



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
AusNet Services Limited 02  
[2021] ATP 8**

**Catchwords:**

*Decline to conduct proceedings - non-binding indicative proposal - superior proposal - disclosure*

*Corporations Act 2001 (Cth), section 602*

*AusNet Services Limited 01 [2021] ATP 9, Mungana Goldmines Limited 01R [2015] ATP 7*

<b>Interim order</b>	<b>IO undertaking</b>	<b>Conduct</b>	<b>Declaration</b>	<b>Final order</b>	<b>Undertaking</b>
<b>NO</b>	<b>NO</b>	<b>NO</b>	<b>NO</b>	<b>NO</b>	<b>NO</b>

**INTRODUCTION**

1. The Panel, Yasmin Allen (sitting President), Michael Borsky QC and Ron Malek, declined to conduct proceedings on an application by Brookfield in relation to the affairs of AusNet. AusNet had received competing proposals made by Brookfield and by APA for control of AusNet. The application concerned statements made by APA in market announcements regarding the value of its proposed scrip consideration and the relative conditionality of the Brookfield and APA proposals. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

APA	Australian Pipeline Limited as responsible entity of the Australian Pipeline Trust and APT Investment Trust
AusNet	AusNet Services Limited
Brookfield	Brookfield Infrastructure Group (Australia) Pty Ltd

**FACTS**

3. AusNet is an ASX listed company (ASX code: AST).
4. AusNet had received competing proposals made by Brookfield and by APA for control of AusNet.
5. On 20 September 2021, AusNet announced that it had:

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- (a) received an unsolicited, indicative, non-binding and conditional proposal from Brookfield<sup>1</sup> 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 *“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.
6. On 21 September 2021, APA announced that it had made a non-binding indicative proposal to the board of AusNet to acquire all the issued shares in AusNet *“by way of scheme of arrangement for \$2.60 per share in cash and scrip”* and made the following statements (among others):

*“APA notes the announcement from AusNet yesterday of an indicative, non-binding and highly conditional proposal made by Brookfield Asset Management”.*

*“Under the Superior [APA] Proposal, in aggregate AusNet shareholders would receive \$1.820 cash and 0.0878 stapled securities in the Australian Pipeline Trust and APT Investment Trust (“securities”) for each AusNet share held, with a mix and match facility enabling shareholders to elect more cash or more securities, subject to aggregate caps in each.”*

*“Based on APA’s closing price on 20 September 2021 of \$8.88 per security, the Offer Price is equivalent to \$2.60 per AusNet share...”.*

*“The Superior Proposal is conditional on, among other things, confirmation by Tuesday 28 September 2021 from AusNet of granting due diligence access, completion of a targeted due diligence review and entry into a satisfactory scheme implementation deed.”*
7. On 23 September 2021, APA applied to the Panel (AusNet Services Limited 01<sup>2</sup>) submitting in effect that the exclusivity arrangements in the confidentiality deed referred to in paragraph 5(b) prevented AusNet from responding to a superior proposal contrary to s602(a) and (c).<sup>3</sup>
8. On 24 September 2021, APA released (by way of an ASX announcement) a presentation titled *“Superior Proposal for AusNet Services”*. The presentation contained a slide comparing the APA and Brookfield proposals.
9. On 29 September 2021, APA announced among other things that *“the deadline for AusNet to confirm that APA will be granted due diligence access under the Superior Proposal will be extended for so long as the Panel Application [in AusNet Services Limited 01] remains under review”*.

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<sup>1</sup> Described by AusNet as the *“infrastructure affiliate of Brookfield Asset Management (together with its affiliates and related managed vehicles, collectively, **Brookfield**)”* (emphasis in the original)

<sup>2</sup> See *AusNet Services Limited 01 [2021] ATP 9*

<sup>3</sup> Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth) and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

## APPLICATION

### Declaration sought

10. By application dated 1 October 2021, Brookfield sought a declaration of unacceptable circumstances. Brookfield submitted (among other things) that:
  - (a) Statements made by APA in market announcements (following its 21 September announcement) that its proposal to acquire AusNet was for \$2.60 per AusNet share in cash and scrip (based on an \$8.88 share price) were misleading, noting that APA’s security price had “*not traded at or above \$8.88 at any time following APA’s announcement of its proposal*” and APA’s proposal contemplates a capital raising to fund the cash component.
  - (b) The reference by APA (in its 21 September announcement) to the ‘highly conditional’ nature of the Brookfield proposal was misleading because APA had repeatedly failed to acknowledge in subsequent market announcements that its own proposal was subject to an ACCC condition.

### Final orders sought

11. Brookfield sought a final order that APA make corrective disclosure.

## DISCUSSION & DECISION

12. We do not consider the statements complained of by Brookfield are misleading. In any event, we consider that Brookfield can easily seek to clarify any concerns it may have in relation to those statements in its own announcements.<sup>4</sup>
13. Accordingly, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances and 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).
14. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

**Ms Yasmin Allen**

**President of the sitting Panel**

**Decision dated 8 October 2021**

**Reasons given to parties 2 December 2021**

**Reasons published 8 December 2021**

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<sup>4</sup> See *Mungana Goldmines Limited 01R* [2015] ATP 7 at [27]

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### Advisers

Party	Advisers
APA	King & Wood Mallesons
AusNet	Allens
Brookfield	Herbert Smith Freehills