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2024

IN
THE
CITY

RULES OF ENAGEMENT

Recent reflections on pre-scheme agreements with major shareholders

As the unsuccessful scheme proposal for Origin illustrated last year, it can be tough to acquire an ASX-listed target with a major shareholder.

So, what are the basic rules of the road for takeover schemes? And how do they work in practice?

This note highlights some of the fundamentals from the driving manual for dealing with major shareholders in a target. We then hit the road to review the pre-scheme agreement reached in the recently-proposed acquisition of Alumina Limited (**Alumina**). Transaction details disclosed in the bidder's publicly available filings¹ provide a relatively rare roadmap charting the negotiation of a pre-scheme agreement.

WHAT CAN BE DONE?

It is generally acceptable for a bidder to have confidential discussions with a major shareholder, provided arrangements are in place to avoid inadvertently tripping over takeover and insider trading traps.

There are three key limitations on pre-scheme agreements or arrangements with major shareholders of a target.

- 1 The bidder must not breach the 20% takeovers prohibition by reaching an agreement or an understanding with a major shareholder to sell voting shares representing more than 20% of the target.
- 2 The bidder should beware that any shares acquired by it (or its associates) are generally not counted towards the scheme voting tests. As we explained [last year](#), this means that stake-building is less common for schemes than takeover bids, and puts more pressure on the structure of pre-scheme arrangements.
- 3 Pre-scheme arrangements which seek commitments from a major shareholder (or shareholders) to support or vote in favour of a scheme proposal can conflict with Takeovers Panel and ASIC guidance. In particular, [ASIC has warned bidders](#) to exercise caution when inviting major shareholders to make "intention statements" where the makers of the statements speak for more than 20% of the shares on issue.²



SHAREHOLDER SUPPORT ESSENTIAL TO SCHEME SUCCESS

A takeover scheme will only be successful if the deal is approved by:

- a majority in number of target shareholders in a class, present and voting (either in person or by proxy); and
- 75% of the votes cast on the resolution.

Bidders considering a takeover scheme must carefully consider their plan to engage shareholders, including any major shareholder who could significantly influence or 'block' the 75% vote requirement.

HOW DID THE ALCOA-ALLAN GRAY AGREEMENT MATERIALISE?

Alcoa proposes to acquire Alumina under a scrip-for-scrip scheme of arrangement, under which Alumina shareholders will receive Alcoa CHES Depositary Interests (**CDIs**), representing an ownership interest in a share of NYSE-quoted Alcoa common stock. Alcoa will seek a secondary listing on ASX so that the CDIs can be quoted and traded on ASX.

Allan Gray is Alumina's largest shareholder, holding around 20% of Alumina for some time.

The infographic below summarises the key chronology leading to signing of the Alcoa/Allan Gray pre-scheme agreement and the Alcoa/Alumina scheme implementation deed.

KEY EVENTS

October 2023

INITIAL APPROACH

In, Alcoa makes confidential non-binding indicative proposal (**NBIO**) to Alumina offering 0.0242 Alcoa CDIs for each Alumina share. Alumina responds in November that it would require a higher exchange ratio.

December 2023

ALLAN GRAY APPROACH

In early December, Alcoa contacts Alumina's largest shareholder, Allan Gray, to discuss the NBIO on a wall crossed, confidential basis. Allan Gray indicates it would be supportive of the potential transaction.

30 January 2024

FURTHER PROPOSAL

Alumina counter-proposes to Alcoa a fixed exchange ratio of 0.0303 Alcoa CDIs. On 13 February, Alcoa offers 0.0265 Alcoa CDIs. Alumina rejected the new NBIO.

23 February 2024

FURTHER AND 'BEST' PROPOSAL

On, Alcoa delivers a further new revised NBIO for an increased fixed exchange ratio of 0.02854 Alcoa CDIs. Alcoa also delivers Alumina a draft exclusivity and transaction process deed (**Process Deed**). The Process Deed requested a hard exclusivity period of up to 4 weeks to negotiate a binding scheme implementation deed consistent with the new revised NBIO. Alcoa informs Alumina that:

- If the parties can't reach agreement on the Process Deed before 26 February, it would publicly announce the terms of the NBIO indicating that it was the best price (meaning the best exchange ratio) Alcoa was willing to offer
- based on its discussions with Allan Gray, it anticipated strong support from Allan Gray.

26 February 2024

PRE-SCHEME AGREEMENT

Alcoa and Alumina sign and publicly announce the Process Deed. Alcoa and Allan Gray enter into the conditional share sale agreement under which a controlled subsidiary of Alcoa had the right to acquire from Allan Gray up to 19.9% of Alumina shares at a price of 0.02854 Alcoa CDIs for each Alumina share (the same fixed exchange ratio).

12 March 2024

SCHEME IMPLEMENTATION DEED SIGNED

Alcoa and Alumina sign a scheme implementation deed under which Alcoa proposes to acquire Alumina on a scrip-for-scrip basis.

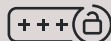
KEY FEATURES OF THE ALCOA-ALLAN GRAY PRE-SCHEME AGREEMENT AND LESSONS LEARNED

The Alcoa-Allan Gray conditional share sale agreement provided Alcoa with a foothold on Alumina shares, as well as transaction support from Allan Gray. The three key elements were:



STRUCTURE

A conditional sale agreement which gave Alcoa a conditional right to acquire up to 19.9% of Alumina from Allan Gray by issuing 0.02854 Alcoa CDIs for each Alumina share, once Alcoa satisfied various conditions including obtaining approvals to list on ASX and quote the CDIs. While these approvals would be obtained as part of the overall scheme process, it is questionable whether they were obtainable on a standalone basis should the scheme not be successful.



LOCK UP

The agreement locked up Allan Gray for a maximum period of three months. This meant that Allan Gray could not deal with interlopers for that period, giving Alcoa a level of assurance that Allan Gray supported its proposal.



TERMINATION

The agreement automatically ended after the three month lock up and could end earlier if (1) a scheme implementation deed was entered into at the fixed exchange ratio and (2) Allan Gray made a public voting intention statement that it intends, in the absence of a superior proposal, to vote any Alumina shares that it has in favour of the scheme.³

The Alcoa-Allan Gray conditional share sale agreement was terminated by Alcoa on 20 May when Alcoa published its preliminary proxy on the SEC. Alcoa's preliminary proxy stated that Allan Gray "has confirmed it continues to be supportive of the proposed transaction".

Given the agreement was terminated, Alcoa no longer had a relevant interest in the shares held by Allan Gray nor could there be said to exist any ongoing association. It may have been challenging for Alcoa to continue to hold a lock-up over (and therefore relevant interest in) the Alumina shares held by Allan Gray through to the scheme meeting date as that would have raised questions about the ability of those shares to be voted. Additionally, had Allan Gray made a formal voting intention statement, there might have been a concern as to whether the parties were associates, or at least what ASIC's and the Court's position might have been.⁴

Finally, proposing a pre-scheme agreement is not the only way forward for a bidder to successfully implement a takeover scheme. In addition to the Alcoa/Alumina scheme, 2024 has also witnessed a joint bid for ASX-listed Adbri Limited by CRH and Adbri's major shareholder the Barro Group. These deals should give bidders comfort that there are options for dealing with major shareholders and successfully implementing a takeover scheme.

The views expressed in this note are the views of the King & Wood Mallesons M&A team only and are based solely on publicly available information.

1. The proposed acquisition of Alumina by NYSE listed Alcoa Corporation (**Alcoa**) requires Alcoa stockholder approval under NYSE listing rules. To that end, Alcoa has published a preliminary proxy statement which is publicly available on U.S. Securities and Exchange Commission website. Alcoa's proxy statement summarises certain key events leading up to signing of the scheme implementation deed with Alumina. The proxy statement provides a unique insight into the "how" of the transaction which would otherwise not be made public for a domestic Australian public M&A deal. Equivalent publicly available "how" summaries were published on the Afterpay/Square and Newmont/Newcrest transactions, however, neither of those deals involved complex pre-deal agreements. Our KWM team has had a role on all three deals.

2. Despite ASIC's statement, there are recent examples of schemes involving shareholders who have given voting intention statements in excess of the 20% threshold e.g. Singapore Power, which owned 32.74% of AusNet Services shares, provided a voting intention statement to the target in relation to the successful Brookfield scheme proposal.

3. Upon signing of the Alcoa/Alumina scheme implementation deed, Allan Gray did not make a formal voting intention statement, but rather confirmed that it continued to be supportive of the proposed transaction.

As noted above, the Alcoa-Allan Gray agreement automatically expired after 3 months (at the end of May) and the announcement of its termination of 20 May ended the agreement between the parties.

4. Cf Re Hostworks Group Ltd [2008] FCA 64 at [45].



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