COMPETING BIDS ON THE INCREASE

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Legal Briefings – By **Rodd Levy**

In the last 12 months or so, we have seen a significant increase in the number of competing takeover bids.

While competing bids have always been a feature of our market, they have been on the increase recently.

IN BRIEF
• In the 12 months to June 2020, there were seven competing bids (out of 51 public company transactions).
• It is unclear what has caused the increase in competing bids, but the most likely explanation is that there are a large number of acquirers (strategics and financial) who are looking for growth by acquisition. Listed companies are regarded as potential acquisition targets, and the impact of the Covid-19 pandemic on listed company valuations has presented opportunities for potential acquirers.

In the 12 months to June 2020, there were seven competing bids (out of 51 public company transactions). These were the bids for Pacific Energy, Konekt, Alto Metals, CML Group, Keybridge, Infigen and Cardinal Resources.

And we have seen two more in the last few months: the competing bids by Uniti and Aware Super for Opticomm (which has received a lot of media coverage) and the competing bids by Web.com and 5GN Networks for Webcentral.

This is a significant increase over previous years. In the three years to June 2019, the average number of competing situations was a little over four per year (out of roughly 60 transactions announced each year).

It is unclear what has caused the increase in competing bids, but the most likely explanation is that there are a large number of acquirers (strategics and financial) who are looking for growth by acquisition. Listed companies are regarded as potential acquisition targets, and the impact of the Covid-19 pandemic on listed company valuations has presented opportunities for potential acquirers.

That means that, once a bid is announced for a company (whether friendly or hostile), there is a good likelihood that at least one other potential acquirer has been reviewing that company and is ready to make a move.

TACTICS FOR TARGETS

The emergence of a competing bidder is usually an excellent development for directors and shareholders of the target company, particularly if it looks like control may pass under the first bid. The competition drives up the price and ensures that the shareholders achieve a better return on their investment.

The key strategy for a target company which is the subject of a takeover bid is, therefore, to try to slow down control passing to the first bidder whilst it seeks to entice other potential bidders to launch their own bid.

If the original bidder seeks due diligence, the target company is usually able to extract a standstill agreement from the potential bidder so that it cannot make a move unless the bid has been recommended by the target company. That is also invariably the case where a number of potential bidders are invited as part of a strategic review to participate in a dataroom to determine whether to make an offer and at what price. In that case, preserving a level playing field between potential bidders (which may include ensuring that bidders do not unreasonably tie up financiers) is a well-worn path.

Where the original takeover bid is made on an unsolicited or hostile basis, the target will have less time and less room to manoeuvre, but it may be able to gain some strategic advantage for its shareholders by seeking to delay the change of control in order to give other potential bidders a chance to emerge. That might be achieved by tactics such as:

- delaying recommending acceptance of the offer whilst potential bidders are being sought;
- offering due diligence to potential bidders; and
- offering break fees and cost recovery to potential bidders.

Under Australian law and practice, the mere fact that a subsequent potential bidder receives due diligence information does not oblige the target to offer equivalent information to any prior bidder (unlike the general UK position).

Years ago, a target would seek to buy time by commencing litigation claiming defects in the offer documents, thereby holding up their despatch. These days, there is much less scope for that to occur due to the efficiency of our Takeovers Panel in determining those sorts of disputes. Despite that, disputes over documentation remain common, even though they may not lead to significant delay in despatch.

IMPACT OF EXCLUSIVITY PROVISIONS

Even if a transaction is recommended and an implementation agreement is entered into (which is the usual position for a transaction effected by a scheme of arrangement), the target company will strive to ensure that it has some on-going freedom to deal with rival bidders.

An important aspect of this will be ensuring that the exclusivity provisions (which would commonly include no shop, no talk, notification and matching right provisions) are not so restrictive as to deter a rival bidder.

In fact, the usual suite of exclusivity provisions in the Australian market successfully strike a balance between protecting the rights of the original bidder without discouraging the emergence of further bidders.

A good example of this is Uniti’s current bid for Opticomm, which was the subject of a scheme implementation agreement which set out the standard range of exclusivity provisions. Despite those provisions, Aware Super has made two counter bids, driving the value to shareholders up by almost 30% above the initial bid recommended by the target.

This highlights that exclusivity provisions are not normally so anti-competitive as to warrant being outlawed. In fact, the Courts’ comments about limiting the time period for an exclusivity regime are out of touch with how the market operates.

Australia’s market for corporate control has successfully struck a balance between the interests of the first bidder and the ability of further bidders to emerge. The Takeovers Panel’s 1% rule of thumb for break fees has not, to my knowledge, led to break fees deterring competition (the key reason why the 1% figure was determined).

The Aussie position can be contrasted with the UK position, which introduced a general prohibition on deal protection measures in 2011 after the controversial takeover of Cadbury by Kraft. The prohibition was intended to address a concern that break fees, non-solicitation agreements and other deal protection measures had become such a standard package that the target felt obliged to provide it in every situation, and therefore was tied up to an unacceptable extent which discouraged competing bids or the target's flexibility to reject an unwanted bid. It is interesting that the Australian experience is otherwise.

CONCLUSION

Competing bids are an important feature of our market and the ability for competing bids to emerge is crucial in ensuring an efficient market for corporate control. The recent increase in the number of competitive bids for Australian listed companies highlights that our current regulatory settings are working well to keep this feature alive in our market.

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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