HERBERT SMITH FREEHILLS

TAKEOVERS AND SCHEMES OF ARRANGEMENT IN AUSTRALIA

LEGAL GUIDE

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Takeovers and schemes of arrangement in Australia

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About this booklet

This booklet is intended as a general guide. By necessity, it only summarises the main features of the law and practice relating to takeovers bids and schemes of arrangement. Accordingly, many aspects of the law and practice are not fully described. Obviously, this booklet should not be relied on as a substitute for obtaining specific advice before determining a course of action.

This booklet was updated in March 2023

1 Australia's M&A market

Australia has a very active M&A market. It is one of the busiest in the world. This reflects a strong economy, stable government, a welcoming attitude to foreign investment and a well-developed set of rules for M&A activity.

The main law regulating the M&A market is the Corporations Act 2001. This is administered by the Australian Securities & Investments Commission (**ASIC**), which takes a deep interest in ensuring that not only are transactions carried out in accordance with the letter of the law, but also consistent with policy objectives of the law.

Australia also has rules regulating foreign investment and transactions that may affect competition.

The key rules are discussed in section 2 of this booklet.

Types of transactions

The acquisition of control of publicly held companies in Australia may occur in various ways. The most common ways are by 'takeover bid' and by 'scheme of arrangement'.

In general terms, a **takeover bid** involves an acquisition undertaken by making offers to the shareholders of the target company. Once sufficient shares have been acquired (normally 50%), control of the target will pass to the bidder, who will then be able to appoint new directors and control the company's operations.

A **scheme of arrangement**, on the other hand, is a transaction which becomes binding on all shareholders once it is approved by a majority of shareholders (including 75% of votes cast) and also by the court. It is a transaction that is driven by the target company so that, unlike a takeover bid, it can only be undertaken on a friendly basis.

Where a takeover or scheme of arrangement leads to a combination of two businesses of comparable size, it is commonly referred to as a **merger** if it is an agreed or recommended transaction and shares in the combined business are issued as consideration. A merger often proceeds without a premium for control flowing from one party to the other, whereas under a takeover, a premium for control is usually paid to target company shareholders.

This booklet discusses takeover bids, schemes of arrangement and the laws that govern these transactions.

2 Legislative framework

In Australia, takeovers and schemes of arrangement are governed by a number of different and overlapping pieces of legislation. This section discusses the legislation most commonly encountered. Other specific industry legislation can be relevant—for example, laws governing banking, media, insurance and trustee companies.

2.1 Corporations Act

The Corporations Act is the main legislation governing the acquisition of control of public companies in Australia. The legislation aims to ensure that an acquisition occurs in an efficient and competitive fashion and that shareholders and directors of the target know the identity of the proposed acquirer, have sufficient time and information to assess the proposal and all shareholders have reasonable and equal opportunities to participate in benefits arising under the transaction.

ASIC has extensive discretionary powers to modify, or to exempt parties from compliance with, certain provisions of the rules that apply to takeover bids. These powers are exercised when strict compliance with the law would lead to unnecessary costs or be contrary to the intention of the legislation.

When do the takeover provisions apply?

The key prohibition in the legislation applies where there is:

- an acquisition of control over issued voting shares in a listed company, or in an unlisted company that has more than 50 shareholders; and
- that acquisition results in the number of shares controlled by one person or his or her associates increasing:
  - from 20% or less, to more than 20%; or
  - from a starting point that is above 20% and below 90%.

The rule means that a person cannot purchase a stake greater than 20%, unless that occurs under an exception (such as under a formal takeover bid or scheme of arrangement). In other words, the law does not permit a person to buy a stake over 20% provided he or she then makes a bid to other shareholders. This is an important difference from the approach under the UK rules. Our approach tends to produce a contest or auction for control as the takeover process unfolds.

A contravention of the restriction is serious. It can constitute a criminal offence and may lead to other penalties and the forced divestment of the shares acquired in contravention of the law.

To whom do the takeover provisions apply?

The provisions apply to acquisitions in Australian incorporated companies that are listed in Australia or have more than 50 shareholders. They do not apply to a company merely because it has operations in Australia.

The rules also apply to acquisitions in listed managed investment schemes (which are typically unit trusts which own real estate). This is achieved by equating features of a listed managed investment scheme with a listed company. This avoids the need to

repeat the takeover provisions specifically for listed managed investment schemes.

Takeovers of listed managed investment schemes can also raise difficult issues relating to collateral benefits, particularly if it is proposed that a payment will be made to an outgoing manager. In those cases, it may be necessary to seek unitholder approval, or ASIC relief, to allow the payment to be made.

A listed managed investment scheme may also be acquired through a 'trust scheme'. Unitholders are asked to vote to approve the acquisition and amendments to the trust's constitution required to effect the acquisition. Judicial advice may also be sought from the court regarding convening the meeting of unitholders and implementation of the transaction.

What are the main exceptions to the prohibition?

There are various exceptions, as discussed in section 10 of this booklet. The main exceptions allow acquisitions under a formal takeover bid or under a formal scheme of arrangement. Others include shareholder approved acquisitions and creeping acquisitions of no more than 3% in a six month period.

2.2 Foreign Acquisitions and Takeovers Act

The Foreign Acquisitions and Takeovers Act 1975 (**FATA**) may be relevant if the bidder is a foreign person.

In general terms, the FATA requires that the Australian Treasurer (acting through the Foreign Investment Review Board (**FIRB**)) be notified in advance of a proposed acquisition:

- by a foreign person of 20% or more of the shares of an Australian corporation carrying on an Australian business with total assets or issued securities valued at more than A$310 million (a higher threshold of A$1,339 million applies to direct acquisitions by prescribed non-government investors including Chilean, Chinese, Hong Kong, Japanese, South Korean, Singaporean, United States, New Zealand and Peruvian companies in non-sensitive sectors)[1]; and
- by a group of foreign persons of an 'aggregate substantial interest', being 40% or more of the shares of such an Australian corporation.

Actions which the Australian Treasurer must be notified of are referred to as 'notifiable actions' and include agreements to make proposed acquisitions. The Treasurer must also be notified of actions relating to a 'national security business', which are referred to as 'notifiable national security actions'.

The FATA gives the Treasurer power to prohibit a 'notifiable action' which would be contrary to Australia's national interest. The Treasurer assesses 'notifiable national security actions' against threats to Australia's national security.

[1] The figures of A$310 million and A$1,339 million (and any other references to those figures in this booklet) apply from 1 January 2023 until 31 December 2023 and are subject to annual indexation.

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The Treasurer can also make divestment orders where a transaction has already been implemented without prior approval. As such, the Treasurer may be notified and prior approval sought even when there is no strict requirement to do so.

Under the FATA, a 'foreign person' includes:

- a person not ordinarily resident in Australia;
- a foreign government. Generally, most direct investment by foreign governments, their agencies (for example, state-owned enterprises and sovereign wealth funds) and entities in which a foreign government has a substantial interest must be notified to FIRB for review regardless of the value of the investment;
- a corporation or trustee of a trust (including an Australian entity) if:
  - an overseas resident, foreign corporation or foreign government owns 20% or more of issued shares or units; or
  - various overseas residents, foreign corporations or foreign governments own 40% or more, even if they are not associated.

  In applying the second test to listed entities, only holders of 5% or more are counted.

FIRB often wishes to consult with a target company and other relevant regulatory bodies prior to giving approval. This could include communication with the Australian Competition and Consumer Commission (**ACCC**), Australian Taxation Office (**ATO**) and, where critical infrastructure assets (such as electricity, gas, telecommunications, water and ports) are involved, the Cyber and Infrastructure Security Centre. This consultation process must be managed to avoid premature disclosure of the proposed transaction and to navigate timing and execution risks.

The FATA also contains important provisions, which impose different thresholds and obligations, in respect of acquisitions of:

- Australian land and companies whose Australian land assets comprise more than 50% of the value of their total assets;
- agribusinesses and companies whose agricultural land assets comprise more than 50% of the value of their total assets;
- businesses in sensitive sectors, which include media, telecommunications, transport, defence and military related industries, encryption and securities technologies and communication systems, and the extraction of uranium and plutonium or the operation of nuclear facilities; and
- direct investments in an Australian media business (generally 10% or more).

2.3 Competition implications

The competition implications of Australian mergers and acquisitions are dealt with in the Competition and Consumer Act 2010 (the **CCA**), which is administered by the ACCC.

The CCA prohibits anti-competitive mergers and acquisitions. The relevant test is whether the transaction would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

Applying this test involves a 'counterfactual' analysis, whereby the ACCC assesses whether competition would be substantially lessened in a future with the acquisition compared to a future without the acquisition. Whether an effect is 'substantial' depends on a close consideration of the facts in a particular situation.

Generally, the ACCC takes the view that a lessening of competition is substantial if it confers an increase in the market power of the merged firm that is significant and sustainable. For example, a merger may substantially lessen competition if there is a real commercial likelihood that the merged firm would be able to significantly and sustainably increase prices.

Factors which must be taken into account include post-merger market concentration, barriers to entry and expansion, actual and potential import competition and the availability of substitutes.

Unlike the majority of overseas jurisdictions, there is no compulsory pre-merger or pre-acquisition notification requirement in Australia. However, in view of the significant remedies and penalties that can be imposed for completing an anti-competitive merger, parties will often engage with the ACCC on a voluntary basis. The ACCC encourages parties to notify it well in advance of completing a merger or acquisition where both of the following apply:

- the products of the merger parties are either substitutes or complements; and
- the merged firm will have a post-merger market share of greater than 20% in a relevant market.

This is a low threshold.

Informal clearance

Parties will often seek 'informal clearance' from the ACCC. The timeline for informal clearance depends on whether the ACCC deems it necessary to conduct public market enquiries and if so, whether a statement of issues is published, requiring a second phase of review. The overall process can range from a few weeks for straightforward matters, to up to six months or more for the most complex assessments.

While the ACCC can consult publicly, information provided to the ACCC by the parties, and by third parties, will remain confidential.

If, following a review, the ACCC determines that the merger or acquisition is not likely to contravene the CCA, it will provide a 'no objection' letter. While such a letter is not binding on the ACCC, past practice shows that it gives a high degree of regulatory comfort. The ACCC considers the vast majority of mergers under the informal clearance process, and clears most without the need for a public review.

2 Legislative framework

If the ACCC indicates that it has concerns with a transaction, the acquirer may offer the ACCC undertakings that seek to address those concerns. This commonly involves divesting parts of the target's business or assets to a third party.

Merger Authorisation

As an alternative to the 'informal clearance' process, an acquirer may apply to the ACCC for 'merger authorisation'.

In order to grant the authorisation, the ACCC will need to be satisfied that either:

- the proposed acquisition would not be likely to substantially lessen competition; or
- the likely public benefit from the proposed acquisition outweighs the likely public detriment, including any lessening of competition.

Authorisation is most likely to be sought where there are substantial public benefits to the merger, as these benefits cannot be taken into account under the informal clearance process.

However, the merger authorisation process raises a number of other important considerations.

Authorisation involves a public process, in which the applicant's submissions will be made public (subject to confidentiality claims) and interested third parties have the ability to make submissions. The process also involves extensive document and information production to the ACCC, and is subject to a 90 day statutory timeline (which can be extended with the applicant's consent).

The applicant can seek review of the ACCC's decision in the Australian Competition Tribunal, and interested parties can also seek review.

3 Preparing for a transaction

3.1 Establish a team

It is important to be well prepared before embarking on an M&A transaction. The bidder should establish a working group comprising relevant company executives and external advisers. The exact make-up of the group will depend on the transaction proposed, but should include senior finance, operational and legal executives from the company. The external members should be briefed about the company's current position and long-term strategy.

3.2 Identify commercial objectives

The commercial objective for the bidder needs to be articulated. In planning an acquisition, the bidder needs to consider the value of the target company and its assets and whether the benefits hoped to be achieved can best be obtained by making a bid or a scheme of arrangement or by proposing some other type of transaction, such as a shareholder-approved placement or an asset purchase.

The same analysis can assist in responding to a takeover bid as it may identify that the bidder may be seeking only a particular asset or outcome.

3.3 Pre-bid discussions and due diligence

A bidder will usually contact the target company in the hope of achieving a friendly bid. If the target is receptive, this will lead to the bidder being granted due diligence and potentially a recommendation by the target's directors that shareholders support the transaction.

Discussions may also be undertaken with major shareholders to gauge the price level at which a bid may be successful. However, any agreement that a major shareholder would accept a bid or sell its shares may be illegal if the bidder would, as a result of such agreement, breach the general 20% limit (discussed in section 2.1).

Target due diligence and confidentiality agreements

If the target is willing to engage with the bidder, due diligence will be allowed. A confidentiality agreement is invariably entered into, which is designed to protect the secrecy of these discussions, as well as restrict the use of any confidential information that is exchanged between the parties. The confidentiality agreement may also contain standstill provisions which prevent the bidder from acquiring target shares for a period of time.

The bidder should be careful to ensure that any confidentiality arrangements it enters into with the target company allow it to disclose material information in its formal documents.

Public sources of information

If the target is not willing to engage, information about the target may be difficult to obtain. Some information can be obtained from searches of public records. This should indicate whether there are any defensive provisions in the target's constitution or in terms of issue of securities, details of existing substantial holdings and details of any recent

3 Preparing for a transaction

capital raisings. Share registers are also available for inspection.

Internal due diligence

In addition, a bidder must exercise diligence in relation to its own affairs before embarking on the transaction. This includes ensuring that it has sufficient finances to pay for the acquisition and all incidental costs, such as legal and advisory fees. It is also necessary to ensure that all public statements it makes in connection with the transaction are not misleading or deceptive, as the Corporations Act may impose civil and criminal liability on persons who make such statements.

3.4 Tax

The tax impact of the bid on the bidder and on shareholders in the target must be considered. If tax consolidation is important, 100% of the target's issued securities (including convertible securities) should be acquired.

3.5 Stake-building

Pre-bid acquisitions

Before launching a transaction, it is generally lawful to acquire a toehold of up to 20% of the issued voting shares in the target. This may enable acquisitions at lower pre-bid prices and may deter others from buying into the company as rivals. It also gives standing to challenge the actions of the target's directors if necessary.

However, there are disadvantages of acquiring such an interest, including raising market prices, compulsory disclosure to the target and relevant securities exchange once interests in 5% or more of voting shares in the target have been acquired (see section 8.1 of this booklet) and becoming 'uncovered' by an ownership tracing notice (see section 8.3 of this booklet).

Furthermore, while share purchases may help a bidder reach control or the 90% compulsory acquisition threshold under a takeover bid, any shares acquired by a bidder cannot be voted to support a scheme of arrangement, which therefore increases the percentage of eligible voting shares held by possible spoilers.

The bidder should also consider whether FIRB approval is required for the pre-bid acquisition and whether the pre-bid acquisition would be unlawful under insider trading laws. Insider trading laws will be relevant if the bidder has received information through its due diligence that is not generally available and would have a material effect on the target's share price.

The price paid (or agreed to be paid) for securities in the bid class during the four months before a formal takeover offer is made will set a floor for the consideration required under the offer.

Pre-bid stake strategic options

Apart from a firm purchase of shares, it is also possible to take an option over shares from, or to enter into a pre-bid arrangement with, a key shareholder, up to the 20% limit, which may enable the bidder to require an acceptance in a takeover bid or require a vote in support in a scheme of arrangement. Such an agreement may deter others from making

a bid, even if the agreement is conditional on no higher unmatched rival bid emerging.

Other pre-bid stake options include taking an equity derivative in respect of shares in the target or obtaining public statements by target shareholders in support of the takeover bid or scheme of arrangement.

The pre-bid stake options have different implications in terms of cost, timing, disclosure and overall effectiveness, which should be assessed by a bidder based on the specific transaction.

Rules against escalators and collateral benefits

Agreements with shareholders in the target need to be carefully drafted in light of rules in the Corporations Act restricting 'escalator agreements' and 'collateral benefits'.

An 'escalator agreement' is an agreement where the bidder buys shares and undertakes to the seller to top up the purchase price if it makes a bid at a higher price subsequently.

These agreements are void if made within six months of a bid.

During the offer period, a bidder or its associates must not give a benefit to a person, which is not offered to all holders of securities in the bid class, and which is likely to induce the person or an associate to accept the offer or to dispose of securities in the bid class. These are referred to as 'collateral benefits'.

3.6 Agreed bids and deal protection mechanisms

One advantage of reaching agreement for a friendly transaction is that the bidder would usually get the benefit of an implementation agreement. This would typically include an undertaking that the bid will be recommended by directors (in the absence of a superior proposal).

It is also common in a recommended transaction for the bidder and the target to enter into deal protection mechanisms, including exclusivity and break fee arrangements, which may favour the bidder.

Care needs to be taken in structuring deal protection devices so as to not create a material disincentive to the prospect of the emergence of a rival bid as the Takeovers Panel has power to set aside those arrangements if it considers them to be unacceptable as anti-competitive.

Break fee arrangements

Break fees are common in recommended bids in Australia.

Typically, a break fee is an agreed amount that becomes payable if certain specified events occur that prevent the takeover or scheme of arrangement from proceeding (such as a change of recommendation or rival bid emerging).

3 Preparing for a transaction

Generally, a fee not exceeding 1% of the target's equity value is considered acceptable by the Takeovers Panel.

Exclusivity arrangements

The parties may also agree to exclusivity arrangements such as:

- 'no shop' or 'no talk' agreements, under which the target agrees not to solicit rival proposals from third parties and, subject to a fiduciary exception, not to negotiate with potential rival bidders; and
- notification and matching rights, under which the target agrees to notify the bidder if it receives an unsolicited proposal from a rival bidder, and not to recommend that proposal unless and until it has given the initial bidder a short period to match or better that proposal.

Again, these arrangements should be carefully drafted to ensure they do not contravene the Takeovers Panel's policy prohibiting anti-competitive arrangements.

4 Scheme of arrangement vs takeover bid

An initial question before proceeding with any change of control transaction is whether to conduct the transaction as a scheme of arrangement or a takeover bid. Several factors relevant to this decision are outlined in the table below.

SCHEME	TAKEOVER
Key features	
• Must obtain target shareholder and then court approval. • Process is driven by the target. • Can only be used in friendly deals.	• Only requires acceptances by shareholders. • Process is driven by the bidder. • Can be used in friendly or hostile deals.
An all or nothing transaction?	
• Yes. If the scheme is approved by target shareholders and the court, the bidder will acquire all of the shares in the target.	• Not necessarily. The bidder can obtain full ownership of the target if it acquires ≥90% of the target shares. However, 90% minimum acceptance conditions can be (and usually are) waived, thus creating a risk for the bidder of acquiring less than 90% of the target shares.
Approval threshold to acquire 100% of the target	
• 75% of the votes cast and 50% by number of shareholders voting for each class of target shareholders present and voting at the scheme meeting(s). • Having a 75% approval threshold (as opposed to a 90% threshold in a takeover) does not necessarily mean a scheme is easier to effect. The class voting system, the ability of the court to discount or disregard votes on the grounds of extraneous interests, and the impact of a low voter turnout can make a scheme easier to block.	• The bidder can compulsorily acquire any outstanding shares in the target if it has acquired ≥90% of the target shares and ≥75% of the shares that the bidder offered to acquire.

4 Scheme of arrangement vs takeover bid

SCHEME	TAKEOVER
Implications of the bidder holding a pre-bid stake	
• Can deter third parties from launching rival proposals. • However, a pre-bid stake cannot count towards the shareholder approval threshold. This means a pre-bid stake reduces the pool of eligible voters.	• Can deter third parties from launching rival proposals. • A pre-bid stake can count towards the 90% compulsory acquisition threshold.
Prohibited conditions	
• Fewer prohibited conditions. • However, the court usually requires that any conditions in the bidder's control must be satisfied or waived before the final court hearing.	• Maximum acceptance conditions. • Conditions depending on the bidder's opinion or events within the bidder's control.
Flexibility to vary the terms of the offer	
• Any variation after the shareholder meeting(s) have been convened may require court consent and the shareholder meeting(s) to be postponed to give shareholders additional time to consider the variation.	• The bidder can vary the terms of the takeover to increase the offer price or extend the offer period at virtually any time.
Timetable	
• As the courts are closed from mid-late December until the start of February, if there is a preference to complete a transaction during this period, this may be a reason for preferring a takeover. • Usually three to four months to effect.	• Generally speaking, the decision to proceed by way of either scheme or takeover will ordinarily not have a material difference on the overall timetable to completion. • Usually three to four months to reach compulsory acquisition.

	SCHEME	TAKEOVER
Independent expert's report	• Effectively mandatory.	• Only mandatory if the bidder's voting power in the target is ≥30% or if the bidder and target have a common director (but are often used).
Court involvement	• Court approval of a scheme is required and the court supervises all aspects of the scheme, including communications outside the formal scheme booklet.	• The court is very unlikely to get involved during a takeover bid.
Takeovers Panel involvement	• The Takeovers Panel is generally reluctant to get involved in a scheme once the court process has commenced.	• The Takeovers Panel is the primary forum for resolving any disputes in relation to takeover bids.
ASIC involvement	• ASIC must generally have at least 14 days to review and comment on the scheme documents. • ASIC will also attend the court hearings if it believes there are matters that should be drawn to the court's attention.	• Prior review of the bidder's statement and target's statement by ASIC is not required. • ASIC's role is more limited in takeovers than in schemes.

4 Scheme of arrangement vs takeover bid

SCHEME	TAKEOVER
Key pros and cons	
✓ 100% ownership in a set timeframe. ✓ Likely that a higher stake is needed to be certain of blocking a scheme than a takeover. ✓ Fewer restrictions on conditions. ✗ Cannot be used in hostile deals. ✗ Independent expert's report is effectively mandatory. ✗ Significant court and ASIC involvement.	✓ Can be used in friendly and hostile deals. ✓ More flexibility to vary the terms of the offer or extend the offer period. ✓ Independent expert's report is often optional. ✗ Pressure to waive 90% minimum acceptance condition, which increases the risk of minorities. ✗ Can be easier for a spoiler to block a 100% acquisition.

Most large transactions in Australia are effected by scheme of arrangement, reflecting the greater certainty for bidders and the fact that bidders usually prefer friendly transactions, particularly when the proposed acquisition is significant.

5 The scheme of arrangement procedure

5.1 Overview

The following key steps need to be carried out in order to effect a scheme of arrangement:

1. Once due diligence is concluded, agree terms of the transaction and execute formal implementation agreement;
2. Prepare the formal scheme documentation;
3. Group the target shareholders into 'classes' for voting purposes;
4. Provide to ASIC for its review and comment the draft scheme booklet, independent expert's report, scheme of arrangement itself and deed poll;
5. Apply to the court to convene the shareholder meeting (this is known as the 'first court hearing');
6. Send the relevant scheme documents to target shareholders;
7. Hold the shareholder meeting;
8. If shareholders approve the scheme, apply to the court to have the scheme approved (this is known as the 'final court hearing'); and
9. Carry out the mechanical steps to implement the scheme.

These steps are discussed in more detail below. For an indicative timetable for a scheme of arrangement see section 5.12.

5.2 Formal implementation agreement

An implementation agreement is entered into by the bidder and target just before the scheme is announced to the market. The agreement is usually negotiated while the bidder conducts due diligence.

The agreement will typically contain, among other things:

- the price to be paid for the shares;
- an obligation on the target directors to recommend the transaction;
- the steps that the bidder and target must perform to implement the scheme;
- the conditions to the scheme;
- restrictions on the target's conduct of business before the scheme becomes effective, such as not entering into contracts above a specified threshold or disposing of material assets; and
- break fees and deal protection mechanisms (see section 3.6 for more details).

5.3 Formal scheme documentation

The target is required to send a disclosure document known as the 'scheme booklet' to its shareholders. This explains the effect of the scheme and contains all the information that is material to a shareholder's decision as to whether to vote in favour of the scheme.

Although the target is primarily responsible for preparing the scheme booklet, the target will require considerable information from the bidder. The level of information required will vary depending on whether the consideration under the scheme is made up of cash, securities or a mixture of both. If the consideration is (or includes) securities, a prospectus level of disclosure is required.

5 The scheme of arrangement procedure

The scheme booklet will contain a very similar level of disclosure to that which would be found in a bidder's statement and target's statement if the transaction were instead proceeding by way of a takeover bid (see sections 6.3 and 7.4 for more details).

The scheme booklet will also include:

- the formal scheme of arrangement that records the terms and conditions of the proposed scheme between the target and its shareholders. This is the document that target shareholders and the court are required to approve; and
- a formal deed poll under which the bidder undertakes to all target shareholders to perform its obligations under the scheme including the payment of the scheme consideration to target shareholders if the scheme is approved.

5.4 Independent expert's report

The target company is required to commission an independent expert's report in connection with the scheme and provide that report to shareholders in the scheme booklet if:

- the bidder has an interest in 30% or more of the shares in the target company; or
- the bidder and the target company have one or more common directors.

However, the market practice is for an independent expert's report to be commissioned and provided to shareholders even where such a report is not legally required. In addition, ASIC will expect to see an independent expert's report.

In its report, the independent expert will typically state its opinion as to whether or not the proposed scheme is fair and reasonable, and in the best interest of target shareholders, and the reasons for that opinion.

5.5 Grouping shareholders into 'classes' and relevance of extraneous interests

Importance of classes

Target shareholders must be divided into 'classes' for the purposes of voting on the scheme. If there is more than one class, each class must vote at a separate meeting. The shareholder approval threshold (see section 5.9 below) must be satisfied at each meeting.

Grouping target shareholders into the correct classes is a critical process. The court will not have power to approve the scheme if the classes were improperly constituted, even if the error had no impact on the outcome of the vote.

How to constitute the classes

A class is confined to those shareholders whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. Classes for a scheme may not necessarily be the same as the classes that the shares have been divided into for registration purposes.

There are two important features of the class test.

First, the test focuses on the legal rights (as opposed to interests) of target shareholders. More specifically, it focuses on their existing

legal rights against the target company and the new rights they will receive under the scheme. In other words, if shareholders have similar legal rights both before and under the scheme, these shareholders should ordinarily be placed in the same class.

Second, even if particular shareholders have different rights before or under the scheme or both, it is only if the effect of the differences makes it 'impossible' for them to consult with other shareholders that the particular shareholders should be placed in a different class.

Generally, courts are reluctant to allow the unnecessary creation of classes as this may give a small group of shareholders an effective veto right over the approval of the scheme against the wishes of a larger majority.

Case study — marshalling shareholders into classes

In the scheme involving Hills Motorway Limited, the court confirmed that the 'cashing out' of certain foreign shareholders who would otherwise have received shares in the bidder did not result in those shareholders forming a separate class for voting purposes. This was because, although their rights were to be treated differently, this treatment did not make it impossible for them to consult with the other shareholders.

Relevance of extraneous interests

Sometimes a shareholder may have an extraneous interest in the outcome of the scheme; for example, an extraneous commercial, financial or personal interest, such as the receipt of a material collateral benefit from the bidder. That is not of itself a reason to place the shareholder in a separate class.

However, a court may have concerns if a significant number of shareholders, or shareholders holding a significant number of shares, have voted in favour of a scheme not because it would benefit them in their capacity as shareholders, but because it would benefit them in some other capacity. In such cases, the court may discount or even disregard the votes of such shareholders. That being said, the court is unlikely to exercise this power lightly.

Case study — extraneous interests

In parallel with the scheme involving the proposed acquisition of Aston Resources by Whitehaven, Whitehaven separately proposed to acquire another company from certain Aston Resources shareholders. The independent expert valued that other company at $200-$330 million, whereas Whitehaven was proposing to pay $393 million for it. The relevant Aston Resources shareholders had an extraneous interest in the outcome of the scheme and would likely have had their votes disregarded by the Court had they not voluntarily decided to abstain from voting on the scheme.

5.6 Provide the relevant scheme documents to ASIC

ASIC must be given a reasonable opportunity (generally at least 14 days) to examine the relevant scheme documents and make submissions to the court at the first court

5 The scheme of arrangement procedure

hearing. ASIC will not make the scheme booklet publicly available until after the first court hearing.

ASIC requires the target to specifically draw to its attention any uncertainties or problematic, complex or novel issues in the relevant scheme documents. If ASIC is satisfied with the content of the relevant scheme documents, it will write a letter to the target confirming this. The target will, in turn, produce this letter to the court at the first court hearing.

ASIC may attend the court hearings to represent the interests of shareholders or where ASIC's view has been requested. ASIC will also seek to ensure that any matters relevant to the court's decision are brought to the court's attention.

5.7 The first court hearing

The target must apply to the court for approval to convene the shareholder meeting, where the target shareholders will vote on the scheme. This application to the court is known as the 'first court hearing'.

At the hearing, the court will need to be satisfied that:

- the scheme booklet complies with the disclosure requirements;
- ASIC has had a reasonable opportunity to review, and make submissions to the court in relation to, the scheme and the scheme booklet; and
- the scheme is of such a nature and cast in such terms that, if the required shareholder approval is obtained, the court would be likely to approve the scheme at the final court hearing.

The target must formally register the scheme booklet with ASIC before sending it to target shareholders. This generally occurs shortly after the court has made orders convening the shareholder meeting.

Case study — ASIC'S refusal to give a letter of no objection

In the scheme involving the acquisition of David Jones Ltd, the bidder, Woolworths Holdings Ltd, also made a simultaneous takeover bid for Country Road Ltd (the bid was conditional on the David Jones scheme becoming effective). ASIC refused to give its usual letter of no objection on the basis that Mr Solomon Lew, who had a 9.89% shareholding in David Jones and an 11.8% shareholding in Country Road, had been given an inducement to vote in favour of the David Jones scheme by the financial benefits he would receive if the Country Road bid proceeded. However, the court nevertheless approved the scheme, finding that the circumstances in this case (including the fact that Mr Lew abstained from voting) adequately mitigated ASIC's concerns.

5.8 The notice period

The target (if listed) is generally required to give 28 days' notice of the shareholder meeting to its shareholders. The notice is contained in the scheme booklet.

5.9 The shareholder meeting

A scheme of arrangement will only be binding upon a particular class of shareholders if the resolution is passed by:

- 50% in number of the shareholders in that class, present and voting either in person or by proxy; and
- 75% of the total number of votes cast by the shareholders in that class, present and voting either in person or by proxy.

If either test is not satisfied, the scheme will fail. However, the court has the power to dispense with the first test in appropriate cases (for example, where there is evidence of share splitting which was intended to manipulate the outcome of the vote).

Case study — voter attendance at the scheme meeting

In the scheme involving the acquisition of Amcom Telecommunications Ltd, TPG Telecom increased its shareholding to 19.99% and said it would not support the scheme or make a counter proposal. Voter turnout in schemes in Australia generally averages about 62% of issued shares, so a 19.99% blocking stake would generally be expected to almost certainly lead to the scheme failing. Following a campaign by Amcom to encourage Amcom shareholders to send in proxy votes, 88% of the shares on issue were voted at the meeting and the requisite majorities were met to approve the scheme.

5.10 The final court hearing

The need for court approval

Once all necessary shareholder approvals have been obtained, and all other conditions satisfied or waived, the court must still approve the scheme at the final court hearing for it to be binding.

Factors relevant to the court's discretion whether to approve a scheme

The court has a general discretion whether to approve the scheme. This is one of the important ways in which minority shareholder interests are protected under a scheme.

If no successful objection has been made to the scheme and the court is satisfied that the factors listed below have been fulfilled, a court will generally be willing to approve the scheme given its reluctance to substitute the court's commercial judgment for those of the shareholders.

In deciding whether to approve a scheme, the court must satisfy itself that:

- the scheme has been approved by the requisite majority of properly informed target shareholders;
- the majority of shareholders have acted in good faith and not in pursuit of some illegitimate purpose;
- the scheme is sufficiently fair and reasonable that an intelligent and honest person, acting alone in respect of their interests as a shareholder, might approve the scheme; and

5 The scheme of arrangement procedure

- either:
  - ASIC has issued a letter stating that it has no objection to the scheme (see 'ASIC no objection letter' below); or
  - if ASIC does not issue a no objection letter, the scheme has not been proposed for the purpose of any person avoiding the operation of any of the takeover provisions in the Corporations Act (see 'Court's consideration of takeover avoidance issues' below).

ASIC no objection letter

ASIC will usually issue a no objection letter if it is satisfied that:

- all material information relating to the proposed scheme has been disclosed to it and the standard of disclosure satisfies the law's requirements;
- the standard of disclosure to, and treatment of, the shareholders is commensurate with the standard that would be required if the transaction had instead been conducted by way of a takeover bid; and
- there are no other reasons to oppose the scheme (such as public policy grounds).

Importantly, it is ASIC's policy that neither it nor the law has a preference as to whether change of control transactions are conducted by way of scheme of arrangement or takeover bid.

Court's consideration of takeover avoidance issues

In determining whether a scheme has been proposed for the purpose of avoiding any of the takeover provisions in the Corporations Act, the court will consider whether there was a legitimate commercial purpose in the scheme proponents choosing to conduct the transaction by way of scheme of arrangement instead of takeover bid. Such purposes may include:

- the particular demands of persons financing the transaction;
- the need for unrestricted access to the target's cash reserves;
- the certainty of obtaining capital gains tax rollover relief; and
- the ability of a scheme to achieve an 'all or nothing' outcome in a set period of time.

The mere decision to proceed by way of a scheme cannot, of itself, be treated as evidence that the scheme was proposed for the purpose of avoiding the operation of any of the takeover provisions.

Case study — takeover avoidance

In the scheme involving the acquisition of MIM Holdings Ltd, the court rejected an objector's argument that the scheme had been proposed for the purpose of avoiding the takeover provisions. The court accepted that a scheme was the preferred transaction structure as this was the only way the bidder could fund the transaction given the fact its financiers required an 'all or nothing' outcome in a set period of time.

Objections

Any target shareholder may attend the final court hearing to object to the scheme if they believe that the scheme prejudices their interests or does not comply with the applicable legal requirements (including the disclosure or voting threshold requirements).

The court may even hear objections from a rival bidder or other aggrieved party. ASIC may also appear at the final court hearing to object to the scheme or draw issues to the court's attention.

Although the court will carefully listen to any objections, it will consider the interests of all shareholders in deciding whether to approve the scheme, not just the interests of the objectors.

Case study — final court hearing objections

In the scheme involving the acquisition of Kasbah Resources Limited, the independent expert changed its opinion from "fair and reasonable" to "not fair, but reasonable" following the scheme meeting (but before the final court hearing) having identified a fundamental error in its (previously adopted) valuation methodology. The court declined an application from the target to adjourn the final court hearing so that the target could renegotiate with the bidder, concluding that doing so was pointless because, even if an improved deal could be reached, the whole scheme process would need to start again

Case study — objections prior to final court hearing

In the scheme involving the acquisition of MYOB Group Limited, shareholders holding 11% of the shares in MYOB filed an interlocutory process ahead of the first court hearing seeking orders to obtain an advanced copy of the draft scheme booklet and for the first court hearing to be adjourned for one week to give them time to review the booklet and lead evidence about the value of MYOB shares and the adequacy of the independent expert's report. The court declined to make the orders, and its reasons included that it was more appropriate for the issue raised by the shareholders to be addressed at the final court hearing. The objecting shareholders ultimately voted in favour of the scheme and did not appear at the final court hearing.

5.11 The mechanical steps to implement the scheme

The scheme is binding on the target company and its shareholders once the court order approving the scheme is lodged with ASIC. This usually occurs shortly after the court has approved the scheme.

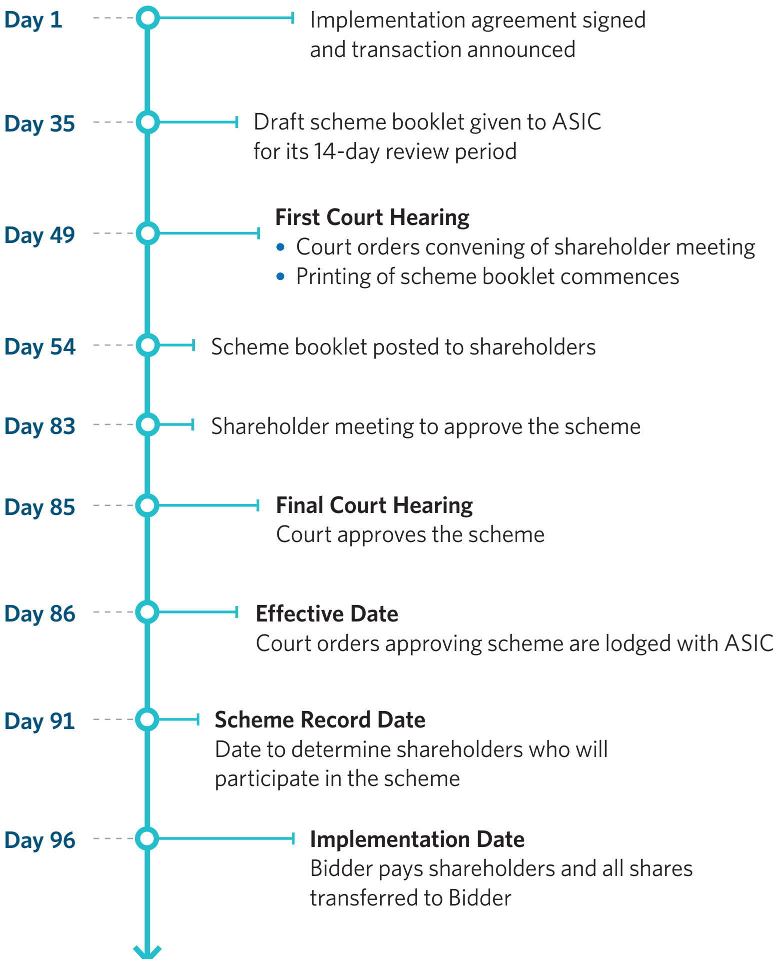
Once the court order has been lodged, the mechanical steps to actually implement the scheme (such as the payments to target shareholders and the transfer of shares to the bidder) are carried out on the 'implementation date' specified in the scheme documents.

The implementation date is usually five business days after the scheme 'record date'. The record date is usually five business days after the date on which the court order approving the scheme is lodged with ASIC.

5 The scheme of arrangement procedure

5.12 Indicative timetable for scheme of arrangement

The indicative timetable below is for illustrative purposes only. In reality, the timetable is likely to vary. For example, in FY22, the median time from announcement of a scheme to the scheme meeting date was 101 days while the time until implementation was 122 days.



Notes: The dates in this timetable are indicative only. This timetable assumes that an independent expert's report will be finalised in 5 weeks or less and that there will be no delay caused by any regulatory approval processes (eg, ACCC and FIRB, if applicable).

6 Takeover bids – steps and procedures

6.1 Off-market bid or on-market bid?

An initial question in a takeover bid is whether to proceed by way of an off-market bid (where shareholders must accept via an acceptance form) or an on-market bid (where acceptances are effected by selling shares into the market). There are some important differences between the two procedures, which are summarised below. Off-market takeover bids are by far the most common in Australia.

OFF-MARKET BID	ON-MARKET BID
Securities covered by the bid	
An off-market bid may be made for all or a proportion of the securities in the bid class held by each holder.	An on-market bid must be for all securities in the bid class held by a holder.
Consideration offered	
An off-market bidder can offer cash, securities or a combination of both as consideration.	An on-market bidder can only offer cash.
Conditions	
An off-market bid may be subject to any number of conditions, provided they are not prohibited conditions as discussed in section 4.	An on-market bid must be unconditional (though the bidder may withdraw if the target becomes insolvent or certain other prescribed events occur).
Variations	
An off-market bid is generally more flexible in terms of variations towards the end of the bid period. If an off-market bidder increases the bid price, all accepting security holders, including those who have already accepted, are entitled to the increased consideration.	In an on-market bid, those who have accepted before the increase are not entitled to receive the increased price.

6 Takeover bids – steps and procedures

6.2 Framing the offer – price and conditions

Under both off-market and on-market bids, the consideration offered must equal or exceed the highest price that the bidder or an associate provided for a security in the bid class in the four months before the bid.

The application of this rule can be difficult in the case of a scrip bid that is preceded by a cash purchase of securities in the bid class, or where the preceding purchase is for shares or other assets rather than cash. Complex valuation issues can arise in these circumstances and it may be advisable to seek guidance or a modification from ASIC to clarify the application of the rules.

In an off-market bid, the bidder is able to make its bid conditional. The conditions give the bidder commercial protection by allowing it to withdraw from a takeover in certain circumstances. Unless the bidder is protected by such conditions, it will not ordinarily be able to withdraw its offers once the bid has been announced.

Common conditions in off-market bids include:

- minimum acceptance conditions (50% or 90%);
- conditions relating to material adverse changes in the financial or trading position or condition of the target;
- conditions requiring government approvals (such as FIRB approval or ACCC clearance); and
- conditions relating to adverse movements in the stock market or in key commodity prices.

However, certain conditions are prohibited, including:

- maximum acceptance conditions;
- conditions allowing the bidder to acquire securities from some but not all of the accepting shareholders;
- conditions requiring approval of payments to officers of the target ceasing to hold office; and
- conditions that turn on the bidder's opinion or events within the bidder's control.

Between seven and 14 days before the end of the offer period, the bidder must provide a notice on the status of any defeating condition. This date will be postponed if the offer period is extended. A notice must also be provided as soon as practicable upon the defeating condition being fulfilled.

Case study — due diligence conditions

In Goodman Fielder 01, Burns Philp's bid was conditional on Goodman Fielder's directors confirming the company's restructuring costs, earnings, working capital and liabilities and an actuarial review of a superannuation plan. The Takeovers Panel held that this condition was not unacceptable, but the directors were not obliged to disclose the information. However, the commercial effect of the condition was that key parts of the information were provided.

6.3 Bidder's statements

Before either an on-market or off-market bid can be launched, the bidder must prepare a disclosure statement called a 'bidder's statement'. This is a disclosure document meant to inform the target directors and shareholders about the terms of the takeover bid and relevant background information.

Preparation of the bidder's statement can be very time consuming, and drafting should be commenced as soon as practicable.

In response to a bidder's statement, the target issues a target's statement. We will discuss that in section 7.4 of this booklet.

General disclosure requirements

The bidder's statement must contain, among other things:

- details of the bidder's intentions regarding:
  - the continuation of the target's business;
  - any major changes to be made to the target's business, including any redeployment of fixed assets; and
  - the future employment of the target's present employees;
- the bidder's financing arrangements in relation to any cash offered under the bid;
- details of any purchases by the bidder or an associate for a security in the bid class during the previous four months;
- details of any collateral benefits offered to a person by the bidder or an associate in the previous four months; and
- any other information known to the bidder that is material to a decision by a holder of securities of the target whether or not to accept the offer and which has not been previously disclosed to them.

Additional disclosure requirements where scrip consideration offered

If securities of the bidder or its controller are to be offered as consideration, in addition to the disclosure requirements listed above, the bidder's statement will also be required to contain information required in a prospectus for the offer of those securities.

6.4 Variation of offers

The takeover procedure is quite flexible. It is common for the terms of a bid to be varied as the takeover unfolds.

Increasing the offer price

An off-market bidder may improve the offer price at any time during the offer period. This may include adding a new form of consideration (eg adding a cash alternative to a scrip bid). The higher price must be paid to all shareholders who accept the bid (including those who accepted before the price increase).

An on-market bidder may increase the offer price, but not during the last five trading days of the offer period. The higher price need only be paid to those shareholders who accept after the price increase.

6 Takeover bids – steps and procedures

Case study — increasing the offer price

In the battle to acquire Nitro Software Ltd, Potentia Capital added a scrip alternative to its cash bid during the offer period. It also offered to increase the bid price if it obtained a relevant interest in 75% of Nitro shares and a further increase if scrip consideration elections met a minimum threshold at the end of the offer period.

Extending the offer period

Off-market bids

If an off-market bid is unconditional, the bidder may extend the offer period at any time before the end of the offer period.

If the bid is subject to a condition, the bidder may only extend the offer period before the date on which the bidder is required to give notice of the status of conditions or after that date only if another person makes a takeover bid or if the offer price under another takeover bid is improved.

There is an automatic extension of 14 days if, within the last seven days of the offer period:

- the offer price is increased; or
- the bidder's voting power in the target increases to more than 50%.

On-market bids

An on-market bidder may extend the offer period:

- before the last five trading days of the offer period; or
- during the last five trading days of the offer period if, during that period:
  - another person makes a takeover bid; or
  - the offer price under another takeover bid is improved.

There is an automatic extension of 14 days if, within the last seven days of the offer period, the bidder's voting power in the target increases to more than 50%.

6.5 Supplementary bidder's statements

The legislation requires a supplementary bidder's statement to be prepared when the bidder becomes aware that:

- the original statement contains a misleading or deceptive statement or an omission; or
- a new circumstance has arisen that would have been required to be included in the original statement had it arisen before that statement was lodged with ASIC,

  that is material to a holder of a bid class security.

The supplementary statement must be given to the target as soon as practicable. If the target is listed, the supplementary statement need not be sent to shareholders. It is only required to be lodged with ASIC, given to the relevant securities exchange and given to the target.

If the target is not listed, the supplementary statement will also need to be sent to any shareholders who have not yet accepted the offer.

There is an equivalent rule requiring the target to issue a supplementary target's statement if corrections or changes are required.

6.6 Compulsory acquisition

When formulating a takeover offer, a bidder should consider strategies for compulsorily acquiring all outstanding securities in the bid class. Complete ownership of the target can be important, particularly where a bidder wishes to access the cash flows or assets of the target.

A bidder making a takeover bid will be permitted to compulsorily acquire the remaining securities in the bid class if during, or at the end of, the offer period:

- the bidder and its associates control at least 90% (by number) of the securities in the bid class; and
- the bidder and its associates have acquired at least 75% (by number) of the securities that the bidder offered to acquire under the bid (whether or not the acquisitions happened under the bid).

In addition, a person who is a '90% holder in relation to class of securities' in a company may compulsorily acquire the remaining securities in that class, whether or not the person has made a takeover bid.

The 90% holder may only use this general compulsory acquisition power within six months after becoming a 90% holder in relation to that class. An independent expert must give an opinion on the fairness of the consideration, and security holders have the right to object in court.

Compulsory acquisition, if unopposed, takes approximately six weeks. It is important to factor this delay into any timetable as the target company cannot be grouped for tax consolidation purposes until the compulsory acquisition procedure has been completed.

6 Takeover bids – steps and procedures

6.7 Indicative timetable for off-market takeover bid

The indicative timetable below is for illustrative purposes only. In reality, the timetable is likely to vary. For example, in FY22, the median time from announcement of a takeover bid to close of the offer was 86 days while the time until completion of compulsory acquisition was 101 days.

Notes:

These dates are indicative only and will depend on how quickly the documents can be prepared.

1. Offer cannot close earlier than 1 month after the offer opens and cannot remain open for more than 12 months.
2. Compulsory acquisition takes approximately 6 weeks.

7 Takeover defence

7.1 Introduction

A publicly owned company is always susceptible to receiving approaches from potential bidders or receiving an unsolicited takeover bid. When this occurs, the directors of the company have an important role to play in dealing with the approach and protecting the interests of all shareholders.

In discharging this role, the interests of shareholders are paramount. The directors of a target company have a responsibility to convey to shareholders and to the market all material information about the company so that there can be a fair appraisal of the value of the company, its assets and prospects. This will enable shareholders to make an informed decision. Responding to a takeover bid is not about protecting the personal position of management or the directors or keeping the company 'independent'. An assessment of value is critical. If the bid is at an undervalue, the directors should explain that to the shareholders and the reasons for that view.

Australian law (and Takeovers Panel policy, in particular) prohibits a company from adopting strategies designed to prevent a bid being made or to improperly frustrate one that has been made.

The actions that a company may consider can be divided into activities prior to a bid being made and activities after a bid is announced.

7.2 Pre-bid strategy

Two things are crucial:

- Strong financial performance is the best way to ensure that an inadequate takeover bid will not succeed and that shareholders will remain loyal to the current directors. Institutional shareholders play an important role and are under more pressure than ever to perform themselves. Companies must strive to ensure adequate returns to shareholders or find themselves deserted by their institutional shareholders.
- The company must have a clear and consistent story to tell about its business. This should be communicated regularly to key shareholders, analysts, the media and the market generally. A detailed communication policy should ensure that shareholders understand and support the company's direction. Close contact with shareholders will also assist in detecting early signs of erosion of their support.

Planning

The company's shareholders will be best served by a coordinated and calm but decisive response to any bid that emerges. Generally, this will require advance planning.

It is common for companies in Australia to have established takeover response procedures and to have established teams of relevant advisers. Typically, this would include key executives, financial advisers and lawyers.

The team may be expanded, when appropriate, to include public relations consultants, accountants and specialist valuers. The team should be regularly briefed about the company's activities.

7 Takeover defence

Some specific roles for the team in advance of a bid include:

- monitoring the market understanding of the company and its activities—the company's strengths and weaknesses should be critically reviewed from an operational and financial perspective, and it should be compared to other companies in which shareholders may invest as an alternative. The company's valuation, including from analysts and the investment community, should also be monitored to assess the likelihood of becoming a takeover target;
- instituting a program to ensure that shareholders and the stock market are well informed about the company's activities;
- monitoring changes in the underlying ownership of its shares. Directors will be better prepared to protect the interests of the target's shareholders if they are aware of an impending bid. This may be done using the notice procedure permitted under the legislation (see section 8.3 of this guide);
- preparing a takeover response pack outlining immediate strategies in case a takeover bid is announced—this would typically involve forms of announcements to the ASX and letters to shareholders for release containing the company's immediate response to the bid and advice to shareholders; and
- reviewing potential bidders and counter-bidders—this will assist in a speedy response to any bid emerging.

7.3 Responding to a takeover bid

As mentioned earlier, most takeovers proceed initially with a confidential informal approach to the target company, typically via the chairman or CEO. Provided this is conditional (as is typical), the listing rules allow the target to keep it confidential. However, an early strategic decision for the board will be whether or not to announce the approach.

The first step after a bid is announced or an approach is received is to gather together the defence team to map out a response. This will usually require a board meeting to be convened urgently. If this cannot be done promptly and the bid is public, it is usual for the directors to release a 'holding statement' urging shareholders not to take any action until a more detailed response can be prepared.

If the bidder's approach is confidential and incomplete, the fact of the approach may remain confidential for a period of time while the parties hold discussions to work out if an agreed bid is possible. If such a deal can be reached, the transaction would usually proceed by scheme of arrangement.

On the other hand, if the bidder proceeds with a public announcement of a bid (a hostile bid), the position is very different. The board will need to act quickly in considering the bid and how to protect shareholders' interests. At that point, the range of possible activities for the target is also restricted by the ASX Listing Rules, which restrict the ability of the company to make placements, and by the Takeovers Panel policy against the target company undertaking any action that may frustrate the bid.

In addition, once a bid is announced, the directors may be forced to be more circumspect in their actions due to an increased likelihood of allegations that their actions have been motivated by improper purpose, namely to frustrate the bid for their own purposes.

Case study — frustrating actions

In Gondwana Resources 02, Gondwana was subject to a conditional off-market bid by Ochre Industries. Prior to the disclosure of the bid, Gondwana announced a 1 for 1 non-renounceable, partially underwritten rights issue. Ochre claimed that the proposed rights issue, which was not subject to shareholder approval, would trigger the defeating condition of the bid and was therefore a frustrating action. The Takeovers Panel agreed with Ochre's argument that the rights issue constituted a frustrating action and considered that, in not seeking shareholder approval, Gondwana failed to give its shareholders a reasonable and equal opportunity to participate in the benefits of the bid.

Directors should concentrate on an analysis of the bid and the company and communicate this to the shareholders and investment community generally. It may be desirable to seek to restrain the bid from proceeding if the offer contravenes rules relating to pricing or conditions, does not meet legal disclosure requirements or misleads shareholders.

Specific actions against an unsolicited takeover bid may include:

- criticising the offer as inadequate;
- disclosing favourable information about the company;
- criticising the bidder and its performance;
- taking legal action to ensure the bidder has complied with all applicable legal and disclosure requirements; or
- seeking a rival bidder.

Formal response

The target company's formal response to a takeover bid is the target's statement. This is discussed in further detail in section 7.4.

Effect on the target company's business

The making of a takeover bid should not affect how the company carries on its business. However, any action that may trigger a breach of a bid condition may be regarded as 'unacceptable' by the Takeovers Panel, requiring it to be subjected to a shareholder meeting.

7.4 The target's statement

The target must formally respond to a takeover bid by preparing a target's statement. The target's statement must contain, among other things:

- all the information that holders of bid class securities and their professional advisers would reasonably require, and reasonably expect to find, to make an informed assessment of whether to accept the offer (though only to the extent that it is known to any of the target's directors); and

7 Takeover defence

- the recommendations of the target's directors on whether the offer should be accepted, giving reasons for the particular recommendation.

An independent expert's report on the fairness and reasonableness of the offer must also be prepared to accompany the target's statement if the bidder's voting power in the target exceeds 30% or if there is a common director between the bidder and the target. Even if those tests are not met, it is common for an independent expert's report to be included.

The target must send its target's statement (and any accompanying independent expert's report) to its shareholders, the bidder, the relevant securities exchange and ASIC no later than 15 days after the bidder has completed dispatch of its bidder's statement to the target's shareholders.

8 Disclosure of shareholdings

8.1 Substantial holding notices

A person that has, either alone or together with associates, control over 5% or more of voting shares in a listed company has a 'substantial holding' in that company and must fulfil certain notification requirements.

A person must, within two business days, give a notice that sets out certain details of their holding to the company and to each relevant securities exchange once they:

- begin to have, or cease to have, a substantial holding; or
- increase or decrease a substantial holding by 1% or more.

8.2 Notification during a takeover

A person making a takeover bid for a listed company is deemed to have a substantial holding in the target during the takeover period and, therefore, whenever there is a movement of at least 1% in the bidder's holding, the bidder must notify the company and each relevant securities exchange of this fact by 9.30am on the next trading day.

8.3 Tracing control of shares

The Corporations Act provides a procedure whereby a listed entity or ASIC can trace ultimate control of a parcel of shares in the company regardless of the size of the parcel. Any shareholder of the company may also require ASIC to initiate the procedure unless ASIC considers that it would be unreasonable to do so.

The procedure is initiated by the giving of a notice to the shareholder. That notice directs the shareholder to disclose certain information, including:

- full details of the holder's control over the shares;
- the identity of other persons who also have some control over the shares; and
- the identity of persons who have given the holder instructions about the acquisition, voting and disposal of the shares.

The shareholder must provide the information to the company within two business days after being given the notice or payment of the relevant fee by the company.

A bidder can use these notices as a way of uncovering the beneficial ownership of shares in the target, when attempting to solicit acceptances. Likewise, a company that believes it may be a target for a bid, can use these notices to monitor changes in its register. Potential targets periodically serve tracing notices on their largest nominee shareholders in order to monitor movements in the underlying ownership of their shares.

9 Dispute resolution

9.1 The Takeovers Panel

Introduction

Unless the transaction is proceeding by way of scheme of arrangement, the Takeovers Panel is the principal forum for resolving takeover disputes during the bid period.

The only exceptions to this are criminal prosecutions and certain other proceedings commenced or referred by ASIC or the Panel itself or by other public authorities.

The Panel's role and power

The Panel has the power to:

- declare circumstances in relation to the affairs of a company to be 'unacceptable circumstances' and make a wide range of orders; and
- review on its merits a decision of ASIC to exempt or modify the takeover rules.

Who may apply to the Panel?

An application to the Panel may be made by the bidder, the target, ASIC or any other person whose interests are affected by the relevant circumstances. Similarly, any person whose interests are affected by a decision of ASIC to exempt or modify the takeover rules will be able to apply to the Panel for review of the decision.

'Unacceptable circumstances'

The Panel's jurisdiction to make a declaration of 'unacceptable circumstances' does not depend upon the existence of a general offer to shareholders under a takeover bid. The Panel will have jurisdiction in all circumstances involving an acquisition of a substantial interest in, or control of, a company. The Panel may declare circumstances to be unacceptable whether or not the circumstances constitute a contravention of the Corporations Act.

In deciding whether the circumstances are unacceptable, the Panel must have regard to the policy principles underlying the takeover rules (often referred to as the 'Eggleston Principles'), the provisions of Chapter 6 of the Corporations Act and any other matters it considers relevant. The Panel may only make, or decline to make, a declaration where it is not against the public interest to do so.

The Panel will have the power to make a wide range of orders that it thinks appropriate, either on an interim basis following an application for a declaration of 'unacceptable circumstances' or as a final order once the declaration is made. In particular, the Panel will be able to make orders to:

- ensure that a takeover bid proceeds in a way that it would have proceeded if the circumstances had not occurred;
- prevent a person from acquiring securities;
- direct a person to dispose of securities; and
- award costs.

Internal Panel reviews

A party to Panel proceedings or ASIC may apply to the Panel for review of a decision of the Panel. After conducting a review of a decision, the Panel may vary or set aside the decision.

9.2 The court's role

Court proceedings before end of bid period

Once a takeover bid has been announced, only ASIC or another public authority of the Commonwealth or a state will be able to apply to the court to stop or affect a takeover bid.

This is intended to reduce takeover disputes and ensure the Panel is the main forum for resolving any disputes that arise before the end of the bid period.

However, the Panel may refer a question of law arising in a proceeding before it to the court for decision.

Court proceedings after end of bid period

A court's powers may be enlivened after the end of the bid period if an unsuccessful application to the Panel for a declaration of unacceptable circumstances has been made and the court finds that the conduct in question contravenes the Corporations Act. In that case, the court may:

- determine whether a person has been guilty of an offence and impose a penalty if the person is found guilty; and
- determine that a person has contravened a provision of the Corporations Act and order that person to pay an amount of money to another person (whether by way of damages, account of profits, pecuniary penalty or otherwise).

10 Alternatives to formal takeover bids or schemes of arrangement

As mentioned earlier, there are various other ways in which a person can increase its voting power beyond 20% without launching a formal takeover bid or scheme of arrangement. The primary practical alternatives to a takeover or scheme of arrangement are outlined below.

10.1 Approval by resolution of target

An acquisition for less than 100% of the target's issued securities can be specifically approved by an ordinary resolution of independent shareholders of the target. The bidder and its associates, as well as any selling shareholders and their associates, must not vote in favour of the resolution.

Before voting on the resolution, the independent shareholders must have been given all information known to the person proposing to make the acquisition or their associates, or known to the company, that was material to the decision on how to vote. In practice, an independent expert's report is generally required.

10.2 Three per cent creep in six months

A person may acquire up to 3% of a company's shares every six months, provided that, as a result of the acquisition, neither that person nor any other person would have voting power in the company of more than 3% higher than they had six months before the acquisition.

10.3 Exempted downstream acquisitions

If a person acquires more than 20% of the voting power in a company (whether registered in Australia or elsewhere), that person will be deemed to have also acquired control over any securities that company controls. If that company controls securities conferring more than 20% of the voting power in an Australian listed company or an unlisted Australian company with more than 50 shareholders (the downstream company), the person will infringe the general 20% prohibition.

So that this is not used to frustrate other takeover bids, the legislation contains a broad exception that will apply whenever the downstream acquisition results from another acquisition of voting securities in a company included in the official list of:

- the ASX; or
- a foreign body conducting a stock market that is a body approved by ASIC in writing.

ASIC has approved various foreign stock markets which require bodies on their official list to comply with takeover rules or regulations that offer a level of investor protection comparable to that offered in Australia. ASIC's view is that reliance on this exemption, in circumstances where control of the downstream company is a 'significant purpose' of the upstream acquisition, may give rise to unacceptable circumstances.

10.4 Capital raisings

Increases in voting power over 20% may occur lawfully as a result of participation in rights issues, including in the capacity of underwriter. However, if the issue is structured so as to deliver an increased holding to the underwriter, the Takeovers Panel may declare the acquisition to be unacceptable.

11 Contacting us

If you have any questions relating to this booklet or any other aspect of takeovers, schemes of arrangement or corporations law generally, please contact one of the partners in the Corporate group at Herbert Smith Freehills in Australia.

Details are on our website **herbertsmithfreehills.com**

Notes

The contents of this publication, current at 17 March 2023, are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

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