BAG OF TRICKS EXTENDED IN CONTEST FOR CONTROL OF AMCOM

29 May 2015 | Australia
Legal Briefings – By **Rodd Levy** and **Nick Baker**

SUMMARY

- After seven months, the Vocus's proposed merger with Amcom is no more certain.
- Manoeuvring by parties in a contest for control can throw up a number of complex legal issues, including disclosure of equity derivatives, insider trading risks, truth in takeovers and the application of competition law to acquisitions of minority stakes.
- While it remains to be seem what happens, what has happened so far provides a number of important lessons.

The long and drawn out, and increasingly complex, saga that is Vocus's proposed scrip for scrip merger with Amcom by way of scheme of arrangement demonstrates a wide range of legal issues that may arise when a scheme proposal encounters an interloper determined to prevent the merger taking place.

In Amcom's case, the interloper is TPG Telecom who built a 19.9% stake through a series of transactions as follows:

- On 3 November and 10 November 2014 – an initial 5.93% was acquired in the week before Amcom announced it was entering into exclusive negotiations with Vocus and subsequently increased to 6.70% on the day of that announcement, and

- On 29 April 2015 and 8 May 2015 – an increase to 18.56%, just five days before the proposed scheme meeting, and a final increase to 19.9%.

Following increasing its holding to 18.56%, TPG Telecom announced to the market that it intended to vote its shareholding against the Vocus scheme and that it supported the continued operation of Amcom as a standalone business. TPG Telecom also stated that it had no intention to make any counterproposal to the Vocus scheme.

At the time of TPG Telecom's announcement, Vocus held a 10% stake through a swap written by a financial institution. When TPG Telecom's stake reached 19.9% and Vocus held 10% (so that the votes attached to shares underlying the swap could not be relied upon), the Amcom scheme would have required a voter turn-out of approximately 85%, with all non-TPG Telecom shares being voted in favour of the scheme. With scheme meeting attendances in Australia averaging 60% of issued shares, Vocus and Amcom's proxy solicitation campaign would have needed to break records to overcome TPG Telecom's blocking stake.

Presumably to improve the odds of a successful scheme vote, Vocus unwound its swap which led to an additional 10% of Amcom shares which can now potentially be voted in favour of (or against) the Vocus scheme. A voter turn-out of approximately 75%, with all non-TPG Telecom shares being voted in favour of the scheme, is still required.

While TPG Telecom, Vocus and Amcom have been manoeuvring, the scheme meeting has been adjourned twice and the final court hearing postponed. At the date of writing, the revised scheme meeting date is 15 June 2015.

It is worth reflecting on some interesting practice and legal points demonstrated by this deal to date, including:

- **Disclosure of equity derivatives** – Vocus's 10% stake was initially acquired through a cash-settled swap. Building a stake under a cash settled swap requires careful consideration. Takeovers Panel Guidance Note 20 deals with disclosure of equity derivatives and states that the Panel expects disclosure of a long position over 5% under a swap where a control transaction has been announced or a substantial interest (ie a parcel of securities, of whatever size, that forms a step in the direction of a change in corporate control) is acquired. It is unclear at what point a bidder accumulating a stake through a cash-settled swap in anticipation of a bid would be required to disclose and Vocus would presumably have given careful consideration to the structure of the cash settled swap, the notional percentage of shares subject to the cash settled swap, the timing of termination/replacement with a physically settled swap and the effect of any hedge position may have on the underlying market for Amcom shares.

- **Video messages for shareholders** – In order to encourage Amcom shareholders to send in proxy votes, Amcom produced a video featuring its chairman and a small shareholder arguing the case for other shareholders to support the scheme. This was made available via the internet. This is a highly unusual step and it is not yet clear whether the court supervising the scheme approved the content before it was released.

- **Application of insider trading laws when unwinding pre-bid stakes** – Vocus's selldown of its 10% stake would need to be managed within the insider trading prohibitions, which can raise complex issues when swaps are used (depending on the close-out methodology). In this instance, insight into how proxies were running would be key information about the prospects of the scheme proceeding – something that would be material to the Amcom share price. Presumably, Vocus was comfortable that it did not possess any information that may have impeded a clean sale of the shares following its termination of its swap and off-market sale of the underlying Amcom shares.

- **Truth in takeovers statements** – The fall in Amcom's share price from $2.70 to $2.30 in response to TPG Telecom's announcement of its holding and intention to vote against the Vocus scheme and not to offer a counterproposal shows the high degree of reliance shareholders place on statements made by parties involved in a control transaction. It remains to be seen whether TPG Telecom's approach would change if Vocus sweetened its offer. There may be some wriggle room given TPG Telecom's statements are made in respect of the 'announced' scheme of arrangement, ie the statement may not apply to another proposal.

- **Application of competition law to acquisition of minority stakes** – There is media speculation that Vocus has referred TPG Telecom's acquisition of its stake to the ACCC which is getting a good work out in the telco space with its review of the TPG Telecom/iiNet merger. Generally speaking, it is difficult to show that the acquisition of a minority stake will substantially lessen competition, although there are a number of examples, including Macquarie/Qantas, Illyria/Ten Network and Air New Zealand/Virgin Australia, which show that the ACCC will still take a look. In the case of blocking a takeover or scheme, a trade bidder faces the difficult task of arguing for its transaction, which itself consolidates market power, and against a minority stake where the impacts on competition are unclear. Interestingly, since announcing its scheme, Vocus itself has acquired a 14.5% stake in Macquarie Telecom.

It remains to be seen what will happen to Vocus's proposed scheme. Herbert Smith Freehills acted for David Jones on its scheme of arrangement with Woolworths (South Africa) during which entities associated with Solomon Lew accumulated a potential blocking stake following the release of the scheme booklet. In that case a successful outcome was achieved.

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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