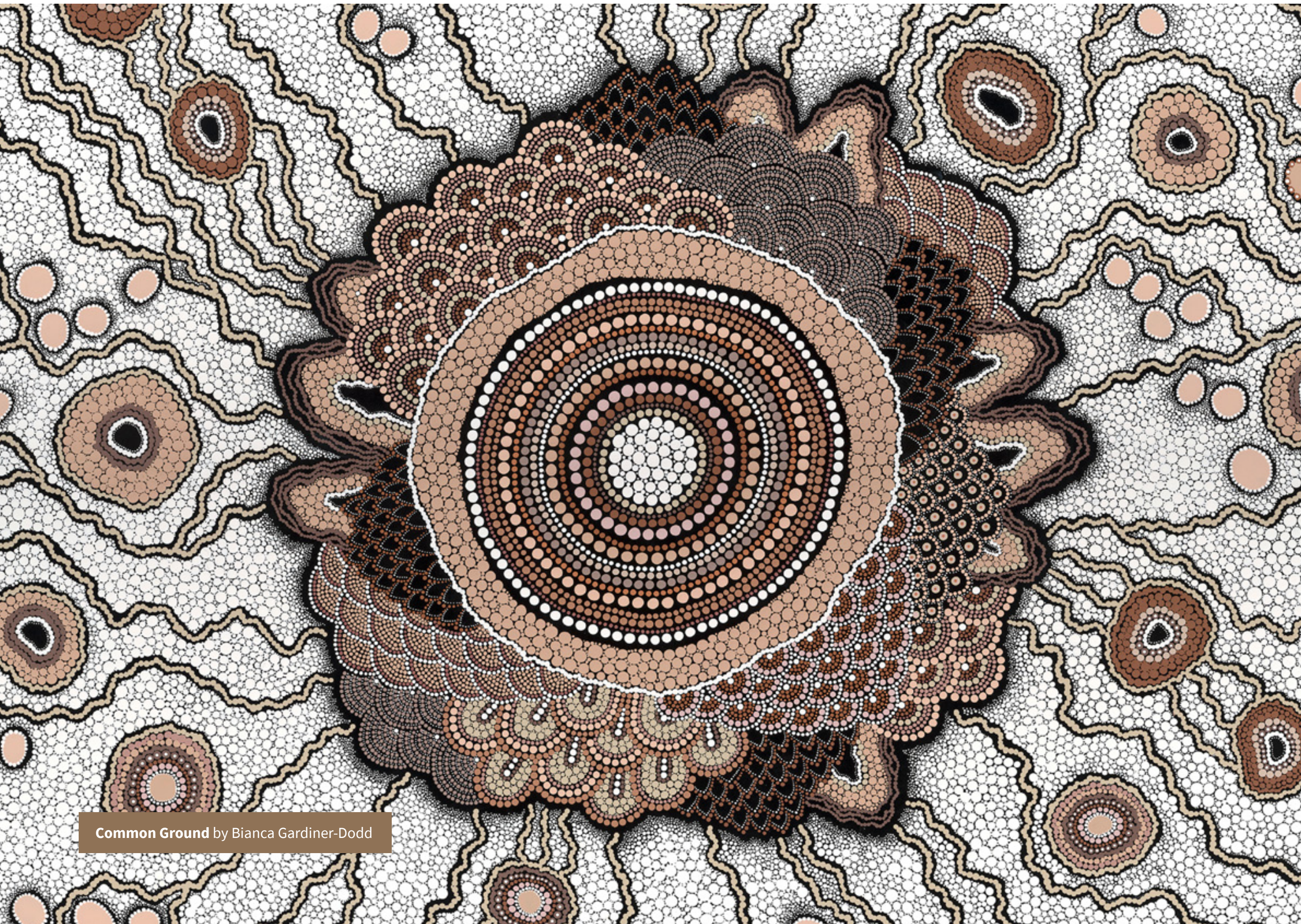
KING & WOOD MALLESONS
金杜律师事务所

KWM'S GUIDE TO TAKEOVERS AND SCHEMES IN AUSTRALIA

2023



Common Ground by Bianca Gardiner-Dodd

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INTRODUCTION

Welcome to the 2023 edition of *KWM's Guide to Takeovers and Schemes in Australia*.

Building on our depth of capability and experience in this area this guide provides an introduction to the legal issues and practical processes involved in making or responding to an offer to acquire control, by way of scheme of arrangement or takeover, of a publicly-listed entity in Australia.

We share our expert knowledge and insight into Australian M&A markets and provide commentary on issues that are relevant to undertaking successful transactions in a highly regulated and dynamic environment.

Of course, this guide is not an exhaustive analysis, nor a replacement for specific professional advice.

If you would like further information or to discuss any proposed transaction, please contact us or any of the partners in our Mergers & Acquisitions practice at https://www.kwm.com/au/en/people.html.

We hope that we can assist you with future acquisitions in Australia.

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1 PUBLIC M&A MARKET OUTLOOK

After the M&A explosion which defined 2021, the Australian public M&A market hit the pause (or slow-mo) button in 2022. Overall, both major deal volume and value almost halved in 2022 when 36 schemes and takeovers valued over $50 million were announced with an average deal value of close to $970 million.

This is in comparison to 2021's dizzying statistics where 60 schemes and takeovers were announced with an average deal value of just over $2 billion. That said, 2021's staggering average deal value was significantly buoyed by 3 notable outliers, being the Brookfield-led consortium's acquisition of AusNet Services ($10.1 billion cash deal), the IFM/GIP-led consortium's acquisition of Sydney Airport ($23.6 billion cash deal) and Square's acquisition of Afterpay ($39 billion scrip deal).

Despite this dip, 2022 more closely resembled long-run averages and was still healthy overall, despite being a year plagued by residual uncertainty and ongoing geopolitical troubles. Of note, the final months of 2022 saw deal makers rally with 10 out of the 36 deals (28%) for the year announced in October and November 2022 alone suggesting deal sentiment remained strong.

A few key strategic themes also emerged from the deal activity in 2022:

- contested transactions are back in fashion, with competition for targets prompting bidders to employ a variety of strategies and tools to gain the upper hand, from pushing the boundaries of exclusivity arrangements that lock-out counterbidders to both acquiring pre-bid stakes and using innovative dual scheme and takeover structures to overcome the blocking stakes of others;
- consortium deals continue to be popular, particularly in larger transactions, with strategic and financial investors (including increasingly active Australian super funds) recognising the benefits of clubbing together to share deal risk and equity funding requirements; and
- the economic downturn appears to have driven apart the bid/ask spread on valuation between bidders pointing to premiums over depressed market prices and target boards holding firm on fundamental valuations. In light of this, bidders have increasingly been willing to turn to 'hostile' takeovers in an attempt to bypass unsupportive boards (even without the benefit of due diligence access) and appeal to target securityholders directly.

For our views on the outlook for 2023 across a number of key sectors and some in depth pieces on recent development in Australian M&A deal structures and tactics please see our M&A in the City publication available here.

2022 PUBLIC M&A ACTIVITY

36
deals announced with deal value **>$50 million**

25
schemes

11
takeovers (9 friendly and 2 hostile)

2022 KEY PUBLIC M&A SECTORS

Mining

Energy

Health care

Technology

2 OVERVIEW OF THIS GUIDE

2.1 What this guide covers

This guide covers some of the key legal issues and considerations involved in making, or responding to, an offer to acquire control of a publicly-listed entity in Australia, including:

- the general laws and regulatory bodies governing acquisitions of interests in listed entities;
- the most common methods of acquiring control (takeover bids and schemes of arrangement) and their relative merits;
- key factors and strategic considerations relevant to planning an acquisition;
- steps, documentation and timing involved in implementing an acquisition; and
- key issues for entities anticipating (or responding to) an approach.

This guide also provides general commentary on the legal and practical issues involved in takeovers and schemes of arrangement in Australia. The information in this guide is current as at 1 January 2023.

2.2 Who this guide will assist

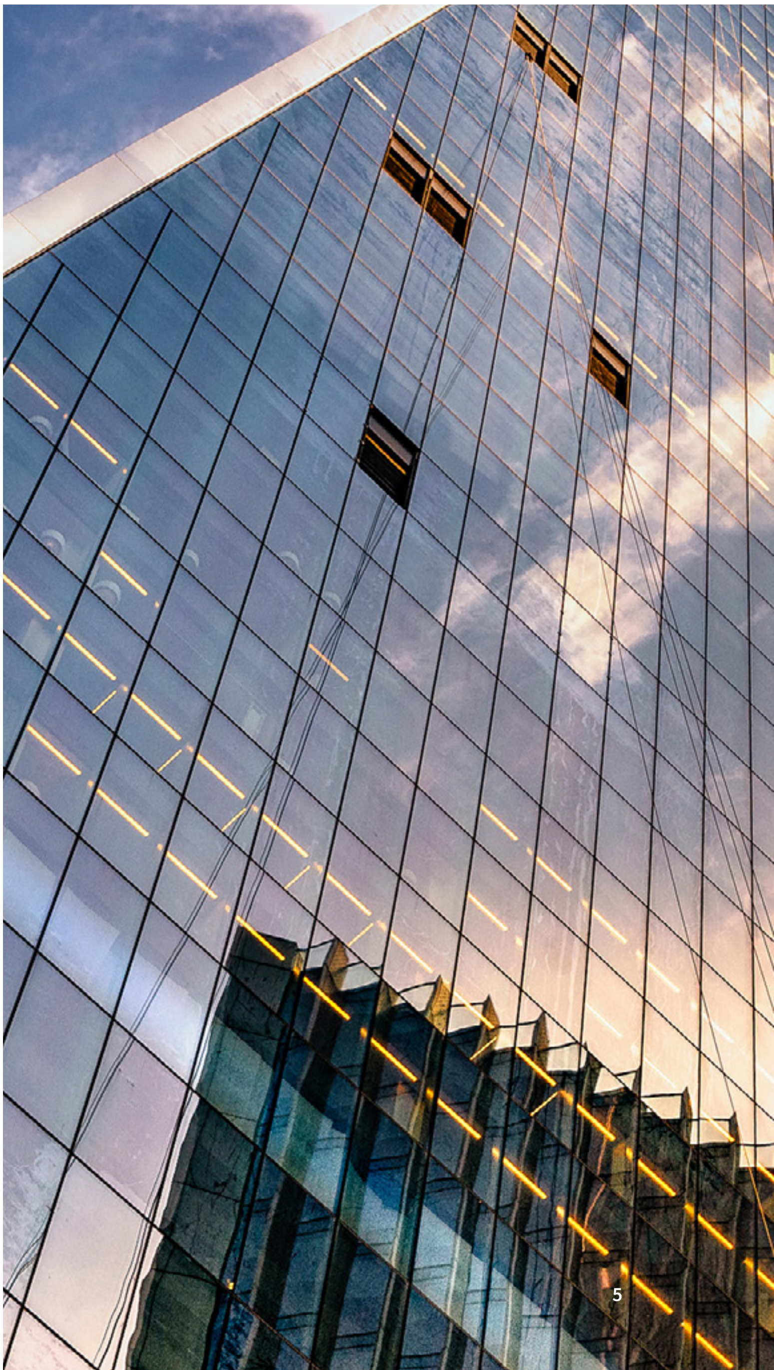
This guide will be of general assistance to:

- foreign advisers and investors;
- directors, executives and in house counsel of public companies and other Australian and international businesses considering public acquisitions in Australia; and
- investment bankers, financial advisers and other professional advisers to participants involved in control transactions.

2.3 Further assistance

Control transactions (such as takeovers and schemes of arrangement) in Australia are complex and highly regulated. This guide does not provide an exhaustive analysis of the issues involved. Anyone involved in any public market activity should obtain detailed professional advice before taking action and should not rely on this guide in substitution for that advice.

If you require specific advice in the context of a transaction, or a possible or proposed transaction, please contact any of the partners in our Mergers & Acquisitions practice at https://www.kwm.com/au/en/people.html.



3 TAKEOVERS AND SCHEMES AT A GLANCE

Acquisitions of publicly-listed Australian companies are regulated by a combination of legislation (Chapter 6 of the Corporations Act) and regulations. These rules also apply to acquisitions of publicly-listed Australian managed investment schemes (eg investment trusts) and unlisted Australian companies with more than 50 shareholders.

3.1 The 20% rule

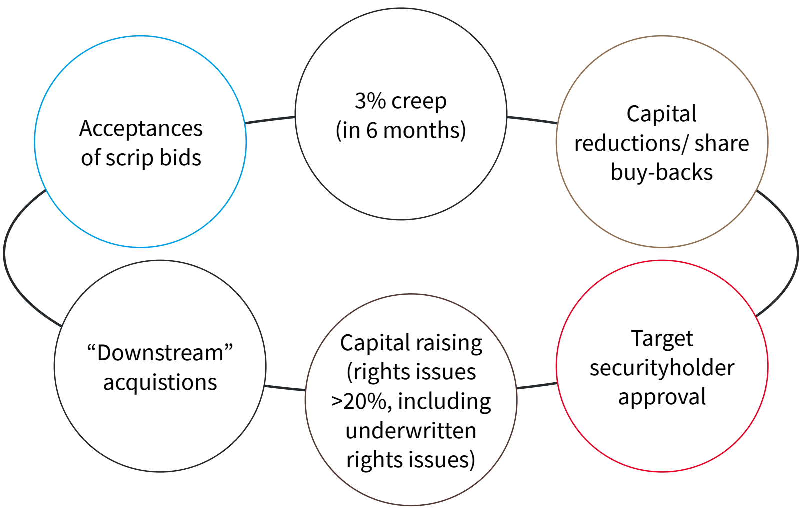
Chapter 6 of the Corporations Act broadly prohibits a person from acquiring securities in an entity that is subject to the takeover rules when the number of securities controlled by that person, and their associates, would exceed 20% (or increase from a starting point that is above 20% and below 90%). See page 9 of this guide for further detail on the 20% rule.

3.2 Exceptions to the 20% rule

The most common way of acquiring an interest in more than 20% of the securities in an entity is by way of a takeover bid (off-market or on-market) or a scheme of arrangement. Off-market takeover bids are much more common than on-market bids and so this guide will largely focus on off-market bids.

OFF-MARKET TAKEOVER BID	SCHEME
Under an off-market bid, a bidder makes separate but identical offers to all holders of securities in a target to acquire their securities. When a holder accepts the offer, an agreement for the acquisition of their securities results. Off-market takeover bids are usually made conditional upon the satisfaction or waiver of a number of conditions such as, that the bidder reaches a **minimum level of acceptances (usually 50%** or **90%**) or obtains specified regulatory approvals such as foreign investment or Australian competition approvals. Off-market takeover bids may be friendly (made with the recommendation of the target board) or hostile (unsolicited).	Under a scheme of arrangement, a target company seeks court and securityholder approval for the transfer of target shares to the bidder. In order to be successful, a scheme needs the approval of **75% by value** and **50% by number** of each class of securityholders present and voting at a scheme meeting (excluding any votes cast by the bidder or any of its associates). In addition, the Court must exercise its general discretion to approve the scheme. As a scheme requires the co-operation of the target company, it is only used for an agreed acquisition. The binary (all or nothing) outcome means schemes are frequently used to effect 100% acquisitions.

While acquisitions by way of an off-market takeover or scheme are most common, other means of acquiring an interest of greater than 20% legally are set out in the below graphic and the most commonly utilised are considered in more detail on page 16 of this guide.



3.3 Considerations for a bidder

The ultimate goals and strategic rationale for a transaction will necessarily shape its structure. Considerations may include:

- **Timing requirements (in particular, whether the transaction needs a finite end date)**
- **Target register analysis (for instance, supportive, dissenting or apathetic shareholders)**
- **Whether a strategic stake will be acquired before a bid is launched (noting that an interest of 5% or more will need to be disclosed to the market)**
- **Whether the bidder wishes to acquire 100% or is willing to settle for lesser control**
- **The level of due diligence required and whether a friendly deal, with the target board's support is necessary**

3.4 Considerations for a target

The aim of any control transaction response should not simply be to deter potential bidders but rather to ensure that, if control is to pass, the transfer occurs on favourable terms and at a price that reflects the true underlying value of the entity. Target directors can prepare for a possible approach by preparing a takeover response manual and undertaking other pre-approach tasks such as monitoring the share register, maintaining a current valuation and preparing for the grant of due diligence.

The key immediate decision for target directors upon receipt of a confidential takeover approach is whether to announce the approach to ASX and whether to engage with the bidder. If the target grants due diligence access it will usually only do so where a friendly acquisition is possible and where a confidentiality agreement has been entered into with the bidder. This may contain a standstill provision under which the bidder undertakes not to acquire securities in the target for a specified period other than pursuant to an agreed offer. Target directors must act in the best interests of the entity and for a proper purpose in considering any control proposal and should not seek to frustrate a bid once it has been made (with the decision regarding whether control should be passed to be left to the target securityholders at that point).

3.5 Shareholding thresholds for acquisitions

The following table sets out the key security holding thresholds for acquisitions in Australian entities:

>5%	**An acquirer must give notice to a target and ASX if they, either alone or together with associates, acquire an interest in 5% or more of the voting securities of a target (substantial holding notice)**
>10%	**Ability to block compulsory acquisition which is possible once >90% security holding is achieved**
>20%	**Acquisitions greater than this threshold are prohibited unless a Chapter 6 exception applies**
>25%	**Ability to block scheme of arrangement. One of the "required majorities" for a scheme is approval by at least 75% of the votes cast on the scheme resolution** **Ability to block special resolutions (75% securityholder approval required)**
>50%	**Ability to pass securityholder ordinary resolution**
>75%	**Acquisition may be approved by securityholder special resolution**
>90%	**Entitlement to compulsory acquisition of remaining securities (10%)**

4 THE 20% PROHIBITION

4.1 Corporations Act

Acquisitions of entities listed on the Australian Securities Exchange (**ASX**) are regulated under Chapter 6 of the *Corporations Act 2001* (Cth) (**Corporations Act**) and, to a lesser extent, the rules and regulations of ASX.

The regime under the Corporations Act relates directly to takeover bids for voting securities in publicly-listed entities. However, it also affects the acquisition of non-voting securities and other securities, such as convertible debt securities and options over issued or unissued securities or other securities (and directly affects the exercise of any such securities). It also regulates acquisitions of securities in Australian incorporated companies which are not publicly-listed but which have more than 50 members.

This guide is principally concerned with the most common form of control transaction, being the acquisition of voting securities in ASX-listed entities by way of an off-market takeover bid or scheme of arrangement. References are commonly made to "securities" and "securityholders" of a company in relation to "shares" and "shareholders" but those concepts can generally be adapted to relate to listed trusts and their "units" and "unitholders" as appropriate.

The regulation of control transactions of public companies in Australia is underpinned by a set of principles which aim to protect securityholders by providing that the transition of control in a public company should occur in a manner which is **transparent, fair and treats all securityholders equally**.

The principles are contained in section 602 of Chapter 6 of the Corporations Act and provide that:

- the acquisition of control should take place in an **efficient, competitive and informed market**;
- securityholders and directors of a target should:
  - know the identity of any bidder (and those that control the bidder) who proposes to acquire a substantial interest in the target;
  - have a reasonable time to consider a proposal; and
  - be given enough information to assess its merits; and
- target securityholders should have a **reasonable and equal opportunity to participate in any benefits** flowing from a proposal.

These principles underpin the provisions of Chapter 6 which regulate in detail the various aspects of takeovers and schemes in Australia. They also form the basis of applications to, and decisions made by, the Takeovers Panel in relation to such transactions (see page 11 of this guide).

4.2 General prohibition

The fundamental feature of Chapter 6 is a general prohibition, contained in section 606 of the Corporations Act, which prohibits a person from acquiring (whether by way of a purchase of existing securities or an issue of new securities) a "relevant interest" in securities in an Australian company if, because of the acquisition, any person's "voting power" in the company would increase from:

- 20% or less to more than 20%; or
- a starting point that is above 20% and below 90%,

unless the acquisition is expressly permitted by one of the "gateways" (exceptions) set out in section 611 of the Corporations Act (including acquisitions by way of takeover bid or scheme of arrangement).

Although the prohibition is directed against the acquisition of voting securities, it has the corresponding effect of limiting the alternatives available to a securityholder wanting to sell a large holding, particularly one of more than 20%, in an Australian public company.

The most significant acquisition gateways (launching a formal takeover bid or scheme of arrangement) are described in more detail later in this guide, but a summary of the other types of common acquisitions permitted by section 611 is set out on page 16 of this guide.

4.3 Key concepts relating to the general prohibition

The concepts of "relevant interest", "voting power" and "associate" (each set out in the below table) are critical to an understanding of the takeovers provisions. As a result of these broad concepts, the regulatory ambit of the takeovers prohibition casts a wide net.

RELEVANT INTEREST	VOTING POWER	ASSOCIATE
A person has a "relevant interest" in a security if the person: • is the holder of the security; • has power to exercise or control the exercise of the voting power attached to the security; or • has power to dispose of or control the disposal of the security. For example, an option to acquire an issued security or a conditional agreement to do so will generally create a relevant interest in a security.	A person's "voting power" in a company is the proportion of the votes attached to all voting securities in which a person and their associates have a relevant interest as a percentage of the total number of votes attached to all voting securities in the company.	An "associate" of a person is defined in very broad and detailed terms but, in summary, 2 persons will be associated if: • one controls the other or they are under the common control of another person; • there is an agreement, understanding or arrangement (whether legally enforceable or not) between them for the purpose of controlling or influencing the relevant company's board or affairs; or • they are acting or proposing to act in concert in relation to the relevant company's affairs.

4.4 Extra-territorial operation

Australian takeover law purports to have extra-territorial force. The takeovers prohibition may therefore apply to a transaction outside Australia, with respect to a non-Australian entity, if the transaction affects the control of voting power in an Australian entity (for example, if an acquirer assumes control of a non-Australian entity which itself holds more than 20% of the voting power in an ASX-listed entity).

These indirect "downstream" acquisitions which result from an acquisition of securities in a non-Australian "upstream" entity will fall within a permitted gateway to the 20% prohibition where the upstream entity is listed on an approved foreign market (which includes, among others, the London Stock Exchange, New York Stock Exchange, NASDAQ Global Market, Toronto Stock Exchange, Frankfurt Stock Exchange, Euronext Paris, Tokyo Stock Exchange and Hong Kong Stock Exchange).

5 KEY REGULATORS

5.1 Regulatory oversight

The key takeovers regulators are the Australian Securities & Investments Commission (**ASIC**) and the Takeovers Panel. ASIC is Australia's corporate, markets and financial services regulator and supervises compliance with the Corporations Act. The Takeovers Panel is a non-judicial body which is the primary forum for resolving corporate control transaction disputes in Australia. As most schemes of arrangement and takeovers involve listed entities, the Australian Securities Exchange (**ASX**) and its listing rules must be complied with when communicating with the market and securityholders regarding a transaction.

Other regulatory bodies may also become involved in certain circumstances. For instance, if an acquirer is foreign, the acquisition may also require approval by the Foreign Investment Review Board (**FIRB**) under Australia's foreign investment regime. Similarly, if a transaction may substantially lessen the level of competition in a market, approval from the Australian Competition and Consumer Commission (**ACCC**) may also be required. Each of these regulators is considered in turn below.

ASIC | TAKEOVERS PANEL | ASX

FIRB | ACCC

5.2 ASIC

ASIC supervises the operation of companies and securities laws including takeovers law.

ASIC is responsible for monitoring compliance with the Corporations Act and has wide powers to investigate, among other things, the conduct and security trading activities of parties involved in a control transaction.

ASIC also has powers to modify the operation of, and grant parties exemption from compliance with, various provisions of Chapter 6 and the wider provisions of the Corporations Act. ASIC publishes detailed guidance on its interpretation of legislative provisions and when it may consider granting such modifications and exemptions.

ASIC also reviews many of the documents issued by parties involved in a takeover bid or scheme.

5.3 The Takeovers Panel and dispute resolution

The Takeovers Panel is a non-judicial body comprised of a small full-time executive and a part time panel of representatives from industry and the legal, finance and accounting professions. The Takeovers Panel is the principal forum for resolving disputes relating to a takeover during a takeover bid.

The Takeovers Panel has broad statutory powers to:

- make declarations of "unacceptable circumstances" regarding the affairs of an entity in relation to a takeover or acquisition of a substantial interest in the entity and make a wide range of interim and final orders (enforceable by the courts) to remedy those circumstances and protect the rights and interests of those affected by the circumstances; and
- review decisions of ASIC which relate to modifying the operation of, or granting exemptions from, the provisions of Chapter 6 relating to takeovers.

During a takeover bid, the Takeovers Panel displaces the courts as the primary forum for resolving disputes in relation to the bid. Each of the bidder, the target, ASIC and any other person whose interests are affected by a takeover bid (for instance, securityholders) may apply to the Takeovers Panel for a declaration or appropriate orders.

The Takeovers Panel also plays a role in disputes in relation to schemes of arrangement, although the Panel will be reluctant to intervene once a scheme has progressed to court (ie after the first court hearing).

The Takeovers Panel may only make a declaration of unacceptable circumstances and consequential orders if it is satisfied that circumstances are unacceptable:

- having regard to the effects the circumstances have had (or are having, will have or are likely to have) on the control or potential control of an entity or the acquisition or proposed acquisition of a substantial interest in an entity;
- having regard to the principles (see page 9) contained in section 602 of the Corporations Act; or
- because they have constituted or given rise to (or currently, will or are likely to constitute or give rise to) a contravention of Chapters 6-6C of the Corporations Act, and the Takeovers Panel considers that action is not against the public interest taking into account relevant policy considerations.

Prior decisions and guidance notes released by the Takeovers Panel provide important sources of advice for parties on key issues which frequently arise during takeover bids.

Since being set up in 2000, the Takeovers Panel has dealt with over 600 applications. While applications span a wide variety of issues, some common grounds for applications are:

- misleading or inadequate disclosure to securityholders;
- alleged associations between participants in a takeover and related breaches of Chapter 6 of the Corporations Act;
- exclusivity and lock-up arrangements inhibiting the operation of an efficient and competitive market;
- adverse control effects arising from rights issues and underwriting arrangements; and
- arrangements which result in unequal treatment of securityholders (such as collateral benefits).

5.4 ASX

In addition to ASIC and the Takeovers Panel, ASX may become involved in a takeover if it is concerned that its rules are not being complied with by the parties involved in the takeover. The principal concern of ASX is to ensure there is an informed market in securities of the target entity (and the acquirer, if listed).

Most schemes of arrangement and takeover bids involve listed entities. The key documents and supplementary materials for takeover bids are released on the publicly available ASX platform via announcements.

5.5 FIRB

> Foreign bidders accounted for approximately **46%** of all deals announced over $50 million between 2018-2022

Australia has a foreign investment regime that regulates the acquisition by “foreign persons” of certain interests in Australian businesses (including the acquisition of shares in Australian companies). The regime is set out in the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) and accompanying regulations. More recently, the government introduced the *Security of Critical Infrastructure Act 2018* (Cth) (which was amended in 2021) (**SOCI Act**) which works with the foreign investment regime and is designed to protect Australian critical infrastructure from sabotage and cyber threats. If approval of an acquisition is required under the FATA, then the Australian Treasurer (advised by FIRB) must be notified in advance of the proposed acquisition. The Treasurer may block proposals by foreign persons that are contrary to the national interest or impose conditions with any approvals.

Thresholds

It is compulsory for foreign persons to notify FIRB of certain types of investment proposals, including, where a single foreign person (together with its associates) acquires a substantial interest (20% or more of the securities or votes) of an Australian corporation or trust with total assets or issued securities valued at A$310 million or more (or A$1,339 million or more where the foreign person is resident in certain trade agreement jurisdictions, including Chile, China, Hong Kong, Japan, New Zealand, Peru, Singapore, South Korea and the USA (and any other country party to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. It is important to note that the acquiring vehicle itself will need to be from that jurisdiction.

Special rules and thresholds also apply to:

- the acquisition of Australian land or companies of which at least 50% of their assets comprise Australian land;
- the acquisition of agribusinesses and companies of which at least 50% of their assets comprise Australian agricultural land;
- businesses in sensitive sectors (including media, telecommunications, transport, military and defence related activities, encryption and security technologies and the extraction of uranium or plutonium or the operation of nuclear facilities); and
- investments in the media sector of 10% or more (or any control or influence).

The monetary screening thresholds, together with other monetary thresholds adopted in connection with Australia's foreign investment regime, are indexed annually on 1 January using the GDP implicit price deflator. The amounts in this guide are current at 1 January 2023.

A foreign person is broadly:

- an individual not ordinarily resident in Australia;
- a foreign government or foreign government investor; or
- a corporation, trustee of a trust or general partner of a limited partnership where an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of at least 20% or, in aggregate, 2 or more of those persons hold an interest of at least 40%.

Foreign government investors are subject to lower thresholds. FIRB approval will be required if a foreign government investor proposes to acquire 10% or more (or any control or influence) in an Australian entity or business. All investments by foreign government investors are subject to a A$0 monetary threshold.

Applications for approval are submitted to FIRB and a prescribed fee must be paid (generally between A$26,400 – A$1,045,000 depending on the value of the proposed transaction). Once the application has been submitted and the fee is paid there is a statutory timeframe within which the Treasurer can make a decision. Initially, the Treasurer has 30 days to make a decision and a further 10 days to notify the applicant.

However, this timeframe can and often is extended (up to 90 days in some circumstances). In practice, the timetable for major acquisitions can range from 3 to 6 months and sometimes longer.

Foreign persons considering control transactions in Australia to which the foreign investment regime might apply should ensure they recognise the potential timing implications of any FIRB application in their transaction timetable.

While FIRB rarely blocks business acquisitions, it often wishes to consult with other relevant regulatory bodies (for instance, the Australian Tax Office and the ACCC) prior to giving approval. In practice, if there is a competition issue, FIRB will not issue the approval until the ACCC has cleared the acquisition.

In addition, FIRB may impose conditions when granting approval which the Treasurer considers necessary to protect the national interest. A condition which is not complied with would be contrary to the national interest and would reactivate the Treasurer's powers.

A suite of standard tax compliance conditions are sometimes applied to FIRB approvals. Additional governance and access conditions may also be imposed to protect Australia's national security. Timing and confidentiality considerations are obviously relevant to any foreign investment notification requirements.

The rules regarding when foreign investment approval is required are technical and complex. Australian legal advice should be sought by foreign persons as to whether the foreign investment restrictions might apply to a potential control transaction before it is undertaken.

National interest considerations

Whether a proposed transaction is contrary to the national interest is assessed on a case-by-case basis. There are no fixed national interest rules but the Australian Government typically considers the following factors:

- national security;
- competition;
- other Australian Government policies (including tax);
- impact on the economy and community; and
- the character of the investor.

A fundamental concern for foreign government related investment is that any investment by a foreign government investor is made on a commercial basis, with understood and clear predictable outcomes. It cannot be an investment made for a strategic government objective.

National security considerations

Recent changes to the SOCI Act have considerably expanded the types of critical infrastructure assets and sectors caught by the definition of 'national security business'. This means that more businesses will be deemed 'responsible entities' and 'direct interest holders' for critical infrastructure assets under the SOCI Act, which in turn renders these businesses national security businesses under the FIRB regime.

The sectors now covered by the SOCI Act are:

- **Communication**
- **Financial Services & Market**
- **Higher Education & Research**
- **Water & Sewerage**
- **Data Storage & Processing**
- **Food & Grocery**
- **Space Technology**
- **Defence Industry**
- **Healthcare & Medical**
- **Transport**

Any acquisition of an interest in national security land or a direct interest (10% or more) in a national security business is considered a 'notifiable national security action' and will be subject to a A$0 threshold. In addition, the proportionate ownership threshold for interests in a national security business reduces to 0% where control elements are acquired.

National security land is defined as Department of Defence premises or land where a National Intelligence Community agency holds an interest that is publicly known, or ascertainable through reasonable inquiries.

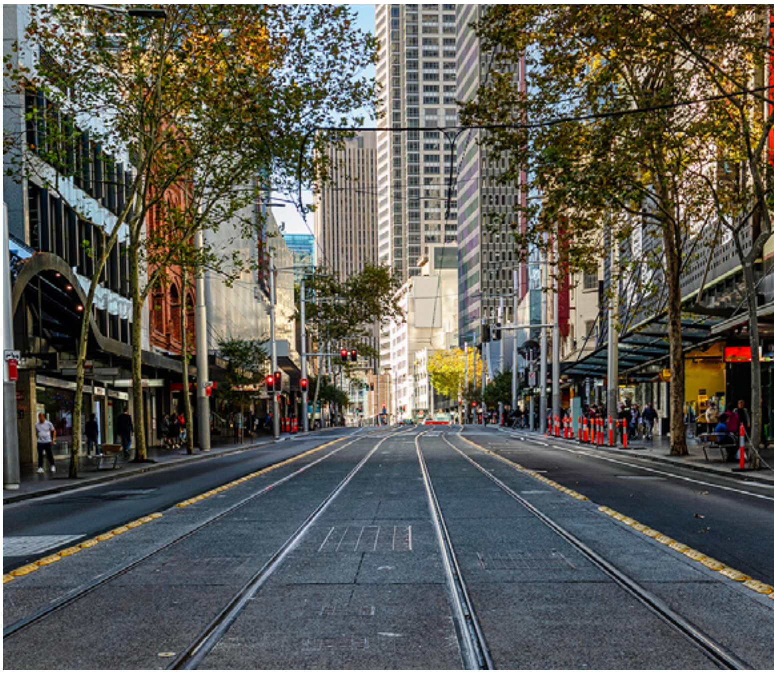
A business is considered a national security business if it is carried on, wholly or partly, in Australia whether or not in anticipation of profit or gain and it is publicly known, or could be known through reasonable enquiries, that the business is of one of the following kinds:

- it is a responsible entity for, or a direct interest holder in, a critical infrastructure asset under the SOCI Act;
- it is a telecommunications carrier or nominated carriage service provider;
- it develops, manufactures or supplies critical goods, technology or services for a military or intelligence use;
- it stores or has access to classified information; or
- it collects, stores or maintains security sensitive personal information for the Australian Defence Force, the Department of Defence or an intelligence agency.

5.6 ACCC

Section 50 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) prohibits an entity from directly or indirectly acquiring shares or assets if the proposed acquisition, whether by scheme or takeover, would have the effect, or likely effect, of substantially lessening competition in any Australian market.

The ACCC is the statutory body responsible for administering the CCA and a range of additional legislation promoting competition and fair trading in Australia.



Australia's merger control regime is neither mandatory nor suspensory and there is no minimum turnover or other monetary threshold for notifying proposed mergers to the ACCC. However, parties are encouraged to approach the ACCC, as soon as there is a real likelihood that a proposed merger may proceed, to discuss possible competition issues and options for having the matter considered. Further, as a matter of practice, FIRB will not approve an investment unless it is satisfied that the proposed merger does not give rise to any competition law concerns.

Parties are encouraged to consult the ACCC about a proposed transaction where both of the following conditions apply:

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

Although filing is voluntary, the ACCC will expect parties to seek clearance where a proposed merger raises competition issues or where the above conditions are met.

If a decision to file is made, there are 2 options for obtaining merger clearance:

- **an informal clearance process:** an acquisition can be considered and assessed on competition grounds by way of an informal, non-statutory ACCC clearance process. This process does not prevent third parties from subsequently challenging the proposed merger. The process followed by the ACCC is set out in the ACCC's Informal Merger Review Process Guidelines. Depending on the extent to which possible competition issues arise from the proposed merger, obtaining informal clearance from the ACCC can take several months. Alternatively, if there are no competition issues as a result of the proposed merger, clearance could be obtained within 4 to 8 weeks; or

- **merger authorisation process:** the ACCC can also formally authorise an acquisition if it is satisfied that the acquisition would be unlikely to result in a substantial lessening of competition or the likely public benefit from the proposed merger outweighs the likely public detriment. In other words, that there is a 'net public benefit'. Merger authorisation is a public process and the process followed by the ACCC is set out in the ACCC's Merger Authorisation Guidelines. The ACCC must make a decision within 90 days of a valid application being lodged. This period may be extended if the applicant agrees in writing before the 90 days expire. If no extension is given, and no decision has been made, the ACCC is taken to have refused merger authorisation. Applicants and interested parties have 2 avenues for the review of ACCC merger authorisation decisions – review by the Tribunal which will make its own findings of fact and reach its own conclusions, or by judicial review of the decision by the Federal Court on a question of law.

Notably, in 2021, the ACCC announced proposed reforms to Australia's merger control regime. These include:

- the introduction of a new single formal clearance regime, abolishing the current informal and merger authorisation process pathways. This new formal clearance regime would include mandatory notification thresholds (yet to be outlined but likely based on revenue/assets, market share and/or transaction size). If these thresholds are met, parties will be required to file with the ACCC and will be unable to complete a transaction without ACCC approval. Further, the ACCC also proposes having a 'call-in' power to review problematic mergers that do not meet the threshold, but which it considers may raise competition concerns;
- changes to the legal test - the ACCC is also proposing a number of other changes to the legal test to make sure it is focused on the competition that is lost as a result of mergers; and
- a specific test for large digital platforms - the current regime does not prescribe sector-specific laws or standards. For acquisitions by large digital platforms, the ACCC expects those mergers to be subject to a separate and tailored test. This test will only apply to a (yet to be identified) list of large digital platforms. The ACCC has not yet proposed what that test should be, but has indicated it may involve any mandatory threshold being lowered in this case.

6 METHODS OF ACQUIRING CONTROL

6.1 Permitted acquisitions under the Corporations Act

The most common ways of acquiring an interest in more than 20% of the voting securities in a listed entity are:

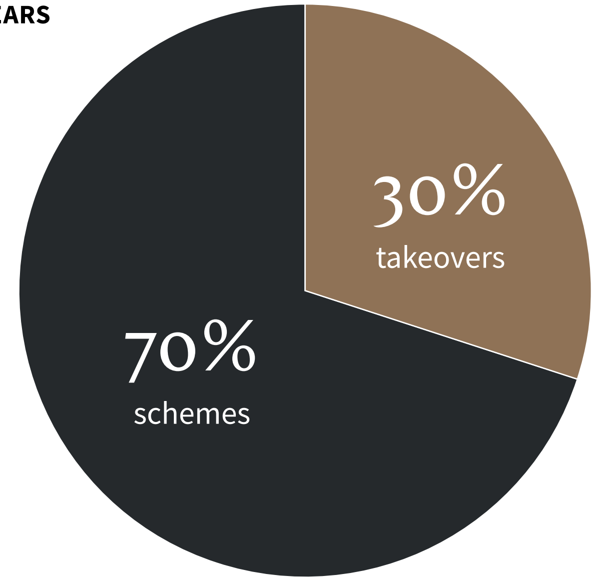
- a takeover bid, either off-market or on-market (described in detail on page 20); and
- a court approved scheme of arrangement (described in detail on page 25).

6.2 Other frequently used exceptions to the 20% prohibition:

Target securityholder approval	Securityholders can give their approval via a general meeting for a person to acquire greater than 20% of the target. Votes by any of the parties to the acquisition or their associates (interested parties) must be excluded from the securityholder resolution. Target securityholders must be provided with all information known to the target and the acquirer that is material to the decision on how to vote. It is typical (and expected by ASIC) to produce an independent expert's report for securityholders.
Creeping acquisition (3% creep in 6 months)	Securityholders may increase their stake in the target by up to 3% every 6 months without contravening the 20% prohibition. Once the securityholder has secured a voting interest of at least 19%, held continuously throughout the preceding 6 months, it may continue to increase its stake by a further 3% in each succeeding 6 month period. This method is usually only used where the acquirer is prepared to patiently build a strategic stake in the target over a period of years or for small re-adjustments.
Acceptances of scrip bids	Acquisitions which result from the acceptance of an offer under a takeover bid in which securities in the bidder form part of the consideration offered are also exempt from the 20% prohibition. This exemption allows so-called "reverse takeovers" in which a bidder offers so many of its own securities as consideration for securities in a target that the target's securityholders end up acquiring control of the bidder itself. ASX also requires bidders to seek securityholder approval where the issue of new securities by a bidder in a takeover bid or scheme of arrangement would equal or exceed 100% of the bidder's share capital. In light of the inherent conflict with the fundamental principles of Chapter 6, ASIC and the Takeovers Panel will also carefully consider any reverse takeovers which threaten control of the bidder passing without its securityholders having the opportunity to participate in any decision, and orders may be made for such bids to require approval of the bidder's securityholders.
Capital raising (rights issues >20%, including underwritten rights issues)	Acquisitions which arise through participation in pro-rata rights issues (including acquisitions by underwriters and sub-underwriters of rights issues) are also exempt. However, ASIC and the Takeovers Panel will carefully review rights issues which affect control and may consider acquisitions unacceptable where the structure, pricing or underwriting arrangements have control effects which are disproportionate to the fundraising purposes of the rights issue. In such circumstances, the Takeovers Panel may make orders to prevent or amend a rights issue or require the approval of target securityholders.

7 COMPARISON OF TAKEOVERS AND SCHEMES

DEALS OVER THE LAST 5 YEARS

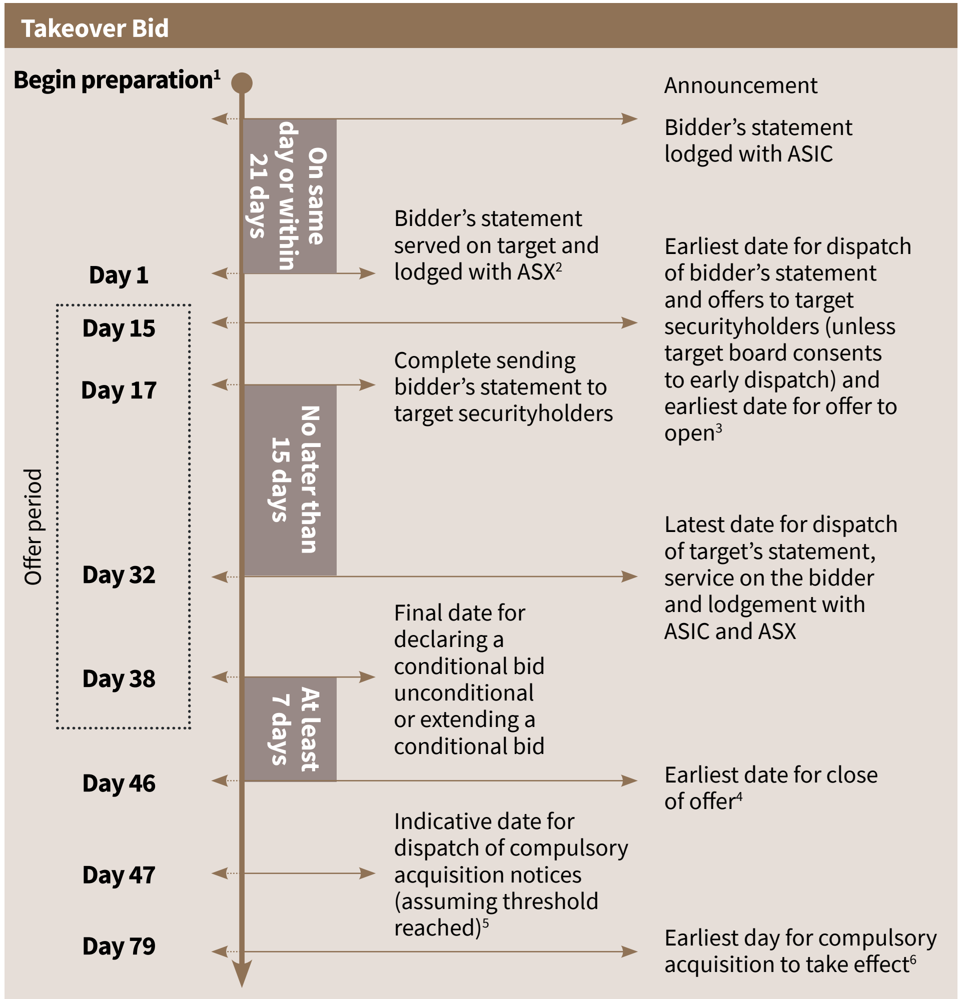


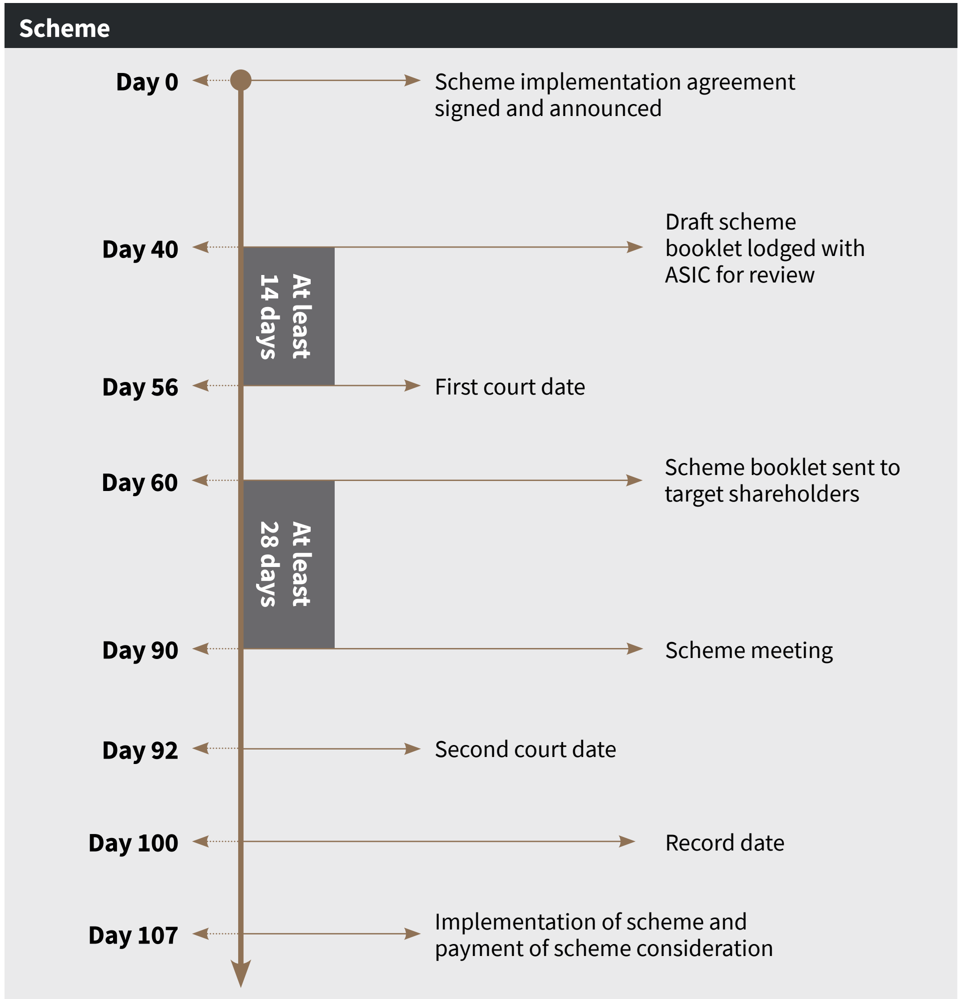
7.1 Comparative analysis

	TAKEOVER BID	SCHEME OF ARRANGEMENT
Control of implementation	Bidder controls the process at all stages	Target controls the process subject to the terms of an implementation agreement with the bidder
Target support	Not essential but a “friendly” bid which enjoys target support is preferable	Essential in practice
Court approval	No formal court or regulatory assent required Takeovers Panel has oversight role	Court approval needed to order scheme meeting and approve scheme. ASIC has formal review role and the Takeovers Panel may become involved in an oversight role
Conditions	Off-market bid may be conditional On-market bid must be unconditional All regulatory approvals must be obtained prior to announcement	May be conditional
Consideration	Off-market bid may be cash and/or securities On-market bid consideration must be cash	May be cash and/or securities. Easier to offer consideration such as “mix and match” where there is a specific pool of cash or securities available as consideration

	TAKEOVER BID	SCHEME OF ARRANGEMENT
Announcement	Can announce bid without target support	Subject to agreement with target
Time to end date	Uncertain - likely to be at least 3 months but no fixed date, bid may be extended for up to a year	More certain - likely to be about 4 months, unless longer is needed to obtain regulatory or other third party approvals
Threshold to reach 100%	90% threshold to trigger right to compulsory acquisition of securities in the bid class	For each class of securityholders, 50% by number of holders present and voting and 75% of votes cast
Differentiation between holders	All securityholders must be treated equally Collateral benefits likely to induce acceptance not allowed	Acceptable if disclosed, although may create separate securityholder classes requiring separate votes
Flexibility of structure	Initial flexibility constrained by Corporations Act requirements but relatively straightforward to increase offer price and modify offer terms during bid period	Initial structural flexibility (for example to incorporate related transactions) but subsequent amendments generally require court sanction and further notice to securityholders
Interloper vulnerability	Flexibility for the bidder to vary offer terms in response to interloper	Less flexibility for the bidder to vary offer terms in response to interloper
Disclosure requirements	Similar. Target commonly commissions a "fair and reasonable" report by an independent expert, although not always required	Similar. Scheme booklet almost always includes a "best interest" report by independent expert, although technically not required
Other deal risks	Risk of not acquiring control Minimum acceptance conditions may be imposed to mitigate this risk	"All or nothing" outcome
ASIC oversight	ASIC's role is more limited in takeovers, when compared to schemes and prior review of takeover offer documentation by ASIC is not required before dispatch to target securityholders	Scheme documentation must be lodged with ASIC at least 14 days prior to the first court hearing ASIC may also appear at the court hearings if it has reason to believe securityholders have received insufficient information in offer documents or if it holds other concerns regarding the scheme which it believes should be raised before the Court
Takeovers Panel involvement	The Takeovers Panel is the primary forum for resolving disputes concerning takeover bids. The Takeovers Panel is empowered to make a declaration of "unacceptable circumstances" to ensure market integrity is upheld	The Takeovers Panel has jurisdiction of schemes only at the very early stages of a bid, after which the courts take charge in overseeing the scheme process

7.2 Indicative Timelines





1. Action items during this period include: preparing the bidder's statement, preparing and lodging FIRB and/or ACCC applications (if required), making an ASX announcement and holding a board meeting to approve the bidder's statement. However, applications for approvals are often lodged after the announcement for confidentiality reasons.
2. Bidder can serve the bidder's statement on the target on the same day as it lodges with ASIC or within 21 days. The last day permitted for making offers is 2 months after the bid is announced.
3. Bidder's statement must be sent to target securityholders within a 3 day period, which itself is within 14-28 days from service of the bidder's statement on the target unless the target agrees to a period shorter than 14 days.
4. Offer cannot close earlier than 1 month after the offer opens and cannot remain open for more than 12 months.
5. Compulsory acquisition notices must be lodged and dispatched during or within 1 month after the end of the offer period.
6. Assumes no requests for lists of securityholders or other action taken by non-accepting securityholders. Compulsory acquisition must be completed within a 14 day period at the end of 1 month after the date the compulsory acquisition notice was lodged.

8 TAKEOVER BIDS

8.1 Takeover structures

There are 2 forms of takeover bids in Australia:

- off-market bids (the most common form of takeover and the focus of this section) for quoted or unquoted securities; and
- on-market bids, which are only available for quoted securities and are relatively rare.

Takeover bids are often classed as friendly or hostile depending upon whether the bidder has secured the support of the target's board in supporting and recommending acceptance of the bid. Friendly acquisitions will often proceed by scheme of arrangement given the greater potential for certainty under a scheme structure.

30% of deals announced over $50 million between 2018-2022 were structured as takeovers, the majority of which (89%) were off-market takeovers

OFF-MARKET TAKEOVER BID	ON-MARKET TAKEOVER BID
Under an off-market bid, a bidder makes separate but identical offers to all holders of securities in a target to acquire their securities. When a holder accepts the offer, an agreement for the acquisition of their securities results. Off-market takeover bids are often made conditional upon the satisfaction or waiver of a number of conditions, such as that the bidder reaches a minimum level of acceptances (usually 50% or 90%) or obtains specified regulatory approvals such as foreign investment or Australian competition approvals. Off-market takeover bids may be friendly (made with the recommendation of the target board) or hostile (unsolicited).	In contrast, under an on-market bid, quoted securities are acquired through ASX rather than through off-market acceptances. A bidder, through a broker, will stand in the market during the bid period and offer to acquire all of the target's securities at the specified offer price, and will have priority over other trades on the market at that price. On-market bids are rare in Australia, largely due to the requirement that they be cash-only and unconditional and therefore risk a bidder being left without control. However, the speed with which an on-market bid can be implemented (with a bidder acquiring securities on-market within hours of announcing the bid and sellers able to receive consideration within days of accepting an offer) can make an on-market bid a highly effective takeover tool when used in the right transaction.

8.2 Key features of an off-market takeover bid

Securities

The offer must relate to all of the securities in the target of the relevant class or a specified proportion of each holder's securities. An offer cannot be made on a "first in first served" basis.

Consideration

Consideration may be cash, securities or a combination of both.

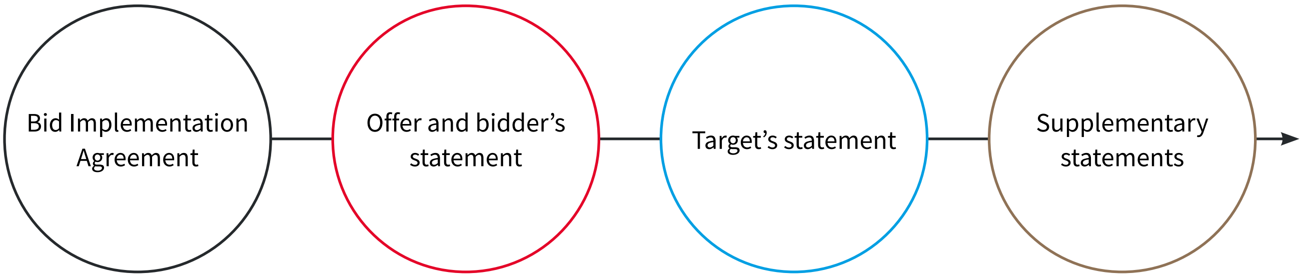
The consideration must be equal to, or more than, the amount or value of the highest consideration for the securities which the bidder or its associates have provided in the 4 months before the date of the bid.

Except in very limited circumstances, all target securityholders must be offered the same consideration per security.

If the consideration is increased during the offer, the increased consideration is payable to any securityholder who had already accepted the offer prior to the increase. Consideration must be paid within 1 month of the later of an acceptance and the offer becoming unconditional and, in any event, not later than 21 days after the offer closes.

A bidder must have a reasonable expectation of being able to fund the bid before announcing it (which generally means having sufficient cash reserves and/or binding commitments for debt financing).

Documents



For more information on these documents, see page 36.

On market purchases

A bidder can only purchase securities on-market in excess of the 20% threshold when the offer is unconditional and the bidder's statement has been given to the target. If the bidder buys securities above the prevailing offer price, the offer price is automatically increased to match the higher price.

Variations

A bidder may vary its offer under an off-market bid by increasing the amount of consideration, adding a new type of consideration (for example, adding an all-cash alternative to a bid offering securities as consideration) or by extending the offer period. If the consideration is increased or a new type of consideration is added, every person whose securities were acquired before the variation is entitled to receive the increased or new consideration. So, if cash is added as an alternative to securities, each person who has accepted an offer may elect cash in lieu of the other consideration.

Withdrawal

The bidder cannot withdraw an offer once it has been accepted. Unaccepted offers can only be withdrawn with ASIC's consent.

The target's securityholders generally cannot withdraw their acceptance of the offer except in limited circumstances. For example, they may withdraw their acceptance if the offer is subject to a defeating condition and the offer period is extended so that payment is postponed for more than 1 month.

8.3 Conditions of an off-market bid

An off-market takeover bid may include conditions or be unconditional.

A bidder may subsequently declare the offer to be free from a condition by giving notice to the target and ASX (or ASIC if the target securities are not listed) in most cases not less than 7 days before the end of the offer period.

If at the end of the offer period the remaining conditions are not satisfied, all acceptances under the offer are void and no securities are acquired.

Australian law prohibits certain conditions in takeovers. Set out below are examples of some common bid conditions and prohibited bid conditions:

Examples of common takeover conditions

- (**Minimum acceptance**) a condition that a specified percentage of bid acceptances must be achieved, usually between 50.1% (which normally gives the bidder control of the target) to 90% (which normally allows compulsory acquisition to proceed);
- (**No prescribed occurrences**) a condition that none of the events or circumstances referred to in sections 652C(1) or (2) of the Corporations Act ("prescribed occurrences") occurs in relation to the target or its subsidiaries (for example, certain transactions which affect a target's share capital, result in an agreement to issue securities or involve the sale of a substantial part of the target's business);
- (**Regulatory approvals**) a condition that regulatory approvals are received (for example, FIRB or ACCC approval);
- (**MAC**) a condition that there are no material adverse changes in the financial position of the target; and
- (**Conduct of business**) conditions in relation to the business such as the target not amending or entering into a material contract, the purchase or sale of a material asset or business or a change in the employment terms of senior executives.

Examples of prohibited takeover conditions

- (**Acceptances cap**) a condition that the offer may be withdrawn if the number of acceptances exceeds a specified number;
- (**Selective acceptances**) a condition that permits the bidder to acquire securities from some, but not all, persons accepting offers under the bid;
- (**Loss of office compensation**) a condition that offerees must approve payment of compensation for loss of office to a director, secretary or executive officer of the target or a related body corporate; and
- (**Conditions within bidder control**) a condition which depends upon an opinion, belief or other state of mind of the bidder or an associate, or the occurrence of some event within the sole control of the bidder or associate (although as a matter of practice, regulatory approval conditions which require positive action by a bidder to make and progress applications to regulators are considered acceptable).

8.4 Timing

An uncontested off-market bid usually takes a minimum of 3 months from announcement to completion. If a bid is contested by the target or a rival bidder, or there are regulatory approvals, the duration of the bid may be significantly longer. Formal offers to securityholders under an off-market takeover bid must be made within 2 months of announcement of a bid and must stay open for a minimum of 1 month and a maximum of 12 months.

A basic timetable for an off-market bid, alongside a timetable for a scheme of arrangement, is set out on page 19 (most takeovers will take longer).

8.5 The endgame - closing an off-market bid

Some strategies that can be employed by bidders to increase the prospects of success in the final stages of an off-market takeover bid include:

Acceptance facilities

Because the opportunities to withdraw an acceptance are limited, securityholders and, in particular, institutional securityholders can be reluctant to accept a conditional offer. To help overcome this reluctance, a bidder may establish an acceptance facility.

Under an acceptance facility, an agent holds acceptance instructions on behalf of a securityholder, which can withdraw its instructions at any time before a defined trigger event (such as the satisfaction of all conditions) occurs. Upon the trigger, the facility immediately 'locks' in all acceptances in the facility at that time and the bidder gets the benefit of those acceptances which can no longer be withdrawn.

The use of acceptance facilities is particularly effective in the case of institutional securityholders who are reluctant to restrict their ability to trade in their securities or whose investment mandates often prevent them from accepting an offer until it is unconditional. By using an acceptance facility, such holders are able to provisionally "accept" into the facility while the bid is still conditional, for example, while it is still subject to a 50% minimum acceptance condition.

A strong flow of "acceptances" into an acceptance facility can then give a bidder momentum in building acceptances and if acceptances in the facility, plus actual acceptances, exceed the level of a minimum acceptance condition a bidder will be able to waive that condition, knowing that the facility will close upon the waiver and lock in all acceptances in the facility at that time.

Last and final statements

These statements, under which a bidder announces that an offer is final or will not be extended, can be used to force the hand of securityholders waiting for a potential higher offer.

Special care must be taken before such statements are made given the approach taken by ASIC and the Takeovers Panel to hold bidders to these statements (for instance, "last and final statements" that the offer price will not be increased).

Virtual variations

By promising to remove outstanding offer conditions or improve the offer price should the bid achieve a specified level of acceptances, bidders are often able to elicit further acceptances without having to actually vary an offer until the relevant target is reached.

Accelerated payment

By reducing the time period in which acceptances are paid out under the offer terms (for example, to make payment equivalent to the on-market terms of "T+2" (being the day of trade plus 2 trading days)) a bidder can make an offer more attractive to securityholders, in particular relative to the alternative of selling on-market.

Removing conditions

A decision to remove outstanding conditions before the last week of the offer period will often encourage securityholders to accept the unconditional offer and can be used in conjunction with voluntary or automatic extensions available in the last week of a bid period.

Bidders are not entitled to waive conditions (other than those relating to standard prescribed occurrences) in the last week of an offer period. If the offer is still conditional it cannot be extended during the last week of the offer period, unless a competing bid is made or improved.

Last-week variations

A strategy of delaying the announcement of a decision over whether to extend the offer period (if the offer is unconditional) or increase the offer price in the last week of an offer can often place securityholders under pressure to consider accepting a bid. However, care must be taken to ensure compliance with the provisions of Chapter 6. A bidder cannot generally elect to extend a conditional bid in the last week of an offer, but a bid will be automatically extended for 14 days if in the last 7 days of the offer period the bidder increases the offer price or reaches voting power of 50% in the target. In *Qantas Airways Limited 02* [2007] ATP 6 and *Qantas Airways Limited 02R* [2007] ATP 7 the Takeovers Panel refused to extend the deadline for a takeover offer following receipt of an acceptance just after the deadline for the close of the bid, which would otherwise have pushed acceptances to over 50% and automatically extended the offer period.

Compulsory acquisition after a bid

A bidder under a takeover bid may compulsorily acquire any remaining securities in the bid class if, by the end of the offer period, it and its associates have:

- relevant interests in 90% by number of the securities in the bid class; and
- acquired at least 75% by number of the securities that the bidder offered to acquire under the bid (whether or not the acquisitions occurred under the bid or otherwise).

A notice of compulsory acquisition must be lodged with ASIC and ASX and given to all remaining holders of securities in the bid class during or within 1 month after the end of the offer period. The bidder is then entitled to acquire the outstanding securities on the terms applicable under the bid. Dissenting securityholders may contest the compulsory acquisition by court application.

In the absence of objections from securityholders, the compulsory acquisition process typically takes between 5 and 8 weeks from obtaining the necessary entitlement thresholds.

9 SCHEMES OF ARRANGEMENT

70% of deals announced over $50 million between 2018-2022 were structured as schemes of arrangement.

9.1 Key features of a scheme of arrangement

Court approval

A scheme of arrangement is a court approved procedure under Part 5.1 of the Corporations Act which may be used to effect a wide range of corporate restructures, including transfers of all or a specified proportion of each shareholder's securities to a bidder. As such, it can be used as an alternative to a takeover bid to effect a change of control or merger of companies.

All or nothing

A scheme has an "all or nothing" outcome and a bidder will have the certainty of knowing that it will either acquire 100% of the securities to which the scheme relates, or nothing if it is not successful.

Flexibility

The flexible structure of a scheme is a key advantage over the relatively prescriptive regime for takeover bids, and allows a bidder not only to pay any combination of cash or scrip as consideration for an acquisition (for example, having a maximum cash pool available) but also enables an acquisition simultaneously to incorporate additional complexities such as the transfer or demerger of specified assets or liabilities or the reduction of a target's capital.

Target support for scheme

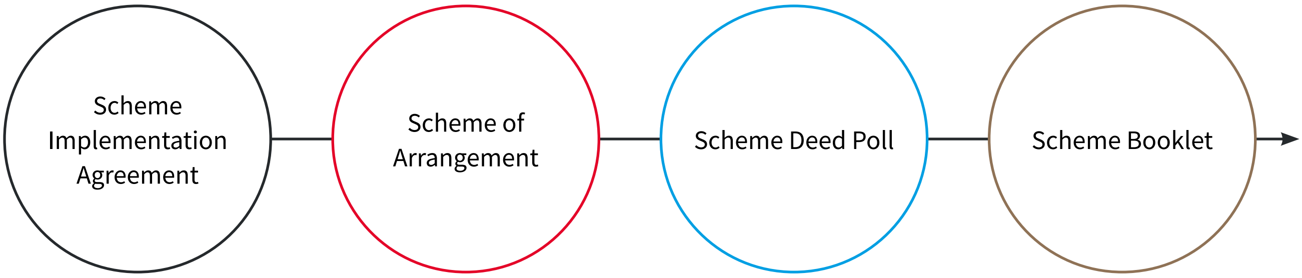
It is generally considered essential for a scheme to be proposed and supported by the target company because of the positive obligations on the target to, among other things, issue the scheme documentation to target securityholders and apply for the relevant court orders.

Friendly

As a result, schemes of arrangement in Australia have to date proceeded on a friendly rather than hostile basis, with targets and bidders entering into a formal scheme implementation agreement setting out the terms upon which a scheme will be proposed to securityholders and supported by the target's directors.

However, it is common for bidders to attempt to drag initially reluctant targets to the negotiating table through the use of "bear hug" announcements, which publicly propose schemes of arrangements with a target in the hope that the resultant securityholder pressure will force an otherwise hostile target board to enter into discussions with a view to putting a proposal to securityholders.

Documents



For more information on some of these documents, see page 37.

9.2 Scheme process

The general steps in the scheme process are as follows:

1 (**SIA signed**) Execution of Scheme Implementation Agreement (**SIA**) between a bidder and the target company setting out each party's rights and obligations in proposing and implementing a recommended scheme.

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2 (**Announcement**) Executing the SIA triggers an obligation on an ASX-listed target to make a public announcement regarding the key terms of the scheme, including the consideration to be paid by the bidder and the key features of the SIA.

While the initial announcement would customarily follow agreement of an SIA, for tactical reasons individual parties may seek to announce a potential deal earlier, in the case of a bidder, to put pressure on a target board to put a proposal to securityholders and, in the case of a target, to flush out any potential counter-offers and initiate an auction.

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3 (**Documentation and Independent Expert's Report**) Scheme documentation, including a scheme booklet and notice of scheme meeting (among other documents), lodged with ASIC at least 14 days prior to the first court hearing. It has become common practice (and generally expected by ASIC and the Court) to include in the scheme booklet an independent expert's report stating whether the scheme is in the best interests of the securityholders.

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4 (**First Court Hearing**) The target will apply to the Court for orders approving dispatch of the scheme booklet (containing the notice of scheme meeting) and the convening of a meeting of securityholders (or meetings of separate classes of securityholders if necessary) to consider and vote on the scheme. Objectors with an obvious interest to be heard at the first court hearing may appear, for instance, ASIC or activist shareholders.

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5 (**Scheme booklet dispatched**) Following court approval, the scheme booklet is dispatched to target securityholders. Securityholders must be given at least 28 days' notice of the scheme meeting for listed entities (21 days notice for non-listed targets).

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6 (**Shareholder approval**) For a scheme to be successfully approved, it must be approved by the 'requisite majorities', being:

- a majority in number of those securityholders present and voting in *that class* (in person or by proxy); and
- securityholders representing 75% of the votes cast on the resolution in that class,

but excluding any votes of any securityholders who are associates of the bidder.

One of the more challenging issues that can arise in a scheme is whether or not the securityholders with the right to vote on a scheme should do so at the same, or separate, class meetings. This is because the scheme must be approved by the requisite majorities in each class.

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7 (**Second court hearing**) If the scheme is approved by the requisite majorities and all conditions to the scheme have been satisfied or waived, the target must return to court for an order approving the scheme. The Court has a discretion whether to approve a scheme and in exercising that discretion will generally consider whether the Corporations Act's requirements regarding schemes have been complied with and whether the scheme is fair and reasonable for securityholders. However, in practice, it is rare for the Court not to approve a scheme.

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8 (**Scheme effective**) Following securityholder and court approval, the scheme takes effect and is binding on all target securityholders (including any dissenters) upon lodgement of the court orders with ASIC.

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9 (**Implementation**) The scheme booklet will contain a subsequent implementation date at which time any security acquisition or reorganisation will occur, and consideration will be paid to target securityholders.

9.3 Timing

Given the time involved in preparing the necessary documentation, holding each of the court hearings and convening a securityholder meeting, it is common for a scheme to take at least 4 months to proceed from agreement of an SIA to final approval and implementation.

A typical timetable for a scheme of arrangement, alongside a timetable for an off-market takeover bid, is set out on page 19.

9.4 Trust structures

Unlike some foreign jurisdictions, the Australian takeover provisions apply to takeover transactions involving listed trusts. However, there is no statutory scheme of arrangement procedure for listed trusts. Accordingly, a scheme is typically implemented as an "informal" trust scheme through a combination of securityholder approvals for the acquisition of the target trust by the bidder, and to amend the target's constitution to empower the responsible entity to give effect to the informal trust scheme. The majority of takeovers of listed trusts to date have been implemented using the informal trust scheme mechanism.

10 PLANNING AND PREPARING AN ACQUISITION

10.1 Key roles and advisers

In embarking upon an acquisition for control, whether by a takeover bid or a scheme of arrangement, a bidder will need to dedicate significant internal resources to the planning and execution stage and will also often need to assemble a team of advisers to assist with the takeover process.

Depending upon the size and complexity of a bid, and the resources of a bidder, a bidder may appoint some or all of the following advisers to assist with various elements of a takeover:

- legal adviser;
- financial adviser;
- accounting adviser;
- security registry; and/or
- public relations adviser.

A target entity will also need to rely on the assistance of many of the above advisers. Boards who believe their entity may become a target in the near future may benefit from putting in place a formal takeover response strategy which will prepare the board to respond rapidly if an approach is made.

10.2 Due diligence

It is common that a bidder will want to perform some due diligence on a target prior to launching a bid or a scheme. The extent of the enquiries which can be made in a public context will largely depend upon whether a bid is friendly or hostile.

Level of due diligence – friendly acquisition

In a friendly acquisition, in which the target is willing to enter into discussions with a view to recommending a bid or scheme to its securityholders, it is likely that a potential bidder will seek access to detailed confidential information regarding the target prior to finalising the terms of an offer and announcement of the transaction.

Although significant information will be made publicly available pursuant to periodic and continuous disclosure obligations, bidders will be keen to obtain comfort about other information which may not have been publicly disclosed because it falls below the threshold of being material to an investor or comes within one of the permitted exceptions to the continuous disclosure rules. While the level of due diligence enquiries undertaken on an acquisition of securities in an ASX listed entity is typically less extensive than the enquiries undertaken for an acquisition of assets or securities in a private company, the level of due diligence has increased in recent years.

In particular, it can be very detailed where the bidder is a private equity firm or where there is more than one party in a consortium bid and there is a plan to separate the assets. The level of access which a target may grant will often depend upon the relative bargaining strengths of the parties and the target's willingness to enter into an agreed transaction at the bidder's indicative price.

There is no formal requirement in Australia for a target to provide equal information to all potential bidders, but a failure to treat all bidders equally may result in the Takeovers Panel making a finding of unacceptable circumstances in the absence of specific compelling reasons for unequal treatment.

If non-public price sensitive information is obtained by the bidder, it will need to be disclosed to the market before the bidder acquires or agrees to acquire securities in the target to avoid any possible breach of the insider trading laws. For this reason, a target may be reluctant to disclose information that is commercially sensitive.

For a friendly bid, target warranties in the relevant transaction documents will typically be limited to certain fundamental matters, including title and capacity, incorporation, capital structure, solvency and continuous disclosure compliance. As the warranties are given by the target itself in a public transaction, as opposed to the seller in a private transaction, there is typically no effective recourse following completion of the transaction (by which time the bidder owns the target) and the warranties instead give a bidder termination rights if a breach of warranty arises prior to a scheme or takeover completing. However, Warranty & Indemnity (**W&I**) insurance is beginning to feature in deals more regularly, particularly for transactions involving private equity and foreign bidders, giving bidders recourse to insurance for warranty claims after completion and allowing more to be included in the transaction documents.

Level of due diligence – hostile acquisition

If a target is not willing to enter into negotiations or provide information, or if a potential bidder wishes to preserve its anonymity and conduct due diligence enquiries prior to announcing a bid or approaching a target, the bidder will be limited to conducting its enquiries using publicly available information. ASX-listed entities are under an obligation to lodge significant amounts of information with both ASIC and ASX, and consequently bidders can obtain the following from desktop searches:

- periodic reports such as annual reports and accounts;
- disclosure documents relating to previous security offerings or takeovers in which the target has been involved;
- details of the target's security capital and major securityholders;
- details of the target's directors and senior management (including certain details of remuneration and security holdings);
- a copy of the target's constitution;
- details of any material litigation proceedings involving the target; and
- ASX announcements of all materially price sensitive information relating to the target (except information permitted to be withheld under the continuous disclosure rules, such as confidential information relating to incomplete proposals or negotiations).

In addition a bidder can, upon application to the target, obtain access to registers held by the entity containing details of all security and option holders and information obtained from any previous tracing enquiries which a target has made into the beneficial ownership of its securities. However, in making direct detailed enquiries of a target such as this, a bidder runs the risk of alerting the target to the possibility of a bid.

A hostile bidder may seek to compel a target to provide access to due diligence by making the provision of information or confirmation of specific items a condition of a takeover proceeding. Although these conditions are not considered inherently objectionable, the Takeovers Panel has indicated that it will not generally force a target of a takeover bid to comply with them and provide information and such conditions have historically had little success in the Australian market.

10.3 Confidentiality and standstill agreements

In receiving non-public due diligence information from a target, a bidder will usually be required to enter into some form of confidentiality/non-disclosure agreement restricting its usage and disclosure of the information which it receives.

A target will usually seek to insert a "standstill" provision into such an agreement under which the bidder undertakes not to acquire securities in the target for a specified period other than pursuant to an agreed offer for the entity.

Standstill provisions serve a dual purpose for a target. They achieve a strategic goal for a target by restricting a bidder from acquiring or increasing a strategic stake prior to making a bid (which could otherwise reduce the likelihood of counter-bidders emerging) and also limit the risks of the target and its officers committing a "tipping" insider trading offence by disclosing non-public price-sensitive information to persons who they believe may acquire securities in the target. If a takeover or other acquisition is to proceed and the bidder is in possession of non-public price-sensitive information, the information needs to be "cleansed" via disclosure to the market in order for the bidder to acquire securities in the target legally.

A bidder may also want exclusivity at the time of conducting due diligence and look to enter into an exclusivity or process agreement with the target which restricts the target from engaging with other potential bidders for a period. The Takeovers Panel has recently made clear that it requires any such pre-deal exclusivity restrictions to be limited in time and scope so as not to adversely affect competition for control. In particular, the Takeovers Panel will usually expect any no-talk or no-due diligence restrictions to be subject to a "fiduciary out" to enable a target to respond to potentially superior proposals during the non-binding pre-bid stage.

10.4 Structuring considerations

A bidder, with assistance from its advisers, will need to carefully consider its commercial objectives in planning any acquisition, as the ultimate goals and strategic rationale for a transaction will necessarily shape its structure.

If a bidder is unsure of a target's likely response to an approach it is often prudent to prepare for a number of different scenarios so that, for example, if a target is unwilling to consider a confidential approach for a friendly scheme or recommended bid, the bidder has a "Plan B" in reserve to acquire a strategic stake swiftly before details of the approach are made public or to launch an alternative hostile bid.

Among various other individual considerations, bidders will often need to consider the following factors in selecting their preferred method of acquisition:

Timing	While the potentially shorter timeframes of on and off-market bids may appeal to some, other bidders may find the potentially more certain timeframe of a scheme more attractive. In practice, any difference in timing between a takeover and a scheme is unlikely to be material given all of the other factors that can affect the timetable for a takeover or a scheme.
Register	An analysis of the target's register for supportive, dissenting and/or apathetic securityholders will inform the likelihood of reaching the required thresholds under a scheme or a takeover bid.
Strategic stake	A bidder may have more flexibility in structuring acquisitions of strategic stakes under a scheme, but such stakes can increase the relative voting power of scheme dissenters.
Outcome	Whether a bidder needs 100% control or is happy to settle for 50 to 90% (or even below 50%) will inform the choice between a scheme or a bid and the conditions required.
Financing & consideration	A bidder needs to consider whether it can offer scrip or has available committed financing to offer cash, and the relative merits of each for the bidder and target securityholders.
Flexibility	The initial flexible structure of a scheme needs to be balanced against the greater ongoing flexibility under a bid to vary an offer in response to delays, opposition and interloper activity.
Tax	A takeover could/can be structured in a way which optimises tax efficiency both for the bidder and the target and its securityholders.

10.5 Funding

A bidder must not propose a bid if it is reckless as to whether it will be able to perform its obligations if its offers are accepted. This means that at all relevant times a bidder must have a "reasonable basis" to expect that it will have sufficient funding arrangements in place to satisfy acceptance of offers when the bid becomes unconditional.

What is a "reasonable basis" will depend on the circumstances of each case. Where new external financing is being relied upon, the bidder may have reasonable grounds at the time of announcing its bid or lodging its bidder's statement even if the relevant arrangements have not been formally documented, or they remain subject to conditions precedent to drawdown, provided that there is a sufficiently detailed binding commitment in place (such as a signed term sheet or commitment letter). Where pre-existing facilities will be drawn-down, the bidder should ensure that the funds are available and not required for other group operations.

Where internal cash reserves are to be used, they should be free from security interests, rights of set off or other arrangements that would materially affect the bidder's ability to use them.

Any funding to be provided indirectly through the bidder's corporate group should be subject to binding documentation which ensures that the bidder entity has access to the required funds, and the parent of the group should agree to procure compliance by relevant group members with the arrangements.

If the financing is denominated in a foreign currency, in order to establish reasonable grounds, the bidder may need to ensure that there will be sufficient funds available in Australian currency. It may do this by either having hedging arrangements or being satisfied that the financing will be sufficient even if there is a material adverse exchange rate movement.

Failing to properly arrange finance for a proposed bid may constitute unacceptable circumstances before the Takeovers Panel. For instance, in *Austock Group Ltd* [2012] ATP 12, the Takeovers Panel considered that the announcement by Mariner Corporation Limited of a takeover bid for all of the shares in Austock Group Limited before settling any binding financing arrangements and which was not subject to obtaining finance, gave rise to unacceptable circumstances.

In the view of the Takeovers Panel, the announcement of Mariner's unfunded bid was likely to have an adverse effect on Austock and its shareholders, as Mariner's omission to arrange finance would mean that the bid would have proceeded in a market which was uninformed as to Mariner's arrangements, its ability to pay for the shares and without Austock shareholders being properly informed as to the merits of the proposal to acquire their shares.

10.6 Pre-announcement strategy

Any approach to a target seeking a prior recommendation for a proposal (rather than simply announcing the proposed offer outright without forewarning) carries with it the risk that the target announces the existence of the approach to the market, in an effort to increase the target's security price. Such an announcement by the target has the potential to limit the first-mover advantage of the bidder.

ASX Listing Rules require a target to immediately notify ASX (and the wider market) of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the target's securities. However, a confidential indicative proposal for a takeover or a scheme is likely to fall within the exceptions which permit non-disclosure of information so long as there are no leaks.

For this reason, approaches are often made on a strictly confidential basis. Any discussions surrounding any proposal are typically emphasised as being preliminary in nature (with commercial terms of any offer to be finalised in due course after negotiations) with no formal offer being proposed, to enable a target to rely on the exception and avoid the need to disclose the approach. However, for strategic reasons a target may want to publicise the approach in any event.

10.7 Leaks

Nonetheless, if an approach is leaked to the market confidentiality may be lost, at which point the exception will no longer apply and the target will be obliged to make an immediate announcement to the market.

Whether or not a leak will trigger a disclosure obligation will depend upon the specificity of any rumour or speculation (for instance whether a target is simply rumoured to be in discussions with an unknown bidder or whether the identity of the parties and key elements such as structure or price are known) and any corresponding movement in the price of the target's securities. Unusual share price movements are likely to prompt an enquiry from ASX which may order disclosure to correct or prevent a false market if it considers that unconfirmed rumours in the market may be impacting the price of a target's securities.

A target's directors are likely to take a conservative approach and make a disclosure if there is any risk that there has been a leak.

10.8 Last and final statements

Bidders and targets must be wary of the effects of making "last and final" statements in the context of takeover proposals, such as that an offer price is "final" or that a party will or will not commit to a certain action. Under ASIC's "truth in takeovers" policy, parties will generally be held to such statements and prevented from undertaking contrary conduct or forced to compensate any parties who may have suffered from reliance on the statement. Care should be taken in any discussions, communications or announcements to preserve flexibility by including clear and express qualifications with any otherwise final statements, such as that an offer price is final "in the absence of a superior proposal" or subject to another appropriate caveat.

10.9 Deal protection mechanisms

If a target is willing to recommend a bid or scheme, the bidder and the target will usually (always in the case of a scheme) negotiate an agreement detailing the terms of the proposal and the parties' obligations to each other in implementing the transaction (known as a Bid Implementation Agreement in a takeover context or a Scheme Implementation Agreement in a scheme context). In addition to the main terms of the proposal (for example, offer price, details of the target's recommendation and any offer conditions) an agreement will often contain a variety of deal protection mechanisms for the benefit of the bidder and/or the target.

Some common deal protection mechanisms are set out below:

Break fee	It has become common in agreed bids and schemes for a target to agree to pay a break fee to a bidder (typically as its sole remedy) if certain specified events occur which cause the transaction to fail (such as the target board withdrawing its recommendation of a proposal). The Takeovers Panel will generally declare unacceptable circumstances exist if the size or structure of the break fee is such that the break fee may pose a material disincentive to the emergence of rival bids or have coercive effects on target securityholders. (**Target break fee**) As a general rule of thumb, fees not exceeding 1% of the equity value of a target will generally not be considered unacceptable, although that view may change if payment is subject to unduly excessive or sensitive triggers. (**Bidder break fee**) It is becoming more common for targets to request a "reverse break fee" to compensate them if the proposal does not go ahead for some reason affecting the bidder, such as the bidder breaching the SIA or failing to obtain regulatory approvals. There is no regulatory cap on a reverse break fee and these fees can be more than 1%.
No-shop	A no-shop operates by preventing the target from soliciting, encouraging or initiating negotiations with another person with a view to obtaining a rival proposal to acquire the target or its assets. Target directors need to carefully consider the implications of entering into such exclusivity arrangements, particularly in regard to the fiduciary duties which they owe to the target and its securityholders.
No-talk	No-talk exclusivity provisions go further than no-shop provisions and seek to prevent a target from entering into any negotiations with potential rival bidders, even where an approach is unsolicited. Because they are by nature much more restrictive than no-shop provisions, directors must take great care in agreeing to them as they can be inconsistent with their fiduciary duties to maximise the value for securityholders in a sale of the company. For that reason, and because of guidance from the Takeovers Panel, all no-talk provisions have a "fiduciary carve-out" which enables a target board to respond to unsolicited offers which would likely constitute a breach of their fiduciary duties, which may include where the unsolicited offer is reasonably expected to lead to a superior proposal. For this reason, a no-talk provision is unlikely to prevent a target negotiating with a genuine alternative bidder.
Go-shop	Although uncommon in the Australian market, a target may request a go-shop provision under which it is entitled to solicit other potential bidders for a limited period of time, after which, if it has failed to solicit a superior proposal, it will submit to no-shop and no-talk restrictions.
Competing proposal notification	A bidder may also seek to obtain the additional right to be informed of the details of any competing proposal received by a target.
Matching right	A matching right may also be negotiated, entitling the bidder to match any superior proposals received before the target is permitted to enter into a competing transaction.

10.10 Discussions with target securityholders and stakebuilding

A bidder may wish to enter into confidential discussions with major securityholders of a target prior to making or announcing a takeover bid either to acquire some or all of their securities outright or to elicit agreement to accept a future takeover bid for those securities, in each case up to the maximum 20% takeover threshold.

Such pre-bid arrangements enable bidders to establish a stronger position from which to launch a bid with the aim of seeding a bid with momentum, increasing the pressure on a target's board to respond positively to the bid and deterring potential competitors from launching rival bids.

It is important for bidders to carefully plan and execute pre-bid arrangements to avoid a number of legal pitfalls. Areas of particular concern include the following:

Confidentiality

Bidders need to ensure that appropriate confidentiality/non-disclosure agreements are entered into to prevent a loss of confidentiality which could give rise to disclosure obligations and increase deal risk. Pre-bid confidentiality agreements also frequently contain provisions to counteract insider trading and association issues.

Insider trading

A bidder seeking to acquire a pre-bid stake needs to comply with Australian insider trading laws, which prevent dealing in securities by persons who have material price sensitive information that is not generally available.

While bidders may have the benefit of the "own intentions" exception to any "dealing" offence (in relation to the price sensitive information that they themselves intend to launch a bid), to avoid a "tipping" offence they must ensure that any securityholders who enter into pre-bid discussions will not deal in securities of the target with third parties while in receipt of inside information about a future bid.

This means that particular care needs to be taken in approaching major shareholders. In particular, it needs to first be made clear to a shareholder, usually via an investment banker, that a bidder wants to discuss a proposal that may make them an insider. A failure to do this can materially damage relations with important shareholders if they receive information that prevents them from trading their securities.

Association

It is important to ensure during pre-bid discussions that no "agreement, arrangement or understanding" (written or otherwise) arises between a bidder and any securityholder for the purposes of controlling or influencing a target's board or affairs or in relation to target securities. There is a risk that such arrangements may create an association between the parties, requiring aggregation of the parties' relevant interests and potentially resulting in premature disclosure obligations or a breach of the 20% threshold. Discussions therefore typically take place on a tentative and non-binding basis until such time as the parties are ready to enter into a formal agreement.

Collateral benefits

It is unlawful for a bidder to offer a benefit selectively to some but not all securityholders that is likely to induce a securityholder to accept a takeover offer. While collateral benefits are not prohibited in the context of a scheme, a securityholder who receives such a benefit may constitute a separate class for the purposes of voting on the scheme, which can have adverse consequences in reaching the necessary approvals thresholds.

Pricing issues

While it is possible for a bidder to acquire a pre-bid stake at a lower price than the eventual offer price, the price paid for any securities acquired in the 4 month period prior to a bid being made will operate as a minimum price for that eventual bid.

It is common for securityholders selling a pre-bid stake or agreeing to accept securities into an offer to retain some exposure to potential 'upside' to any future increased offer price as a reward for committing their shares and helping to seed the bid. While there are prohibitions against bidders entering into an 'escalator agreement' under which a pre-bid stake is acquired on terms which entitle the seller to a subsequent price uplift referable to the price of the takeover bid, it is possible to structure pre-bid arrangements so that sellers receive the economic advantages of subsequent price uplifts without breaching the escalator provisions.

Pre-bid agreements and intention statements

As noted above, bidders can enter into a variety of different types of pre-bid arrangements with shareholders to acquire securities up to the 20% threshold. Arrangements can range from simple outright acquisitions giving a bidder an initial stake at the outset, to more complex arrangements involving acceptance agreements, deferred purchase and settlement agreements, put and call option arrangements and derivatives. These types of arrangement can enable a bidder to acquire shares in certain circumstances while also offering some flexibility for sellers to benefit from potential increases in a bidder's offer price or superior competing offers. However, as a general rule, the speed with which pre-bid agreements need to be negotiated means that complex pre-bid agreements are relatively rare.

As an alternative (or potentially in addition) to entering into pre-bid agreements with target securityholders, a bidder may seek to elicit a target securityholder to publicly announce that they intend to accept an offer for their securities (or vote in favour of a scheme), rather than enter into an actual arrangement to sell their securities to the bidder. This will create legal and commercial obligations for the target securityholder to comply with its statement.

The Takeovers Panel has made clear that shareholders who announce intentions to accept a bid (or vote in favour of a scheme) should qualify their intentions as being "subject to there being no superior proposal" and delay acceptance until later in the offer period to avoid the implication of there being an arrangement with the bidder which gives rise to an association or relevant interest in the shares.

A bidder proposing a scheme may acquire (or take an option over) a pre-bid stake to deter a competing bidder by potentially being able to block a competing scheme. However, a pre-bid agreement where the purchase is conditional prior to a scheme is more complicated than prior to a takeover as it is difficult to make a payment in consideration of a favourable vote without creating a separate class of shareholder. For that reason, the more common approach is to settle for a statement of support, subject to there being no higher proposal and/or to take an option over the shares without restricting how the shareholder can vote prior to exercise of the option.

10.11 Disclosure of security holdings

An acquirer must give notice to a target and ASX if they, either alone or together with associates, acquire an interest in 5% or more of the voting securities of a target. The obligation requires notice to be given within 2 business days of the acquirer becoming aware of the circumstances giving rise to the interest.

Once a "substantial holding" is obtained, a holder must give further notice of any subsequent changes of 1% or more in the voting securities held and give notice on ceasing to be a substantial holder. During the period of a takeover bid, changes in a bidder's interest in the target need to be notified by 9.30am on the next trading day.

Importantly, substantial holding notices must attach copies of any relevant documents which give rise to the interest, such as copies of any sale agreements under which an interest is acquired or any agreements which create an association between relevant parties.

These disclosure provisions require bidders to be careful when stakebuilding or entering into pre-bid agreements with target securityholders to avoid inadvertently breaching a disclosure threshold and triggering an obligation to prematurely disclose stakebuilding activities and the underlying documents giving rise to them.

Interests in purely "economic" derivative instruments (such as cash settled equity swaps) which do not provide for physical settlement of securities or grant voting rights to an acquirer do not give rise to 'relevant interests' and therefore do not require disclosure under these provisions. However, the Takeovers Panel considers that non-disclosure of such positions can give rise to unacceptable circumstances in the context of control transactions, and therefore expects holders of any such positions which of themselves, or in aggregate with physical holdings, exceed 5% to disclose them irrespective of whether a control transaction has commenced.

11 DOING AND DOCUMENTING THE DEAL

11.1 Documentation

The documentation required will vary depending on whether the transaction proceeds by way of a takeover bid or a scheme of arrangement. The following tables set out the main content requirements of the primary documents for both a takeover (whether on-market or off-market) and a scheme. In addition to those specific requirements, the key disclosure documents must include any other information that is known to the bidder and is material to the making of a decision by target securityholders as to whether to accept an offer under the bid.

<table>
<tr><th rowspan="5">TAKEOVER BID DOCUMENTS</th><th>BID IMPLEMENTATION AGREEMENT (FRIENDLY TRANSACTIONS ONLY)</th><th>BIDDER’S STATEMENT</th><th>TARGET’S STATEMENT</th></tr>
<tr><td rowspan="4">If the bid is friendly, the parties may enter into a bid implementation agreement which sets out the terms on which the bid will be proposed. Typically this document would contain the following agreed terms:
the consideration to be offered (cash, scrip or a combination);
obligations on the target board to recommend the bid;
any conditions of the bid;
any break fee arrangements; and
other deal protection mechanisms such as break fees and reverse break fees.</td><td>The key transaction document setting out the offer to securityholders is the bidder’s statement. A bidder’s statement will contain the following prescribed information about the bidder and the terms of bid:
the identity of the bidder;
the bidder’s intentions regarding the business of the target and the future employment of its employees;
detail on funding arrangements (for cash bids);
details of any purchases of target securities by the bidder or its associates in the 4 months prior to the bid;
details of any collateral benefits given by the bidder or an associate likely to induce the recipient to accept an offer under the bid in the 4 months prior to the bid;
the number of securities in any class in the target in which the bidder has a relevant interest; and
the bidder’s voting power in the target.</td><td>A target is required to respond to the bidder’s statement by issuing a target’s statement. A target’s statement must include all information that target securityholders and their professional advisers would reasonably require to make an informed assessment whether to accept the offer under the bid, including:
prospectus level disclosure required where scrip consideration is offered;
recommendation from each director (with reasons) as to whether the offer should be accepted or not; and
where the bidder and its associates have voting power in the target of over 30% or where both target and bidder share a common director, an independent expert’s report must be included (the target may often seek an independent expert’s report to justify their valuation of and response to a bid even where not strictly required).</td></tr>
<tr><th colspan="2">SUPPLEMENTARY STATEMENTS</th></tr>
<tr><td colspan="2">The bidder and the target must prepare supplementary statements in relation to the following, where such matters would be material from a target securityholder’s point of view:
where the bidder or the target becomes aware of a misleading or deceptive statement in, or of an omission of required information from, its original documents; or
where the bidder or target becomes aware of a new circumstance, arising after the original documents were lodged, that would have been included if it had arisen before the documents were lodged.</td></tr>
</table>

<table>
<tr><th rowspan="2">SCHEME DOCUMENTS</th><th>SCHEME IMPLEMENTATION AGREEMENT</th><th>SCHEME BOOKLET</th></tr>
<tr><td>As a first step, the parties to a scheme negotiate and enter into a scheme implementation agreement setting out the terms upon which a scheme will be proposed to securityholders and supported by the target's director. Expected terms include:
• the consideration to be offered by the bidder (cash, scrip or a combination);
• obligations on the target board to pursue and recommend the scheme;
• obligations on the target to apply to the Court for an order convening a shareholders' meeting to vote on the scheme;
• any conditions of the scheme;
• any break fee arrangements; and
• other deal protection mechanisms.
Annexures:
• a "scheme of arrangement" which sets out the process by which the shares in the target are to be transferred to the bidder if the scheme is approved; and
• a "deed poll" which contains an undertaking by the bidder in favour of all of the target securityholders to perform its obligations under the scheme, including the payment of the scheme consideration, if the scheme becomes effective.</td><td>The scheme booklet is a document prepared primarily by the target with input from the bidder on certain sections. To be compliant with the Corporations Act, this document must include:
• an explanation of the manner in which the scheme will be considered and implemented (if approved);
• details on the mechanics of issuing the scheme consideration;
• the notice of meeting convening the scheme meeting itself;
• details of the court approval process and key dates for the first and second court hearings;
• information regarding the bidder's intentions if the scheme is implemented, including intentions regarding target employees;
• an explanation of the funding arrangements for the scheme consideration (if cash); and
• prospectus level disclosure about bidder/scrip entity if scrip consideration is offered.</td></tr>
</table>

11.2 Disclosure liability regime

The Corporations Act provides an extensive regime of liability for misleading or deceptive statements, omissions or conduct in relation to takeovers generally.

Contravention of this regime can potentially result in a wide range of penalties and sanctions.

For example, a bidder and its directors may be deemed liable for a defective bidder's statement and will be potentially liable to any person who suffers loss or damage as a result of a misleading or deceptive statement in, or an omission of a material particular from, the bidder's statement.

Similarly, a target and its directors may be deemed liable for misleading and deceptive statements in a target's statement or scheme booklet.

It is important to note that liability for misleading or deceptive statements extends beyond the contents of the bidder's (or target's statement) to cover other documents and public statements made in relation to a takeover and a target's securities.

While there are some statutory "due diligence-type" defences for misstatements and omissions in the bidder's statement, there are no such formal defences available for misleading and deceptive statements made outside of the bidder's statement. In addition, there are no formal due diligence style defences available for misleading statements or omissions in a scheme booklet. Therefore, it is crucial that the various statements, statistics and other information produced in key disclosure documents are vetted and signed off by the relevant person for the target or bidder (which may be directors, accountants, investment banks or legal advisers). This process is known as 'verification'.

A person who is responsible for a contravention may not only be subject to civil liability but may also be subject to criminal liability.

12 RESPONDING TO AN APPROACH

12.1 Formulating a response strategy

The overriding principle of a response strategy should not simply be to deter potential bidders but rather to ensure that if control is going to pass, the transfer occurs on favourable terms and at a price that reflects the true underlying value of the entity.

The aim of a takeover response is to ensure that any bid for the entity maximises securityholder value and allows securityholders to make an informed decision on whether or not to accept a takeover bid, as opposed to protecting the personal position of management or directors. Should an unsolicited offer emerge, the interests of the entity, its securityholders and other stakeholders will be best served by a decisive, coordinated and effective response from the board and management team, which will increase the likelihood that an inadequate offer for the entity will fail and, if an offer appears likely to succeed, maximise the consideration for securityholders.

Planning for and being vigilant against an unsolicited takeover bid will ensure that the entity is in a position to make an effective response to an unsolicited takeover offer or approach. Some important planning measures to ensure an entity is prepared for an unsolicited takeover bid are outlined in paragraph 12.2.

12.2 Planning and vigilance measures

Identify potential bidders

It is useful to monitor the activities of likely potential acquirers and consider specific tactics and strategies for use against them in the event of an offer.

Identify supportive parties

Analyse potential counterbidders, white knights, strategic investors and other supportive parties who may be approached in the event of a bid.

Monitor trading

Regularly review trading volumes, purchases and prices on ASX. Determine who is buying and detect if any transactions are being held back from registration (sometimes done by a stakebuilder).

Prepare the board of directors

Directors should be prepared to be able to deal with an unsolicited takeover bid. The board should be able to maintain a unified board consensus on key strategic issues.

Communicate the company's value to the market

The best response strategy is to ensure an entity is fully valued by the market.

Communications with analysts are an effective way to do this.

Develop relationships with equity desks

Equity desks can play an important role in communicating the entity's messages and reporting back market sentiment.

Preparation of a takeover response manual

A response manual is a document which outlines how an entity can plan and prepare for an unsolicited takeover approach, and how to deal with an approach immediately after it has been received. It will assist the company in delivering a swift, decisive and co-ordinated response.

The manual will help directors and executives to avoid confusion and mistakes in the crucial first few days after a formal approach is made, or a bid is announced. It will also allow the entity to avoid the need to undertake basic administrative and advisory work when time pressures are the greatest. A manual will also provide directors with a guide to their responsibilities and the appropriate processes to be followed to discharge those duties.

King & Wood Mallesons can assist in the preparation of a response manual. For further information, please contact a partner in our Mergers & Acquisitions practice at https://www.kwm.com/au/en/people.html.

Pre-emptive preventative strategies

The most effective preventative measure to an inadequate takeover bid is strong financial performance which should encourage securityholder loyalty and ensure that a company's securities are fully priced.

There are a number of other measures which may decrease the chance of an unsolicited takeover or approach (such as a placement of shares to shareholders that may support the board or inclusion of change of control provisions in major contracts and financings). However, these strategies should only be implemented if the directors genuinely believe that they are in the best interests of securityholders and the transactions are being implemented in good faith and for proper purposes. Further, as many measures which have the effect of prohibiting or discouraging unsolicited takeover bids are highly regulated in Australia by ASX Listing Rules, the Corporations Act and the Takeovers Panel, legal advice should be sought prior to implementing any of these strategies. Given the impact of these regulations, the likelihood of such strategies being effective in thwarting potential takeover activity may be low.

However, some examples of strategies that have been regarded as defensive in the context of anticipated takeover bids include:

Expansion by way of acquisition	This is particularly effective if funded by an issue of securities. However, this may also force the hand of a potential bidder and could potentially result in an unsolicited offer.
Amendment of capital structure	The alteration of a company's capital structure may act as a defensive strategy if it makes a potential bidder's task more difficult, for example, a pro-rata issue of securities increasing the number of shares for a bidder to acquire or an issue of convertible securities with special terms and conditions that apply in the event of a takeover.
"Poison Pills"	For example, changes in a company's capital structure or pre-emptive rights or change of control provisions in material contracts may result in adverse consequences in the event of a takeover, which may deter potential acquirers. However, the Takeovers Panel may declare poison pills to be unacceptable if they have not been disclosed to, or approved by, securityholders. Poison pills are extremely rare in Australia.
"Shark Repellents"	Amending the provisions in a company's constitution to cause the company to be a less attractive or attainable target, such as a percentage restriction on acquiring securities, or restrictions on securityholders rights to convene general meetings (to the extent permitted by law). Such provisions are very rare in Australia and their use can be restricted by ASX rules.

12.3 Responding to an approach

As soon as an approach is received, the target board should be notified immediately and should convene a board meeting as soon as possible. Senior management should also be notified, and a takeover response team (see paragraph 12.4) assembled. However, while there should be a short board meeting to make an initial consideration, the target should also take the time necessary to consider the approach properly. The background work can often take a week or more.

If the bidder's approach is made publicly, a "holding statement" should be sent to ASX urging securityholders to take no action in relation to the offer until given further direction by the board after more detailed consideration. If the target is informed of the proposed offer prior to a public announcement, it should consider whether trading in the target's securities should be halted until the bid is announced.

Once an offer is announced, directors should be careful that their actions in responding to the offer are not motivated by any improper purpose, in particular, trying to frustrate the transaction for their own benefit.

12.4 Key roles and advisers

It is common practice for large Australian entities to establish a takeover response team (which would typically include key executives, directors and other employees). It is necessary at times to call upon other parties to provide specific assistance to the takeover response team (for example, legal advisers, financial advisers and public relations consultants).

12.5 Defensive tactics

There are a number of defence strategies that a target can use in response to an unsolicited approach. The target's ability to adopt such defences will be dependent on directors' duties under the Corporations Act, compliance with ASX Listing Rules and the Takeovers Panel's power to declare certain actions to constitute unacceptable circumstances. Some tactics may require the approval of securityholders to implement.

A target will often devise its key defensive tactics and themes in the preliminary stages of its defence. Key themes adopted will be implemented and repeated in various documents released to the market and sent to securityholders.

Some of the defensive strategies that may be adopted following an approach include:

Criticising the bidder	To the extent that the offer consideration is scrip, it may be helpful to undermine the value of the bidder's scrip. A target may also seek to attack the credibility of the bidder's business or management or to highlight a bidder's ability to pay more in light of anticipated synergies and other perceived deal benefits.
Releasing favourable information	The entity should ensure that, wherever possible, favourable information is released to the market and those who can influence securityholder opinions (such as the media and analysts) to ensure that it is fully valued by the market.
Announcing higher dividends or a capital return	Depending on the entity's balance sheet position, a cash return to securityholders may be appropriate. The feasibility of this strategy will be dependent on the structure and the gearing of the entity at the time of the offer. In particular, if an entity has been advised of a proposed takeover, ASX Listing Rules will prevent the entity from issuing new securities for the next 3 months unless securityholder approval is obtained. Further, taking an action which would breach a condition of the bid may also be seen as a frustrating action and be blocked by the Takeovers Panel.
Facilitating another bid or alternative transaction	If directors approach another party to see if a higher bid might be made, the directors' actions must be designed to facilitate an auction or some other method to assist securityholders in receiving a fair market price for their securities (rather than discriminating against particular bidders).
Encourage friendly buying or placement to white knight	The directors of the target may be able to encourage a third party to buy securities in the entity to in turn encourage the bidder to increase the offer price. Care should be taken that the third-party buyer of the securities is not an "associate" of the target, especially when the target has an interest in its own securities.
Appeal to the loyalty of securityholders	Some securityholders may be influenced by an appeal not to let control of the entity pass to a particular bidder. This may be a useful strategy where the bidder is a foreign entity, or where the bidder is likely to break up the target upon a successful bid. Communications should seek to enhance understanding by securityholders of the future direction of the entity. Letters from the chairperson to securityholders can be an important tool in keeping small securityholders informed and onside.
Appeal to the Takeovers Panel or other regulators	It is common practice following a hostile approach for the target and its advisers to conduct a detailed review of the bidder's statement and other announcements looking for anything that could be the basis for an application to the Takeovers Panel or complaint to ASIC, or any other regulatory non-compliance. A target may also seek to lobby specific regulators which have the ability to directly or indirectly influence the outcome of a bid.

Branding the bid as inadequate or opportunistic	Criticism of the commercial desirability of an offer is usually dealt with in the target's statement. This can be done by highlighting the inadequacy of the bid in terms of: • the premium/discount to market (before and after the offer is announced); • a multiple of historic and future earnings or a comparison of the offer to trading and transaction multiples of comparable entities; • the fundamental value estimated by an expert, if engaged, or the strategic importance and value of the entity, including any hidden value not fully appreciated by the market; and • any conditionality (and associated risk) attached to the bidder's offer. However, the target needs to be careful that it does not make any statements as to future financial performance or the value of assets without a reasonable basis to do so. Such statements may attract legal liability to the directors.
Prepare independent expert report	Legally, a target is only required to provide an independent expert's report when the bidder holds more than 30% of the entity or has common directors. However, an independent expert's report is often voluntarily included in a target's statement to justify a board's response to an offer.

12.6 Directors duties

Australian law (in particular ASX Listing Rules and Takeovers Panel's Policy) prohibit a company from adopting strategies designed to prevent a bid being made or to frustrate a bid once it has been made unless securityholder approval has been obtained. Directors should proceed with caution when considering whether an act has the potential to frustrate a genuine offer.

The Takeovers Panel has consistently expressed the view that transactions which have an effect on the control of a target should be left to securityholders, not the board. Any attempt by a target board to interfere in the right of securityholders as a group to approve transactions will likely be unacceptable. The fundamental obligation of directors is to act genuinely in the interests of the company and for a proper purpose, irrespective of whether a takeover bid has been made. Directors are under a duty to assess the reasonableness of any takeover bid. This will include obtaining appropriate information in order to assess the target's value. Where necessary, directors need to obtain professional advice, such as engaging an independent expert. Ultimately, directors are responsible for ensuring that securityholders are provided with sufficient information to make an informed assessment as to whether to accept the offer under the bid.

Directors must also take care that none of their actions, including defensive actions, could give rise to a declaration of unacceptable circumstances by the Takeovers Panel. Action by the target's directors to frustrate a bid or a potential bid (in particular, any action taken by the target which could trigger a condition to the bidder's offer or may otherwise lead to that offer being withdrawn or not proceeding) may constitute unacceptable circumstances because it deprives securityholders of the opportunity to consider the bid.

This could include a transaction such as the sale or purchase of a business that had been planned for some time, but the agreements had not been signed prior to the approach by a bidder in connection with a takeover. The directors may remedy frustrating action which would otherwise amount to unacceptable circumstances by obtaining securityholder approval for the action.

Directors must also ensure that material provided to securityholders remains current and correct after it has been published and complies with continuous disclosure obligations under the Corporations Act and, where applicable, ASX Listing Rules.

If a conflict of duty arises, a target director must make full disclosure of their interests and abstain from taking part in voting or deliberations in relation to the bid. The board could create a sub-committee of directors who are not conflicted to make decisions on, and to consider, the bid. A target should also adopt formal protocols to manage any conflicts arising from the bid as recommended by the Takeovers Panel.

CONTRIBUTORS

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