AusNet battle could see a rewrite of the rules

Takeovers

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The $17 billion battle for AusNet Services between rival bidders APA Group and Brookfield is shaping up to be a significant test case for the Takeovers Panel, the likes of which has not been seen for more than a decade.

AusNet is sailing close to the wind by granting Brookfield exclusivity without a "fiduciary out" in sight.

But what makes this takeover battle particularly interesting is that, regardless of the outcome, the Takeovers Panel may be compelled to rewrite the rules on if and when target companies are required to provide rival bidders equal access to its information.

The pressure is already evident. While the panel announced on Friday that there was no reasonable prospect it would make a declaration of unacceptable circumstances in relation to matters raised in an application by Brookfield just four days earlier (that announcement made by APA contained misleading and incorrect information), APA's original application, submitted more than a fortnight ago, is still being considered.

Australia's takeovers law was founded on a set of principles developed in the 1960s by the Company Law Advisory Committee and has remained largely intact – and relevant – ever since. These principles, commonly known as the "Eggleston principles", named after Sir Richard Eggleston who headed the committee, seek to protect the interests of target company shareholders in the context of public market takeovers.

The Eggleston principles are so central to the regulatory regime of takeovers that the Takeovers Panel resolves disputes by reference to them, with only incidental concern for the black letter law. This approach has allowed the panel to respond to market developments and deliver fair, speedy and cost-effective resolutions to complex disputes.

The commitment to the Eggleston principles underpins the strength of the M&A market and has earned Australia a reputation as a reliable home for prized capital.

That said, it is not always clear how the Eggleston principles might apply in certain circumstances, requiring the panel to plug the gaps by publishing guidance notes which elaborate on policy relevant in control transactions.

However, the panel has remained largely silent on the issue of whether a target is required to provide equal access to information to competing bidders based on its view that there is no legal or policy requirement for this in Australia. By assuming this position, the panel has given target boards broad discretion to selectively provide information to some potential bidders at the exclusion of others.

Target boards will argue that directors must already act in accordance with their fiduciary duties and, provided they do so, it is for the board to determine if access is granted to the target's information. As a result, a competing bidder might be dissuaded from bidding or making a higher offer if it is unable to properly assess the target's business with only publicly disclosed information, particularly where a rival bidder has the advantage of more fulsome data.

By contrast, the Takeovers Panel in the United Kingdom requires targets to provide information to rival bidders even if that other bidder is "less welcome". A similar approach has been adopted in Singapore. The purpose of this policy has been to ensure that, in a competitive situation, an offer is not frustrated as a result of the target board giving additional information to the preferred bidder.

In the United States, directors of Delaware companies have a heightened duty to seek the highest price possible for shareholders when a sale of the company or a transfer of control is inevitable. These "Revlon duties" – which do not exist in Australia – seek to ensure that a board does not unreasonably reject a higher-value rival bid over an existing bid.

On face value, these distinctions between the approaches taken in Australia and overseas jurisdictions may seem nuanced. But the fundamental question is this: if a company is "in play" and subject to bona fide competing offers, should all bidders have a presumptive right to access the target's information where it has already been provided to at least one bidder?

The AusNet saga is a perfect case in point. AusNet has granted Brookfield exclusive access to its books for eight weeks since it became apparent that Brookfield's non-binding, all cash offer of $2.50 per share was conditional on exclusive due diligence access. This was despite AusNet also being aware that APA intended to submit an improved proposal to its previous offer.

AusNet's board and advisers will have carefully documented their reasons for granting exclusive due diligence to Brookfield. Which, based on the panel's current guidance, may well be all that is required.

But it will sit uncomfortably with many AusNet shareholders, knowing as they do that APA is banging on AusNet's door with bags full of cash (and shares) that, on paper, amount to a higher offer than Brookfield's.

It also sits uncomfortably with the Eggleston principle that the acquisition for control take place in an efficient, competitive and informed market.

With M&A deal volumes in Australia sitting at 10 times the five-year average, listed companies will need to be more prepared than ever to deal with hostile and competing offers.

The high-profile competition for AusNet provides the Takeovers Panel with fertile ground to clarify a significant, unresolved question about the state of the playing field.

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