



Monday, 30 April 2007

APL vs. Alinta Ltd

The Takeovers Panel notes the decision of the Full Court of the Federal Court in Australian Pipeline Limited v Alinta Limited [2007] FCAFC 55 which was handed down on Friday 20 April 2007.

Federal Court decision

In its decision relating to the Panel's declaration of unacceptable circumstances, the Federal Court (Finkelstein J dissenting) declared that section 657A(2)(b) of the Corporations Act 2001 is invalid. The Court discussed the operation of section 657A(2)(a) but did not find it to be invalid. The Federal Court found that section 657A(2)(b) seeks to confer on the Takeovers Panel the judicial power of the Commonwealth, in contravention of Chapter 3 of the Constitution of Australia.

On the basis that the declaration of invalidity made by the Federal Court is limited to section 657A(2)(b), and the Federal Court made no declaration in relation to section 657A(2)(a), the Panel considers that it is not prevented from operating in reliance on section 657A(2)(a).

Existing Applications

The Panel has advised parties to current applications of this approach and of any steps it considers they would need to take to ensure that it is able to consider the applications.

Future Applications

Following the decision of the Federal Court the Panel will decline to accept applications which seek a declaration of unacceptable circumstances based on section 657A(2)(b) or which make allegations of contraventions of the Corporations Act.

Applicants to the Takeovers Panel should, henceforth, frame applications solely in terms of seeking declarations based on section 657A(2)(a) of the Corporations Act. The grounds for such declarations should be based on the terms of section 657A(2)(a) and section 602. Applications should not refer to the legality of any circumstances for which they seek declarations or orders.

The Panel is confident that the vast majority of disputes concerning takeovers are able to be framed in terms of section 657A(2)(a). The Panel considers that very few, if any, persons will be left without a forum for resolution of their disputes following the Federal Court's decision in relation to section 657A(2)(b).

Guidance Notes

The Panel proposes to review its Guidance Notes to assess whether any of them need updating in light of the Federal Court decision.

Corporations (Takeovers Amendments) Act 2007

The Panel notes that on 13 May 2007, the Corporations (Takeovers Amendments) Act 2007 will commence. The act will change a number of provisions relating to the operations of the Takeovers Panel, including section 657A(2)(b) of the Corporations Act. The act, amongst other things:

- (a) amends section 657A(2)(a);
- (b) introduces 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. This provision was not considered by the Federal Court in the Federal Court decision; and
- (c) introduces a new section 657A(2)(c). The new section 657A(2)(c) is similar to the current section 657A(2)(b) which it replaces, but has some differences.

The Panel proposes to accept applications made under new sections 657A(2)(a) and (b), provided these do not allege breaches of the Corporations Act.

The Panel does not propose to accept applications made under the new section 657A(2)(c). The Panel will operate on that basis unless a court finds otherwise.

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Journalist briefing note

The Takeovers Panel is a peer review body designed to deal with issues that arise in takeovers in Australia in a speedy and informal way. It commenced its current form in March 2000. The Panel's jurisdiction comes from section 657A of the Corporations Act.

Section 657A gives the Panel two bases for declaring circumstances in relation to the affairs of a company to be unacceptable circumstances.

The first (section 657A(2)(a)) is if the Panel considers that the circumstances are unacceptable 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.

The second (section 657A(2)(b)) is if the Panel considers that the circumstances are unacceptable because they constitute or give rise to a breach of the Takeovers Chapters of the Corporations Act (Chapters 6, 6A, 6B and 6C).

In APL v Alinta, the full Court of the Federal Court heard two related matters. The hearings were held in December 2006. Both were appeals from earlier decisions of Justice Emmett in October 2006. One matter was whether Alinta had breached the Corporations Act by acquiring a relevant interest in stapled securities in Australian Pipeline Trust in breach of section 606 of the Corporations Act in June and August 2006. The other was whether the Panel's declaration that Alinta's on market acquisition of a parcel of stapled securities amounting to approximately 10.25% of Australian Pipeline Trust in August 2006 was an unacceptable circumstance, was valid. The Panel had ordered that Alinta divest the 10.25% parcel of securities.

The full Court, by majority of 2 to 1, found that section 657A(2)(b) of the Corporations Act sought to give the Panel judicial power of the Commonwealth that can only be invested in a court, and was therefore invalid. The full Court found that the Panel is not entitled to declare circumstances to be unacceptable circumstances under section 657A(2)(b) based on a breach of relevant laws because that section is invalid.

The majority also considered how the Panel operated when considering whether circumstances were unacceptable based on paragraph (a), but did not find it necessary to decide the "difficult question" of whether this aspect of the Panel's jurisdiction was invalid.

Given the invalidity of section 657A(2)(b), the court quashed the Panel's declaration and orders.