



Australian Government

Takeovers Panel

**Reasons for Decision
AusNet Services Limited 01
[2021] ATP 9**

Catchwords:

Declaration – orders – lock-up devices – process and exclusivity deed – exclusive due diligence – no-talk – ‘fiduciary out’ – non-binding indicative proposal – superior proposal – efficient, competitive and informed market – disclosure

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

Guidance Note 7 – Lock-up devices

GBST Holdings Limited [2019] ATP 15, Mission NewEnergy Limited [2012] ATP 19, Ross Human Directions Ltd [2010] ATP 8, Goodman Fielder Ltd 02 [2003] ATP 5

The City Code on Takeovers and Mergers, Rule 21.3

Takeovers Panel’s 2010-2011 Annual Report

ASIC Report 393: Handling of confidential information: Briefings and unannounced corporate transactions

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	NO	YES	YES	YES	NO

INTRODUCTION

1. The Panel, Yasmin Allen (sitting President), Michael Borsky QC and Ron Malek, made a declaration of unacceptable circumstances in relation to the affairs of AusNet Services Limited. The application concerned the exclusivity arrangements AusNet entered with one of two potential bidders who had each submitted unsolicited, confidential, indicative and non-binding proposals to acquire all the issued shares in AusNet by way of scheme of arrangement. The Panel declared the circumstances unacceptable having considered the exclusivity arrangements to have an unacceptable effect on competition for control of AusNet. The Panel made orders including that the no-talk restriction be of no force and effect unless it is amended to include a ‘fiduciary out’.

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
Confidentiality Deed	the confidentiality deed between AusNet and Brookfield dated 19 September 2021

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Cost Reimbursement Provision	has the meaning given to that term in paragraph 16 of these reasons
Exclusivity Arrangements	has the meaning given to that term in paragraph 14 of these reasons
Exclusivity Period	the period in which the Exclusivity Arrangements apply under the Confidentiality Deed

FACTS

3. AusNet is an ASX listed company (ASX code: AST). AusNet owns and operates the electricity transmission network, an electricity distribution network and a gas distribution network in Victoria.
4. On 30 August 2021, AusNet received an unsolicited confidential indicative and non-binding proposal from 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.
5. 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.
6. On 10 September 2021, AusNet provided feedback to Brookfield in relation to its proposal, including that it was:
 - (a) in receipt of another proposal at a similar valuation and
 - (b) open to considering an improved proposal and prepared to grant due diligence if such a proposal was compelling.
7. 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.
8. Between 15 September 2021 and 19 September 2021, AusNet and Brookfield engaged in negotiations concerning a further increase in the indicative price of Brookfield's proposal in exchange for exclusive due diligence and unanimous board support for the proposal.
9. On 16 September 2021, AusNet confirmed to APA that it had considered the initial proposal from APA and decided not to engage with it, indicating concerns with value and structure. APA advised that "*AusNet would be hearing again from APA in the not too distant future*".
10. On 17 September 2021, APA's advisors indicated to AusNet's advisors that APA had a board meeting scheduled for 21 September 2021 and that, depending upon the

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outcome of that meeting, APA would be back in touch after that. APA's advisors also sought guidance as to what price would be acceptable for due diligence access.

11. 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 the Confidentiality Deed with Brookfield "*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.
12. 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.
13. On the same day, AusNet announced (among other things) that it had received APA's revised non-binding indicative 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.
14. The Confidentiality Deed contains a number of deal protection measures, including:
 - (a) a no-shop restriction preventing AusNet from soliciting alternative transactions
 - (b) a no-talk restriction preventing AusNet from participating in negotiations or discussions with any person in relation to a competing proposal and
 - (c) a notification obligation requiring AusNet to notify Brookfield of any competing proposal received and pass on details of the competing proposal received (including the person making the proposal and its material terms and conditions) to Brookfield,(together, the **Exclusivity Arrangements**).
15. There is no 'fiduciary out' in relation to the no-talk restriction or the notification obligation and the Exclusivity Arrangements are likely to apply for a *minimum* period of 8 weeks after the date of the Confidentiality Deed. The Exclusivity Period ends at the earliest of:
 - (a) one week after either party provides a notice that it wishes to cease negotiations regarding the proposal (with such notice not being capable of being given for seven weeks after the date of the Confidentiality Deed)

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- (b) entry into a scheme implementation deed between AusNet and Brookfield or
 - (c) Brookfield confirming that it has decided to no longer progress the proposal.
16. The Confidentiality Deed also contains a provision enabling Brookfield 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:
- (a) AusNet’s failure to progress negotiations on documentation in a timely or reasonable manner, or
 - (b) 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**).
17. The Cost Reimbursement Provision was not disclosed by AusNet in its announcement of 21 September 2021 or otherwise.

APPLICATION

18. By application dated 23 September 2021, APA sought a declaration of unacceptable circumstances. APA submitted that:
- (a) the Exclusivity Arrangements provide Brookfield with a minimum period of 8 weeks of “*absolute exclusivity*” which includes a no-talk restriction and notification obligation “*which are not subject to a customary “fiduciary out” for [AusNet] to respond to potential competing proposals*”
 - (b) the Exclusivity Arrangements prevent APA from responding to APA’s revised proposal and had “*forestalled the development of an auction*” for control of AusNet and
 - (c) APA was not provided with a reasonable opportunity to improve its proposal prior to AusNet agreeing to enter the Confidentiality Deed.
19. APA submitted that the effect of the circumstances was to:
- (a) hinder the acquisition of control of AST taking place in an efficient, competitive and informed market and
 - (b) deny AusNet shareholders an opportunity to participate in the benefits of a control proposal.
20. APA sought final orders to the effect that the Exclusivity Arrangements be terminated or be made subject to a customary ‘fiduciary out’.

DISCUSSION

21. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.

Decision to conduct proceedings

22. AusNet and Brookfield each made a preliminary submission in response to the application, submitting that we should decline to conduct proceedings.

23. AusNet submitted that we should not conduct proceedings including because:

- (a) the AusNet board determined in good faith, having taken advice, that acceptance of the Exclusivity Arrangements to secure Brookfield’s cash proposal was in the best interest of AusNet’s shareholders
- (b) the public announcement of Brookfield’s proposal has had a pro-competitive effect in relation to the control of AusNet and
- (c) APA has not been significantly disadvantaged by the Exclusivity Arrangements and AusNet would be free to provide APA due diligence access at the end of the Exclusivity Period if the circumstances justified it.

24. In addition, Brookfield submitted that the Panel has previously acknowledged that target boards are best placed to determine how to maximise value for target shareholders and there is nothing to suggest that the AusNet board “*has been motivated by anything other than maximising value for its shareholders and conducting a process it considers will best achieve that*”.

25. In our view, the application raised concerns that warranted consideration, including that the inclusion of a no-talk restriction without a ‘fiduciary out’ appeared to be contrary to the Panel’s guidance concerning lock-up devices. Accordingly, we decided to conduct proceedings.

Application of Guidance Note 7

26. The Panel has previously accepted that while deal protection measures “*obviously have an anti-competitive element, they can, if subject to certain basic structural requirements, indirectly facilitate competition for control in the sense that, but for those deal protection measures, many bidders will be unwilling to proceed to make a bid*”.¹

27. The Panel has decided not to adopt the UK Takeover Panel’s approach of prohibiting deal protection measures (with only limited exceptions). Rather the Panel has adopted a principles-based approach² and encouraged target directors to negotiate such measures and not necessarily accept deal protection measures as ‘market practice’.³

¹ See *Ross Human Directions Ltd* [2010] ATP 8 at [26]

² See Guidance Note 7 - Lock-up devices

³ See the Review by the President (by President Farrell, now Justice Farrell), in the *Takeovers Panel’s 2010-2011 Annual Report* at page 4

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28. As set out above, the Confidentiality Deed includes a number of deal protection measures, including no-shop and no-talk restrictions (without a customary ‘fiduciary out’), a notification obligation and a cost reimbursement provision. The Panel has previously recognised that deal protection measures such as no-shops and no-talks *“are commonplace in implementation agreements for schemes of arrangement and takeovers in Australia, and typically do not stop a serious competing bid emerging”* but their effect needs to be considered taken as a whole.⁴ Guidance Note 7 (at [27]) states that in *“the absence of an effective ‘fiduciary out’, a no-talk restriction is likely to give rise to unacceptable circumstances”*.
29. Here, the Exclusivity Arrangements are included in a confidentiality deed agreed prior to the submission of binding bids. AusNet submitted that the Panel’s policy in Guidance Note 7 should *“not apply to the circumstances of non-binding proposals (or should only apply to a limited extent)”* because there are practical difficulties in assessing non-binding proposals because the full terms and conditions of the proposal are yet to be formulated and *“the provision of unrestricted exclusivity for a specified period can facilitate the pursuit of a proposal or, as was the case here, an improvement in the terms of an indicative proposal”*.
30. APA submitted that the *“anti-competitive impacts of lock-up devices can be even more damaging for a target’s shareholders at these earlier non-binding stages, particularly when the devices prematurely shut down the development of an auction”* and that there is *“no good reason to apply the policy of Guidance Note 7 differently in these particular circumstances or more generally in the circumstances of non-binding bids.”* APA also noted that the practical difficulty in assessing competing non-binding proposals is a reason why it is not appropriate to enter into restrictions like the Exclusivity Arrangements at this stage, noting *“the anticompetitive effect at this stage is not offset by AusNet securing any binding offer or obtaining any other actual benefit for AusNet shareholders from Brookfield”*.
31. ASIC submitted that the underlying policy of Guidance Note 7 applies equally in the circumstance of non-binding bids and that that the existence of the Exclusivity Arrangements without a ‘fiduciary out’, even if the ultimate proposal contained a ‘fiduciary out’, could limit the prospect of a competing proposal eventuating.
32. Brookfield submitted that there is *“no reason to apply the policy of Guidance Note 7 differently in these circumstances”* and that the Panel should adopt the same approach taken in previous decisions on this subject *“which is to adopt a principles based approach”*.
33. The principles discussed in Guidance Note 7 are stated to apply to *“any arrangement which has the effect of fettering the actions of a target, a bidder or a substantial shareholder.”*⁵ While the Panel’s guidance has most frequently been considered in the context of implementation agreements with respect to control transactions, the policy has been

⁴ Ross Human Directions Ltd [2010] ATP 8 at [26]

⁵ Guidance Note 7 – Lock-up devices at [2]

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applied previously in different circumstances,⁶ and has been considered in the context of an exclusive due diligence process prior to the submission of binding proposals.⁷

34. We consider that that there is no compelling reason why Guidance Note 7 should not apply in the circumstances of this matter. Indeed, we see force in the argument that the anti-competitive impact of deal protection measures can be more significant in the context of non-binding proposals.

Exclusivity Arrangements

35. AusNet submitted that the Exclusivity Arrangements are not unacceptable in the circumstances of this case, including because:
- (a) while the no-talk restriction prevented AusNet from engaging with competing bidders during the Exclusivity Period, potential competing bidders would become aware of Brookfield's proposal and could submit competing proposals which AusNet would be required to release publicly (which, it was submitted, APA did)
 - (b) the AusNet board "*determined that it was in shareholders' best interests*" to use the existence of APA's original proposal to "*encourage Brookfield to improve the price of its indicative proposal*" from \$2.35 per share to \$2.50 per share
 - (c) Brookfield insisted on the provision of the Exclusivity Arrangements without a 'fiduciary out' in exchange for the final increase in the price of its indicative proposal from \$2.45 per share to \$2.50 per share and
 - (d) if AusNet entered into a scheme implementation deed with Brookfield at the end of the Exclusivity Period, the implementation deed would contain a 'fiduciary out' and there would be a significant period between execution of the implementation deed and completion of the transaction in which a competing proposal could arise and be properly considered.
36. Brookfield similarly submitted that the Exclusivity Arrangements have not deterred competition in the market for control of AusNet and were not unacceptable "*in light of the policy bases for Guidance Note 7*" including because:
- (a) the lack of 'fiduciary out' for a finite period is not unacceptable per se,⁸ and "*it remains necessary to consider the circumstances leading up to, and the effect of, the Exclusivity Arrangements as a whole*"
 - (b) APA was prompted to make its revised proposal as a result of the Exclusivity Arrangements which have "*created the competition that now exists*" such that the "*provision of a sufficient period for due diligence, coupled with a deferral of AusNet's 'fiduciary out' to the end of that period*" has "*materially enhanced competition for control, of AusNet*"

⁶ See, for example, *Mission NewEnergy Limited* [2012] ATP 19

⁷ See, *GBST Holdings Limited* [2019] ATP 15

⁸ Noting the use of the word 'likely' in Guidance Note 7 – Lock-up devices at [27]

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- (c) the Exclusivity Arrangements apply for a “*brief period*” or a “*reasonable period*” and AusNet has the ability “*to engage with APA following completion of the exclusivity period*”, even if AusNet and Brookfield were to enter into a scheme implementation deed during the Exclusivity Period
 - (d) the Panel has accepted that a target board “*is entitled to take into account the risks and delays affecting a proposal*” and accordingly “*should broadly adopt the judicial review standard*” in assessing the actions of AusNet’s board, namely that “*the reviewing body should not interfere with a decision under review, unless satisfied that it was in fact (or must have been) made for an improper purpose, affected by a mistake of law, or plainly illogical*” and
 - (e) there “*is no suggestion that the AusNet Board is not properly motivated to get the best results for shareholders*” and “*its strategic decisions should not be lightly set aside*”.
37. APA submitted that the effect of the no-talk restriction gave Brookfield “*critical competitive advantages which are likely to be fatal to the prospects of any superior competing proposal*” including that:
- (a) Brookfield would be in a position to enter into a scheme implementation deed ahead of any other bidder “*securing itself a break fee (which any competing bidder will effectively fund)*”
 - (b) Brookfield would be able to respond to any competing proposal with the benefit of due diligence information
 - (c) Brookfield could leverage the exclusivity period to demand that lending banks sign up to it exclusively⁹ and
 - (d) Brookfield’s bid would necessarily appear less conditional and more certain in comparison to any competing bid.
38. APA submitted that the Exclusivity Arrangements operated to deprive AusNet shareholders of the opportunity to participate in the benefits of APA’s revised proposal. APA further submitted that the duration of the Exclusivity Arrangements “*exceed what is reasonable and customary in the market*”.
39. ASIC submitted that a no-talk restriction without a ‘fiduciary out’ “*prevents a target board from engaging with alternative proposals at even the most basic level such as having discussions about an unsolicited rival bid from a rival bidder*” which has the effect of “*unduly stifling competition and can adversely impact the market for control of a target company’s securities*”.

Effect of the Exclusivity Arrangements

40. The Exclusivity Arrangements contain a number of elements that raise concerns, including that:

⁹ Brookfield confirmed that it had not entered into exclusivity or lock-up arrangements with any bank or financial institution

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- (a) the no-talk restriction is in its most restrictive form as it does not allow AusNet to participate in negotiations or discussions with any person in relation to a competing proposal even where such a proposal was unsolicited or has been announced publicly and regardless of whether the competing proposal is (or could reasonably be expected to be) superior to the initial proposal,
 - (b) the no-talk restriction is not subject to a ‘fiduciary out’ at any stage during the Exclusivity Period or at all,
 - (c) the no-talk restriction is coupled with a notification obligation in respect of competing proposals which may increase its anti-competitive effect,¹⁰
 - (d) the notification obligation requires AusNet to disclose details of a competing proposal, including its material terms,¹¹
 - (e) the Exclusivity Arrangements apply for a *minimum* of 8 weeks and the Exclusivity Period may only be ended by AusNet after providing seven days’ notice and deciding to end negotiations with Brookfield.¹²
41. Deal protection measures and exclusivity arrangements must be “*subject to certain basic structural requirements to ensure that they do not unreasonably hinder competition for control of the target company*”.¹³ The Panel’s guidance recognises that:
- (a) the safeguards need to be more stringent in the case of a no-talk restriction given the anti-competitive effect of such a restriction may be greater than other forms of restriction,¹⁴ and
 - (b) the inclusion of an effective fiduciary out is an important safeguard where a no-talk restriction has been imposed.¹⁵
42. The absence of a ‘fiduciary out’ for the entire Exclusivity Period was particularly concerning as it had the effect of preventing AusNet from discussing any proposal received (including a proposal that is unsolicited, made publicly and superior to the existing proposal). In our view, the absence of a ‘fiduciary out’ in these circumstances could unduly inhibit competition for control of Ausnet and reduce the likelihood a competing proposal emerging.
43. We do not consider, in the circumstances of this matter, that the proposed inclusion of a ‘fiduciary out’ to the deal protection measures in a subsequent implementation agreement would cure the anti-competitive effect of the absence of a ‘fiduciary out’ in the pre-binding bid Exclusivity Arrangements.

¹⁰ See Guidance Note 7 – Lock-up devices at [29]

¹¹ See Guidance Note 7 – Lock-up devices at [15]

¹² See paragraph 15 above for further details regarding the manner in which the Exclusivity Period could be ended by AusNet

¹³ *Ross Human Directions Ltd* [2010] ATP 8 at [28]

¹⁴ See Guidance Note 7 – Lock-up devices at [26]

¹⁵ See Guidance Note 7 – Lock-up devices at [27]

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44. Even with a ‘fiduciary out’, the period of restraint of a no-talk restriction must be “*limited and reasonable*”.¹⁶ In relation to the Exclusivity Arrangements, we are concerned that:
- (a) the no-talk restriction applies without any ‘fiduciary out’ during the entire Exclusivity Period
 - (b) the duration of the Exclusivity Period is at the longer end of market practice
 - (c) the Exclusivity Period only ends if AusNet wishes to end negotiations with Brookfield (or vice versa) and
 - (d) the manner in which the Exclusivity Period may be ended by AusNet effectively operates to provide Brookfield with a seven-day period to negotiate exclusively with AusNet a revised proposal in response to any competing proposal.
45. Brookfield offered to change the Exclusivity Period from a ‘rolling’ period to a simple 8-week period. This was not sufficient to address our concerns regarding the Exclusivity Arrangements.

Context in which Exclusivity Arrangements were entered

46. APA submitted that it would have been in the best interest of AusNet shareholders for both bidders to have been given equal access to diligence in parallel, to maximise the potential for an auction to develop. Unlike the UK City Code on Takeovers and Mergers¹⁷, there is no general requirement in our jurisdiction that a target company must provide equal access to information about the target company to rival bidders.¹⁸ We also do not consider that there is any requirement for a target company to undertake a public auction process prior to entry into any exclusivity arrangements.¹⁹ However, whether a deal protection measure is unacceptable will depend on the context in which the measure is entered into, including the sale process conducted prior to entry into such arrangements.²⁰
47. In *Ross Human Directions Ltd*, the Panel considered it more important to ensure that deal protection measures were subject to certain basic structural requirements where there had not been any public sale process prior to entry into the implementation agreement.²¹
48. In *GBST Holdings Limited*, the target provided interested parties with an opportunity through a confidential tender process to secure exclusive due diligence through the submission of indicative proposals.²² While the Panel considered that the process

¹⁶ Guidance Note 7 – Lock-up devices at [27]

¹⁷ See Rule 21.3

¹⁸ Guidance Note 19 – Insider participation in control transactions at [23] and *Goodman Fielder Ltd 02* [2003] ATP 5 at [84] to [96]

¹⁹ See also, *Ross Human Directions Ltd* [2010] ATP 8 at [27]

²⁰ *Mission NewEnergy Limited* [2012] ATP 19, [27]. See also *GBST Holdings Limited* [2019] ATP 15; *Ross Human Directions Ltd* [2010] ATP 8 at [28]

²¹ [2010] ATP 8 at [28]

²² *GBST Holdings Limited* [2019] ATP 15, [8] - [12]

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adopted by GBST was “*not conventional*”, it was not considered to be unacceptable, noting (among other things) that it had led to significantly increased indicative offer prices to the benefit of GBST’s shareholders and there was nothing to prevent third parties submitting a superior proposal to GBST to trigger the fiduciary out.²³

49. Guidance Note 7 provides that a no-talk restriction is “*less likely to give rise to unacceptable circumstances if the target has conducted an effective auction process before agreeing to it*”.²⁴ This is because where the market has already been tested, the likelihood of the restriction agreement having an anti-competitive effect is reduced and the benefits of the target entering into the restriction agreement are strengthened.
50. Brookfield submitted that AusNet had conducted an effective auction, noting its direct experience with AusNet rejecting its initial proposal at \$2.35 per share and AusNet refusing to entertain due diligence exclusivity at \$2.45 per share.²⁵ AusNet, on the other hand, acknowledged that the competitive tension created by the existence of APA’s proposal to encourage Brookfield to improve the price of its initial proposal “*was not an auction per se*”. However, it submitted those actions enabled an improvement in Brookfield’s proposal and “*fostered an on-going auction at price levels that the Board considered were attractive to shareholders and that auction was taking place in the public domain*”.
51. We do not consider that the process AusNet undertook prior to entering the Confidentiality Deed and granting the Exclusivity Arrangements was an auction process in the relevant sense. In our view, AusNet did not take any actions to stimulate a competitive auction between its two credible suitors.²⁶ AusNet did not indicate to APA that there was other interest in its business. We were not provided with material to establish that AusNet meaningfully engaged APA on price or any other terms of its proposal, or otherwise seek a final price from APA, before entering the Confidentiality Deed.
52. We accept that the public announcement of the Brookfield proposal itself may potentially attract interest from other bidders. However, the failure to engage in any effective auction process in circumstances where there was a contemporaneous and credible rival bidder and then agreeing to a no-talk restriction with no fiduciary out at the insistence of the bidder that locked out that rival bidder for at least 8 weeks is in our view significant. We consider the lack of any effective auction process before granting the Exclusivity Arrangements exacerbated the anti-competitive effect of the Exclusivity Arrangements.

²³ GBST Holdings Limited [2019] ATP 15, [36]

²⁴ Guidance Note 7 – Lock-up devices at [28]

²⁵ See paragraphs 6 to 8 above

²⁶ It would have been clear to AusNet that APA had invested considerable time, effort and cost in preparing its original proposal that involved a detailed transaction structure from a strategic bidder, was to be financed by an underwritten equity raising and a highly confident debt package, and was supported by a large team (including four financial advisory firms, in addition to legal advisers) committed to progressing due diligence and agreeing transaction documents in an accelerated 4-week timeframe

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53. That AusNet agreed to the Exclusivity Arrangements in return for an increase in the indicative consideration available under Brookfield’s proposal from \$2.45 per share to \$2.50 per share is certainly relevant. However,
- (a) we were not provided with material to establish that Brookfield’s proposal would not have proceeded without the Exclusivity Arrangements being granted in the form that they were and
 - (b) the Exclusivity Arrangements were granted in respect of an indicative proposal and there was no guarantee that AusNet shareholders would receive a binding bid at the indicative price under Brookfield’s proposal or at all.

Disclosure of Exclusivity Arrangements

54. The Panel’s guidance provides that the *“existence and nature of any lock-up device should normally be disclosed no later than when the relevant control proposal is announced”* including all the relevant terms,²⁷ however it does not expressly require disclosure of the full agreement in which a lock-up device is contained.
55. AusNet initially disclosed on 20 September 2021 that it had entered into 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”* (see paragraph 11(b) above). On the following day (after APA’s revised proposal had been publicly announced), AusNet annexed *“the terms of such exclusivity”* to its announcement acknowledging APA’s revised proposal and disclosing that it has the ability to engage with APA following completion of the exclusivity period (see paragraph 13 above). The Cost Reimbursement Provision was not disclosed in either announcement.
56. AusNet submitted that it *“considers all material aspects of the Exclusivity Arrangements were disclosed in the ASX announcement of 20 September 2021”* and that AusNet did not consider it *“to be necessary to state that the Exclusivity Arrangements were not subject to a fiduciary carve-out”* because *“the term ‘exclusive basis’ is well-understood in the market”*.
57. APA submitted that there was a *“heightened requirement for fulsome disclosure”* in the circumstances because, among other reasons, the *“lack of a fiduciary out in the Exclusivity Arrangements ... is inconsistent with market practice and could not have been reasonably anticipated or inferred from AusNet’s minimal disclosure”*. APA further submitted that it *“may have adopted a very different strategy regarding its revised proposal”* had it been aware of the specific terms of the Exclusivity Arrangements.
58. ASIC submitted that the lack of disclosure of exclusivity arrangements *“can impact a competing proposal in terms of the structure, terms or strategy employed by a competing bidder”*. In the circumstances, ASIC noted that a *“lack of awareness of exclusivity arrangements can inhibit APA or other potential bidders from putting forth a proposal on a fully informed basis”* which *“can impose a disadvantage on APA and any other potential competing bidders”*.

²⁷ Guidance Note 7 – Lock-up devices at [35]

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59. We agree with APA's and ASIC's submission and consider that the disclosure of the Exclusivity Arrangements by AusNet was not consistent with the Panel's guidance in this area. This is because:
- (a) AusNet's announcement of 20 September 2021 did not disclose the nature of the Exclusivity Arrangements (including the lack of a 'fiduciary out' to the no-talk restriction) or disclose "*all relevant terms*" of the Exclusivity Arrangements as required by Guidance Note 7
 - (b) material terms of the Exclusivity Arrangements were not disclosed until 21 September 2021, being *after* both the announcement of Brookfield's control proposal and the public announcement by APA of its competing proposal and
 - (c) the Cost Reimbursement Provision ought to have been disclosed along with all the other "*relevant terms*" of the Exclusivity Arrangements because it operates as Brookfield's sole remedy against AusNet in connection with the matters contemplated by the Confidentiality Deed, including the Exclusivity Arrangements and is accordingly relevant to the Exclusivity Arrangements regardless of the maximum quantum of the costs to be reimbursed.
60. We consider that the anti-competitive effect of the Exclusivity Arrangements has been exacerbated by:
- (a) the delay in AusNet disclosing the full terms of the Exclusivity Arrangements until its announcement of 21 September 2021 and
 - (b) the failure by AusNet to disclose the terms of the Cost Reimbursement Provision at all.
61. The lack of effective and timely disclosure of the Exclusivity Arrangements by AusNet disadvantaged APA as it put forward its revised proposal without knowing, among other things, that AusNet would be restricted from engaging with the proposal for a minimum of 8 weeks and that the material terms and conditions of its proposal would be provided to Brookfield.
62. In *GBST Holdings Limited*,²⁸ the Panel accepted that "*market practice is varied on whether a process deed is released in full... or summarised*" and left open the question of the circumstances in which it "*may be sufficient to disclose a summary of a process deed instead of the process deed itself*".
63. ASIC submitted the preferable approach would be to require the full disclosure of the Confidentiality Deed, noting that:
- (a) agreements containing provisions like the Exclusivity Arrangements "*should be released in full so that they are available to any current or future*" competing bidder
 - (b) it may be difficult for a target to assess which terms are "*material or relevant to a potential bidder/the market and which may have a deterrent effect if not fully disclosed*" and

²⁸ [2019] ATP 15, [43]-[44]

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- (c) there is a risk that the precise terms of exclusivity arrangements may not be reproduced accurately if disclosed as a summary rather than in full.
64. AusNet submitted that it would be “*unnecessary and inconsistent with market practice*” to require that the full Confidentiality Deed be disclosed to the market.
65. In the circumstances, we considered that it would be sufficient for all material terms of the Exclusivity Arrangements, including the Cost Reimbursement Provision, to be disclosed by extracting the relevant provisions of the Confidentiality Deed.
66. Given that the terms of the Exclusivity Arrangements (other than the Cost Reimbursement Provision) had been extracted in AusNet’s announcement of 21 September 2021, we made orders requiring that AusNet disclose:
- (a) the effect of the Panel’s orders on the Exclusivity Arrangements and
 - (b) the Cost Reimbursement Provision.

Overall Effect

67. In considering this matter, we did not look at the individual aspects of the Exclusivity Arrangements and the disclosure of these arrangements in isolation, but rather assessed each aspect within the surrounding circumstances and the context in which the Exclusivity Arrangements were granted.
68. Having regard to the Panel’s guidance on lock-up devices and drawing on our experience, we consider that the combination of the following circumstances have or are likely to have an anti-competitive effect and give rise to unacceptable circumstances:
- (a) 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
 - (b) there is no ‘fiduciary out’ to the no-talk restriction
 - (c) the exclusivity period operates for a minimum of eight weeks and may only be terminated by AusNet on seven days’ prior notice
 - (d) 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
 - (e) AusNet did not conduct an effective auction process before entering the Confidentiality Deed and
 - (f) AusNet delayed in disclosing the full terms of the exclusivity arrangements, noting the Cost Reimbursement Provision was not disclosed by AusNet.
69. In coming to the above conclusions, we have not sought to second guess the commercial reasons of the AusNet board in pursuing the Brookfield proposal (in

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preference to the APA proposal), but consider that the effect of the circumstances, in totality, are unacceptable having regard to sections 602 and 657A.²⁹

Other Matters

70. On 5 October 2021, an article was published in the *Australian Financial Review*, titled 'Meet the corporate heavies set to decide AusNet M&A battle'. The article identified the members of the sitting Panel and disclosed details of a subsequent application from Brookfield that had not been disclosed in the Panel's media release in relation to the matter.³⁰
71. The Panel was concerned that the contents of this article may have been received in contravention of the confidentiality obligation and media canvassing restriction in the Panel's Procedural Rules.³¹
72. In response to inquiries from the Panel, each of the parties submitted that they have not had, and are not aware of any, communications with media that could have led to any confidential information being disclosed in contravention of the Panel's Procedural Rules.
73. ASIC has previously undertaken analysis regarding the prevalence of leakage of confidential, market sensitive information about corporate transactions.³² We have referred this matter to ASIC for further consideration.

DECISION

Declaration

74. It appears to us that the circumstances are unacceptable:
 - (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 or
 - (b) further or in the alternative, having regard to the purposes of Chapter 6 set out in section 602.
75. Accordingly, we made the declaration set out in Annexure A and consider that it is not against the public interest to do so. We had regard to the matters in section 657A(3).

²⁹ 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)

³⁰ See TP21/023

³¹ See rules 18 and 19 of the *Takeovers Panel Procedural Rules 2020*

³² See Report 393: Handling of confidential information: Briefings and unannounced corporate transactions

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Orders

76. Following the declaration, we made the final orders set out in Annexure B. Under section 657D the Panel's power to make orders is wide. The Panel is empowered to make 'any order'³³ if 4 tests are met:
- (a) it has made a declaration under section 657A. This was done on 15 October 2021.
 - (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. For the reasons below, we are satisfied that our orders do not unfairly prejudice any person.
 - (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 12 October 2021. Each party made submissions and rebuttals.
 - (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. The orders do this by (in effect) requiring that:
 - (i) the no-talk restriction in the Exclusivity Arrangements be of no force and effect unless it is amended to include a 'fiduciary out' and
 - (ii) AusNet provide further disclosure regarding the terms of the Exclusivity Arrangements, in particular the Cost Reimbursement Provision.
77. On 12 October 2021, we provided draft orders to the parties and ASIC and sought submissions on the proposed orders. The draft orders were in the same form as the final orders made on 15 October 2021.
78. AusNet did not oppose the proposed orders. Brookfield submitted, among other things that the effects of the orders are unfairly prejudicial to Brookfield and AusNet shareholders because:
- (a) Brookfield "*received the exclusivity arrangements in return for a substantial increase in its offer price*" and
 - (b) APA obtaining due diligence may impair the value of AusNet to Brookfield and any other buyer because APA competes with AusNet.
79. APA submitted that further orders were necessary to ensure that "*APA is afforded a reasonable opportunity to 'catch up' to Brookfield*" given that Brookfield will have had the benefit of at least four weeks of exclusive due diligence under the Confidentiality Deed. The further orders suggested by APA included orders:
- (a) terminating the no-talk restriction and notification obligation and

³³ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

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- (b) a standstill preventing AusNet and Brookfield entering into a scheme implementation agreement for 5 weeks after the cessation of the Exclusivity Arrangements.
80. After considering the submissions received, we made the proposed orders. In our view, these orders address the unacceptable circumstances by:
- (a) permitting AusNet to engage with competing proposals, including APA's proposal, if such proposals are considered superior and
 - (b) ensuring that the market, and potential competing bidders, are aware of all material terms of the Exclusivity Arrangements.
81. The order in respect of the no-talk restriction may cause prejudice to Brookfield, but we are not satisfied that it unfairly prejudices Brookfield given that it has had the benefit of the Exclusivity Arrangements (without a fiduciary out) since entering into the Confidentiality Deed and is in a more advantageous position than it would have been had the unacceptable circumstances not occurred. We do not consider the proposed orders unfairly prejudice AusNet shareholders.
82. We were not satisfied that the additional orders requested by APA were necessary to address the unacceptable circumstances in connection with the Confidentiality Deed.

Yasmin Allen

President of the sitting Panel

Decision dated 15 October 2021

Reasons given to parties 2 December 2021

Reasons published 8 December 2021

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Advisers

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



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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'.
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



Australian Government

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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