HERBERT SMITH FREEHILLS

HOSTILE TAKEOVER BIDS IN AUSTRALIA IN 2017 (PART II) – MAXIMISING VALUE IN A HOSTILE SITUATION

28 February 2018 | Australia
Legal Briefings – By **Rodd Levy and Sam Kings**

One of the key tasks for directors of target companies is to ensure shareholders appreciate the value of their company and, if control may pass, do what they can to seek to maximise that value. By reference to a series of transactions during 2017, we look at how directors can maximise value by encouraging rival bidders or developing alternative transactions.

IN BRIEF

- Maximising value for shareholders is the general task of a company director.
- In a hostile bid, this may mean encouraging a rival bidder or developing an alternative transaction.
- Recently, we have seen examples of target directors using competitive tension (either a rival bidder or by presenting an alternative transaction to shareholders) to create extra value for their shareholders.

UNDER MORE PRESSURE, MORE OFTEN

As we discussed in Hostile takeover bids in Australia in 2017 (Part I), hostile takeover bids[1] are a significant part of the Australian public company M&A market. They can place a lot of pressure on target company directors.

One of the key tasks for directors of a target company is to ensure shareholders appreciate the value of their company and, if control may pass, do what they can to seek to maximise that value. By reference to a series of transactions during 2017, we examine how directors have sought to maximise value by encouraging rival bidders or developing alternative transactions.

COMPETING BIDS

It has long been demonstrated that having competing bids can deliver significant additional value to target shareholders. However, competing bids have been relatively rare in recent years. This is probably due to the shift towards recommended schemes of arrangement, where the competitive tension is often played out before any deal announcement, and possibly due to the extensive use of exclusivity provisions which are intended to deter rival bidders (and which have been largely banned in the UK for that reason).

In 2017, there were only 2 examples of rival bids emerging after an unsolicited bid and only one gave rise to a materially higher bid price.

> **Hunter Hall International**
>
> Washington H Soul Pattison announced an initial A$1.00 per share bid for Hunter Hall International (along with a 19.9% pre-bid stake). Pinnacle then emerged with a A$1.50 per share offer. This competition saw the offer price eventually increase to A$2.60. That was an excellent outcome for shareholders.
>
> During the bidding war, Pengana Capital and Hunter Hall entered into an agreement for Hunter Hall to acquire all the shares in Pengana Capital. See below for more detail on the Hunter Hall / Pengana Capital deal.
>
> **MHM Metals**
>
> MHM Metals announced that it had received an off-market takeover bid from Mercantile Investment Company at A$0.04 per share. Two months later, Cadmon Ventures made a competing takeover bid at A$0.0435 per share (a 9% premium over Mercantile's bid). Both bids were unsuccessful.

The current competing bids for AWE show a better outcome for shareholders. This unfolded as follows:

- On 30 November 2017, AWE received an unsolicited non-binding indicative approach from China Energy Reserve and Chemical Group (**CERCG**) at $A0.71 per share. This was rejected. CERCG came back in December with a hostile takeover bid at A$0.73 per share.

- A few days later, AWE received a scrip merger proposal from Mineral Resources worth A$0.80 per AWE share – about a 10% increase to the CERCG bid. The AWE board recommended that its shareholders support the Mineral Resources proposal and the parties signed a scheme implementation deed.

- In January 2018, AWE received an unsolicited, non-binding and conditional proposal from Mitsui worth A$0.95 per AWE share.[2] As at the date of this article, the AWE board had withdrawn its recommendation of the Mineral Resources offer, rejected the CERCG offer and recommended that its shareholders accept Mitsui's bid.

Mitsui's current proposal represents a 30% increase to the CERCG offer.

ALTERNATIVE TRANSACTIONS

Even if a company is subject to a hostile bid, target directors can still explore alternative transactions (in addition to pro-actively soliciting and facilitating rival bids). In most cases, the alternative transaction will need shareholder approval so as not to breach the Takeover Panel's 'frustrating action' policy (which only allows targets to do things which may cause a bid to be withdrawn or lapse in certain circumstances).

In 2017, we saw 3 instances where, after receiving a hostile bid, target directors took alternative transactions to their shareholders.

Hunter Hall International

During the contest for control of Hunter Hall, Hunter Hall announced that it had entered into an agreement to buy all of the shares in Pengana Capital in exchange for Hunter Hall shares. The deal was subject to Hunter Hall shareholder approval, so shareholders were given a choice between accepting the takeover or voting in favour of the merger.

The merger was approved by Hunter Hall shareholders. The valuation applied under the merger resulted in Hunter Hall shareholders receiving a 225% value increase compared to the initial takeover bid.

Macmahon

Macmahon was subject to an unconditional takeover bid from CIMIC at A$0.145 per share. The Macmahon board recommended that shareholders reject the offer and engaged an independent expert who opined that it was neither fair nor reasonable.

Later, Macmahon entered into an agreement with Indonesian mining company PT Amman Mineral Nusa Tenggara (**AMNT**). Under this agreement, Macmahon would acquire certain assets from AMNT, AMNT would end up with between 40% and 50.1% of Macmahon post completion (Macmahon shares were valued at a 40% premium to the CIMIC offer price for the purposes of the deal) and Macmahon would be given a life of mine contract to provide services at AMNT's Indonesian copper-gold mine. The deal, which was recommended by the Macmahon board and considered to be fair and reasonable by an independent expert, was subject to Macmahon shareholder approval.

The CIMIC bid was unsuccessful and CIMIC sold its Macmahon shares in July 2017. The AMNT deal was approved by Macmahon shareholders and completed in August 2017.

Goldfields Money

Goldfields Money was subject to an unconditional takeover bid from Firstmac at A$1.12 per share. The Goldfields board recommended that shareholders reject the offer. In response, Firstmac increased its bid to A$1.27 per share, but this was also rejected.

Goldfields then announced that it had entered into an agreement with Finsure whereby Goldfields would acquire all of the shares in Finsure in exchange for Goldfields shares. Firstmac's offer closed a week later with its interest in Goldfields stuck at 15% (its pre-bid stake).

The Finsure deal is subject to Goldfields shareholder approval, with shareholders expected to vote on it at a shareholders' meeting in March 2018. If the deal is completed, the deemed issue price of Goldfields shares under the merger (A$1.50 per share) will be above the independent expert's price range and will represent a 34% increase to Firstmac's initial bid price.

COMMENTARY: PRESSURE MAKES DIAMONDS

As we discussed in Hostile takeover bids in Australia in 2017 (Part I), there are a number of things directors can do to generate value for shareholders in a hostile situation.

Whilst directors should consider all of the defence options available to them, recent experience suggests that some healthy competition – whether in the form of a competing bid or an alternative transaction – is one way to extract maximum value for target shareholders in a hostile situation.

ENDNOTES

1. For this purpose, we treated as 'hostile' any bid that was not supported by a recommendation of the target's board of directors from the outset. In other words, any

public takeover bid which was announced and unsolicited.

2. Herbert Smith Freehills is advising Mitsui.

KEY CONTACTS

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

RODD LEVY
PARTNER,
MELBOURNE
+61 3 9288 1518
rodd.levy@hsf.com

LEGAL NOTICE