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Australian Government
Takeovers Panel

MEDIA RELEASE

No: TP21/26

Friday, 15 October 2021

AusNet Services Limited 01 – Declaration of Unacceptable Circumstances and Orders

The Panel has made a declaration of unacceptable circumstances (Annexure A) and final orders (Annexure B) in relation to an application dated 23 September 2021 by Australian Pipeline Limited as responsible entity of the Australian Pipeline Trust and APT Investment Trust (**APA**) in relation to the affairs of AusNet Services Limited (**AusNet**) (see TP21/21).

In particular, the Panel has made an order that the no-talk restriction in the Confidentiality Deed will be of no force and effect unless the Confidentiality Deed is amended to include a 'fiduciary out' in relation to the no-talk restriction.

Background

On 30 August 2021, AusNet received an unsolicited, confidential, indicative and non-binding proposal from the infrastructure affiliate of Brookfield Asset Management (**Brookfield**) to acquire all the issued shares in AusNet by way of scheme of arrangement at an indicative price of $2.35 per share in cash.

On 1 September 2021, AusNet received an unsolicited, confidential, indicative and non-binding proposal from APA to acquire all the issued shares in AusNet by way of scheme of arrangement at an indicative price of $2.32 per share in cash and scrip.

On 13 September 2021, AusNet received a revised confidential, indicative and non-binding proposal from Brookfield to acquire, by way of scheme of arrangement, all of the issued shares in AusNet at an indicative price of $2.45 cash per share.

On 20 September 2021, AusNet announced that it had:

- received an unsolicited, indicative, non-binding and conditional proposal from Brookfield to acquire, by way of scheme of arrangement, all of the issued shares in AusNet at an indicative price of $2.50 cash per share and
- entered into a confidentiality deed with Brookfield (the **Confidentiality Deed**) "*which provides for Brookfield to conduct due diligence and for the parties to negotiate a scheme implementation deed on an exclusive basis. Either party may terminate the*

exclusivity arrangements by giving the other 7 days' written notice" and that no such notice may be given earlier than 7 weeks from 20 September 2021.

On 21 September 2021, APA announced that it had made a revised confidential, indicative and non-binding proposal to the board of AusNet to acquire all the issued shares in AusNet by way of scheme of arrangement at an indicative price of $2.60 per share in cash and scrip.

On the same day, AusNet announced (among other things) that it had received APA's revised indicative, non-binding and conditional proposal and that "*AusNet will consider the APA Revised Indicative Proposal and has the ability to engage with APA following completion of the exclusivity period*" with Brookfield. AusNet's announcement attached an extract of the exclusivity arrangements from the Confidentiality Deed.

Declaration

Having regard to the Panel's guidance on lock-up devices, the Panel considered that the following aspects of the exclusivity arrangements in the Confidentiality Deed, taken together, have an anti-competitive effect:

- the no-talk restriction prevents the AusNet board from responding to any competing proposal, including an unsolicited proposal or a proposal that has been publicly announced
- there is no 'fiduciary out' to the no-talk restriction
- the exclusivity period operates for a minimum of eight weeks and may only be terminated by AusNet on seven days' prior notice and
- the no-talk restriction is coupled with a notification obligation that requires AusNet to provide Brookfield with all material terms and conditions of an actual, proposed or potential competing proposal.

The Panel also considered that the anti-competitiveness of the exclusivity arrangements in the Confidentiality Deed is exacerbated by the delay in AusNet disclosing the full terms of the exclusivity arrangements, noting the cost reimbursement provision has not been disclosed by AusNet.

The Panel has not sought to second guess the commercial reasons of the AusNet board in pursuing the Brookfield proposal, but considered that the effect of the circumstances, in totality, are unacceptable having regard to sections 602 and 657A of the Act.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in section 657A(3) of the Act.

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Orders

The Panel has made orders that:

- the no-talk restriction in the Confidentiality Deed will be of no force and effect (with effect from 5:00pm (Melbourne time) on the date that is 2 business days after the date of the Panel's orders) unless the Confidentiality Deed is amended to include a 'fiduciary out' in relation to the no-talk restriction and

- AusNet must disclose the material terms of the Confidentiality Deed as affected by these orders, including the terms of the cost reimbursement right in favour of Brookfield.

The sitting Panel was Yasmin Allen (sitting President), Michael Borsky QC and Ron Malek.

The Panel will publish its reasons for the decision in due course on its website www.takeovers.gov.au.

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ANNEXURE A

CORPORATIONS ACT
SECTION 657A
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

AUSNET SERVICES LIMITED 01

CIRCUMSTANCES

1. On 30 August 2021, AusNet Services Limited (**AusNet**) received an unsolicited, confidential, indicative and non-binding proposal from the infrastructure affiliate of Brookfield Asset Management (**Brookfield**) to acquire all the issued shares in AusNet by way of scheme of arrangement at an indicative price of $2.35 per share in cash.

2. On 1 September 2021, AusNet received an unsolicited, confidential, indicative and non-binding proposal from Australian Pipeline Limited as responsible entity of the Australian Pipeline Trust and APT Investment Trust (**APA**) to acquire all the issued shares in AusNet by way of scheme of arrangement at an indicative price of $2.32 per share in cash and scrip.

3. On 13 September 2021, AusNet received a revised confidential, indicative and non-binding proposal from Brookfield to acquire, by way of scheme of arrangement, all of the issued shares in AusNet at an indicative price of $2.45 cash per share.

4. On 20 September 2021, AusNet announced that it had:

   (a) received an unsolicited, indicative, non-binding and conditional proposal from Brookfield to acquire, by way of scheme of arrangement, all of the issued shares in AusNet at an indicative price of $2.50 cash per share and

   (b) entered into a confidentiality deed with Brookfield (the **Confidentiality Deed**) "*which provides for Brookfield to conduct due diligence and for the parties to negotiate a scheme implementation deed on an exclusive basis. Either party may terminate the exclusivity arrangements by giving the other 7 days' written notice*" and that no such notice may be given earlier than 7 weeks from 20 September 2021.

5. The specific terms of the exclusivity arrangements were not initially disclosed. Those terms include a no-talk restriction without a 'fiduciary out'.

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6. On 21 September 2021, APA announced that it had made a revised confidential, indicative and non-binding proposal to the board of AusNet to acquire all the issued shares in AusNet by way of scheme of arrangement at an indicative price of $2.60 per share in cash and scrip.

7. On the same day, AusNet announced (among other things) that it had received APA's revised indicative, non-binding and conditional proposal and that "*AusNet will consider the APA Revised Indicative Proposal and has the ability to engage with APA following completion of the exclusivity period*" with Brookfield. AusNet's announcement attached an extract of the exclusivity arrangements from the Confidentiality Deed.

8. AusNet's announcement did not disclose Brookfield's right under the Confidentiality Deed to have its out-of-pocket costs and expenses incurred during the exclusivity period in pursuing the proposal reimbursed by AusNet (up to a cap of $5 million plus any applicable GST) if, among other things, Brookfield is continuing to diligently pursue the proposal with AusNet and AusNet ceases to diligently pursue the proposal (including as evidenced by failure to progress negotiations on documentation in a timely or reasonable manner, or by AusNet granting due diligence to a third party in respect of a competing proposal) during the period commencing on 19 September 2021 (being the date of the Confidentiality Deed) and ending four weeks after the end of the exclusivity period (the **Cost Reimbursement Provision**).

9. The Panel considers that:

   (a) the following aspects of the exclusivity arrangements in the Confidentiality Deed, taken together, have an anti-competitive effect:

      (i) the no-talk restriction prevents the AusNet board from responding to any competing proposal, including an unsolicited proposal or a proposal that has been publicly announced

      (ii) there is no 'fiduciary out' to the no-talk restriction

      (iii) the exclusivity period operates for a minimum of eight weeks and may only be terminated by AusNet on seven days' prior notice

      (iv) the no-talk restriction is coupled with a notification obligation that requires AusNet to provide Brookfield with all material terms and conditions of an actual, proposed or potential competing proposal

   (b) the anti-competitiveness of the exclusivity arrangements in the Confidentiality Deed is exacerbated:

      (i) because AusNet did not conduct an effective auction process before entering the Confidentiality Deed and

(ii) by the delay in AusNet disclosing the full terms of the exclusivity arrangements, noting the Cost Reimbursement Provision has not been disclosed by AusNet.

EFFECT

10. The Panel considers that the circumstances, considered as a whole in the context of the competing proposals made by Brookfield and by APA, inhibit or are likely to inhibit the acquisition of control over voting shares in AusNet taking place in an efficient, competitive and informed market.

CONCLUSION

11. It appears to the Panel that the circumstances are unacceptable circumstances:

    (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:

        (i) the control, or potential control, of AusNet or

        (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in AusNet

    (b) further or in the alternative, having regard to the purposes of Chapter 6 set out in section 602 of the *Corporations Act 2001* (Cth) (the **Act**).

12. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3) of the Act.

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of AusNet.

Tania Mattei
General Counsel
with authority of Yasmin Allen
President of the sitting Panel
Dated 15 October 2021

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ANNEXURE B

CORPORATIONS ACT
SECTION 657D
ORDERS

AUSNET SERVICES LIMITED 01

The Panel made a declaration of unacceptable circumstances on 15 October 2021.

THE PANEL ORDERS

1. Clause 12.3 (No talk restriction) of the Confidentiality Deed is of no force and effect as of 5:00pm (Melbourne time) on the date that is 2 business days after the date of these orders unless:

   (a) the Confidentiality Deed is amended to include a 'fiduciary out' in relation to Clause 12.3 (and any necessary consequential amendments) in a form acceptable to the Panel (**Amended Confidentiality Deed**) and

   (b) AusNet provides a copy of the fully executed version of the Amended Confidentiality Deed to the Panel.

2. AusNet must, as soon as practicable after the date of these orders, and in any event within 3 business days after the date of these orders:

   (a) in the event that an Amended Confidentiality Deed is approved and provided to the Panel under Order 1, release an ASX announcement (in a form approved by the Panel) which discloses details of all material terms of the Amended Confidentiality Deed, including the amended exclusivity arrangements and the cost reimbursement arrangements or

   (b) in the event that clause 12.3 of the Confidentiality Deed becomes of no force and effect under Order 1, release an ASX announcement (in a form approved by the Panel) which explains that clause 12.3 of the Confidentiality Deed has become of no force and effect and discloses details of the cost reimbursement arrangements under the Confidentiality Deed.

3. In these orders, the following definitions apply:

Amended Confidentiality Deed	has the meaning given in Order 1(a)

AusNet	AusNet Services Limited
Brookfield	Brookfield Infrastructure Group (Australia) Pty Ltd
Confidentiality Deed	the confidentiality deed between AusNet and Brookfield dated 19 September 2021

Tania Mattei
General Counsel
with authority of Yasmin Allen
President of the sitting Panel
Dated 15 October 2021

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