

ATTORNEY-GENERAL OF THE COMMONWEALTH v ALINTA LIMITED & ORS (S331/2007)

Court appealed from: Full Court of the Federal Court of Australia

Dates of Judgment: 30 April 2007

Date of Grant of Special Leave: 15 June 2007

One of the main issues in this appeal is whether the Full Court erred in holding that section 657A(2)(b) of the *Corporations Act* 2001 ("the Act") is invalid on the ground that it purports to confer the judicial power of the Commonwealth on the Takeovers Panel contrary to Chapter III of the Constitution.

On 26 April 2006 Alinta Limited ("Alinta") entered into a Heads of Agreement ("the Agreement") with the Australian Gas Light Company ("AGL"). That agreement contemplated AGL acquiring an interest in certain Alinta assets, while Alinta would acquire an interest in certain AGL assets. These included units held by AGL in the Australian Pipeline Trust ("the Trust"). On 22 June 2006 AGL and Alinta entered into a Merger Implementation Agreement ("the Merger Agreement") which provided a scheme for the implementation of the Agreement.

From 16 - 22 August 2006 Trewas Pty Limited ("Trewas"), a wholly-owned subsidiary of Alinta, acquired 10.25% of the issued units in the Trust ("the Trewas Acquisitions"). On 21 August 2006 Australian Pipeline Limited ("APL"), the responsible entity of the Trust, applied to the Takeovers Panel ("the Panel") concerning the Trewas Acquisitions. On 20 September 2006 the Panel made a declaration of unacceptable circumstances pursuant to both section 657A(2)(a)(i) and section 657A(2)(b) of the Act. In making that declaration, the Panel found that the Trewas Acquisitions had, or were likely to have, an effect on the control or potential control of the Trust. This gave rise to a contravention of section 606 of the Act ("the Panel Declaration"). On 24 September 2006 the Panel ordered ("the Panel Orders") that the units, the subject of the Trewas Acquisitions, be vested in the Australian Securities and Investments Commission ("ASIC") to be held on trust for sale. It also ordered that Alinta not acquire any further units in the Trust

APL commenced proceedings in the Federal Court seeking declarations ("the declaration proceedings") that both the Trewas Acquisitions and Alinta's acquisition of an interest in APL contravened section 606 of the Act. Alinta also commenced proceedings for the judicial review of both the Panel's decision and its orders ("the judicial review proceedings"). Both matters were heard together.

On 20 October 2006 Justice Emmett held that the Panel had erred in finding that there had been a contravention of section 606 of the Act. His Honour then dismissed the declaration proceedings. He nevertheless found that the Panel Orders could stand because they were based on the finding of unacceptable circumstances within section 657A(2)(a), as well as section 657A(2)(b) of the Act. Justice Emmett further dismissed Alinta's application for judicial review. In doing so, his Honour rejected the submission that the Panel Declaration and the Panel Orders were invalid exercises of Commonwealth judicial power. Both APL and Alinta appealed to the Full Federal Court.

On 20 April 2007 the Full Federal Court (Finkelstein, Gyles & Lander JJ) held, with respect to APL's appeal, that there had been contraventions of section 606 of the Act arising from the Merger Agreement and the Trewas Acquisitions. Their Honours then referred the matter to the trial judge for the determination of what relief, if any, should be granted. With respect to Alinta's appeal (in which the Attorney-General of the Commonwealth intervened), a majority (Gyles & Lander JJ, Finkelstein J dissenting) held that section 657A(1) of the Act was invalid. This was insofar as it purported to give the Panel jurisdiction to declare circumstances to be unacceptable based on a finding of a contravention of the Act. The majority also held that section 657A(2)(b) of the Act was invalid and could not be severed.

In separately considering the validity of section 657A(2)(a) of the Act, the majority expressed the view that that section was invalid for the same reason as section 657A(2)(b) was invalid.

Special leave applications were filed by the Attorney-General, Alinta and APL. Special leave was granted to the Attorney-General and to APL. Alinta's application for special leave was referred to the Full Court. By reason of a commercial settlement reached between APL and Alinta, APL did not file a notice of appeal and the grant of special leave lapsed. Alinta discontinued its application for special leave.

The first and second respondents have filed a summons seeking the revocation of the grant of special leave to the appellant or, alternatively, an order revoking the grant of special leave in part. The appellant has filed a summons seeking leave to amend its notice of appeal.

Section 78B notices have been served.

The grounds of appeal include:

- The Court below erred in holding that section 657A(2)(b) of the Act was invalid in that it purported to confer the judicial power of the Commonwealth on the Third Respondent contrary to Chapter III of the Constitution.
- The Court below ought to have held that section 657A(2)(b) of the Act was valid.