Death of joint bid relief?

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In brief

- Where joint bidders’ collective shareholding in the target company exceeds 20 per cent, ASIC relief from the general 20 per cent takeover prohibition can be sought.
- ASIC’s policy is to grant joint bid relief subject to a condition that the joint bidders accept into a higher rival bid. This can be very unattractive to long term/strategic holders.
- The use of the ‘conditional agreements’ exception to a relevant interest being acquired in two recent transactions shows an effective alternative to seeking joint bid relief in a friendly transaction.

Where two or more parties who collectively have a greater than 20 per cent relevant interest in a target company’s securities have the joint goal of seeking control of that target company, they may want to enter into an agreement in respect of each other’s target company securities as part of the joint bid arrangements. Where that agreement would give one joint bidder a ‘relevant interest’ in the others’ securities in the target company (or each a relevant interest in the others’), ASIC relief has typically been sought to ensure that those arrangements do not breach the takeover rules in the Corporations Act.

ASIC’s policy

ASIC’s policy is to grant relief to allow the joint bid to proceed subject to conditions that address its concerns that the joint bid may deter rival bids. Where both ‘joint bidders’ have a pre-existing interest in target securities, one such condition is that the joint bidders accept or match a higher rival bid.

In situations where one or more of the ‘joint bidders’ has been a significant long term and/or strategic holder of target securities, this can be very unattractive as often that holder would rather maintain its interest than sell into another bid, even if its own bid is unsuccessful.

An alternative to joint bid relief

In those circumstances it may be possible to persuade ASIC that the ‘higher rival bid’ condition should not be imposed. However, an alternative is to have the acquisition of any relevant interest (whether this be an acquisition of securities by one of the joint bidders from the other or control or influence over each others voting rights), subject to target shareholder approval under item 7 of section 611 of the Corporations Act. Section 609(7) of the Corporations Act provides that a person does not have a relevant interest in securities merely because of an agreement if the agreement:

- is conditional on a resolution under item 7 in the table in section 611 being passed,
- does not confer any control over, or power to substantially influence, the exercise of a voting right attached to the securities, and
- does not restrict disposal of the securities for more than 3 months from the date when the agreement is entered into.

This approach has been taken in two recent transactions.

Santos Limited recently completed the acquisition of Eastern Star Gas Limited by scheme of arrangement. Santos had an interest in just over 20 per cent of Eastern Star Gas which it had held since mid 2009. TRUenergy held just under 4 per cent of Eastern Star Gas.
Santos agreed to acquire all the shares in Eastern Star Gas, other than those held by it and TRUenergy, for Santos scrip under a scheme of arrangement. Santos also agreed to acquire TRUenergy’s shares in Eastern Star Gas shares for cash, rather than them being acquired under the scheme for Santos scrip, so that the consideration for the shares could be set-off against a payment by TRUenergy for certain of Eastern Star Gas’ assets to be sold to TRUenergy post the scheme being implemented. This acquisition by Santos of TRUenergy’s shareholding was subject to Eastern Star Gas’ shareholder’s approval which was sought and obtained on the same day as the scheme meeting.

Rio Tinto Limited and Mitsubishi Development Pty Ltd made a joint takeover proposal to acquire all the shares in Coal & Allied Limited in August this year. When agreement was reached with Coal & Allied it was announced the acquisition was to be effected by way of a scheme rather than takeover bid. Rio Tinto and Mitsubishi Development are both long term holders of Coal & Allied shares with Rio Tinto having an approximate 75.7 per cent interest and Mitsubishi having an approximate 10.2 per cent interest.

Rio Tinto and Mitsubishi Development entered into arrangements that restricted the disposal by each other of each of their shares in Coal & Allied (among other things). That agreement would breach the takeovers provisions of the Corporations Act unless the acquisitions by each of a relevant interest in each other’s Coal & Allied shares was subject to ASIC relief being obtained or Coal & Allied shareholder approval. Shareholder approval is proposed to be sought on the same date as the scheme meeting.\(^3\)

Where to from here for joint bid relief?

ASIC’s joint bid relief still has a role to play as the alternative approach described in this article requires the target company to convene a meeting of its shareholders to seek section 611(7) approval, and so is only a practicable alternative in friendly transactions. Also, while it is possible to be used in a takeover context (and this was what was initially proposed in the Coal & Allied proposal), it may not be an attractive alternative to obtaining ASIC relief as it requires a meeting of target company shareholders where no meeting would otherwise be required.

However, the examples of the alternative approach described in this article begs the question as to whether ASIC should relax its policy on the ‘higher rival bid’ condition.

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Endnotes

1. For example, in AMP Limited’s and AXA France’s acquisition of AXA APH.
2. ASIC Regulatory Guide 159 at 159.294. A higher rival bid is a bid offering more than 105% of the value of the joint bidders’ bid consideration. ASIC states in its Regulatory Guide at 159.297 that it may not impose this condition when only one of the ‘joint bidders’ has a pre-existing relevant interest. This was the case with the relief obtained in AMP Limited’s and AXA France’s acquisition of AXA APH.
3. Rio Tinto and Mitsubishi Development also obtained an (unconditional) modification of section 609(7) of the Corporations from ASIC to extend the 3 month period referred to above to 4 months to ensure that the disposal restrictions could remain in place until the scheduled time of the meeting.

More information

For information regarding possible implications for your business, contact

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