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TAKEOVER BIDS: THE NEW BLACK?

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Legal Briefings – By **Rebecca Maslen Stannage**

Despite predictions to the contrary, the 2016 financial year so far has seen a strong showing of takeover bids announced in the public M&A deal space. In this article, we consider this trend in more detail.

With Q3 of the 2015-16 financial year having recently wrapped up, we have reviewed the deal data available for a preview of trends we might see working through come year end.

The available data tends to suggest that takeover bids have been more popular in the year to date than schemes of arrangement. We calculate that:

- of the 48 public company M&A transactions for which disclosure documents were lodged with ASIC during Q1 and Q2 of FY2016, 54% (by number) related to takeover bids.[1] This represents an increase in proportionate representation of takeover bids compared to schemes of arrangement for the equivalent period in FY2015,
- of the 29 proposed Australian public company control transactions announced during the first 3 quarters of FY2016, 62% (by number) were announcing takeover bids[2] rather than proposed schemes of arrangement, and
- 28 takeover bids were made during the period July-December 2015, almost double the 16 in the previous 6-month period.[3]

What is interesting about this potential trend is that it comes at a time when Australian corporates are cognisant of the potential benefits of conducting a (friendly) control transaction by way of scheme of arrangement rather than by takeover bid. Those benefits include all-or-nothing target ownership and the benefit of due diligence – see our Takeovers Guide for further detail.

So – why are we seeing so many takeover bids launched?

MORE CONTESTED AND HOSTILE ACTIVITY?

Since hostile transactions can only be implemented via takeover bid and not by scheme of arrangement, a rise in hostile transactions could explain the surge in the popularity of takeover bids.

However, in fact the number of hostile bidders' statements lodged with ASIC in FY2016 (as a proportion of public company transaction documents lodged) is largely on trend with the proportion of hostile transactions we have seen in the market over the past 5 years.

It is possible that the uptick in takeover bids is a response to a perception that control transaction bids are more likely to be contested in the current market conditions. While schemes of arrangement offer some flexibility if structured appropriately from the outset, takeover bids offer greater flexibility since price increases and timing extensions can be implemented easily at short notice. This may appeal to a bidder who thinks that their bid might become contested.

As we noted in our February 2016 newsletter, 2015 saw a raft of takeover bids being defeated by the emergence of a rival bidder:

- G8 Education's scrip bid with an initial value of $0.70 per share for Affinity was topped by Anchorage's successful scheme proposal at $0.92 (a 31.4% increase),
- Westside's cash offer of $0.12 per share for Armour Energy was topped by American Energy Partners' offer of $0.25 (an increase of 108.3%),
- Zijin Mining's cash offer of $0.10 per share for Phoenix Gold was topped by Evolution Mining's cash and scrip bid valued at $0.158 (an increase of 58%), and
- Pulse Group's scrip bid valued at $0.88 for Vision Eye Institute was topped by Jangho Group's cash bid of $1.10 (a 25% increase).

A ‘live’ example of a nimble approach to a contested control transaction bid is the Asciano transaction, which has played out over the entire financial year to date. While Brookfield (the original bidder) had initially proposed a scheme of arrangement with Asciano, Brookfield instead lodged a takeover bid in respect of the shares in the company once a potential rival bidder, the Qube Consortium, emerged. Through this structure, Brookfield was able to amend the terms of its takeover bid, including extending the offer period, in order to be able to respond flexibly to the emergence of the Qube Consortium’s proposal. Ultimately, this has resulted in a ‘Joint Consortium’ scheme of arrangement proposal, involving both Brookfield and the Qube Consortium.

GOOD NEWS FOR TARGETS?

If bidders are seeking the advantages of increased flexibility in using the takeover bid structure, this potentially benefits target shareholders as well. A recent study of deals announced over the period 2000 to 2011 published in the *Australian Journal of Management* found that target shareholders receive significantly larger premiums under takeovers than schemes of arrangement, although a survey conducted on behalf of Herbert Smith Freehills found that the average premium in a recommended or friendly takeover bid was not materially higher than the average premium paid in schemes of arrangement, over the period 1996-2012. Of course where bids are contested, the auction effect is ultimately to the benefit of the target’s shareholders through achievement of a higher price.

Will takeovers continue their upward march in the public M&A sphere? Time will tell, and we will keep you posted.

This article was written by Rebecca Maslen-Stannage, Partner, Sydney and Katie Simmonds, Solicitor, Sydney.

Endnotes

1. 26 takeover bids compared to 22 schemes of arrangement. Source: ASIC Report 469, ASIC regulation of corporate finance: July to December 2015 (Published February 2016). Data has been modified to reflect duplicate entries relating to single transactions.

2. 18 takeover bid announcements compared to 11 scheme of arrangement announcements. Source: Mergermarket.

3. Source: ASIC Report 469, ASIC regulation of corporate finance: July to December 2015 (Published February 2016).

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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