



Australian Government

Takeovers Panel

**Reasons for Decision
Hastings Diversified Utilities Fund 02
[2012] ATP 11**

Catchwords:

Managed investment scheme – competing bids – Bid Implementation Deed –recommended bid –internalisation of management - evaluation of internalisation – target’s statement – independent expert’s report – conflict of interest - decline to conduct proceedings – premature application – defer proceedings - efficient, competitive and informed market - section 602 principles

Corporations Act 2001 (Cth), sections 602, 638, 640, 657A, 638

ASIC regulation 16(1)(j)

Guidance Note 19

NewSat Limited [2009] ATP 20

INTRODUCTION

1. The Panel, John Fast (sitting President), Rod Halstead and Mike Roche declined to conduct proceedings on an application by Australian Foundation Investment Company Ltd in relation to the affairs of Hastings Diversified Utilities Fund (HDF). The application concerned whether an evaluation of the internalisation of management of HDF was required for unit holders to be properly informed about whether to accept an offer by Pipeline Partners Australia Pty Ltd (PPA). HDF is the subject of two competing bids. The Panel considered that, as the target’s statement and independent expert’s report for the PPA bid had not yet been released, there was insufficient material on which to determine that the information for unit holders will be deficient. Accordingly the Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

AFI	Australian Foundation Investment Company Ltd
APA	APT Pipelines Ltd, a subsidiary of APA Group
Bid Implementation Deed	Takeover Bid Implementation Deed between HFML as responsible entity for each of the HDF Trusts and PPA dated 13 July 2012 and released to the market on that date
HDF	Hastings Diversified Utilities Fund, consisting of - HDUF Epic Trust HDUF Finance Trust and HDUF Further Investments Trust
HFML	Hastings Funds Management Ltd, the responsible entity for HDF
PPA	Pipeline Partners Australia Pty Ltd

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FACTS

3. HDF is a listed managed investment scheme, listed on ASX (ASX code: HDF).
4. On 14 December 2011, APA made a takeover bid for all the stapled securities of HDF. The bid is part cash and part scrip.
5. On 10 July 2012, PPA provided HFML with a binding proposal, subject to conditions, to make a takeover bid for all the stapled securities of HDF. The bid is a cash bid.
6. On 13 July 2012, HFML announced that a subcommittee of independent directors of HFML unanimously recommended PPA's bid (subject to there being no superior offer and receipt of an independent expert's report that concluded that the offer was fair and reasonable) and had entered the Bid Implementation Deed. The deed included the following clause:

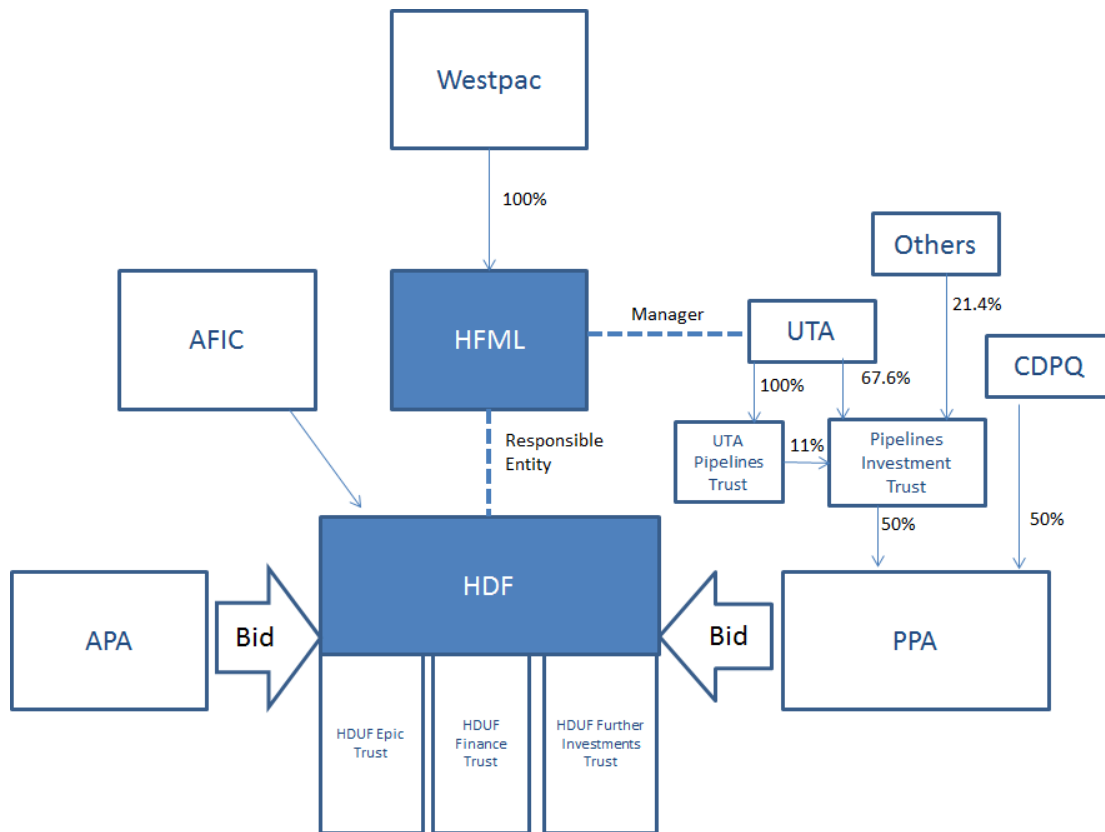
7.2 No-shop restriction

During the Exclusivity Period, the Responsible Entity must ensure that neither it nor any of its Representatives directly or indirectly solicits, invites, encourages or initiates any Competing Proposal or any enquiries, negotiations or discussions with any Third Party in relation to, or which may reasonably be likely to lead to, a Competing Proposal, or communicate any intention to do any of those things (whether from a person with whom the Responsible Entity or any of its Representatives has previously been in discussions or not).

7. The target's statement is due to be lodged with ASIC by 3 August 2012.
8. AFI is a unit holder in HDF. It has sought from HFML that holders of stapled units in HDF be provided with a proper and full independent evaluation of internalisation of the management of HDF. In response, the independent directors of HFML initially indicated that they were committed to undertaking a full evaluation of all the options available to unit holders. This was followed up by AFI. Subsequently HFML stated that "[a]t this stage the board is not pursuing an internalisation of HDF."
9. AFI also raised with HFML concerns about the conflicts of interest HFML faced in dealing with the PPA bid.
10. Various structural relationships between the parties identified in the application are described below.

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APPLICATION

Declaration sought

11. By application dated 19 July 2012, AFI sought a declaration of unacceptable circumstances. It submitted (among other things) that:
- to be properly informed about choosing whether to decline or accept the PPA bid, HDF unit holders need information about the prospects of HDF, which assessment *"is inadequate if it does not include a proper and full evaluation of internalisation"*
 - HFML and its directors have too many conflicts of interest to be involved in the preparation of the evaluation, which should be undertaken by an independent third party. It submitted that HFML's remuneration would cease upon internalisation and it had entered the Bid Implementation Deed and recommended the PPA bid
 - the no-shop restriction in the Bid Implementation Deed prohibited HFML from encouraging or initiating any "Competing Proposal" and the effect of this was that HFML was prohibited from *"encouraging (which includes producing a favourable report on) an internalisation"* and
 - the effect of the circumstances was that the market in HDF stapled securities is currently not fully informed and a change of control of HDF *"could well take place without the requirements of section 602 being observed."*

Final orders sought

12. AFI sought final orders that:
- (a) HFML and PPA amend the Bid Implementation Deed to allow HFML to obtain a proper and full evaluation of internalisation and to distribute it to unit holders of HDF
 - (b) HFML provide to unit holders of HDF a proper and full evaluation of internalisation prepared by an independent party and
 - (c) until the end of the tenth business day after HFML has dispatched to holders of stapled securities of HDF a proper and full evaluation of internalisation by an independent party, PPA destroy or cancel within one business day of receipt by PPA or any agent of PPA, acceptances received by PPA for offers under its takeover bid.

DISCUSSION

Preliminary submissions

13. HDF and PPA each made preliminary submissions on the application.
14. HDF submitted, among other things, that the application was "precipitous" in that HDF had not yet released its target's statement in response to PPA's bid. HDF advised that it has until 3 August 2012 to do so. It submitted that the Bid Implementation Deed did not prevent an analysis of internalisation:

An internalisation could be done in a variety of ways and we do not accept that an internalisation would necessarily constitute a 'Competing Proposal' under the Implementation Deed. In any event, it is quite clear that nothing in the Implementation Deed prevents HFML from:

- *conducting an evaluation of an internalisation; or*
- *disclosing the HFML independent directors' evaluation of an internalisation in its target's statement (just as the target's statement will include a discussion of APA's competing bid).*

15. HDF also submitted:

The evaluation of an internalisation is a matter for the HFML independent directors. HFML has analysed the merits of internalisation in the past and made an announcement to ASX on 27 August 2010 disclosing various observations and considerations in relation to internalisation. The independent directors have more recently again carefully and thoroughly evaluated, and taken advice on, internalisation and determined that the PPA offer is superior. The reasons for this will be set out in the target's statement, and HDF securityholders will be fully informed in making a decision whether to accept the PPA bid.

16. PPA submitted, among other things, that it expected that the market would be fully informed of any alternative proposals considered by HFML for HDF upon release of the target's statement.

Internalisation of management

17. AFI submitted that internalisation of HDF's management was feasible. The application included an example of an internalisation of management:

Epic Energy Holdings Pty Ltd could be converted to a public company, have a share split, and adopt a constitution suitable for a listed public company. Then the unit holders of the HDF Epic Trust would resolve to bring forward the termination date on which the trust would be wound up and have HFML distribute in specie the shares in Epic Energy Holdings Ltd, which would be stapled to units in the other two trusts. Epic Energy Holdings Ltd would incorporate a new subsidiary and have it acquire an Australian Financial Services Licence with power to act as a responsible entity. HFML would resign as responsible entity of the two trusts and the new subsidiary would be appointed as responsible entity. The new responsible entity would after appointment alter the trust deeds to remove the remuneration provisions or alter the remuneration to a nominal amount.

Application premature?

18. It is not possible at this stage to gauge whether there is a disclosure deficiency because the target's statement has not yet been released. Similar to *Newsat*,¹ the appropriate place for such matters as are raised in the application to be dealt with is in the target's statement.²
19. We note that HDF submitted that the Bid Implementation Deed does not prevent HFML undertaking an investigation of internalisation. That is our view of the provisions in the Bid Implementation Deed as well. We also note HDF's submission that the target's statement will include information on internalisation. While the 2010 analysis referred to in HDF's submission may be too old now, the submission goes on to make it clear that the independent directors have "*more recently again carefully and thoroughly evaluated and taken advice on internalisation*" Presumably, and we would expect, they have already thoroughly analysed, or will thoroughly analyse, the relevant alternatives and the merits of each.
20. Moreover, HDF has advised that the recommendation of the independent directors "*is (as is customary) subject to an independent expert's report*" We infer that the independent expert's report will be provided to security holders by the target.³ Internalisation of management may very well be an option examined in that report.
21. Accordingly, it seems to us that the application is premature. If the information in the target's statement or independent expert's report appears inadequate, that is the appropriate time for an application of this sort to be made, and AFI (or indeed anyone else with a proper interest in the matter) could make a fresh application.
22. In short, we think given that the target's statement and independent expert's report for the PPA bid has not yet been released, there is insufficient material on which to determine that the information for unit holders will be deficient.

¹ *NewSat Limited* [2009] ATP 20 at [16]

² See section 638

³ See section 640

Conflict?

23. We note from the application a concern raised about potential, or actual, conflict of interest. Conflict arises because, for example, internalisation of management might affect the fees payable to the responsible entity.
24. Conflict could also arise because HFML ordinarily acts as manager of a trust which has a significant investment in one of the bidding parties.
25. HDF submitted that these conflicts have been addressed by the establishment of a subcommittee of independent directors of HFML and the implementation of other corporate governance and information barrier protocols.
26. Guidance Note 19 deals with insider participation in control transactions. It provides guidance on situations where there is involvement or potential involvement by the management, directors or external advisers of a target company with the bidder. As well as identifying procedures to address conflicts and potential information advantages, the guidance note says:

The bidder and the [independent board committee] should ensure that there is adequate disclosure to target shareholders, whether in the bidder's statement or target's statement, including information as to:

- (a) *the identity of any participating insiders;*
 - (b) *details of any incentive, participation and fees offered to participating insiders;*
 - (c) *the process, and the protocols adopted by the [independent board committee] to address potential conflicts of interest; and*
 - (d) *the identity of the persons behind a bidder to the extent required by sections 602.⁴*
27. Again presumably, and we would expect, the target's statement will very clearly set out the potential and actual conflicts and how they have been addressed.

DECISION

28. For the reasons above, we do not consider that there is any reasonable prospect that we would at this stage make a declaration of unacceptable circumstances on the application. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).
29. We did consider whether it would be appropriate either to defer making this decision or to decide to conduct proceedings but defer the proceedings under ASIC regulation 16(1)(j).⁵ There is approximately a week before the target's statement is due for release, which is quite a long time in which circumstances could change, particularly because there are competing bids. We note APA's recent announcement increasing its bid for HDF. Or there may be a delay (for example with ASIC relief) in release of the target's statement. Further, the basis for the application may be

⁴ GN 19: Insider Participation in Control Transactions, paragraph [28]

⁵ Regulation 16(1)(j) of the *Australian Securities and Investments Commission Regulations 2001* (Cth) says that the Panel may "direct that Panel proceedings be deferred until a day determined by the Panel"

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different after the target's statement is released. Accordingly we did not consider either of these courses to be appropriate in this case.

Orders

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

John Fast

President of the sitting Panel

Decision dated 27 July 2012

Reasons published 31 July 2012

Advisers

Party	Advisers
AFI	Robert Paterson
HDF	Freehills
PPA	Allens