The Australian

# Mitr Phol's play adds to 'Bear Hug' grip

- **by: Bryan Frith**
- From: **The Australian**
- November 10, 2011 12:00AM

Mitr Phol's bid for Maryborough Sugar has narrowed the gap between schemes of arrangements and takeovers
*Source:* Bloomberg

**THE differences between schemes of arrangement and takeover offers as change of control transactions has narrowed even further with Mitr Phol's $313 million bid for the Queensland sugar miller Maryborough Sugar (MSF).**

Today, potential bidders like to conduct due diligence on the target companies and it has become commonplace for due diligence to be completed before the parties agree on a scheme offer and enter into a contractual implementation agreement.

There have been cases where bidders under a takeover offer have been allowed to conduct due diligence, but Mitr Phol wanted to go a step further and make any bid conditional on having completed limited due diligence and being satisfied with the outcome.

That presented a problem as Section 629 of the Corporations Act prohibits the inclusion in a takeover offer of a defeating condition, which depends for fulfilment on the bidder's "belief or other state of mind" or the happening of an event that is within the sole control of, or is a direct result of action by, the bidder and any associates.

The problem was resolved by making due diligence a precondition, so that if the Thai group is not satisfied after due diligence it is under no obligation to proceed with a bid.

That does not trigger the section 631 requirement to post an offer to target shareholders within two months of announcing a takeover offer.

The intent of that section is to ensure that bids are not announced unless there is a firm intention to proceed. But today the section is honoured in the breach, and it has become commonplace for the announcement of "indicative, incomplete and conditional" proposals that do not amount to offers. In many cases, such proposals are leaked by a potential bidder in an attempt to mobilise the target shareholders to pressure the target board to engage, which have become known as "bear hugs".

By disclosing the offer terms and the due diligence pre-condition, MSF has ensured that the market is informed and has been alerted to the possibility that a bid may not eventuate.

MSF is already reasonably well known to Mitr Phol. In the 12 months since acquiring a strategic 19.9 per cent of the sugar miller, executives from the Thai group have made a number of visits to talk to the board and growers and make site visits to familiarise themselves with the business.

Late last week, a senior executive of Mitr Phol contacted MSF chairman James Jackson with a proposal to acquire the company. Discussions were held over the weekend between the Thai group and its adviser Barclays and MSF and its adviser Greenhill Caliburn Partnership and agreement was reached early on Wednesday morning.

Under the agreement, Mitr Phol has exclusivity until November 21 to conduct due diligence to decide whether to proceed with a firm offer.

Commendably, and unusually, the scope of the limited due diligence has been disclosed; it is only of a confirmatory nature.

Mitr Phol wants to review summaries of material sugar supply and insurance agreements and claims, property titles and water allocation rights, debt facilities, any undisclosed material contingent liabilities, any material litigation and summaries of change of control and termination provisions in material contracts.

If the due diligence proves to be satisfactory, Mitr Phol will make a cash bid of $4.45 a share, which is a premium of $1.05c, or 30.9 per cent to the previous closing price of $3.40 and a premium of 37.8 per cent to the one month VWAP of $3.23.

The MSF board has made no recommendation at this stage, but if a bid is made they intend to recommend acceptance and to accept for their holdings, subject to an independent expert determining that the offer is fair and reasonable.

The market responded yesterday by boosting MSF's share price by $1.01 to $4.41 on heavy turnover for the company of more than 2.1 million shares, indicating confidence that the bid will proceed.

The share register is widely held. Apart from Mitr Phol, the only substantial shareholder is Perpetual, with 5 per cent.

The bid would have relatively few conditions, comprising a minimum acceptance of 50.1 per cent, FIRB and Thai regulatory approval, no material adverse change and the prescribed occurrences.

It's thought that Mitr Phol initially sought a 90 per cent minimum acceptance condition, but there is strong international interest in sugar stocks at present, with considerable consolidation taking place in the industry and MSF and its advisers wanted to maximise the possibility of triggering a competitive auction for the company, despite Mitr Phol having its foot on a highly strategic 22 per cent stake.

The 50.1 per cent minimum acceptance condition also increases the potential to end up with a minority interest remaining after the close of the bid. It's also thought that Mitr Phol initially proposed an offer price of $4.35 a share, but MSF and its advisers managed to secure an increase, which is an indicator of the Thai group's desire to secure control, and perhaps to deter any other interested parties.

But MSF also had to make some compromises. One relates to the requirement to pay a 1 per cent break fee of $3.1m if a rival party announces a "competing transaction" and manages to secure at least 15 per cent of MSF. Normally, such provisions require the rival party to succeed. But viewed against the higher bid price and lower minimum acceptance condition, that is a relatively minor concession.

Mitr Phol is a privately owned group owned by the Vongkusolkit family and founded more than 70 years ago. It is Thailand's fourth-largest producer and second-largest exporter of sugar and on a global basis is ranked No 5.

On past experience, the bid will receiver foreign investment approval, but FIRB in recent times has been showing more sensitivity about proposed acquisitions in the agricultural sector.

Some observers have been hopeful that Australian sugar millers would combine to produce a national champion, but the level of foreign takeovers that has taken place probably means that opportunity has now been lost.

A takeover of MSF would leave the co-operative, Mackay Sugar, as the only remaining sizeable independent.

And it must be wondered how long that will last, as Mackay has indicated that it is open to offers.

**bfrith@acenet.com.au** *(mailto:bfrith@acenet.com.au)*