AMCOM/VOCUS – THE WASH UP

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Legal Briefings – By **Rodd Levy** and **Nick Baker**

SUMMARY

- Vocus's proposed merger with Amcom shows a determined target can overcome a 19.99% shareholder who votes against the scheme.
- Shares sold by a bidder just prior to the scheme meeting can be voted in support of the scheme provided there is no association or understanding between the bidder and the new shareholder.
- Extraneous commercial interests are unlikely to lead to a court discounting or disregarding votes cast unless there is strong and cogent evidence that, in voting on the scheme, the holder of the interests favoured their own self-centred, rather than class-promoting, view.

The Amcom/Vocus merger has been one of the more interesting public company transactions this year. It may not have been the biggest deal, but it made up for lack of size in the action which followed the late emergence of TPG Telecom with what looked like a very strong blocking stake of 19.99%.

RECAP OF THE STORY

Amcom and Vocus announced a scheme of arrangement in November 2014 under which Vocus, which held an interest in approximately 10% of Amcom Shares via an equity swap with a financial institution, would acquire Amcom for scrip consideration of 0.4614 Vocus shares for every Amcom share.

TPG Telecom held a 6.7% shareholding in Amcom at the time of the announcement. After the scheme was well under way and the scheme booklet had been dispatched, TPG Telecom announced an increase of its shareholding to 19.99% and said that it would not support the scheme and would not make a counter proposal.

TPG Telecom's announcement made it look like the scheme was dead in the water. Voter turnout in schemes in Australia generally averages about 62% of issued shares, so a 19.99% blocking stake would normally lead to the scheme failing. The Amcom share price tumbled.

In response, Amcom and Vocus employed various tactics to get the scheme over the line. These included:

- **Campaign to ensure high voter turnout**. Amcom commenced a campaign to encourage Amcom shareholders to send in proxy votes. This included producing a video featuring its chairman and a small shareholder arguing the case for other shareholders, which was made available via the internet. Further correspondence was sent to shareholders, voting cards and a telephone proxy solicitation campaign were employed.

- **Vocus unwinding its swap and freeing up the underlying 10% stake** – the general principle in Australia is that shares held by the bidder or by a related body corporate of the bidder cannot be voted at the scheme. To counter any arguments that the shares held by the swap counterparty could not be voted (and because the strategic value of the stake had been undermined), Vocus terminated the swap arrangement which led to the financial institution which held the matching shares selling those shares to other investors. This was done carefully so that the sales were on arm's length terms to institutional investors via a bookbuild conducted by a stockbroker. Vocus avoided having any discussions with the eventual purchasers, so that there could be no basis for arguing that there was any relevant understanding, agreement, conferral of collateral benefit nor any other vitiating feature sufficient to stop the shares being voted.

- **Postponing the scheme meeting** – in order to give Amcom plenty of time to encourage shareholders to cast their vote, the scheme meeting was delayed several times.

THE SCHEME MEETING

As everyone knows, the scheme was successful and TPG Telecom was not able to block the scheme, despite voting 19.99% of the share capital against the scheme.

The voting statistics were as follows:

- 88% of the shares on issue were voted at the meeting,

- 42.3% of all shareholders on the register voted at the meeting, with 3,542 voting in favour and 48 voting against,

- 77.19% of votes were cast in favour, and
- 22.8% were voted against, which included TPG’s 19.9% and 1.23% voted by other shareholders.

This meant that the necessary majorities were achieved.

THE COURT’S CONSIDERATION

The Court heard the matter and delivered a judgement on 17 July 2015. TPG Telecom had flagged that it would oppose the scheme in the court at the final court hearing and lodged documents in opposition.

However, as it turned out, TPG did not appear at the final court hearing.

The court re-visited a number of arguments that TPG had raised and rejected all of these. These were:

- TPG argued that the votes cast by persons who had purchased shares held under Vocus’s equity swap should not have been counted. This was rejected as the court had no evidence of any discussions between Vocus and potential purchasers as to how purchasers may vote and there was no evidence of any agreement which would form the basis for excluding those votes.
- Vocus had announced it would pay a special dividend of 5.1 cents per share conditional on the scheme becoming effective. It was argued that shareholders of Amcom who also held Vocus shares would receive an additional benefit and, therefore, their votes should be disregarded. The court rejected this on the basis that any benefit offered by Vocus to its shareholders was independent and external to the scheme and that the shareholders of Amcom and Vocus did not form a separate class. In any event, it was unclear just who the relevant shareholders were.
- The Commonwealth Bank (and its related bodies corporate) held a 3% stake and was a lender to Vocus. TPG argued that the bank stood to receive additional benefits in the form of early repayment of Vocus debt facilities and Amcom’s assets being provided as further security for Vocus debt. The court rejected that this argument as the Commonwealth Bank shares in Amcom were not treated any differently by virtue of its position as a lender to Vocus.
- The court rejected an argument that the chief executive officer of Amcom, who was to be compensated for termination of office on implementation of the scheme, and the

chairman of Amcom who was to be appointed to as the deputy chairman of the board of Vocus upon implementation of the scheme, would form separate classes or should have their votes discounted on the grounds of extraneous commercial interests. Those interests had been disclosed and the court was not satisfied that they had voted primarily to benefit themselves by securing those individual benefits.

COMMENTARY

The Amcom/Vocus scheme will give heart to targets who fear that their transaction may not proceed due to the emergence of someone with a sizeable blocking stake. However, it may require every shareholder to be contacted and great care in examining the position of any shareholder who may have other interests affected by the scheme.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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