



Thursday, 13 December 2007

Attorney-General (Commonwealth) vs. Alinta Ltd: High Court Appeal Allowed

The Takeovers Panel notes the decision of the High Court of Australia delivered today, which upheld the validity of s 657A(2)(b) of the Corporations Act 2001 (as it was)¹. The Panel also notes that reasons for the decision will be delivered later.

The Full Federal Court (Finkelstein J dissenting) had declared that section 657A(2)(b) was invalid, and discussed the operation of section 657A(2)(a)². Following the Full Federal Court's decision, the Panel declined to accept applications which sought a declaration of unacceptable circumstances based on section 657A(2)(b) or which made allegations of contraventions of the Corporations Act. See [TP 07/19](#).

Following the decision in the High Court, the Panel will once again accept such applications.

The President of the Panel, Mr Simon McKeon, welcomed the decision saying: "The Panel has been well received by the business community as an efficient way to resolve issues concerning takeovers, and now it can continue fully in that important work."

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¹ Amended 13 May 2007 and became current section 657A(2)(c).

² Also since amended on 13 May 2007

Journalist briefing note

The Takeovers Panel is a peer review body established by Commonwealth legislation that deals with takeovers issues in a speedy and less formal way than a court. It has been operating in its current form since March 2000.

The case of *APL v Alinta*, involved (in part) the question of whether Alinta's on market acquisition of a parcel of approximately 10.25% of Australian Pipeline Trust's stapled securities in August 2006 was unacceptable circumstances. The Panel considered that it was, and ordered that the parcel be divested.

Alinta sought judicial review of the Panel's decision. Emmett J upheld the Panel's decision, and the validity of the Panel's legislation. Alinta appealed Emmett J's decision to the Full Federal Court. On appeal, on the question of the constitutional validity of section 657A, the full Court of the Federal Court, by majority of 2 to 1, found that section 657A(2)(b) (as it then was) - dealing with unacceptable circumstances because of a contravention - was the exercise of the judicial power of the Commonwealth and under the Australian Constitution could only be vested in a court. It was therefore invalid. The majority also considered that section 657A(2)(a) - dealing with unacceptable circumstances because of the effect on control or the acquisition of a substantial interest - raised concerns, but did not find it necessary to decide whether or not it was invalid. The Full Federal Court quashed the Panel's declaration and orders.

The Attorney-General appealed to the High Court on the question of the validity of the Panel's legislation. The parcel of APT securities which was at the centre of the dispute has since been divested (by way of in specie distribution to Alinta shareholders) as part of a settlement between the parties.

The High Court's decision was handed down today.

Corporations (Takeovers Amendments) Act 2007

Section 657A was amended on 13 May 2007. Previously, under section 657A(2), the Panel could declare circumstances in relation to the affairs of a company to be unacceptable circumstances if they were unacceptable -

- (a) having regard to their effect on either control or potential control of a company, or on an acquisition or proposed acquisition of a substantial interest in a company or
- (b) because they constituted or gave rise to a breach of the 'Takeovers Chapters' of the Corporations Act (Chapters 6, 6A, 6B and 6C).

On 13 May 2007, the [Corporations \(Takeovers Amendments\) Act 2007](#) commenced, which, among other things:

- (a) amended section 657A(2)(a);
- (b) introduced a new section 657A(2)(b) which provides a ground for the Panel to make a declaration of unacceptable circumstances based on the purposes of the Corporations Act as set out in section 602 of the Corporations Act; and
- (c) introduced a new section 657A(2)(c), which amended, but is similar to, previous section 657A(2)(b).