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PUBLIC MERGERS AND ACQUISITIONS

Association of Corporate Counsel

Public mergers and acquisitions in Australia: overview

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M&A ACTIVITY

1. What is the current status of the M&A market in your jurisdiction?

Australian M&A activity in 2014 to 2015 saw a continuation of recent deal-making enthusiasm, with underlying deal activity reflecting favourable conditions for executing transactions, including financing.

Announced M&A deals amounted to AU$91.7 billion in the 2014 to 2015 financial year, a mild increase from AU$80.5 billion in the preceding period. Meanwhile, the number of announced deals dropped from 513 to 450 (a 12.3% decrease). The landscape for cross-border inbound M&A has remained relatively strong, albeit foreign corporations have now focused their attention on the consumer, leisure, agricultural and transportation sectors (with an observable shift away from mining and resources assets).

The following trends emerged during the course of 2014 to 2015:

- Bulge bracket transactions dominated the total values, with four deals above AU$5 billion amounting to AU$36.9 billion in aggregate, exceeding the sum of both the deal volume and value of announcements in this space in each of the previous three years.
- Energy, mining and utilities remained the dominant sector with announced M&A deals of AU$35.6 billion. However, reduced activity towards the end of the 2014 to 2015 financial year suggests that deals in the sector are on hold due to continued lower commodity prices and a weaker Australian dollar against the US dollar.
- Technology, media and telecommunications enjoyed the largest growth among all industry sectors. Consolidation between telecommunications groups contributed the most towards total deal values in the sector with major transactions such as the merger between iiNet and TPG (AU$1.7 billion) and the tie-up between Amcom and Vocus (AU$628 million).

Significant transactions

The major cross-border transactions by state-owned enterprises include:

- Japan Post's acquisition of the entire share capital of Toll Holdings Limited, a leading provider of transport and logistics in the Asia Pacific region employing approximately 40,000 people across 1,200 locations in more than 50 countries. Toll's shares were acquired by a scheme of arrangement at a 49% premium to their pre-announcement closing share price for an aggregate enterprise value of approximately AU$8 billion. The transaction was ranked as Australia's fifth-largest inbound acquisition ever.
- Joint off-market contractual takeover offer by Baosteel Resources Australia Pty Ltd and Aurizon Operations Limited to acquire Aquila Resources Limited for approximately AU$1.4 billion. This was notable as the first joint bid for an Australian-listed target by a Chinese state-owned entity and an Australian-listed company and a key example of vertical integration in Australian and Chinese iron ore and steel production. Shanghai Baosteel Group Corporation is listed on the Shanghai Stock Exchange and was the fourth-largest steel producer in the world measured by crude steel output in 2014.

Significant private equity transactions include:

- KKR-led consortium (including Varde Partners and Deutsche Bank AG) AU$6.3 billion acquisition of GE Capital's Australasian consumer finance operations, following a competitive auction process.
- Affinity Equity Partners' AU$640 million acquisition of Nine Live from Nine Entertainment Co. The Nine Live business covers Australia and New Zealand and spans across live events ticketing (Ticketek), events promotion, data and analytics and software licensing.

Significant demergers include BHP Billiton's demerger of South32 Limited implemented via a distribution of South32 shares by an *in specie* dividend to shareholders in both BHP Billiton Limited and BHP Billiton plc. Eligible BHP Billiton shareholders received South32 shares on a one-for-one basis. Following the demerger, South32 applied for listing of its shares on each of the following:

- The Australian Securities Exchange (ASX) Limited.
- The main board of the Johannesburg Stock Exchange.
- The official list of the London Stock Exchange.

The South32 businesses comprised gross assets of over US$26,000 million as of 31 December 2014.

2. What are the main means of obtaining control of a public company?

Acquisitions of companies, as well as other bodies and managed investment schemes listed on prescribed markets in Australia (including that operated by the Australian Securities Exchange (ASX) Limited), and unlisted public companies, are generally implemented by a contractual takeover offer or court approved scheme of arrangement.

20% acquisition threshold. A person proposing to increase their "voting power" from 20% or below to more than 20%, or to increase their "voting power" if it is already more than 20% in a listed company, body or managed investment scheme or an unlisted company with more than 50 members, will generally do so

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via a contractual takeover or scheme of arrangement, because of a statutory prohibition that would generally otherwise apply to making that acquisition, or offering to do so.

Unlike the 30% concentration threshold in the UK, a breach of the 20% threshold in Australia is a statutory offence, rather than a mandatory bid trigger.

Off-market takeovers. A large majority of Australian takeovers are off-market rather than market bids. A bidder's off-market takeover is an offer to all holders of securities (whether or not listed) in a bid class for all those securities or a specified proportion of them.

Off-market takeovers in Australia can be implemented either by a contractual takeover offer or bid or court approved scheme of arrangement.

Off-market takeovers can be conditional on the following:

- Regulatory approvals such as those from the Australian Competition and Consumer Commission (ACCC) or the Foreign Investment Review Board (FIRB) (*see Question 4*).
- For a takeover by contractual offer or bid, a minimum level of acceptances (but, unlike the UK, there is no mandatory minimum acceptance condition).

Schemes of arrangement. A scheme of arrangement consists of an acquisition with the consent of holders of target securities according to a court-approved procedure under Part 5.1 of the Corporations Act 2001 (Cth) (Corporations Act).

To be implemented, the scheme proposal must be approved by 75% by value and (generally) a bare majority in the number of holders of offer class securities present and voting at a scheme meeting. Unlike in the UK, the court has the discretion to dispense with the majority headcount requirement.

Votes of the offeror and associates are usually excluded, which can make it difficult to execute a scheme where an offeror already has a substantial target stake. A scheme provides "all-or-nothing" certainty that, if approved, the offeror acquires all the scheme class securities. Equally, where it is not approved, it acquires nothing at all.

Schemes of arrangement apply to companies and certain other entities registrable under the law. Listed managed investment schemes can replicate their effect by seeking security holder approval to insert scheme-like provisions in their constitutions.

Market takeover bids. A market bid comprises the acquisition of listed securities by a contractual offer through the relevant stock exchange. A bidder must offer to acquire all securities in the bid class. Market bids must be unconditional and made in cash. This makes them less flexible than off-market takeovers and therefore less common, but they can prove significantly faster to implement where possible. Their average value tends to be lower than for off-market takeovers.

Other types of control transaction. Other exceptions to the 20% acquisition prohibition include:

- Acquisitions approved in advance by resolution at a target general meeting where no votes are cast in favour by the acquirer and associates or disposer and associates.
- (Creeping) acquisitions in a target made by a person with at least 19% of the votes whose voting power increases by no more than 3% in a period of six months.
- Acquisitions by entitlements under a pro rata rights issue or by the underwriter or sub-underwriter to such issue or other fundraising (but potential control effects of dilutive issues can still be subject to declaration of unacceptable circumstances by the Takeovers Panel: *see Question 4*).

HOSTILE BIDS

3. Are hostile bids allowed? If so, are they common?

Hostile bids are allowed but are less common than recommended offers or schemes due to the diminished possibility of due diligence and elevated execution risk.

It is generally considered impractical to implement a hostile bid by a scheme of arrangement, although some practitioners consider that it is technically feasible.

It is possible to attempt to coerce target boards by announcing non-binding bids to target security holders with the aim of encouraging them to pressure target management to agree to recommend a proposal (known as a bear hug or virtual bid). Currently, there is no parallel to the UK "put up or shut up" regime.

REGULATION AND REGULATORY BODIES

4. How are public takeovers and mergers regulated, and by whom?

Takeover law and regulation

Takeovers of companies with more than 50 members, as well as stock-exchange listed bodies and managed investment schemes, are primarily regulated by statute, which is:

- Chapter 6 of the Corporations Act 2001 (Cth) for contractual offers.
- Part 5.1 of the Corporations Act 2001 (Cth) for acquisitions by scheme of arrangement.

The rules and regulations of relevant stock exchanges (such as the Australian Securities Exchange (ASX) Limited) also apply to listed entities.

Takeover principles. The regulation of takeovers is founded on the general principles of section 602 of the Corporations Act 2001 (Cth), which state that the purpose of the regime is to ensure that:

- The acquisition of control of relevant entities takes place in an efficient, competitive and informed market.
- The holders of target securities and target management:
  - know the identity of any person that proposes to acquire a substantial interest in the target;
  - have a reasonable time to consider the proposal; and
  - are given enough information to enable them to assess the merits of the proposal.
- As far as practicable, holders of target securities have a reasonable and equal opportunity to participate in the benefits of a proposal.

The principles are said to inform the general regulation and enforcement policy of the two principal regulatory bodies (see below):

- The Australian Securities and Investments Commission (ASIC).
- The Takeovers Panel.

Principal concepts. The principal concepts defined for the purposes of Chapter 6 of the Corporations Act 2001 (Cth) on takeovers are as follows.

Relevant interest. Defined broadly to extend the scope of the 20% acquisition prohibition beyond simple acquisitions of holdings to encompass:

- The holder of securities.
- Other persons with the power to exercise or control the exercise of a right to vote attached to securities.
- Other persons with the power to dispose of, or control the exercise of disposal of, securities.

The concept of power or control is extended to encompass power and control that is both direct or indirect and exercisable by (or in breach of) trust, agreement, practice or any combination of them, whether or not enforceable. Arrangements, options and rights that can give rise in the future to this power or control also often result in the relevant interest being deemed to exist, even if they are conditional.

Associate. This is defined broadly to aggregate relevant interests of persons that are connected quite indirectly, encompassing as associates two persons where:

- One controls the other or they are under the common control of another person.
- They are subject to an agreement or proposed agreement (whether or not enforceable) for the purpose of controlling or influencing a relevant entity's management or affairs.
- They are acting, or proposing to act, in concert in relation to a relevant entity's affairs.

Voting power. This includes all votes attached to securities that a person and associates have relevant interests in, divided by the total number of votes attached to all voting securities in the entity.

Regulatory bodies

ASIC. This is the principal regulator for mergers and acquisitions. ASIC is an independent statutory body that supervises compliance with the Corporations Act 2001 (Cth), including its takeover provisions. ASIC has broad powers under those provisions, including:

- Exempting a person from them.
- Declaring that provisions apply to them as if specified provisions were omitted, modified or varied.

ASIC can apply to the Takeovers Panel for declarations of unacceptable circumstances in takeover disputes and consequential remedial orders, but the Takeovers Panel is the arbitral body.

ASIC is also the regulator with whom scheme of arrangement documents must be registered and can also appear to present its views in court proceedings either for the convening of scheme meetings or, following those meetings, for the approval of the scheme.

ASX. The rules of the ASX govern a target or bidder if either or both is listed on that exchange, although some companies can also (or instead) be listed on a foreign stock exchange.

Takeovers Panel. The primary arbiter of disputes in relation to Australian takeovers is the Takeovers Panel. The Takeovers Panel consists of members appointed by the government on the basis of their particular expertise in takeovers. The Takeovers Panel is the primary venue for dispute resolution while takeovers are current.

As a statutory body, the Takeovers Panel's decisions are nevertheless still subject to judicial review by the Federal Court under statute and the High Court under the terms of the Australian Constitution. Unlike in the UK, the review power has actually been exercised in practice against the Takeovers Panel in the celebrated *Glencore International AG v Takeovers Panel* decisions of 2005 and 2006.

The Takeovers Panel has broad powers in takeovers including:

- Declaring unacceptable circumstances, whether or not they constitute a contravention of the Corporations Act 2001 (Cth). The Takeovers Panel can then make any order it thinks appropriate, including divestment orders and orders affecting third parties.
- Reviewing ASIC's decisions modifying, or exempting persons from, takeover provisions.

The Takeovers Panel has published several Guidance Notes on its policy. Unacceptable circumstances on control (or a substantial interest) can arise in respect of any transaction (not solely contractual takeovers) and the Takeovers Panel has jurisdiction. In addition to ASIC, any person (including the target) whose interests can be affected can apply to the Takeovers Panel for a declaration of unacceptable circumstances on control.

Certain acquisitions may also require approval from:

- **The Foreign Investment Review Board (FIRB).** The FIRB is a non-statutory body that assists the government with the foreign investment regime. For various control transactions, a foreign acquirer can ultimately require the approval of the Treasurer, acting on the advice of FIRB (*see Question 26*).
- **The Australian Competition and Consumer Commission (ACCC).** The ACCC monitors compliance with the Competition and Consumer Act 2010 (Cth). The ACCC can become involved in control transactions which would, or be likely to, have the effect of substantially lessening competition in a substantial market (*see Question 25*).

See box, *The regulatory authorities*.

PRE-BID

Due diligence

5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

Recommended bid

Bidders are likely to receive significant target confidential information for a recommended bid, subject to constraint under the continuous disclosure and insider dealing regimes.

There is no statutory equivalent to the UK "equality of information" rule for competing bidders. Subject to fiduciary duties and Takeovers Panel guidance, the target management in a takeover contest may feel able to disclose different information to a preferred bidder over a less welcome one.

Hostile bid

The bidder is limited in hostile takeovers to public information, including that published by either the Australian Securities and Investments Commission (ASIC) or the Australian Securities Exchange (ASX) Limited. For ASX-listed entities, this includes:

- Announcements of materially price sensitive information of target.
- Periodic reports, for example, annual reports and accounts or half-year or quarterly financial statements.
- Disclosure documents for previous takeovers, debt or securities offerings.
- Particulars of target share capital and major holders.
- Particulars of target directors (if any) and senior management (including their remuneration or security entitlements).
- Target constitutional documents.

Public domain

An ASX-listed entity that is, or becomes, aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities must immediately tell ASX under the continuous disclosure rules. Immediately is interpreted in regulatory guidance as "promptly and without delay".

Information is excepted for as long as it satisfies each of the below:

- One or more of the following five applies:
  - it would be a breach of a law to disclose the information;
  - the information concerns an incomplete proposal or negotiation;
  - the information comprises matters of supposition or is insufficiently definite to warrant disclosure;
  - the information is generated for the internal management purposes of the entity; or
  - the information is a trade secret.
- The information is confidential and the ASX has not formed the view that the information has ceased to be confidential.
- A reasonable person would not expect the information to be disclosed.

Therefore, significant information in relation to listed entities that is price sensitive and undoubtedly commercially relevant to a bidder can exist but, so long as it is confidential, is not required to be disclosed (for example, internal management forecasts).

Therefore, confidentiality agreements are required to maintain the incomplete proposal and negotiation exception for the purposes of a recommended bid proposal (*see Question 6*). They can also contain limited period standstills, which are restrictions on the prospective bidder acquiring target securities so as not to assist a later hostile bid or attempt to build a blocking stake.

There has recently been a significant overhaul in the regulatory guidance underlying the regime and increased media scrutiny, particularly in the context of allegations of selective disclosure of price sensitive information.

Secrecy

6. Are there any rules on maintaining secrecy until the bid is made?

A takeover proposal is likely to contain price sensitive information that prima facie should be disclosed.

While it remains an incomplete proposal or negotiation, parties can avail themselves of the exception to the continuous disclosure obligation, if confidentiality is maintained. Importantly, they are not required to do so and recipients and offerors of incomplete takeover approaches can nonetheless announce them for strategic reasons, for example, to initiate a bidding contest or "bear-hug" a target.

Once confidentiality is lost (for example, through a leak) then the target must disclose promptly and without delay (see public domain in *Question 5*).

Agreements with shareholders

7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

A bidder can negotiate with significant target security holders pre-bid. The bidder can either acquire their securities (for stake-building, see *Question 8*) or obtain their agreement ultimately to accept the bid. Either transaction can potentially trigger the 20% acquisition threshold.

Other legal considerations include:

- **Confidentiality.** Bidders can mitigate continuous disclosure obligations and avoid a premature announcement by ensuring appropriate confidentiality agreements are in place. They often include provisions to manage association and insider trading issues described below.
- **Associates.** Bidders may wish to evade inadvertent re-characterisation of parties subject to pre-bid discussions as associates under the Corporations Act 2001 (Cth). They must avoid implication of an agreement (whether written or otherwise) between a bidder and target security holders for the purposes of controlling or influencing the composition of target management or conduct of its affairs. Any agreement creating associates can precipitate aggregation of their relevant interests and possibly a breach of the 20% acquisition threshold or premature disclosure obligations. Therefore, discussions prior to formal agreement must be emphasised as non-binding or provisional.
- **Insider trading.** The Corporations Act 2001 (Cth) prevents dealing in securities by those that have information that is not generally available and would reasonably be expected to have a material effect on the price or value of the securities. Bidders prohibit security holders in pre-bid discussions from dealing in target securities with third parties while having inside information about the bid in order to avoid the bidder committing a tipping offence. Bidders themselves have the benefit of the "own intentions" exception to a dealing offence if the only price sensitive information they have is knowledge they intend to launch a bid.
- **Collateral benefits.** During a bid period, a bidder or associate must not give, offer or agree to give a benefit, if it is likely to induce a person or their associates to accept a takeover offer or dispose of bid class securities, if that benefit is not offered to all holders. Unlike the UK, there is no exception for (or guidance suggesting exemption might be granted for) independent shareholder approval of these benefits. Although the statutory offence does not extend to schemes, a collateral benefit can constitute a beneficiary as a separate class for the scheme meeting. This can require separate approval and, by excluding the beneficiary, assist dissenters in the principal vote.

Procuring a public statement of support is a potential alternative, or complement, to pre-bid agreements with target security holders. Australian bidders can then rely on the Australian Securities and Investments Commission's (ASIC) "truth in takeovers" policy to hold initial supporters to (unconditional) statements of intention to accept. Reneging on these statements can entail regulatory sanction of unwary security holders by both ASIC and the Takeovers Panel. Security holder statements are presently subject to consultation under a new draft Takeovers Panel Guidance Note (*see Question 29*).

Stakebuilding

8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives) before announcing the bid, what disclosure requirements, restrictions or timetables apply?

If a bidder seeks to build a target stake prior to a takeover offer, possible strategies include:

- Either on- or off-market acquiring target securities or derivative positions.
- Entry into restraints with existing holders, including lock-ups or options.

The aim is often to pressurise target management to welcome the bid and (to the extent consistent with the 20% acquisition threshold) deter competitive bids. Considerations pertinent to stake-building include:

- **20% acquisition threshold.** See constraints under this rule in *Question 2* and the implications of parties being deemed associates in *Question 7*.
- **Insider trading**. See *Question 7*.
- **Substantial holding**. A bidder has a substantial holding where:
  - he has a holding in a company or managed investment scheme listed on an Australian market; and
  - the votes attaching to securities in which the bidder or associates have relevant interests are 5% or more of the total votes of all target voting securities.

  A bidder that first acquires a substantial holding normally has two trading days to lodge with the relevant market (for example, the Australian Securities Exchange (ASX) Limited) a notice of their holding together with a copy of any agreement by which they have those interests. This is likely to require disclosure of pre-bid agreements between holders over more than 5% of total target voting securities.
- **Class issues on a scheme of arrangement.** A bidder's pre-bid stake can constitute a separate "class" from other holders for scheme meeting voting and be discounted from the numerator and denominator for the required 75% by value vote of remaining holders. This lowers the absolute number of votes required for dissenting holders to impede the scheme. Therefore, a pre-bid stake can actually make it more difficult to execute a bid by scheme. Some public-to-private management buy-outs (MBOs), where bidder's associates can have significant holdings, can therefore be implemented by recommended contractual offer.
- **Raising the offer share price.** Target security acquisitions set the pricing floor for a bid in the next four months (*see Question 18*).
- **Foreign Investment Review Board (FIRB).** A foreign bidder, which can include Australian subsidiaries of foreign groups, can require FIRB approval under various thresholds for acquisition of Australian targets (*see Question 26*). The need for approval can be triggered at concentrations of 15%, while notification is mandatory for state-owned enterprise (SOE) bidders, regardless of the size of the investment.

Agreements in recommended bids

9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

A scheme of arrangement normally entails a scheme implementation agreement between the target and bidder. Bidders and targets in recommended contractual bids can also enter into bid implementation agreements.

Unlike the situation post-2011 in the UK, the law still generally permits a variety of "offer-related arrangements" and "deal protection measures" to be entered into between the bidder and the target, often subject to fiduciary "outs" to permit boards to consider some competitive bids. Typical measures (beyond break fees, see *Question 10*) are discussed below.

Lock-up devices. Panel guidance suggests lock-up devices are not "unacceptable as such". By mitigating an initial bidder's transaction risks, they can secure a proposal that would not otherwise have proceeded. Regulatory treatment depends on overall intent and effect:

- **No-shop provisions.** No-shops prohibit the target for a period from soliciting prospective alternative bidders for the purpose of a rival bid. Target directors must consider the consistency of agreeing these provisions with their statutory and common law fiduciary duties. The Takeovers Panel can declare these arrangements unenforceable if they are considered unreasonably anti-competitive or coercive.
- **No-talk provisions.** These extend further than no-shops to prevent target management negotiating with prospective alternative bidders, even if approaching unsolicited. Therefore, they require the utmost scrutiny under fiduciary duties and commonly include a "fiduciary out" for unsolicited approaches that are reasonably expected to lead to a superior offer.

No due-diligence provisions. These often complement the other devices to prevent a target allowing third parties to conduct target due diligence in preparing a rival proposal. The Takeovers Panel considers their potential anti-competitive effects similar to no-talk provisions.

Targets can also agree additional rights including notification of competitive approaches and matching rights enabling the bidder to match competitive proposals before the target announces them. Depending on their precise drafting, they can equally be considered anti-competitive and the basis for a declaration of unacceptable circumstances.

Break fees

10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful?

A target often agrees to pay a break fee in recommended bids (whether by contractual offer or scheme of arrangement) if a transaction fails in circumstances such as the target board withdrawing its recommendation, potentially subject to a "fiduciary-out" for superior competitive proposals.

The Takeovers Panel can declare unacceptable circumstances if the size or structure of a break fee poses a disproportionate disincentive to competitive bids or unduly coerces target security holders. The Takeovers Panel considers break fees not exceeding 1% of the equity value of the target "generally not unacceptable" unless payment is subject to excessive or coercive triggers. "Naked

no vote" break fees can fall into this category, that is, break fees payable where a bid is rejected by security holders even in the absence of a competing proposal.

It is possible, but less common, for targets to seek a reverse break fee if a transaction fails in circumstances, such as the bidder not obtaining regulatory consent for which it was responsible or breaching the pre-bid agreement.

Committed funding

11. Is committed funding required before announcing an offer?

Unlike the UK, committed funding of a cash offer is not strictly required under the law before an offer is announced.

Both the Takeovers Panel and the Australian Securities and Investments Commission (ASIC) historically advocated that bidders met an objective test as to the reasonableness of their funding expectations to avoid being "reckless" in breach of the Corporations Act 2001 (Cth). They required bidders to have reasonable grounds to expect funding would be available for accepting shareholders once the offer became unconditional, even if not formally documented, or subject to drawdown conditions, at announcement.

However, the Federal Court departed in a recent case from the objective test and suggested that bidders' boards would only be "reckless" if:

- They were subjectively aware of a substantial risk that they would not meet their funding obligations if a substantial proportion of offers were accepted.
- Having regard to the circumstances known to them, they were not justified in taking the risk.

Legislative reform is likely to be required to harmonise the resulting legal position with more stringent expectations of ASIC, the Takeovers Panel and market participants.

ANNOUNCING AND MAKING THE OFFER

Making the bid public

12. How (and when) is a bid made public? Is the timetable altered if there is a competing bid?

Information that a reasonable person would expect to have a material effect on the price or value of an Australian Securities Exchange (ASX) Limited listed entity's securities must be communicated to the ASX "promptly and without delay" (see public domain, *Question 5*). This includes giving or receiving notice of intention to bid.

Where a bidder has made a firm decision to proceed with a bid, that decision is communicated to the target and announced to ASX immediately with the offer terms. If confidentiality is not maintained before the intended bid announcement, then a holding announcement must be issued specifying those facts that are definite. It should also state that the bid cannot proceed along with the reasons why.

A bidder that announces a bid must make the offer within two months. A bid must be open for acceptance for a minimum of one month and no more than 12 months, although once an offer has concluded there is no general rule preventing the bidder from immediately announcing a whole new offer (*see Question 21*).

It typically takes three to four months to conclude a takeover offer and implement compulsory acquisition. There are certain rules governing the announcement of extensions to a previously announced offer period (up to the 12 month limit) that provide for increased flexibility to extend an offer period if a competing bid is announced.

Offer conditions

13. What conditions are usually attached to a takeover offer? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

Market bids must be unconditional and for a whole bid class. Off-market bids can be conditional but are prohibited by the Corporations Act 2001 (Cth) from being subject to:

- Subjective conditions, the fulfilment of which depend on the bidder or associate's opinion, belief or state of mind or events in the sole control of a bidder or associates. This effectively rules out general due diligence conditions in bids.
- Maximum acceptance conditions under which the bid terminates or the bid consideration is reduced, if any of the following reaches or exceeds a particular level:
  - the number of acceptances;
  - the bidder’s voting power in target; or
  - the bid class securities in which the bidder has relevant interests.
- Discriminatory conditions on which the bidder acquires securities from some, but not all, accepting holders.

Off-market bids typically include conditions for:

- Regulatory approvals (*see Question 4, Regulatory bodies*).
- Funding (*see Question 11*).
- Absence of certain events (for example, inhibitory court orders or regulatory steps or target insolvency).
- No material adverse change.

There is not as much regulatory guidance or practice as there is in the UK as to the (limited) possibilities of invoking a material adverse change condition. There is some indication that the Takeovers Panel may take a similarly stringent view. Bids can be conditional on a minimum level of acceptances but there is no mandatory minimum acceptance condition.

Bid documents

14. What documents do the target's shareholders receive on a recommended and hostile bid?

Bidder’s documents

The bidder prepares a bidder's statement with the required information about the bidder and the bid. The bidder's statement usually includes the offer document, which outlines formal offer terms.

The Corporations Act 2001 (Cth) dictates the content requirements of the bidder's statement, including:

- The identity of the bidder.
- The bidder's intentions regarding the continuation of, or changes to, the target's business and future employment of its present staff.
- (For off-market bids) the fact the statement has been lodged with Australian Securities and Investments Commission (ASIC).
- If the consideration is cash, details of funding arrangements.

- If the consideration includes securities, all material normally required for an offer document for them.
- Particulars of consideration paid for bid class securities in four months preceding the bid by the bidder or associates (*see Question 4*).
- (For off-market bids) the bidder's interests and voting power in target.
- Any other information that is material to the decision of target security holders whether or not to accept and known to the bidder.

The bidder's statement must be:

- Lodged with ASIC.
- Lodged with any relevant prescribed market on which target securities are listed (for example, the Australian Securities Exchange (ASX) Limited).
- Served on the target.

Between 14 and 28 days after it has been served on the target, the bidder's statement must be sent to target's security holders.

Target’s statement

The target must issue a response to the target's statement within 15 days. The target's statement must be sent to the bidder and target's security holders and lodged with ASIC and any prescribed market on which target securities are listed (for example, ASX).

A target's statement must include all information that bid class security holders and their professional advisers would be reasonably required to make an informed assessment whether to accept the offer. A target's statement must also contain a recommendation by each target director with reasons for that recommendation or why it is not made, if either or both:

- The bidder's voting power in the target is 30% or more.
- The bidder and the target share a common director.

The target's statement must include or be accompanied by an independent expert's report, but a target can also include one entirely voluntarily to support their position.

Supplementary statements. These are required if the bidder or target, respectively, becomes aware of:

- A misleading or deceptive statement in, or an omission of information required from, its respective original documentation.
- A new circumstance, arising after the respective original documentation was lodged, that should have been included if it arose before lodgement.

In any event, if the matter is material to target security holders, the bidder or target (as applicable) must prepare a supplementary statement.

In a scheme of arrangement, the target sends a notice of meeting and explanatory statement to target security holders. This documentation contains similar details to the target's and bidder's statements and must be registered with ASIC and approved by the court before dispatch.

Employee consultation

15. Are there any requirements for a target's board to inform or consult its employees about the offer?

There are no specific statutory requirements for a target's board to inform or consult employees about an offer. If the target is a company, then the bidder must include in the bidder's statement details of the bidder's intentions regarding, among other things, the future employment of target's present employees (*see Question 14*).

Mandatory offers

16. Is there a requirement to make a mandatory offer?

Unlike the threshold provisions of the UK takeover code, breach of the 20% threshold (in the absence of applicable exceptions) is a statutory offence rather than a mandatory bid trigger. There is no requirement to make a mandatory offer and the making of an offer subsequent to having exceeded the 20% threshold does not excuse the original offence.

CONSIDERATION

17. What form of consideration is commonly offered on a public takeover?

Market bids can only be made in cash. Off-market bid consideration can be cash, securities or a combination of cash and securities.

18. Are there any regulations that provide for a minimum level of consideration?

Consideration under any bid (market or off-market) must equal or exceed the maximum that a bidder or associate provided, or agreed, for a bid class security under any purchase or agreement during the four months before the bid.

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders?

There are no legal restrictions on the consideration that can be offered by foreign bidders, although shares not listed in Australia can prove unpopular with security holders for a variety of reasons. Prospectus laws apply to shares as consideration under a takeover offer.

POST-BID

Compulsory purchase of minority shareholdings

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders?

The law permits compulsory acquisition by a bidder, if the bidder and associates by the end of an offer period, have:

- Relevant interests in at least 90% (by number) of bid class securities.
- Acquired at least 75% (by number) of the securities that the bidder offered to acquire under the bid.

This 90% requirement explains one attraction of a scheme of arrangement. 100% ownership can be achieved by a scheme with the votes of merely 75% by value of scheme class securities represented and voted at scheme meetings (for schemes of arrangement, see *Question 2*). Turnout at scheme meetings can often be much less than 100%, so schemes can be secured with the approval of much less than 75% by value of scheme class securities, rather than the inflexible 90% required after a contractual offer for statutory squeeze-out.

Other provisions permit compulsory acquisition within the period of six months after a person becomes a 90% holder in relation to a class of securities.

Restrictions on new offers

21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

There are no equivalents to the post-offer restrictions applicable in the UK. A failed bidder is generally only restricted from launching a new offer or buying interests in the target if the failed bidder made statements before the end of the bid that it would not extend the bid. They can be held to these statements by the "truth in takeovers" policy.

De-listing

22. What action is required to de-list a company?

Where there is a compulsory acquisition following a takeover bid (*see Question 20*), the Australian Securities Exchange (ASX) Limited suspends the quotation of an entity's securities five business days after receiving a copy of the compulsory acquisition notice sent to shareholders. ASX then removes the entity from listing at close of business on a date decided by ASX, which is normally the third business day following the date of suspension.

An ASX-listed entity can request ASX to de-list it at any time. ASX guidance suggests it would act on a voluntary delisting request (so long as the entity had not been the subject of a takeover offer within the previous 12 months) if approved by ordinary resolution, unless ASX was concerned that delisting was intended to avoid the application of its listing rules to a particular possible transaction or situation.

TARGET'S RESPONSE

23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

Defensive strategies

Directors often issue a holding statement to the Australian Securities Exchange (ASX) Limited requesting target security holders not to take further action as a result of a bid until they have given it detailed consideration. Typical defensive strategies encompass:

- Commissioning an independent expert's report to justify rejection of a bid.
- Publicly criticising the commercial adequacy, conditionality or execution risk of a bid.
- Transactional defences such as returns of value, that are likely to require shareholder approval.

Legal constraints

Target management can only take defensive measures subject to:

- **Fiduciary duties.** As fiduciaries of the target and its owners, directors must exercise reasonable care and diligence and act honestly and in good faith in the best interests of the target and for a proper purpose. Directors must, before issuing a recommendation to shareholders, exercise skill and due care in making a balanced assessment of bids. To the extent they exercise their powers for an improper purpose (such as preserving incumbent management) they can commit both civil and criminal offences under the law.
- **Takeovers Panel oversight of "frustrating action".** The Takeovers Panel can declare target responses (frustrating action) as "unacceptable circumstances", whether or not consistent with fiduciary duties. The Takeovers Panel has issued guidance on when "frustrating action" can constitute "unacceptable circumstances". Illustrative examples given by the Takeovers Panel include the target:
  - making a significant share issue/repurchase, or convertible security or option issue;
  - acquiring or disposing of a major asset, including making a bid;
  - undertaking significant liabilities or changing debt terms;
  - declaring a special or abnormally large dividend; or
  - making a significant change to share plans.

  The basis for Takeovers Panel policy is that shareholders should decide what can interfere with their reasonable and equal opportunity to participate in proposals or inhibit the acquisition of control in an efficient, competitive and informed market. There are not generally unacceptable circumstances for "frustrating action" offering security holders a choice between competing proposals.

  In reviewing "frustrating action", the Takeovers Panel says it considers whether (among other things):
  - it is undertaken by the target in ordinary course of business (which tends towards acceptability);
  - there is a legal or commercial imperative (for example, court order or legislative requirement, avoiding materially adverse or achieving materially favourable consequences, being subject to pre-bid announcement), which tend towards acceptability; and
  - it materially affects target's financial or business position.
- **ASX rules.** Listing rules can also require shareholder approval for defensive transactional responses to takeover bids, for example, for new issues of securities.

TAX

24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in the jurisdiction? Can payment of transfer duties be avoided?

Stamp duty is generally not payable on a transfer of Australian Securities Exchange (ASX) Limited listed securities. However, in some state jurisdictions, stamp duty is payable on acquisitions of unlisted securities and "land-rich" or landholder duty can also be payable on some acquisitions of listed securities in land holding companies.

OTHER REGULATORY RESTRICTIONS

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable?

The Competition and Consumer Act 2010 (Cth) (CCA) prohibits mergers or acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in any market. The CCA is supervised by the Australian Competition and Consumer Commission (ACCC) (*see Question 4*).

Mandatory or voluntary

There is no compulsory pre-notification requirement for mergers and acquisitions transactions, which is similar to the position in the

UK domestic competition regime. Therefore, the decision whether to notify the ACCC is at the discretion of the merger parties based on their view as to whether concerns arise under the merger prohibition in section 50 of the CCA.

The ACCC has issued merger guidelines that encourage merger parties voluntarily to notify the ACCC where both of the following apply:

- The merged firm has a post-merger market share of greater than 20% in relevant market(s).
- The products of the merger parties are substitutes or are complementary to each other.

The ACCC can also investigate any merger, whether or not the parties have previously notified the ACCC of their intentions. For example, all Foreign Investment Review Board (FIRB) submissions (*see Question 26*) are automatically notified to the ACCC by FIRB.

Types of merger assessments

Merger parties have three avenues available to have a merger considered and assessed:

- The ACCC assesses the merger on an informal basis.
- The ACCC assesses an application for formal clearance of a merger.
- The Australian Competition Tribunal (Tribunal) assesses an application for authorisation of a merger.

Formal clearance has never been sought and applications to the Tribunal for authorisation are rare, although two applications were made during 2014.

Informal clearance process. Informal clearance is the process used for the vast majority of transactions notified to the ACCC. The ACCC, if it clears the merger, provides a non-binding "letter of comfort" to the parties stating that it does not intend to oppose the acquisition, but reserves the right to do so should new information come to light.

In common with the UK domestic merger control approach, the ACCC process is essentially a two stage process. An initial review (commonly referred to as "pre-assessment") considers whether the merger raises *prima facie* competition concerns, with a second stage in-depth review for more contentious mergers. The ACCC clears a merger via "pre-assessment" where it considers that the risk of competition issues is low.

The timeframe of the informal clearance process, where the ACCC determines that a more substantive public review is necessary, is as follows:

- The ACCC conducts two to five weeks of market inquiries during which it actively scrutinises information from competitors, suppliers and customers of the parties, and any other interested persons.
- Within six to 12 weeks of the announcement of the acquisition the ACCC usually decides:
  - not to oppose the proposed merger; or
  - to publish a statement of issues outlining the issues identified.
- If a statement of issues is published, the ACCC conducts another round of market inquiries. In this case, the clearance process can take an additional six to 12 weeks, or longer.

The ACCC can extend its indicative timelines if:

- It identifies potential issues.
- It experiences delays in obtaining information.
- The acquirer negotiates remedies.

The informal clearance process also affords the merger parties a chance to overcome any competition issues that the ACCC perceives by offering a court-enforceable-undertaking. Unlike the position in the UK domestic regime, there are no strict time limits imposed upon merger parties in offering such undertakings and it remains a relatively fluid and informal process.

Where informal clearance is sought, there is no prohibition on completing the acquisition before the ACCC makes its decision. However, parties generally do not complete until they obtain clearance. Where the ACCC has concerns about the acquisition, the ACCC can request that the parties provide undertakings not to complete until the ACCC has completed its review. The ACCC can also seek injunctions from the Federal Court to prevent the completion of an acquisition.

Proposed reform. On 31 March 2015, the Competition Policy Review Panel (Harper Committee) released a "Final Report" into a review of the CCA. This was the culmination of the most comprehensive and significant review of competition policy, laws and institutions since 1993.

The Report sets out 56 key recommendations for changing the structure of the competition law framework, including the introduction of a more workable formal merger clearance process.

The government has indicated that it will review the recommendations, in conjunction with the Australian states and Territories, with the aim of developing a response action plan by the end of 2015.

26. Are there restrictions on the foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

At present, a foreign person has to consider whether they must, or should, provide prior notification to the Australian Foreign Investment Review Board for transactions within the scope of the:

- Foreign Acquisitions and Takeovers Act 1975 (Cth).
- Foreign Acquisitions and Takeovers Regulations 1989 (Cth).
- Federal Government's Foreign Investment Policy.

Foreign person. Under the Foreign Acquisitions and Takeovers Act 1975 (Cth) and Federal Government's Foreign Investment Policy, a foreign person encompasses (among other things) a corporation in which:

- A corporation incorporated overseas (solely or together with associates) holds 15% or more of the corporation.
- Two or more of those corporations (together with associates) hold 40% or more of the corporation.

To avoid criminal sanction under the Foreign Acquisitions and Takeovers Act 1975 (Cth), prior approval must be obtained on transactions including those where foreign person(s) propose to acquire:

- A substantial interest (15% or more) in an Australian corporation that has total assets valued at AU$252m or more (indexed annually).
- Investments of 5% or more in the media sector.

The AU$252m threshold can be subject to increase under free trade agreements or other arrangements with Chile, China, Japan, New Zealand, South Korea and the US, for investing entities constituted or located in the relevant jurisdiction investing outside prescribed sensitive sectors (including media, transport and communications).

The government considers whether notified proposals are contrary to the national interest (defined by reference to broad objectives under the Federal Government's Foreign Investment Policy including national security, competition and public policy).

Foreign government. Foreign government investors must notify the Federal Treasurer and obtain Foreign Investment Review Board (FIRB) approval for all direct investments irrespective of size.

Foreign government investors encompass (among other things):

- Entities where foreign governments, their agencies or related entities from a single foreign country have an aggregate interest (direct or indirect) of 15% or more.
- Entities where foreign governments, their agencies or related entities from more than one foreign country have an aggregated interest (direct or indirect) of 40% or more.

This definition tends to include Chinese state-owned enterprises (SOEs) and therefore materially qualifies liberalisation under the China-Australia Free Trade Agreement, as a significant portion of Chinese investment in Australia by value is through SOEs.

Other proposed acquisitions are not compulsorily notifiable but can entail the Australian Federal Treasurer making adverse prohibition or divestment orders if he considers proposals to be contrary to Australia's national interest. A foreign person can voluntarily obtain FIRB approval to mitigate this risk.

The Treasurer has 30 days to consider applications and make a decision. Applications to the FIRB are very seldom rejected.

Reform. There are presently three bills before Parliament which, if enacted in their present form, would entail significant changes to the foreign investment regime including:

- Review application fees of AU$100,000 for some corporate acquisitions.
- Increased penalties on individuals and companies for breaches, and third party accessory liability for advisers.
- A new threshold of AU$55 million for investment in agribusiness.
- The transition of enforcement responsibilities to the Australian Tax Office.
- An increase in the substantial interest threshold from 15% to 20% (in line with the 20% acquisition threshold under the Corporations Act 2001 (Cth)).

The amendments are intended to apply from 1 December 2015.

Sectors. There are other sector-specific foreign investment restrictions applicable to banking, airlines, airports, shipping and telecommunications.

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies?

There are no restrictions on the repatriation of profits, although interest or dividend withholding taxes may need to be paid. The Department of Foreign Affairs and Trade can impose exchange control rules (*see www.dfat.gov.au/sanctions/consolidated-list.html*).

28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

After a bidder makes a takeover offer, another person dealing in target securities must give Australian Securities Exchange (ASX) Limited a substantial holder notice by 9.30 am on the next business day after:

- Beginning, or ceasing, to have a substantial holding (5% or more) (*see Question 8*).
- At least a 1% change in their substantial holding.

REFORM

29. Are there any proposals for the reform of takeover regulation in your jurisdiction?

A 2012 government paper mooted introducing takeover reforms including "put up or shut up" requirements, but they have yet to be implemented.

The Australian Securities and Investments Commission (ASIC) is presently consulting on the remaking of some class orders relating to control transactions, but they are relatively peripheral and substantial policy changes are not intended.

The Takeovers Panel proposes to clarify requirements for security holder intention statements. Its consultative draft guidance suggests these statements can give rise to unacceptable circumstances where:

- Acceptance occurs before the prospective date disclosed.
- They are qualified by reference to superior proposals but reasonable time for them to emerge is not given.
- They ignore a demonstrably superior proposal without reason.
- They are not qualified by reference to a superior proposal but the security holder and bidder hold aggregate relevant interests in over 20% of target votes.
- They do not disclose the identity of the holder or details of their holding where material.
- No consent is given to be named in disclosure.

This Chapter is a statement of the relevant law as at 30 October 2015.

THE REGULATORY AUTHORITIES

Australian Securities and Investments Commission (ASIC)

W www.asic.gov.au

Main area of responsibility. Supervises the registration and operation of companies and managed investment schemes, including supervising compliance with Corporations Act 2001 (Cth).

Takeovers Panel (Panel)

W www.takeovers.gov.au

Main area of responsibility. Primary (but not exclusive) forum for resolving bid disputes.

Australian Securities Exchange (ASX)

W www.asx.com.au

Main area of responsibility. Securities exchange.

Foreign Investment Review Board

W www.firb.gov.au

Main area of responsibility. Regulating "foreign" investment.

ONLINE RESOURCES

Australian Government ComLaw Website

W www.comlaw.gov.au/Home

Description. Official Australian legislation website maintained by the Australian Government which is intended to be kept up-to-date.

Australian Securities Exchange (ASX) Website

W ww.asx.com.au

Description. Official ASX Listing Rules, guidance notes and waivers website maintained by Australian Securities Exchange Limited and intended to be kept up-to-date.

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Recent transactions

- Acting in the UK for London Stock Exchange premium listed Asia Resource Minerals plc (ARMS) in relation to the US$210m bid for ARMS by Asia Coal Energy Ventures Limited (backed by the Sinar Mas Group).
- Acting for WIN Corporation on its sales of Channel 9 Perth and Channel 9 Adelaide to Nine Entertainment Corporation and WIN's renewal of its programme supply arrangements with Nine.
- Acting in the UK for London Stock Exchange premium listed Glencore plc (and its CEO) on Glencore's scheme of arrangement merger with similarly listed Xstrata plc valued (on announcement) at US$90 billion.

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Recent transactions

- ASX-200 listed Aquila Resources Ltd in resolution of litigious joint venture dispute with Vale S.A. and option exercise and completion regarding Belvedere coal assets in Queensland, Australia (enterprise value AU$600 million).
- ASX-listed Panoramic Resources Ltd in its participation in auction by Rio Tinto Group for Kennecott Eagle assets in Michigan, the US (sale value US$315 million).