GILBERT + TOBIN

DEAL REPORT: AUSTRALIAN UNITY OFFICE FUND SCHEME

NOVEMBER 2019

TRANSACTION SNAPSHOT

The **Transaction** involved a proposal by CHAB to acquire all of the issued units in AOF via a trust scheme as contemplated by the Takeovers Panel's Guidance Note 15 *Trust Scheme Mergers* (**Scheme**).

CHAB announced its intention to acquire all the units in AOF on the same day it acquired a strategic pre-bid stake of 19.9% in AOF for cash consideration of $2.95 per unit.

Following the execution of a scheme implementation agreement in respect of the Transaction (**Implementation Agreement**) at an improved offer price of $3.04 per unit on 14 August 2019 and the acquisition of units by certain other unitholders who were expected to vote against the Scheme, CHAB divested its entire pre-bid stake prior to the Scheme meeting for consideration of $2.95 per unit while maintaining its commitment to the Scheme. The circumstances pertaining to the disposal of the pre-bid stake prompted ASIC to make an application to the Takeovers Panel for a declaration of unacceptable circumstances.

Despite the divestment of the pre-bid stake and resulting increase in the pool of prospective unitholders who may have voted in favour of the Scheme, the Scheme failed to receive the requisite level of unitholder support at the Scheme meeting held on 18 November 2019. On 19 November 2019, AUIREL announced that the Scheme would not proceed.

PARTIES

TARGET

Australian Unity Office Fund (**AOF**). Australian Unity Investment Real Estate Limited (**AUIREL**) is the responsible entity for AOF and, if the Scheme had been implemented, would have been removed as responsibility entity of AOF and replaced by a member of the Charter Hall Group.

BIDDER

A consortium comprised of Charter Hall Group (**Charter Hall**) and Abacus Property Group (**Abacus**), acting through CHAB Office Pty Ltd as trustee for the CHAB Office Trust (**CHAB**).

CONSIDERATION

Cash consideration of $3.04 per unit, increased from an initial offer price of $2.95 per unit.

The increase in cash consideration offered by CHAB:

+ pre-dated AUIREL's announcement on 17 July 2019 (being one and a half months after receipt of CHAB's initial proposal) that it would formally engage with CHAB by providing due diligence access on a non-exclusive basis for a four week period, but followed an announcement by AUIREL on 26 June 2019 that AOF's net tangible assets per unit as at 30 June 2019 was estimated to have increased to $2.78 per unit (from $2.67 per unit as at 31 December 2018); and
+ was accompanied by a statement that its improved proposal was best and final such that, in the absence of a competing proposal, CHAB would not increase its offer price above $3.04 per unit.

PERMITTED DISTRIBUTION

A distribution of 3.95 cents per unit which was announced prior to announcement of the Transaction.

TRANSACTION VALUE

Based on the Consideration and the Permitted Distribution:

+ an implied equity value of $501 million; and
+ an enterprise value of $698 million.

BOARD RECOMMENDATION

Unanimous support for the Transaction by the AOF independent directors, in the absence of a superior proposal.

PREMIUM

The Consideration represented a:

+ 9.4% premium to AOF's closing price of $2.78 on 3 June 2019, the day prior to the initial announcement by CHAB of its intention to acquire all of the units in AOF;
+ 11.8% premium to the 30-day VWAP up until 3 June 2019 of $2.72;
+ 12.5% premium to the 3-month VWAP up until 3 June 2019 of $2.70; and
+ 9.0% premium to AOF's net tangible assets per unit of $2.79 as at 30 June 2019.

ACQUISITION OF PRE-BID STAKE

On 4 June 2019, CHAB:

+ acquired a strategic interest of 19.9% in AOF at $2.95 per unit;
+ announced its intention to acquire all the units in AOF not currently held by CHAB by way of trust scheme for $2.95 per unit; and
+ entered into a Framework Agreement with Charter Hall and Abacus, governing their conduct in pursuing the Transaction.

AUIREL announced on 3 July 2019 that CHAB had increased the indicative acquisition price to $3.04 per unit and that such price was best and final.

ACCUMULATION OF A POTENTIAL BLOCKING STAKE AND DIVESTMENT OF PRE-BID STAKE

In a series of transactions from 23 October 2019 to 11 November 2019, Hume Partners Pty Ltd, an existing unitholder of AOF, increased its stake from 6.55% to 11.4%. It was reported in the media that Hume Partners proposed to vote against the Scheme and that such acquisitions may have been a blocking tactic.

On 31 October 2019, it was announced that CHAB had divested its entire 19.9% interest in AOF in an off-market sale at a price of $2.95 per unit (**CHAB Divestment**), being less than the prevailing market price at the time of approximately $3 per unit. In making such announcement, CHAB reaffirmed its commitment to pursuing the Scheme and confirmed that the CHAB Divestment did not affect the terms or consideration offered under the Scheme.

By divesting its pre-bid stake, CHAB increased the pool of prospective unitholders who may vote in favour of the Scheme, thereby (in effect) decreasing the relative voting power of Hume Partners.

AUIREL noted that it was concerned to ensure that those purchasers of CHAB's units under the CHAB Divestment were not associates of CHAB and accordingly, sought confirmation from CHAB that it had not entered into any arrangements or agreements with those purchasers in relation to how they would vote in respect of the Scheme. The Scheme meeting was delayed from 7 November 2019 to 18 November 2019 to allow unitholders adequate time to consider the CHAB Divestment.

APPLICATION TO TAKEOVERS PANEL

In a media release on 14 November 2019, the Takeovers Panel noted that it had received an application from ASIC in relation to the Transaction and the CHAB Divestment. In its application, ASIC made the following submissions:

+ that CHAB had intervened in the market for securities in AOF during the course of the Transaction in a way that undermined the integrity of the trust scheme mechanism and the basis for the compulsory expropriation of interests in AOF that would have resulted if the Scheme had been approved; and
+ if the Scheme had been approved, not all unitholders would have had an equal opportunity to participate in the benefits offered given the selective nature of the sale process undertaken to effect the CHAB Divestment. We infer that this submission relates to the fact that units were sold at a price of $2.95 when the prevailing market price for AOF units was above $3.

ASIC sought an interim order that the Scheme meeting set for 18 November 2019 be adjourned. ASIC also sought the following final orders that:

+ in the event the Scheme is approved, CHAB gives a cash payment to all AOF unitholders (other than those who purchased units from CHAB under the CHAB Divestment) that is equivalent to the difference between the sale price under the CHAB Divestment (that is, $2.95) and the prevailing market price (being just above $3); or
+ AOF is to determine whether the requisite majorities for the Scheme resolutions are achieved by subtracting 19.9% of units from all votes cast in favour of the resolutions and treating those units as if they did not cast a vote – that is, as if CHAB still held the pre-bid stake of 19.9%.

The Takeovers Panel made no comment on the merits of the application; however, on 15 November 2019, it announced that AUIREL had undertaken not to cause the Scheme to become effective until the Takeovers Panel had determined ASIC's application. Accordingly, the Takeovers Panel declined to make the interim order sought by ASIC to adjourn the Scheme meeting set for 18 November 2019.

Following an announcement by AUIREL that the Scheme would not proceed due to the Scheme failing to receive the requisite level of unitholder support, ASIC sought and obtained the Takeovers Panel's consent to withdraw its application.

THE DIVESTMENT IN VOCUS / AMCOM – THE SAME OR DIFFERENT?

In relation to the orders sought by ASIC to have the results of the Scheme resolutions calculated by excluding CHAB's pre-bid stake, similar circumstances existed in relation to Vocus' successful members' scheme of arrangement to acquire all of the shares in Amcom Telecommunications in 2015.

Following the acquisition of a blocking stake of 19.99% by TPG, a competitor of Vocus, Vocus divested its existing stake of 10% of the shares in Amcom prior to the scheme meeting, thereby enabling those shares to be voted on the resolution to approve the scheme.

The Court in Vocus noted that a bidder which disposes of its pre-bid stake in a target does not, ipsofacto, contravene any legal rule or principle. However, the facts relating to the disposal can give rise to collateral problems that might cause the Court to discount or disregard votes at a scheme meeting. The main kinds of collateral problems that may arise are:

+ where the bidder engages in misleading conduct by representing that it would retain the pre-bid stake or misrepresenting the nature of the divestment; or
+ if a bidder disposes of its pre-bid stake to a related body corporate or an associate.

In approving that scheme, the Court noted that the divestment by Vocus was completed in accordance with precise parameters intended to ensure that Vocus would not become an associate of any purchaser. The divestment was conducted on arm's length terms to institutional investors, there were no discussions between Vocus and any potential purchasers in relation to how any purchaser would vote, and the parties were not acting in concert.

ASIC made submissions in support of Vocus, noting that:

+ the arm's length sale process did not allow for a relevant understanding, agreement or conferral of a collateral benefit; and
+ it had not identified any evidence that Vocus had acquired the pre-bid stake for the purpose of later conducting the divestment to increase the vote in favour of the scheme.

The Court found that there was no basis to disregard or discount any votes cast by purchasers in those circumstances.

LEVEL OF UNITHOLDER SUPPORT

The Scheme failed to receive the requisite level of unitholder support at the Scheme meeting held on 18 November 2019.

For the Scheme to proceed, unitholders had to approve each of the following resolutions:

+ an ordinary resolution to approve CHAB acquiring all of the units in AOF for the purpose of item 7 of section 611 of the Corporations Act (**Approval Resolution**). The Approval Resolution was carried, with 62.60% of votes cast in favour; and
+ a special resolution to amend the Trust Constitution (**Amendment Resolution**). The Amendment Resolution was required to enable the Scheme to be implemented and to make it binding on all unitholders. The Amendment Resolution was not carried, with 62.82% of votes cast in favour, falling short of the requisite 75% special majority, (together, the **Scheme Resolutions**).

Following the announcement that the Scheme Resolutions had not been carried by the requisite majorities, CHAB announced that the Transaction would not proceed and on 19 November 2019 AUIREL announced that the Implementation Agreement had been terminated by the parties.

FINANCING ARRANGEMENTS

CHAB proposed to fund the acquisition by using a combination of:

+ equity commitments from related entities of Charter Hall and Abacus; and
+ third party debt financing.

The third party debt financing was proposed to take the form of debt funding arrangements for an aggregate amount of approximately $375 million from a syndicate of ANZ, NAB and HSBC.

The Scheme booklet noted that the Scheme was not conditional upon finance. It was also noted that CHAB would have sufficient equity to fund the aggregate Consideration in full, such that funding of the Scheme was not subject to obtaining the debt finance.

At the time that the Scheme booklet was issued, CHAB already held 19.9% of the units. The aggregate Consideration which would have been payable was therefore greater following the CHAB Divestment. Notwithstanding this, we infer that CHAB was still in a position to fund the aggregate Consideration through equity commitments based on there being no further announcements to the contrary prior to the Scheme meeting.

CONDITIONS PRECEDENT

+ FIRB approval and any necessary ASIC relief.
+ Support of AOF unitholders by the requisite majorities.
+ Court approval of the Scheme and the grant of judicial advice in respect of the Scheme.
+ No legal restraint rendering unlawful implementation of the Transaction.
+ No material adverse change in respect of AOF – triggered by diminution in net assets ($23 million) or recurring funds from operations ($1.4 million), in each case other than as a result of certain specified matters.
+ No prescribed occurrence in respect of AOF.
+ No breach of representation or warranty.
+ Completion of certain corporate restructure steps.
+ Receipt of a specified third-party consent.
+ Execution of certain deeds of retirement and appointment in relation to each of the sub-trusts of the AOF group.

EXCLUSIVITY

Yes – customary suite of no shop, no talk, no due diligence, notification and matching right provisions; however, we note that the notification obligation was (in addition to the no talk and no due diligence provisions) the subject of a fiduciary exception.

BREAK FEE

Amount: Approximately $4.9 million (being approximately 1% of implied equity value).

Payable if:

+ the independent directors fail to recommend, or withdraw or adversely change their recommendation, that AOF unitholders approve the Scheme Resolutions, unless the independent expert concludes that the Transaction is not in the best interests of AOF unitholders or AUIREL is entitled to terminate the Transaction in accordance with the Implementation Agreement;
+ a 'Competing Proposal' of certain specified kinds is announced during the Exclusivity Period and completes within 12 months from the date of the Implementation Agreement; or
+ CHAB has terminated the Implementation Agreement in certain specified circumstances.

REVERSE BREAK FEE

No

TERMINATION

Either party may terminate for:

- material unremedied breach;
- the imposition of a temporary restraining order, preliminary or permanent injunction or other order by a government agency which would prevent the implementation of the Scheme; or
- the non-fulfilment of a condition precedent which is expressed to benefit that party or if the Scheme has not become effective by the agreed sunset date.

CHAB may terminate if AOF experiences a prescribed occurrence or the independent directors change, modify or withdraw their recommendation in respect of the Scheme.

AUIREL may terminate if the independent directors change, withdraw or modify their recommendation following receipt of an unmatched superior proposal or if the independent expert concludes that the Transaction is not in the best interests of AOF unitholders.

Either party may terminate in certain circumstances as a result of the other party being in material breach of a representation or warranty given by that other party.

KEY POINTS TO NOTE FOR FUTURE TRANSACTIONS

- ASIC appeared to take issue with CHAB's divestment of a significant interest in AOF prior to the Scheme meeting, which ASIC may have perceived as a tactic to decrease the relative voting power of unitholders who were anticipated to vote against the Scheme. ASIC submitted that CHAB had intervened in the market for securities in AOF in a way that undermined the trust scheme mechanism and sought orders that AOF determine whether the Scheme Resolutions would have been passed had CHAB's pre-bid stake been excluded from voting in favour of the Scheme. Unfortunately, ASIC's detailed submissions on this point are not publicly available; however, in relation to the Vocus-Amcom scheme, ASIC did not object to the divestment of a pre-bid stake on arm's length terms to counter the effects of TPG's blocking stake.
- The final orders sought by ASIC suggest that ASIC was concerned to ensure that AOF unitholders were treated equally following CHAB's divestment of a significant stake in AOF at a price below the prevailing market price. ASIC sought an order that, if the Scheme had been implemented, CHAB would have been required to pay an additional amount to those unitholders who did not purchase CHAB's divested stake such that all unitholders received the same financial benefit.
- The Takeovers Panel was not inclined to require the adjournment of the Scheme meeting following an application from ASIC in circumstances where AUIREL had undertaken not to implement the Scheme prior to the Takeovers Panel providing its determination.

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