



**In the matter of GasNet Australia Limited
[2006] ATP 22**

Catchwords:

Withdrawal of application; disclosure in bidder's statement; minimum bid price rule; joint bid; cash alternative; bona fide joint bid; headline valuation; pricing of scrip consideration cum and ex dividend; joint bid agreement; post-bid arrangements between joint bidders; benefits conferred in capacity as joint bidders

Corporations Act 2001 (Cth), sections 602(c), 621(3), 657A, 657D

Australian Pipeline Trust; BBI GP (Aust) Pty Limited; Babcock & Brown Infrastructure Limited; GasNet Australia Investments Limited; GasNet Australia Limited GasNet Australia Trust; GasNet Australia Investments Trust

These are the Panel's reasons for its decision to consent to GasNet Australia Investment Limited withdrawing its application to the Panel dated 11 July 2006. The application was for a declaration of unacceptable circumstances under section 657A¹ and associated interim and final orders respectively under sections 657E and 657D.

SUMMARY

1. The Application concerned an off-market scrip takeover offer (**Offer**) by BBI GP (Aust) Pty Limited (**Bidder**), a wholly owned subsidiary of Babcock & Brown Infrastructure Limited (**BBI**), in association with Australian Pipeline Trust (**APT**), for 100% of the securities in GasNet Australia Investments Limited and GasNet Australia Limited (in its capacity as responsible entity of GasNet Australia Trust and GasNet Australia Investments Trust) (together **GasNet**).
2. GasNet complained of three issues:
 - (a) The Bidder offering GasNet securityholders BBI scrip of a value which is less than \$2.55 per GasNet security (being the amount that GasNet submitted APT has agreed to pay to acquire, through a series of put and call options, GasNet securities from the Bidder immediately after the Offer).
 - (b) The failure of BBI to offer a \$2.55 cash alternative to GasNet securityholders.
 - (c) The use of a 'headline' valuation figure of the Offer in the bidder's statement that GasNet submits is based on a cum-distribution price of the BBI securities offered under the Offer, where GasNet securityholders are not entitled to the relevant BBI distribution in relation to any BBI securities they would receive under the Offer.
3. The Panel provided parties with its preliminary views in relation to the Application that:
 - (a) Bidder should not have used a headline valuation of \$2.55 based on a cum-distribution BBI security price without clear qualification in the headline announcement given that GasNet securityholders would not receive the distribution; and

¹ Unless otherwise specified, all statutory references are to the Corporations Act.

Takeovers Panel

Reasons for Decision – GasNet Australia

- (b) the arrangements in the Joint Bidding Agreement between BBI and APT were unlikely to breach section 621(3) or offend the equality principle in section 602(c), given that:
 - (i) there was no evidence that the bid was not a bona fide joint bid; and
 - (ii) the combined holding of the joint bidders in the target was less than 20%.
- 4. The parties agreed to a resolution on the disclosure issues, following which GasNet sought, and the Panel granted, the Panel's consent to withdraw the application as there seemed no public interest grounds for continuing the application.

THE PROCEEDINGS

- 5. These reasons related to an application (**Application**) to the Panel for a declaration of unacceptable circumstances and orders from GasNet on 11 July 2006 in relation to the Offer.

THE PANEL & PROCESS

- 6. The President of the Panel appointed Elizabeth Alexander (sitting President), Karen Wood (sitting Deputy President) and Peter Scott as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
- 7. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
- 8. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

BACKGROUND

- 9. On 19 June 2006, BBI and APT announced the Offer. The announcement indicated that conditional pre-acceptance agreements had been entered into in respect of 14.2% of GasNet securities (comprising the existing 8.0% holding of BBI and the existing 6.2% holding of APT).
- 10. On 21 June 2006, the BBI group gave a substantial shareholding notice which attached a copy of a joint bidding agreement with APT (**Joint Bidding Agreement**). The Joint Bidding Agreement included put and call arrangements under which APT agreed to acquire for cash, shares in the Bidder's holding company and beneficial interests in units forming part of the triple-stapled GasNet securities. GasNet submitted that these arrangements meant that APT had agreed to pay a total of \$2.55 cash per GasNet security for its 50% interest in Bidder's holding company.
- 11. On 30 June 2006, Bidder served the bidder's statement in relation to the Offer on GasNet and lodged it with ASIC.
- 12. On 6 July 2006, GasNet's legal advisers wrote to BBI's legal advisers in relation to GasNet's concerns regarding the bidder's statement (including, amongst other things, the issues raised in the Application).
- 13. On 7 July 2006, BBI's legal advisers responded to concerns raised by GasNet. The Bidder agreed to lodge a replacement bidder's statement in response to some of GasNet's concerns (**Bidder's Statement**). The Bidder also indicated that it intended

Takeovers Panel

Reasons for Decision – GasNet Australia

to despatch the Bidder's Statement on or around 14 July 2006, which was consistent with its previous announcement on the ASX on 19 June 2006 that it would despatch its Bidder's Statement during "mid July 2006".

14. On 10 July 2006, Bidder served the Bidder's Statement on GasNet and lodged it with ASIC.
15. On 11 July 2006, GasNet lodged the Application with the Panel.
16. On 14 July 2006, the Panel advised the parties of its preliminary views in relation to the issues raised in the Application.²
17. On 17 July 2006, GasNet informed the Panel that it had reached agreement with the Bidder in relation to the following disclosure issues:
 - (a) the form of revisions to the Bidder's Statement to address GasNet's complaints concerning the Bidder's use of a 'headline' valuation figure; and
 - (b) that BBI would dispatch its replacement bidder's statement no earlier than 24 July 2006.
18. On 17 July 2006, GasNet applied for the Panel's consent to the withdrawal of the Application.

APPLICATION

Declaration sought

19. GasNet sought a declaration under section 657A that each of the following constituted unacceptable circumstances:
 - (a) The Bidder offered GasNet securityholders BBI scrip of a value which was less than \$2.55 per GasNet security (being the amount that GasNet submitted APT had agreed to pay to acquire interests in GasNet securities from the Bidder immediately after the Offer, through a series of put and call options). Accordingly, GasNet submitted that the Offer did not comply with the minimum bid price rule in section 621(3).
 - (b) The failure of the Bidder to offer a \$2.55 cash alternative to GasNet securityholders (given, GasNet submitted, that APT had agreed to acquire interests in GasNet securities from the bidder for cash under the put and call options). GasNet submitted that a cash alternative was required under the equality principle in section 602(c) (which requires that, as far as practicable, security holders have a reasonable and equal opportunity to participate in benefits accruing through a proposal to acquire a substantial interest).
 - (c) The use of a 'headline' valuation figure of the Offer in the Bidder's Statement that GasNet submitted was based on a cum-distribution price of the BBI securities offered under the Offer, where GasNet securityholders were not entitled to the relevant BBI distribution in relation to any BBI securities they would receive under the Offer.

² Please see paragraphs 17 to 21 for further information.

Takeovers Panel

Reasons for Decision – GasNet Australia

Orders sought

Interim Orders

20. GasNet sought an interim order that the Bidder be restrained from dispatching its Bidder's Statement to GasNet securityholders and from corresponding with GasNet securityholders in respect of the Offer pending determination of the Application by the Panel.

Final Orders

21. GasNet sought the following final orders:
 - (a) that the Bidder amend the Bidder's Statement to ensure that the consideration offered was at least equal to \$2.55 per GasNet security, based on a two day volume weighted average price of BBI securities in the period up to 5 business days prior to the date of the Offer;
 - (b) that the Bidder amend the Bidder's Statement to offer a cash alternative to GasNet securityholders of at least \$2.55 per GasNet security; and
 - (c) that the Bidder amend the Bidder's Statement and correct any other announcements or communications in relation to references to a \$2.55 valuation based on a BBI security price of \$1.65 (i.e. a cum-distribution price) and undertake not to continue to make such references.

DISCUSSION

Preliminary views of the Panel

Disclosure issues

22. The Panel had previously advised the parties that its preliminary view was that the Bidder should not have used a headline valuation of \$2.55 based on a cum-distribution BBI security price without clear qualification in the headline announcement, and clear explanation of any justification for doing so, given that GasNet securityholders would not receive the distribution. The Panel recognised, however, that in several places in communications with GasNet securityholders, and in the BBI bidder's statement, BBI did clearly explain that GasNet securityholders would not receive the BBI distribution and did clearly explain the implied value of the Offer if the full BBI distribution was deducted from the value of the BBI securities offered as consideration under the Offer.
23. Following the Panel's advice, and a request to them to seek to resolve the disclosure issues that were outstanding, on the basis of the Panel's preliminary views, GasNet and the Bidder informed the Panel that they had reached a degree of agreement. They advised that they had agreed, in relation to the disclosure issues:
 - (a) the form of revisions to the bidder's statement to address GasNet's complaints concerning the Bidder's use of a 'headline' valuation figure of \$2.55; and
 - (b) that BBI would dispatch its replacement bidder's statement no earlier than 24 July 2006.
24. The Panel commended the parties on reaching agreement on these issues.

Takeovers Panel

Reasons for Decision – GasNet Australia

Minimum bid price, and cash alternative issues

25. GasNet had submitted in the Application that, under the Joint Bidding Agreement between BBI and APT, APT had agreed to pay \$2.55 per GasNet security to acquire such securities from the Bidder immediately after the Offer and accordingly:
 - (a) the minimum bid price rule in section 621(3) required that the value of the Offer consideration must be at least equal to \$2.55; and
 - (b) the equality principle in section 602 required the Bidder to offer a \$2.55 cash alternative to GasNet securityholders.
26. The Panel's preliminary view was that the arrangements in the Joint Bidding Agreement between BBI and APT were unlikely to offend the equality principle in section 602(c), given that:
 - (a) there was no evidence that the bid was not a bona fide joint bid; and
 - (b) the combined holding of the joint bidders in the target was less than 20%.
27. The Panel noted that the Joint Bidding Agreement appeared to deal solely with transactions between BBI and APT in their role as joint bidders and their internal funding arrangements.
28. The Panel's preliminary view was that any benefits conferred on BBI or APT by the Joint Bidding Agreement appeared to be conferred on them in their capacity as joint bidders in a bona fide joint bid. The Panel's preliminary view was also that the joint bid agreement and structure did not appear to be:
 - (a) a device to transfer ownership or control of GasNet or its securities between the joint bidders;
 - (b) a device to avoid section 606; or
 - (c) a device to avoid section 621 or section 602.

Given that there was nothing to suggest that BBI's bid was anything other than a bona fide joint bid, the issue of what constitutes a bona fide joint bid was not considered further.

29. Accordingly, the Panel's preliminary view was that, even if GasNet were to establish that the provisions of the Joint Bidding Agreement gave rise to a technical contravention of section 621(3) (or other specific requirements which were intended to give effect to the principle in section 602(c)), the Panel would not be likely to make a declaration of unacceptable circumstances on the basis of the Applicant's submissions concerning the Offer terms.

DECISION

30. In light of the Panel's preliminary view on the minimum bid price rule, and the parties' agreement on disclosure issues, GasNet requested the Panel's consent to withdraw its application. GasNet submitted that no useful purpose would be served by continuing with the Application. The Bidder, BBI and APT did not object to GasNet's request.

Takeovers Panel

Reasons for Decision - GasNet Australia

31. Given the parties' agreement, and the preliminary views of the Panel as described above, the Panel considered that continuing the proceedings would not be likely to benefit the parties or their shareholders, or the market generally. Accordingly, the Panel consented to GasNet withdrawing the Application.
32. The Panel made no order for costs.

Elizabeth Alexander
President of the Sitting Panel
Decision dated 17 July 2006
Reasons published 5 October 2006