



HIGH COURT OF AUSTRALIA

Public Information Officer

31 January 2008

ATTORNEY-GENERAL OF THE COMMONWEALTH v ALINTA LIMITED, TREWAS PTY LIMITED, TAKEOVERS PANEL, AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION AND AUSTRALIAN PIPELINE LIMITED (in its capacity as responsible entity of Australian Pipeline Trust)

The Takeovers Panel's role in declaring circumstances relating to the affairs of a company to be unacceptable circumstances constituting contraventions of the *Corporations Act* was not a judicial function and was validly conferred, the High Court of Australia held today.

On 13 December 2007, the Court allowed the appeal by the Attorney-General and made a declaration that section 657A(2)(b) of the Act was not invalid for purporting to confer the judicial power of the Commonwealth on the Takeovers Panel. The Court published its reasons today.

In April 2006, Alinta and the Australian Gas Light Company (AGL) agreed to merge their assets. The assets included units held by AGL in the Australian Pipeline Trust (APT), a listed managed investment scheme. AGL held 30 per cent of the issued units in APT. Trewas, a subsidiary of Alinta, acquired a further 10.25 per cent of the issued units in APT during August 2006. On the application of Australian Pipeline Limited the Takeovers Panel made a declaration of unacceptable circumstances in relation to these acquisitions. Section 606 of the Act prohibits acquisitions which increase a person's voting power in a company to more than 20 per cent and prohibits any increase if the starting point is between 20 and 90 per cent. If, as was later argued in Federal Court of Australia proceedings, the agreement gave Alinta a relevant interest in AGL's units in APT, Alinta's later purchases of units in APT was a contravention of section 606. The Takeovers Panel made orders vesting the additional units acquired by Alinta in the Australian Securities and Investments Commission on trust for sale, with proceeds remitted to Alinta.

Alinta applied to the Federal Court for review, contending that the Panel's declaration and orders were invalid because in making them the Panel exercised the judicial power of the Commonwealth. Justice Arthur Emmett rejected the contention. The Full Court of the Federal Court, by majority, allowed Alinta's appeal and declared section 657A(2)(b) of the Act invalid. The High Court granted the Attorney-General special leave to appeal against the orders made by the Full Court. Other parties discontinued proceedings in the High Court as the underlying commercial controversy was resolved and the disputed APT units disposed of. The Attorney-General arranged for counsel to appear as *amici curiae* to provide contrary argument.

The High Court unanimously allowed the appeal and held that Takeover Panel does not exercise the judicial power of the Commonwealth when discharging its functions under section 657A(2)(b) of the Act. The Panel's making of a declaration of unacceptable circumstances under that section does not involve resolution of a controversy about a legal obligation. Instead the Panel undertakes the non-judicial function of considering policy considerations relevant to the public interest. It makes orders about the process to be undertaken with respect to a takeover and what the rights of the parties should be. The Panel's task is the creation of new rights and obligations rather than adjudicating a dispute about a contravention of the *Corporations Act*. It lacks power to compel compliance with its orders. An order of a court is necessary for enforcement of compliance with the Panel's orders. A court may make any order that it considers appropriate where a contravention has occurred.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*