller of the 10.25% stake, ought to be able to accept the stake into a scrip bid (whether made by it or another bidder). On the other hand, APT maintained that Alinta ought not to be permitted to re-acquire the 10.25% stake by making a takeover bid at all:

(i) in relation to Alinta's submissions regarding a scrip bid, the Panel considered that the orders should be limited to selling the 10.25% stake into a cash bid (or a bid with an equivalent cash consideration alternative). The Panel considered that a cash bid (or cash alternative) was desirable for those APT unitholders who had not been able to sell their APT units to Alinta (when Alinta had been acquiring its 10.25% stake on-market and accordingly, had no opportunity to receive the same cash sum for their units). The Panel noted that this restriction did not prevent Alinta from making a scrip bid for APT as the Panel considered that Alinta could make a scrip bid with a cash consideration alternative. In addition, the Panel considered that any other bidder could also make a cash / scrip (alternative) bid which would similarly promote the rights of affected APT unitholders;

(ii) in relation to APT's submission that Alinta should not be permitted to re-acquire the 10.25% stake under a takeover bid, the Panel disagreed. The Panel considered that the market for control would benefit from Alinta being permitted to make a takeover bid for APT and that an order restricting such action would go further than was necessary to remedy the unacceptable circumstances. The Panel considered that Alinta would have

been able to acquire the 10.25% block if it had offered a sufficient price under a full takeover bid for all units in APT prior to the Acquisitions, so if Alinta made such a bid now, it should not be prevented from acquiring them from ASIC's Appointed Seller if the Appointed seller considered that was the best price it could achieve for the Sale Units;

(b) APT and Alinta each submitted that a 1% cap should apply to any purchaser of the units pursuant to any bookbuild. The Panel did not consider that such a cap was necessary. It considered that the market for control of APT units would benefit from a prospective purchaser of the units having the ability to acquire a strategic stake of up to 10.25% in the trust. The Panel was concerned that imposing a 1% cap was likely to adversely affect the other unitholders in APT by reducing the price prospective bidders were prepared to offer; and

(c) Alinta submitted that a "floor price" should apply to any sale of its 10.25% stake. The Panel noted that the "Appointed Seller" under the orders is obliged to "not unreasonably depress the market for APT units". Furthermore, the Panel observed that APT's recent stock placement (of 44 million units) was placed in approximately 24 hours (leading to the presumption that the stock is reasonably liquid). Accordingly, the Panel did not consider that a floor price was necessary.

136. The Panel considered that its orders were appropriate to protect the rights or interests of persons affected by the circumstances, in accordance with section 657D(2)(a). In the Panel's view, the particular rights or interests that were affected by the Acquisitions were the rights and interests of APT unitholders (other than Alinta). Such rights and interests were affected as there was, or was likely, an effect on control or potential control of APT (taking into account Alinta's relevant interest in the AGL Parcel, together with its further 10.25% stake) which did not occur in circumstances where an offer on equal terms was not made to all unitholders in accordance with Chapter 6 or in compliance with another exception in section 611. As a result, the acquisition of control over voting units in APT did not take place in an efficient, competitive and informed market and the purposes of section 602 were not upheld. The Panel considered that, subject to engaging in a balancing of those rights and interests against any unfair prejudice that may arise for Alinta (see paragraphs 137 and 143), it should make orders that were appropriate to protect those interests.

137. The Panel considered that its Orders were appropriate to protect the rights or interests of persons affected by the unacceptable circumstances identified by the Panel, in accordance with section 657D(2)(a). Those rights and interests are outlined in paragraph 136) (the **Rights and Interests**).

138. The Panel noted that in making any decision on orders it must weigh the object of protecting the Rights and Interests against the prejudice to any person that would flow from the making of its orders, in order to determine whether that prejudice would be unfair. Accordingly, in assessing its orders, the Panel considered whether any prejudice to Alinta and its associates was unfairly prejudicial, having regard to the extent of protection of the Rights and Interests of persons that would be afforded by the proposed orders.

139. In relation to the Divestment Order Alinta submitted that it would suffer unfair prejudice as the "overhang" caused by the sale of the relevant shares would depress the price of APT units and cause loss to Alinta. Alinta also submitted that it would not realise "proper value" for its units in such circumstances.

140. APT submitted that any such prejudice, if it arose, would not be unfair. APT noted that "*the fact that a person is prejudiced by an order does not, of itself, establish that the order is unfair*"[18]. APT also noted the observations of Sackville J in *Australian Securities Commission v Bank Leumi Le-Israel (Switzerland)* (1996) 69 FCR 531 (at 152) that the classification of whether prejudice is "unfair" "*may depend upon whether the order is essential to give effect to the relevant legislative policy*". APT submitted that the extent to which Alinta may be affected by the Panel's proposed orders is not "unfair" particularly in the light of Alinta's actions, its acceptance of the risk faced by its actions (to which it acceded or was reckless) and given the legislative policy behind the Takeovers Code.

141. The Panel accepted APT's submissions.

142. As was noted in *AMP Shopping Centre Trust 02* [2003] ATP 24 at [54]-[55], the Panel cannot make an order if it is satisfied that the order would ***unfairly*** prejudice a person, but mere prejudice of itself is not enough.

143. In balancing the Rights and Interests against the submissions in relation to unfair prejudice, the Panel noted in particular that:

    (a) the terms of the Review Panel's Orders were drafted to minimise harm to Alinta by minimising the effect of the sales on the market price of APT units;

    (b) any depression of the market price of APT units would likely be temporary;

    (c) Alinta had not provided the Panel with evidence to suggest that there was a high likelihood that the Schemes would not be implemented; and

    (d) divestiture appeared to the Panel to be the appropriate order to remedy **most directly,** the effects of the acquisition of 10.25% parcel of APT units.

    The Panel concluded that it was not satisfied, having regard to the circumstances and the Panel's findings, that any prejudice caused by the orders to Alinta was unfair.

144. Accordingly, on 24 September 2006, the Panel made final orders in the form set out in Annexure B that the APT units Alinta acquired under the Acquisitions be vested in ASIC for cash sale by bookbuild or into a takeover bid (conditional only on prescribed occurrences) where that bid offered cash as bid consideration (or as an equivalent alternative bid consideration) for all of the units in APT. The Panel noted that its orders did not restrict Alinta from making a scrip-only bid for APT but that the 10.25% parcel could not be accepted into that bid under the terms of the Panel's orders. The Panel considered that it was also appropriate that final orders should not restrict Alinta from making a takeover bid (which offered cash) for all of the units in APT as any competition for control of APT would be to the benefit of APT unitholders.

The Panel made no order for costs.

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[18] Waldron v MG Securities (Australasia) Ltd [1975] VR 508 at 532

David Gonski AO
President of the Sitting Panel
Date of declaration 20 September 2006, Date of Orders 23 September 2006
Reasons published 29 September 2006

<u>Annexure A – Declaration</u>

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 83,668,630 units in Australian Pipeline Trust (**APT**) (then representing approximately 30% of the voting power in APT), subject to the implementation of proposed schemes of arrangement between Alinta and AGL (**Schemes**).
2. On 3 July 2006, the Australian Securities and Investments Commission (**ASIC**) made a Declaration pursuant to paragraph 655A(1)(b) of the Corporations Act 2001 (*Cth*) (**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 (inclusive), Alinta acquired approximately 10.25% of the units in APT (**Acquisitions**).

Application

4. The Takeovers Panel (**Panel**) received applications dated 5 September 2006 and 8 September 2006 from Alinta under section 657EA of the Corporations Act for a review of the Australian Pipeline Trust 01 Panel decision to make a declaration of unacceptable circumstances and final orders in the Australian Pipeline Trust 01 proceedings.

Unacceptable Circumstances

5. The Panel finds that the Acquisitions constituted, or gave rise to, a contravention of section 606 of the Corporations Act.
6. The Panel also finds that the Acquisitions, when considered in the context of the relief granted by ASIC, the forthcoming Schemes and the existing holding of 83,668,630 units in APT by AGL, have, or 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 in relation to the Acquisitions and the affairs of APT.

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 of the Corporations Act 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 fact that the Acquisitions constituted, or gave rise to, a contravention of section 606 of the Corporations Act, and the effect of the Acquisitions on the control or potential control of APT.

David Gonski AO
President of the Sitting Panel

Dated 20 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 20 September 2006, the Takeovers Panel HEREBY ORDERS:

Divestment order

(1) that the Sale Units vest in the Australian Securities and Investments Commission (**ASIC**) to be held by ASIC on a trust, for ASIC to:

 (a) sell the Sale Units; and

 (b) subject to any requirement arising under a Tax Law, account to the persons or their nominee who, immediately before the making of this order, were the registered holders of the relevant Sale Units for the proceeds of sale and any distributions on the Sale Units received by ASIC, 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) within 4 business days of the date of these Orders;

(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 for a cash sum by:

  (i) a bookbuild; or

(ii) into a takeover bid (which offers cash as bid consideration (or an equivalent cash amount as one of the alternatives of bid consideration)) for all units in APT that is (at that date) freed from conditions (other than prescribed occurrences) (**Unconditional Bid**);

(b) to seek to maximise the competition for, and 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 must obtain from any purchaser of Sale Units, prior to the sale, 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 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;

Creep order

(6) that Alinta may not take into account any relevant interest or voting power that Alinta or its associates had, or have had, in the Sale Units, when calculating the voting power referred to in Item 9(b) of section 611, of a person six months before an acquisition exempted under Item 9 of section 611;

Acquiring, disposing and voting restriction orders

(7) Alinta not to:

(a) acquire any relevant interest in any further units in APT;

(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 units in APT or the price of units in APT;

(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 (7)(a) to (e) above;

prior to the implementation of the Schemes, or the expiry of the MIA,

(8) that each Party, APT and ASIC have the liberty to apply for further orders in relation to the matters covered by orders (1), (2), (3), (4), (5), (6) and (7);

Nothing in these orders (including order 7) prevents Alinta making a takeover bid for all APT units.

David Gonski AO
President of the Sitting Panel

Dated 24 September 2006

Schedule 1 - Glossary

Act means Corporation Act 2001 (Cth).

Alinta means Alinta Limited, its related bodies corporate 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 of the Act.

MIA means the Merger Implementation Agreement dated 22 June 2006 between Alinta, AGL, AGL Energy Limited and Alinta Mergeco Limited.

Parties means Alinta and AGL and their associates.

prescribed occurrences means the occurrences set out in section 652C of the Act.

Sale Units means Alinta's 10.25% holding in APT acquired on and between 16 and 22 August 2006 (inclusive), and units in APT acquired by Alinta under the placement bookbuild conducted by APT on 31 August 2006 and 1 September 2006.

Schemes means proposed schemes of arrangement between Alinta Limited and AGL.

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.

Annexure C – ASIC Declaration

06/0586

Australian Securities and Investments Commission
Corporations Act 2001 - Subsection 655A(1) - Declaration

Pursuant to paragraph 655A(1)(b) of the *Corporations Act 2001* ("Act"), the Australian Securities and Investments Commission ("ASIC") declares that Chapter 6 of the Act applies to the person specified in Schedule A in respect of an agreement of the kind referred to in Schedule B and the class of securities specified in Schedule C, as if subsection 609(7) of the Act was omitted and replaced as follows:

"A person does not have a relevant interest in securities merely because of an agreement if the agreement:

(a) is conditional on:

(i) a resolution under item 7 in the table in section 611 being passed; or

(ii) ASIC exempting the acquisition under the agreement from the provisions of this Chapter under section 655A; or

(iii) a scheme of arrangement approved by the Court under Part 5.1 taking effect; and

(b) does not confer any control over, or power to substantially influence, the exercise of a voting right attached to the securities; and

(c) does not restrict disposal of the securities for more than 4 months from the date when the agreement is entered into.

The person acquires a relevant interest in the securities when the condition referred to in paragraph (a) is satisfied."

Schedule A

Alinta Limited ACN 087 851 001 ("Alinta")

Schedule B

The Merger Implementation Agreement between Alinta, The Australian Gas Light Company ACN 052 167 405 ("AGL"), AGL Energy Limited ACN 115 061 375 and Alinta Mergeco Limited ACN 119 985 590 dated 22 June 2006 that is conditional on a Part 5.1 scheme of arrangement between AGL and its members taking effect.

Schedule C

Units in Australian Pipeline Trust ARSN 091 678 778

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