



Tuesday, 09 May 2006

Alinta Limited 01R – Panel decision

The Takeovers Panel advises that it has made a decision in relation to the application by Alinta Limited for review of the Panel's decision in the Alinta 01 proceedings. The Panel published a Media Release on 23 April 2006 ([TP06/41](#)) setting out its decision in the Alinta 01 proceedings. In those proceedings the Panel (Initial Panel) 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 in relation to the bid by AGL for Alinta (AGL Offer) and the bid by Alinta Group Holdings Pty Limited for AGL (Alinta Offer).

The Panel (Review Panel) considers that the very significant events which have occurred since the Initial Panel's decision mean there is no current basis for the continuation of a declaration of unacceptable circumstances. Therefore, the Review Panel has decided to revoke the declaration of unacceptable circumstances and the orders made by the Initial Panel.

The Review Panel noted that parties may return to the Panel if the currently proposed arrangements between Alinta and AGL do not come to fruition and the concerns which were raised before the Initial Panel become enlivened again.

In its decision, the Review Panel noted that it had not been required to make, and had not made, any decision or finding in relation to the Initial Panel's decision, because of the different circumstances before it compared to the circumstances before the Initial Panel.

Recent events

After the decision of the Initial Panel on 23 April 2006, Alinta and AGL announced on 26 April 2006, that they had entered into a binding Heads of Agreement (HoA) to work together to draft and sign a Merger Implementation Agreement (MIA). Under the MIA, Alinta and AGL will each propose schemes of arrangement to their respective shareholders to transfer assets between Alinta and AGL so as to practically give effect to a large part of the demerger scheme which Alinta had proposed to AGL, and the demerger which AGL had proposed to its shareholders earlier this year. The HoA includes terms requiring each of Alinta and AGL to advise their shareholders not to accept the takeover offer from the other, and to advise shareholders of the other company not to accept the takeover offer that each of them had made to the other's shareholders. Both companies have now provided that advice to their, and to the other's, shareholders.

The Review Panel considers that the HoA, and the subsequent advice that has been provided to Alinta and to AGL shareholders pursuant to the terms of the HoA, have materially changed the circumstances now before it, compared to the circumstances which came before the Initial Panel.

Decision

Given the change of circumstances, and after considering the submissions and rebuttals in the Alinta 01R proceedings and the Alinta 01 proceedings, the Review Panel, under section 657EA(4)(b) of the Corporations Act,¹ has determined to set aside the decision of the Initial Panel to make a declaration of unacceptable circumstances. The Review Panel has consequently also revoked the orders which the Initial Panel made to address the unacceptable circumstances identified by it.

The Review Panel's power to make decisions under its review power in section 657EA is a de novo review power. In undertaking review proceedings, the Panel looks anew at the decision of the original application, based on the circumstances before the Review Panel at the time it makes its decision. Where, as in this case, the circumstances before the Review Panel are materially different from the circumstances before the Initial Panel, the decision of the Review Panel may be as different to that of the Initial Panel as are the two different sets of circumstances which originally confronted the Initial Panel and, now the Review Panel, respectively.

In this case, the changes in the circumstances before the Review Panel as a consequence of the recommendations of the two boards, and the other aspects of the 26 April announcements are of critical significance. As a consequence of those changes, the Review Panel does not consider that there currently exists any real likelihood of the uncertainty for Alinta and for AGL shareholders, which the Initial Panel found would have an effect on their decisions in respect of the offers, and therefore an effect on control or potential control of one or both of Alinta and AGL.

Similarly, the Review Panel does not consider that there is now an ongoing information deficiency in the two bidder's statements as to the potential for a Conflicting Control Scenario described below.

Alinta 01 circumstances

AGL described the primary issue before the Initial 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. Alinta would be precluded from processing acceptances received from AGL shareholders because of section 259C (Conflicting Control Scenario). “

The Initial Panel required that both Alinta and AGL include defeating conditions in their offers which required 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 could become unconditional. These conditions could not be waived without the consent of the Initial Panel.

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

Current circumstances

The Review Panel considers that there is no evidence that Alinta and AGL shareholders are currently concerned at present about the possibility of a Conflicting Control Scenario, because their directors have advised them to take no action in relation to either takeover offer. The directors of both companies have advised their shareholders that they have entered into a legally binding HoA which is intended to make the two takeover offers redundant and of no effect. Their directors have made clear and definite public statements of their intentions to work towards the achievement of the MIA and have set out the benefits to both Alinta and AGL shareholders of their achieving the MIA on behalf of their shareholders. Thus, the Review Panel considers that the possibility of a Conflicting Control Scenario has no current effect on the decisions of Alinta's or of AGL's shareholders, and therefore it has no current effect on control or potential control of either Alinta or AGL.

On that basis, the Review Panel considers that the material change in circumstances since the Initial Panel's decision means that the unacceptable circumstances identified by the Initial Panel do not currently exist.

Both parties sought, in their respective submissions, that the Review Panel should make orders of different sorts, for differing reasons. However, as noted above, the Review Panel formed the view that unacceptable circumstances do not currently exist, and that there is no current basis for a declaration of unacceptable circumstances or for interfering with the ordinary operation of the market in these circumstances.

Possible future unacceptable circumstances

In their submissions to the Review Panel, the parties raised the possibility of negotiations between them failing in relation to the Merger Implementation Agreement. If that occurred, the parties advised the Review Panel, both companies would likely seek to pursue their respective offers, in a similar manner as before the entry into the HoA. On that basis, it is possible that the same concerns which were brought before the Initial Panel could arise again. In the latter case, any person would be free to apply to the Panel for a declaration of unacceptable circumstances in relation to the then existing circumstances and the Panel would consider the circumstances then prevailing and the interests of Alinta and of AGL shareholders anew. The decision of the Review Panel does not preclude any such future application to the Panel, which would be determined on the circumstances which exist at the time.

Undertakings

The Panel notes that AGL and Alinta have each voluntarily offered undertakings to the Panel that, in the event that the MIA is not entered into, they will not free their takeover offers from defeating conditions without giving the Panel and the other company, 7 days notice of their intention to do so. The Panel notes that this sensible suggestion will eliminate the possibility of a Panel decision acting to affect the terms of offers which had earlier crystallised into complete contracts.

Panel

The President of the Panel appointed John Fast, Norman O'Bryan SC and Ian Ramsay (sitting President) 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