



Sunday, 23 April 2006

Alinta Limited 01 - Panel declaration and orders

The Takeovers Panel advises that it has made a declaration of unacceptable circumstances and final orders in relation to one of two applications dated 3 April 2006 from The Australian Gas Light Company (AGL) in relation to the bid (AGL Offer) by AGL for Alinta Limited (Alinta) and the bid by Alinta Group Holdings Pty Limited for AGL (Alinta Offer).

The Panel's orders require each bid to be subject to a number of conditions which cannot be waived without the consent of the Panel. These are intended to allow the bids to proceed and to avoid unacceptable circumstances as outlined below.

The Panel's orders allow a clearly successful bidder (i.e. it achieves over 50% of the shares in its target) to complete its takeover quickly and conclusively if it gains the requisite support and the other bidder does not (i.e. it achieves less than 50% of the shares in its target).

The Panel's reserve power to consent to either of the bidders waiving the Panel's conditions give the Panel the flexibility to break a stalemate if one develops, or if there is a clear and conclusive outcome available consistent with the law and an efficient, competitive and informed market.

Alinta has advised the Panel that it intends to make an application for review of the Panel's decision. On that basis the Panel has stayed its current orders until either the date by which a review application must be made, or the determination of any review proceedings.

Alinta 01 Application

In the first application, AGL sought a declaration of unacceptable circumstances and orders to prevent the problems which might arise from two conflicting offers.

Alinta 02 Application

AGL's second application was in relation to the content of Alinta's bidder's statement and supplementary bidder's statement. The Panel published a Media Release in relation to that application on Friday 21 April 2006 ([TP06-40](#)).

ALINTA 01 APPLICATION- DISCUSSION

The Panel's declaration and orders (see Annexure) are in response to the unusual circumstances of two companies concurrently making takeover offers for each other (compounded by the fact that both offers are scrip offers).

Orders

The Panel has required that both Alinta and AGL include defeating conditions in their offers which require them to acquire more than 50% of the shares in their target, and the rival bidder to have acquired less than 50% of them, before their offers can become unconditional. These conditions cannot be waived without the consent of the Panel.

The Panel has also required that the successful offer be open for at least two weeks after it becomes unconditional in order to allow shareholders the time to reassess their positions once control of the two companies has been decided.

PRIMARY PROBLEM

AGL described the primary issue before the Panel as being:

- (a) if AGL were to receive sufficient acceptances to give it a relevant interest in more than 50% of Alinta's Shares; and
- (b) Alinta's Offer is unconditional; and
- (c) a takeover contract under Alinta's Offer completes so that AGL Shares are transferred to Alinta,

then any purported transfer of the AGL Shares to Alinta under Alinta's offer would be void under section 259C of the Corporations Act¹. Alinta would be precluded from processing acceptances received from AGL shareholders because of section 259C (**Conflicting Control Scenario**).

This analysis applies, of course, equally to the AGL Offer if Alinta had achieved more than 50% of AGL's shares.

However, the Panel notes that while the above scenario could cause protracted and expensive complications for the companies and their shareholders, a more complicated scenario and analysis would come where one of the bidders had acquired less than 50%, but asserted that it had acquired "control" as defined under section 259E, which is not a "bright line" test but requires a detailed analysis of whether a company has the capacity to determine the outcome of decisions about an entity's financial and operating policies.

Setting the Conflicting Control Scenario in terms of section 259C introduces the potential issue of contention between parties as to whether or not either or both of the offerors controlled the other, and if so, at what point in time. The definition of control in section 259E for the purposes of section 259C is not a bright line test, and whether one or other of two competing offerors "controlled" the other at any particular time may well be capable of vigorous dispute and great uncertainty.

In the case of two competing bids, control under section 259E would be exceedingly difficult to assess where the effective control of a bidder had never been tested, and could never be, on the floor of a general meeting or in a boardroom vote.

¹ All section references are to sections of the Corporations Act, unless specifically indicated.

Operation of Panel decision

The Panel's orders operate to prevent either offer from becoming unconditional (and contracts crystallising) unless it is clear that one offer has been successful and that the other has not. Preventing either bid becoming unconditional, and thus preventing transfers which might later be voided, will promote certainty for shareholders of both companies. The Panel's object is to ensure that there is a clear basis on which the offers can proceed and to provide certainty of an outcome in the circumstances where one party has clearly acquired control of the other but with a residual ability for the parties to return to the Panel in other circumstances.

The Panel was extremely concerned that leaving the outcome of two closely contested takeovers to litigation as to which company "controlled" the other, and at what point of time, and the potentially uncertain test of control under section 259E would not ensure a competitive informed and efficient market for control of shares in either company. If shareholders had accepted either offer and litigation was required to assess which takeover had succeeded, and whether transfers had been voided, their shares would likely be tied up for a long period.

Stalemate

One of the issues put before the Panel was that it should map out now, a roadmap for a number of situations which might arise in the contest between the two companies other than the clear outcome which the Panel's current orders allow. However, neither of the two companies was able to give the Panel any certainty about the range of circumstances which might arise when the two takeover bids close. Nor could either company provide any assurance that the Panel could specify now, solutions which would avoid uncertainty and complication outside the single type of scenario which the Panel's orders allow to proceed to a clear and timely result in keeping with an efficient, competitive and informed market.

In the absence of any certainty as to what the landscape might look like, the Panel advised both parties that it would accept undertakings, or make orders, which facilitated a clear outcome but would not attempt to determine now, what arrangements should be accepted in any of the uncertain outcomes. Therefore the Panel's orders allow for a bid to become unconditional only where one bidder has gained unarguable control and the other has not. The Panel advised both parties that it would wait until the actual circumstances were clear before deciding where the interests of shareholders lay in the range of circumstances which might eventuate where neither of the bidders had conclusively won. The Panel's ability to consent to either of the bidders freeing their offers from conditions allows it the flexibility to review the circumstances after the bids have proceeded and the outcomes become clearer.

Disclosure

The Panel has ordered that each of the bidders provide their target shareholders with a plain English explanation of the problems which the Panel's decision and orders are

intended to address and the effects and operations of the Panel’s declaration and orders.

Undertakings

The Panel initially proposed an outcome under which both parties would offer undertakings to the Panel in relation to their takeover offers which would ensure the type of clear and timely outcomes which the Panel considered desirable for an efficient competitive and informed market. Alinta declined to provide the undertakings requested by the Panel, instead, offered undertakings which Alinta submitted would provide an acceptable outcome in circumstances where the clear and unarguable outcome which the Panel considered desirable had not eventuated. However, the Panel considered that the Alinta proposals could allow outcomes which were not in the interests of an efficient competitive and informed market.

AGL offered to provide the undertakings which the Panel requested.

In the absence of both parties providing undertakings which the Panel was able to accept, the Panel considered that it would be most efficient to make essentially identical orders which regulate both bids identically rather than make orders in relation to one bid and accept AGL’s offers of undertakings in relation to its bid.

Review

The Panel notes that Alinta has advised that it intends to seek review of the Panel’s decision under section 657EA. The Panel will appoint three different Panel members to consider any review application which is made in relation to these proceedings.

Panel

The President of the Panel appointed Stephen Creese, David Gonski AO (sitting President) and Teresa Handicott as the sitting Panel to consider the application.

The Panel will publish its reasons for its decision on its website in due course.

Nigel Morris
Director, Takeovers Panel
Level 47, 80 Collins Street
Melbourne, VIC 3000
Ph: +61 3 9655 3501
nigel.morris@takeovers.gov.au



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

In the matter of Alinta Limited 01

WHEREAS

COMPETING OFFERS

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

APPLICATION

- G. On 3 April 2006 the Takeovers Panel (**Panel**) received an application from AGL under section 657C of the Corporations Act 2001 (Cth) (**Corporations Act**)² in relation to the affairs of AGL and Alinta.

² All section references in this declaration are to sections of the Corporations Act, unless otherwise specified.

VOIDING OF ACCEPTANCE TRANSFERS

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

DISCLOSURE

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

UNACCEPTABLE CIRCUMSTANCES - VOIDING OF ACCEPTANCE TRANSFERS

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

UNACCEPTABLE CIRCUMSTANCES - DISCLOSURE

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

UNACCEPTABLE CIRCUMSTANCES

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

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

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

David Gonski AO

President of the Sitting Panel

Dated 22 April 2006



**Corporations Act
Section 657D
Orders**

In the matter of Alinta Limited 01

Pursuant to:

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

and WHEREAS:

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

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

the Takeovers Panel HEREBY ORDERS that:

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

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

- (iii) AGL Shares of which Alinta GH (including its related bodies corporate) is the beneficial owner;

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

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

David Gonski AO

President of the Sitting Panel

Dated 23 April 2006



**Corporations Act
Section 657D
Orders**

In the matter of Alinta Limited 01

Pursuant to:

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

and WHEREAS:

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

the Panel HEREBY ORDERS that:

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

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

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

(and the reverse applies, mutatis mutandi, for ascertaining the shares that Alinta

(including its related bodies corporate) has “acquired” in AGL);

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

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

David Gonski AO

President of the Sitting Panel

Dated 23 April 2006