

Before the High Court

Attorney-General (Commonwealth) v Alinta Limited: Will the Takeovers Panel Survive Constitutional Challenge?

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Abstract

The Takeovers Panel is the primary decision-making body in relation to takeovers under the *Corporations Act* 2001 (Cth). In *Australian Pipeline Limited v Alinta Limited*,¹ a majority of the Full Federal Court found a key part of the Panel's jurisdiction to be invalid on the basis that it was exercising judicial power contrary to Chapter III of the *Commonwealth Constitution*. This article examines the High Court authorities on 'judicial power' and analyses their application to the Panel. It finds that the Panel's functions are similar to those previously considered by the High Court to be non-judicial. However, if the High Court were to come to a contrary conclusion due to the provision allowing the Panel to make a declaration based upon certain contraventions of the *Corporations Act*, then this provision should be severed. This would allow the Panel to continue to operate based upon it making decisions solely taking into account policy considerations.

1. Introduction

The High Court will soon decide the fate of the Takeovers Panel. Elements of the Panel's jurisdiction have been struck down by a majority of the Full Federal Court and its remaining powers have been called into question. Originally established as the Corporations and Securities Panel ('previous Panel') with more limited powers, the Panel survived constitutional challenge in the High Court following its first matter in *Precision Data Holdings Ltd v Wills*.² Similarly, the Takeovers Panel's expanded powers were found to be constitutional in Federal Court decisions made by a single judge,³ including by Emmett J in the *Alinta* proceedings at first instance.⁴

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1 (2007) 25 ACLC 602 ('*Alinta*').

2 (1991) 173 CLR 167 ('*Precision Data*').

3 *Glencore International AG v Takeovers Panel* (2005) 220 ALR 495 ('*Glencore*') at 510–1 (Emmett J); *Tower Software Engineering Pty Ltd, Re; Pendant Software Pty Ltd v Harwood* (2006) 154 FCR 150 at 167 (Goldberg J).

4 *Australian Pipeline Limited v Alinta Limited* (2006) 24 ACLC 1207 at 1235 (Emmett J).