



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Hastings Diversified Utilities Fund  
[2012] ATP 1**

**Catchwords:**

*Bidder's statement – deficiencies in disclosure – efficient and informed market – scrip consideration – implied value – capital gains tax roll-over relief disclosure – refinancing disclosure – interim order declined – decline to make a declaration – supplementary bidder's statement*

*Corporations Act 2001 (Cth), sections 602(a), 636, 657A, 657D, 657E, 670A*

*Guidance Note 5: Specific Remedies – Information Deficiencies*

*GasNet Australia Limited [2006] ATP 22, Sydney Gas Limited 01 [2006] ATP 9, General Property Trust [2004] ATP 30, Namakwa Diamond Co NL (No 2) [2001] ATP 9*

**INTRODUCTION**

1. The Panel, Julie McPherson, Ian Ramsay (sitting President) and Mike Roche, declined to make a declaration of unacceptable circumstances in relation to the affairs of Hastings Diversified Utilities Fund. The application concerned disclosure deficiencies in the bidder's statement lodged by APT Pipelines Limited. The Panel decided not to make a declaration after APT Pipelines Limited agreed to provide supplementary disclosure in a form and manner that was acceptable to the Panel.
2. In these reasons, the following definitions apply.

APA Group	Australian Pipeline Trust (which controls the bidder, APT Pipelines Limited), APT Investment Trust and each of the entities controlled by Australian Pipeline Limited (with the stapled securities consisting of one unit in Australian Pipeline Trust and one unit in APT Investment Trust)
Bidder's Statement	The bidder's statement dated 15 December 2011 and containing APA Group's offer
HDF	Hastings Diversified Utilities Fund
Supplementary Bidder's Statement	The supplementary bidder's statement dated 3 January 2012
VWAP	Volume weighted average price

**FACTS**

3. HDF is listed on ASX (ASX code: HDF).
4. APA Group is listed on ASX (ASX code: APA) and has voting power of 20.71% in HDF.<sup>1</sup>

---

<sup>1</sup> Form 604: Notice of change of interest of substantial holder dated 15 December 2011

## Takeovers Panel

### Reasons – Hastings Diversified Utilities Fund [2012] ATP 1

5. On 14 December 2011, APA Group announced an off-market takeover bid for all of the stapled securities in HDF that it did not already own or control. The consideration offered under the bid for each HDF stapled security was a combination of cash (50 cents) and scrip (0.326 APA Group stapled securities).
6. On 15 December 2011, APA Group served the Bidder's Statement on HDF and lodged it with ASIC and ASX.
7. On 21 December 2011, HDF wrote to APA Group drawing its attention to what HDF considered were material deficiencies in the Bidder's Statement. HDF requested a response from APA Group to each of its concerns by no later than 5.00pm on 22 December 2011.
8. On 22 December 2011, APA Group responded to HDF denying that there were material deficiencies in the Bidder's Statement.
9. On 23 December 2011, HDF lodged an application with the Panel in respect of all 13 of the alleged Bidder's Statement deficiencies identified in its letter dated 21 December 2011. The alleged disclosure deficiencies related to:
  - (a) the implied value per HDF security represented to HDF securityholders (**Implied Value Disclosure**)
  - (b) statements regarding the HDF security price being "likely to fall"
  - (c) the capital gains tax consequences for HDF securityholders who accept the offer given the unavailability of roll-over relief (**CGT Roll-over Relief Disclosure**)
  - (d) statements regarding management fee "leakage"
  - (e) the presentation of the offer premium
  - (f) the basis for earnings forecasts
  - (g) statements regarding the outperformance of the APA Group compared to HDF
  - (h) statements as to APA Group's capacity to refinance HDF debts (**Refinancing Disclosure**)
  - (i) the ACCC condition and
  - (j) four other matters such as the bidder's intentions and management capability.
10. HDF also raised an issue regarding the investigating accountant's report not containing a qualification regarding access to HDF's workpapers, accounting records and other documents.
11. On 23 December 2011, following receipt of HDF's application by the Panel, APA Group began printing the Bidder's Statement.

## APPLICATION

### Declaration sought

12. By application dated 23 December 2011, HDF sought a declaration of unacceptable circumstances. HDF submitted that there were material deficiencies in the disclosure in the Bidder's Statement (see paragraphs 9 and 10 of these reasons) which gave rise to unacceptable circumstances:
  - (a) because it constituted a breach of Chapters 6 and 6B, in particular sections 636<sup>2</sup> and 670A (section 657A(2)(c))
  - (b) due to the effects the deficient disclosure had, is having, will have or is likely to have on the acquisition, or the proposed acquisition by a person of a substantial interest in HDF (section 657A(2)(a)) and
  - (c) having regard to the purposes of Chapter 6 as set out in section 602 (section 657A(2)(b)).
13. HDF submitted that the distribution of the Bidder's Statement without amendment would have the potential to seriously mislead HDF securityholders and *would be contrary to one of the purposes of Chapter 6, namely that the acquisition of control over the voting shares in a listed body takes place in an efficient and informed market (section 602(a))*.

### Interim order sought

14. HDF sought an interim order that APA Group be restrained from dispatching the Bidder's Statement, pending final determination of the application.
15. We considered the application for an interim order, but decided to conduct proceedings and defer further consideration of the interim order to see if we could complete the matter before dispatch of the Bidder's Statement (scheduled for 3 January 2012). We indicated that we would reconsider the position if that course became untenable. Ultimately, after accepting APA Group's offer to include supplementary disclosure with the Bidder's Statement, it became unnecessary to make any interim order.

### Final orders sought

16. HDF sought final orders that APA Group prepare, lodge and dispatch a replacement bidder's statement, in a form approved by the Panel:
  - (a) correcting the deficiencies identified in the application and
  - (b) including such disclosures as were necessary for APA Group to meet its disclosure obligations.

---

<sup>2</sup> Unless otherwise indicated, references are to the *Corporations Act 2001* (Cth)

## DISCUSSION

### Introduction

17. We decided to conduct proceedings in relation to three disclosure issues, being:
  - (a) the Implied Value Disclosure
  - (b) the CGT Roll-over Relief Disclosure and
  - (c) the Refinancing Disclosure.
18. There was no reasonable prospect that we would make a declaration of unacceptable circumstances in relation to the other issues.

### Implied Value Disclosure

19. The Bidder's Statement stated in a number of places<sup>3</sup> that APA Group's offer implied a value of \$2.00 per HDF stapled security.<sup>4</sup> The value of the scrip component was based on the closing price of APA Group's stapled securities on 13 December 2011, being the day prior to the announcement of APA Group's offer.
20. In its letter to APA Group dated 21 December 2011, HDF stated that the implied value disclosure was misleading for the following reasons:
  - (a) the scrip component of the consideration was calculated using the APA Group stapled security price at a time when the APA Group was trading *cum* its 31 December 2011 distribution. However, HDF securityholders would not be entitled to this distribution (the distribution was 17 cents and APA Group traded *ex* distribution on 22 December 2011)<sup>5</sup> and
  - (b) while the Bidder's Statement disclosed that the cash component of the consideration would be reduced by any HDF distributions made during the offer period, the implied value had not been reduced by the amount of the distribution of 2.5 cents per HDF stapled security that HDF had already announced on 19 December 2011 and which was payable for the quarter ended 31 December 2011.
21. HDF also stated in its letter that the implied value distorted the premium to the 5 day VWAP and the 3 month VWAP of HDF stapled securities as set out in the Bidder's Statement.

---

<sup>3</sup> HDF made specific reference to the implied value statements on pages ii, 1, 2 and 7 of the Bidder's Statement

<sup>4</sup> The \$2.00 implied value was calculated by adding the cash component of the consideration (\$0.50) to the scrip component (\$1.50) (the scrip component was calculated by multiplying the closing price of APA Group's stapled securities on 13 December 2011 of \$4.60 by the ratio of 0.326 APA Group stapled securities for each HDF stapled security)

<sup>5</sup> Where securities are trading *cum* distribution it means they are trading with the right to receive a distribution. Where they are trading *ex* distribution, they are trading without that right

## Takeovers Panel

### Reasons – Hastings Diversified Utilities Fund [2012] ATP 1

22. HDF submitted in its application: *Put simply, the statements as to the offer value are not merely insufficiently qualified – rather they fundamentally misstate the offer price.*
23. In response to HDF's letter, APA Group said in its letter dated 22 December 2011:
  - (a) the Bidder's Statement included information to highlight the variable nature of the implied value of the offer consideration and
  - (b) many factors affect the price of securities on the ASX, the consequences for the price of securities that go 'ex distribution' was inherently uncertain and it was unlikely that the APA Group security price would move exactly in line with the amount of the distribution.
24. APA Group also said that it was open to HDF to rebut the implied offer consideration in its target's statement, and noted that HDF had already done so in its letter to HDF securityholders on 22 December 2011.
25. In its letter to securityholders, HDF re-calculated the implied value of the offer at \$1.92 by deducting the APA Group distribution of 17 cents from the APA Group stapled security price of \$4.60 and deducting the HDF distribution of 2.5 cents from the cash component of the consideration.
26. The implied value of a scrip (or part-scrip) offer is an important consideration for securityholders. For many securityholders it may be the most important consideration. It, naturally, is given considerable weight by securityholders when determining whether they wish to accept a bid.
27. HDF referred to *Namakwa Diamond Co NL (No 2)*<sup>6</sup> and *General Property Trust*<sup>7</sup> and submitted that, using the trading price of securities at the date of announcement to determine the implied value, may not be appropriate if there has been a material movement in the security price between the date of the announcement and dispatch of the bidder's statement. HDF said that to give effect to the principles underpinning these decisions, APA Group should use the *ex* distribution price of the APA Group stapled securities to determine the implied value of its offer.
28. We agree. In this case, the Bidder's Statement was not dispatched until after APA Group's stapled securities traded *ex* distribution so there should have been reference to this price.<sup>8</sup>
29. In *Gasnet Australia Limited*<sup>9</sup> the Panel expressed the preliminary view that the bidder should not have used a headline valuation based on a *cum* distribution 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. In that case the bidder's statement included a 'theoretical' *ex*

---

<sup>6</sup> [2001] ATP 9

<sup>7</sup> [2004] ATP 30

<sup>8</sup> The Bidder's Statement was dispatched on 3 January 2012 while APA Group's stapled securities traded *ex* distribution on 22 December 2011

<sup>9</sup> [2006] ATP 22

## Takeovers Panel

### Reasons – Hastings Diversified Utilities Fund [2012] ATP 1

distribution price reference. Here, in our view, given that the amount of the distribution was known, had the Bidder's Statement been dispatched before the securities traded *ex* distribution, APA Group should have included a 'theoretical' *ex* distribution price to calculate the implied value. Had the amount of the distribution been unknown, the clear qualification referred to in *Gasnet* would at least be required.

30. While the Bidder's Statement disclosed, in several places, that HDF securityholders would not be entitled to receive the APA Group distribution and the implied value of the offer would fluctuate, the Bidder's Statement did not adequately link the effect of the distribution to the implied value being offered. To represent that the implied value of the offer is \$2.00 having not accounted for the APA Group distribution of 17 cents and the HDF distribution of 2.5 cents (both of which were known and excluded from the actual consideration to be paid), would be likely to give rise to unacceptable circumstances.
31. Even though additional information regarding the implied value had been included in the letter from HDF to its securityholders on 22 December 2011, this is not sufficient to 'correct' the disclosure in the Bidder's Statement.
32. APA Group offered to include a more detailed explanation of the implied value and to correct the premium disclosure in its Supplementary Bidder's Statement.
33. The form of the additional disclosure was acceptable to the other parties and the Panel and included the following:  
  
*If the closing price of APA Stapled Securities on the day before the announcement of \$4.60 had been adjusted for the full amount of the FY2012 interim APA Group distribution of 17 cents for the half year ending 31 December 2011 (that is, the price was actually \$4.43, representing \$4.60 less 17 cents), the headline value of the Offer would be \$1.94 per [HDF] Stapled Security, and the amount payable to [HDF] Security Holders after also adjusting for the [HDF] interim distribution of 2.5 cents per [HDF] Stapled Security would be \$1.92 (instead of the \$2.00 referred to in the Bidder's Statement).*
34. We think the market and HDF securityholders will be sufficiently informed by the Supplementary Bidder's Statement.

#### **CGT Roll-over Relief Disclosure**

35. HDF submitted in its application that the fact that HDF securityholders who accept APA Group's offer will not be entitled to capital gains tax roll-over relief<sup>10</sup> was material to their decision whether to accept the offer and required more prominent disclosure in the Bidder's Statement. Disclosure regarding the unavailability of roll-over relief was not mentioned until page 19 of the Bidder's Statement, which only

---

<sup>10</sup> Capital gains tax (scrip for scrip) roll-over relief is a tax concession available to securityholders who receive scrip consideration for their securities in a takeover which allows the securityholders of the target company to defer paying capital gains tax until the securities they receive in the acquiring company are sold

## Takeovers Panel

### Reasons – Hastings Diversified Utilities Fund [2012] ATP 1

included limited information and a cross-reference to section 7 (tax considerations) where additional disclosure was set out.

36. APA Group denied that more prominence was required, also noting that HDF had already highlighted the matter to its securityholders in its letter of 22 December 2011.
37. Whether or not a securityholder will incur a tax liability as a result of accepting an offer, and the extent of that liability, are important considerations for securityholders. Securityholders would generally expect roll-over relief to be available in a takeover where scrip consideration is offered.
38. We think that the disclosure regarding the unavailability of roll-over relief should have been more prominent.
39. APA Group offered to make additional disclosure regarding the unavailability of roll-over relief in the Supplementary Bidder's Statement in a form acceptable to the parties and the Panel.
40. We think the market and HDF securityholders will be sufficiently informed by the Supplementary Bidder's Statement.

#### Refinancing Disclosure

41. HDF submitted in its application that more detail should be provided in the Bidder's Statement regarding APA Group's statement that it: *believes that it has reasonable grounds to expect to be able to organise replacement financing*, in the event that it was required to refinance HDF group's debt facilities.
42. In particular, HDF submitted that the Bidder's Statement should include:
  - (a) more detail regarding APA Group's strategy for effecting the refinancing and
  - (b) confirmation that the refinancing could be implemented if APA Group was to acquire more than 50%, but less than 90%, of HDF as a result of the takeover.
43. Section 5.2.4 of the Bidder's Statement stated (at paragraph 3):

*...[APA Group] believes that it has reasonable grounds to expect to be able to organise replacement financing if it is able to understand the current [HDF] Group financing arrangements, those arrangements are on customary commercial terms, there are no aggregate break costs of more than \$50 million and it is able to have satisfactory discussions with the existing [HDF] Group financiers.*
44. APA Group pointed out in its letter to HDF that there was limited publicly available information with respect to HDF group's debt, so it was restricted in what disclosure it could make. APA Group said that it had:
  - (a) made its offer conditional on further disclosure being made to the ASX about HDF's financing arrangements and any "change of control" provisions

## Takeovers Panel

### Reasons – Hastings Diversified Utilities Fund [2012] ATP 1

- (b) disclosed that it would need to negotiate with HDF and its financiers to ensure that the HDF funding arrangements would remain available or that new replacement financing could be arranged and
  - (c) included a qualified opinion in the Bidder's Statement that it expected to be able to organise replacement funding.
45. APA Group acknowledged that issues connected with refinancing HDF group's debt were important and that there would be a material impact if APA Group proceeded with an unconditional offer and failed to successfully effect such refinancing. We agree.
46. We consider that aspects of the refinancing disclosure in the Bidder's Statement are unclear and that additional disclosure is necessary to explain why APA Group needed to understand the current HDF financing arrangements (given it had reasonable grounds to expect to be able to organise replacement finance) and why the need for those arrangements to be on customary commercial terms was relevant to APA Group's ability to replace them.
47. We also consider that HDF securityholders should be provided with details of the refinancing that would be implemented if APA Group acquired less than 90% of the HDF stapled securities.
48. APA Group agreed to provide supplementary refinancing disclosure which was acceptable to the parties and the Panel, including the following additional detail:

*APA Group's statement that it has a reasonable basis to expect to be able to organise replacement financing is based on detailed discussions with a major Australian bank. The bank has not yet committed to provide a replacement financing facility and the terms of the replacement facility have not yet been agreed.*

...

*The reason that [APA Group] needs to understand the current [HDF] Group financings is because any replacement financing is likely to involve co-ordination with the [HDF] Group and existing financiers for a number of purposes including arrangements for repayment of existing financial arrangements, the release of existing security and the provision of guarantees by entities in the [HDF] Group.*

...

*The replacement financing facilities referred to [in the Supplementary Bidder's Statement] that [APA Group] is seeking to organise will only be available if APA Group acquires 90% or more of the [HDF] stapled securities.*

49. The supplementary disclosure sets out more clearly what APA Group had initially tried to express concisely in the Bidder's Statement and will provide sufficient information to the market and HDF securityholders.



## Takeovers Panel

### Reasons – Hastings Diversified Utilities Fund [2012] ATP 1

#### Supplementary or replacement disclosure?

50. The Panel generally prefers fewer and more comprehensive documents to be sent to target shareholders, although this concern is less where the supplementary disclosure adds to, rather than corrects an inaccuracy in, the original document.<sup>11</sup>
51. While the disclosure deficiencies here are material and corrections were required to the Bidder's Statement, we do not think that supplementary disclosure needs to take the form of a replacement bidder's statement in this case, because:
- (a) there is a reduced risk of confusion for HDF securityholders given the short and relatively simple nature of the Supplementary Bidder's Statement and the fact that the corrections were not voluminous<sup>12</sup>
  - (b) the Supplementary Bidder's Statement will be dispatched at the same time (and in the same envelope) as the Bidder's Statement and
  - (c) the Supplementary Bidder's Statement, in the form agreed, presents the material in a clear manner that can easily be reconciled to the Bidder's Statement by HDF securityholders.
52. APA Group proceeded to print the Bidder's Statement on the day that the application was received by us, accepting the risk that a replacement bidder's statement may have been required.

#### DECISION

53. The Panel encourages parties to negotiate<sup>13</sup> and we are pleased by the prompt and cooperative manner in which the parties have sought to resolve the issues in this matter.
54. In matters involving disclosure deficiencies, the Panel may require a statement in the corrective disclosure that the corrective disclosure was required by the Panel.<sup>14</sup> Such a statement has not been sought because the parties resolved the issues expeditiously amongst themselves.
55. Given the supplementary disclosure offered by APA Group (which was in a form acceptable to the other parties and the Panel), we decline to make a declaration having regard to the matters in s657A(3).
56. We are satisfied that it is not against the public interest to do so on the basis that securityholders (and the market generally) will now receive timely information that is not misleading in relation to APA Group's offer.

---

<sup>11</sup> *Sydney Gas Limited 01* [2006] ATP 9 at [31]

<sup>12</sup> *Sydney Gas Limited 01* [2006] ATP 9 at [29] and [35]

<sup>13</sup> Guidance Note 5: Specific remedies – Information deficiencies at [29]

<sup>14</sup> Guidance Note 5: Specific remedies – Information deficiencies at [21(b)]

## Takeovers Panel

### Reasons - Hastings Diversified Utilities Fund [2012] ATP 1

#### Orders

57. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

**Ian Ramsay**  
**President of the sitting Panel**  
**Decision dated 5 January 2012**  
**Reasons published 6 January 2012**

#### Advisers

<b>Party</b>	<b>Advisers</b>
APA Group	Mallesons Stephen Jaques Macquarie Capital (Australia) Limited
HDF	Freehills JP Morgan Royal Bank of Canada