ICLG

The International Comparative Legal Guide to:

Mergers & Acquisitions 2018

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A practical cross-border insight into mergers and acquisitions

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Country Question and Answer Chapters:

Australia

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The acquisition of publicly listed companies in Australia is regulated by a combination of:

- Part 5.1 and Chapter 6 of the Corporations Act 2001 (Cth) (Corporations Act), associated regulations and statutory instruments;
- government policy, as issued by the Australian Securities and Investments Commission (ASIC) and the Takeovers Panel, a specialist administrative tribunal with wide statutory powers; and
- the listing rules of the Australian Securities Exchange (ASX).

In addition, M&A activity must commonly take into account Australian competition/anti-trust legislation, as administered by the Australian Competition and Consumer Commission (ACCC), legislation regulating foreign investment, as administered by the Foreign Investment Review Board (FIRB) and taxation legislation.

Furthermore, industry-specific legislation may affect particular transactions (such as in the banking, media, aviation and gaming sectors).

1.2 Are there different rules for different types of company?

The rules governing the making of takeover offers apply only to Australian-incorporated companies listed on the ASX, unlisted Australian-incorporated companies with more than 50 shareholders, and Australian-registered managed investment schemes (an Australian form of regulated 'investment trust') listed on the ASX.

Court-approved schemes of arrangement (i.e., takeover or merger schemes) can be effected upon any Australian company or other body registrable under the Corporations Act, but not upon managed investment schemes. A separate process has, however, developed in Australia for 'trust schemes' which requires a meeting of unit holders. These typically involve review of documentation by ASIC and by the court.

1.3 Are there special rules for foreign buyers?

Yes. Foreign buyers will need to ensure compliance with Australia's foreign investment laws, and possibly seek the prior approval of the FIRB.

By way of introductory summary only, a 'non-government' foreign buyer is required to obtain FIRB approval under the foreign investment legislation for any acquisition of 20% or more of an Australian company where the company has either gross assets, or an implied equity valuation of more than A$261 million. If the investor is from the United States, New Zealand, Chile, China, Japan, Singapore or South Korea (FTA Countries), this threshold is increased to A$1,134 million, subject to the exclusion of certain industry sectors. These thresholds are indexed annually. Lower thresholds apply to foreign government investors and also in certain sectors, including the media, agriculture, and mining sectors.

Substantial fees are now required to be paid as part of the application to the FIRB.

1.4 Are there any special sector-related rules?

Yes. Separate legislation applies to ownership and control of companies in various sensitive sectors, such as the broadcasting, banking, aviation and gaming industries.

1.5 What are the principal sources of liability?

The Corporations Act prescribes a liability regime specifically in relation to misleading and deceptive statements and conduct in takeover transactions, whilst separate and more general provisions regarding misleading and deceptive conduct or false and misleading statements, etc. will apply to documents produced pursuant to a scheme of arrangement. Non-compliance with the Corporations Act can create both civil and criminal liability.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

The most common public company acquisition structures in Australia are (i) an off-market takeover bid (on-market bids are possible but rare in practice), and (ii) a court-approved scheme of arrangement (a takeover or merger scheme).

A takeover bid involves the making of individual offers to purchase target securities at a specified bid price. A scheme of arrangement is a shareholder- and court-approved statutory arrangement between a company and its shareholders that becomes binding on all shareholders by operation of law.

Control can also often be passed by way of purchase by, or issue to, an acquirer of a sufficiently large block of shares if that transaction

is approved by independent shareholders. In such cases, there is typically a purchase or subscription agreement which is conditional upon shareholder approval. ASIC policy typically also requires an independent expert's report to accompany the shareholders' meeting materials.

Other, less commonly used, takeover structures include selective capital reductions (for a company), security holder-approved transactions (for a company or managed investment scheme), and security holder-approved 'trust schemes' (for managed investment schemes).

2.2 What advisers do the parties need?

There are generally no mandatory requirements regarding the appointment of advisers, but typically (and depending upon the circumstances), the parties may require:

i. legal advisers;
ii. financial advisers;
iii. accounting and tax advisers; and
iv. public relations consultants.

2.3 How long does it take?

A public takeover transaction, whether proceeding by way of a basic off-market takeover bid or by way of a scheme of arrangement, can ideally be completed in three to four months. The period of an off-market bid for which the offer itself must be remain open for acceptances is at least one month but no more than 12 months.

2.4 What are the main hurdles?

Subject to certain exceptions, an investor is prohibited from acquiring a 'relevant interest' in the securities of a listed company or managed investment scheme which (together with the interest of its 'associates') represent more than 20% of votes, without the making of a takeover offer to all shareholders (the '20% prohibition').

Whilst the bidder can make its offer subject to various conditions (see question 7.1), takeovers regulation itself does not impose any mandatory hurdles on an off-market takeover offer, such as a minimum acceptance condition.

See question 7.4 for the thresholds for compulsory acquisition of non-accepting shareholders of a takeover offer.

Under the scheme of arrangement process (by which 100% of securities can be acquired), the scheme will have to be approved by both: (i) at least 75% of votes cast by persons within the 'class' of security holders (as determined by the court, and typically excluding the bidder and its associates); and (ii) at least a bare majority (by number) of the persons within that 'class'.

2.5 How much flexibility is there over deal terms and price?

In terms of price, the bid must equal or exceed the price at which any bid class securities were purchased by the bidder or an associate in the previous four months.

In a takeover bid, the terms of the offer can only be varied to increase the offer price, waive bid conditions and/or extend the offer period.

A scheme of arrangement may (with the support of the target board) afford greater flexibility in terms of being better able to incorporate related transactions or provide contingent consideration, or other tailor-made mechanisms for more complex transaction structures.

2.6 What differences are there between offering cash and other consideration?

Any offer of, or inclusion of, securities as consideration under a takeover offer, will typically have to contain all material that would have been required for a prospectus for an offer of those securities by the bidder. The position is largely the same for a scheme of arrangement.

2.7 Do the same terms have to be offered to all shareholders?

In a takeover bid, all the offers made under the bid must be the same, with some very limited exceptions.

By contrast, target shareholders may be treated differently under a scheme of arrangement, provided that such difference in treatment is disclosed. This may, however, give rise to separate shareholder 'classes', which then requires separate voting approval from each 'class' in order for the scheme to be approved.

2.8 Are there obligations to purchase other classes of target securities?

If it has not already offered to do so, the bidder under a takeover offer must offer to buy out the holders of all securities that are convertible into bid class securities if, at the end of the offer period, the bidder or its associates hold in aggregate at least 90% of the securities in the bid class.

2.9 Are there any limits on agreeing terms with employees?

It is uncommon in the process of an acquisition to form an agreement with employees. Any agreement with a particular employee (e.g., a senior officer) risks making that person an 'associate' of the bidder, which may lead to complications in the transaction, particularly if that person is also a director of the target.

2.10 What role do employees, pension trustees and other stakeholders play?

Most such stakeholders tend to play a relatively passive role. Company pension schemes are uncommon due to the Australian system of externally managed compulsory superannuation.

2.11 What documentation is needed?

In a takeover bid, the bidder prepares an offer document called a bidder's statement, which is filed with ASIC and sent to shareholders. The target then responds with a target's statement.

In a scheme of arrangement, a bidder and a target will usually enter into an implementation agreement which governs their agreement and the obligations on both parties to implement the scheme. The target (with assistance from the bidder about its own information) will then prepare an explanatory memorandum (usually referred to as a scheme booklet) to be sent to target shareholders.

2.12 Are there any special disclosure requirements?

In a takeover bid, the bidder's statement must contain certain information, including a statement of the bidder's intentions regarding

the target's business, details of the consideration offered and all other information known to the bidder which is material to target shareholders.

The target's statement must contain certain information, including the target directors' recommendation as to whether to accept the offer and their reasons for such recommendation, as well as all information known to the directors which target shareholders would reasonably require to make an informed assessment as to whether or not to accept the takeover offer. If the bidder already has an interest in more than 30% of the target, or the bidder and target share a common director, the target must also commission and provide shareholders with an independent expert's report (but it would not be unusual for this to be undertaken voluntarily in any event).

In a scheme of arrangement, the scheme booklet must explain the effect of the proposed scheme and contain, in a full and fair manner, all the information that is material to a member's decision as to whether or not to vote in favour of the scheme. The level of disclosure required in a scheme booklet is broadly equivalent to that of a bidder's statement and target's statement combined. The recommendation of the directors must be provided. An independent expert's report on the proposal is also typically commissioned and provided to members.

2.13 What are the key costs?

The primary costs associated with an acquisition relate to advisers' fees or, potentially (if agreed between the bidder and target), any break fees.

Where required, the costs of seeking foreign investment approval from the FIRB are now also material (typically, A$25,300) and the fee for applying for formal merger clearance from the ACCC is A$25,000 (although there is no fee for an informal merger review, which is the more common procedure).

2.14 What consents are needed?

A transaction that is subject to notification to FIRB should not be implemented unless the Australian Treasurer (or his/her delegate) has 'approved' the transaction by giving a notice of no objection.

Transaction notification to, or receipt of clearance from, the ACCC is not mandatory but is generally advisable.

2.15 What levels of approval or acceptance are needed?

For a takeover bid, there is no minimum level of acceptances required (but see question 7.4 regarding compulsory acquisition).

Approval requirements for a scheme of arrangement are described in question 2.4.

2.16 When does cash consideration need to be committed and available?

Unlike certain jurisdictions, Australia does not have a 'cash confirmation' requirement. It is, however, an offence under the Corporations Act to publicly propose a takeover bid if a person is reckless as to whether they will be able to perform their obligations if a substantial proportion of the offers are accepted.

3 Friendly or Hostile

3.1 Is there a choice?

Compared to most Western jurisdictions, Australia offers a favourable environment for hostile takeover offers, with a strong regulatory bias towards allowing target shareholders to determine the outcome of any control transaction.

No Australian scheme of arrangement, however, has yet been proposed without the co-operation of the target company board (although the conduct of a 'hostile' scheme remains a theoretical possibility).

3.2 Are there rules about an approach to the target?

A potential bidder may approach a target and instigate discussions without triggering particular obligations upon the bidder under the takeovers rules or setting any timetables running, even if the existence of such talks is announced. The target will be subject to continuous disclosure obligations under ASX Listing Rule 3.1 (discussed in question 4.2).

Once a 'genuine potential bid' has been communicated to target directors (even if only privately and not publicly announced), the jurisdiction of the Takeovers Panel to find 'unacceptable circumstances' is enlivened, potentially restricting target directors from taking any action that may have the effect of 'frustrating' a bid or potential bid.

3.3 How relevant is the target board?

The recommendations of the target board in response to a takeover offer will often carry considerable weight with shareholders.

The target board is critical to conducting a scheme of arrangement. See question 3.1.

3.4 Does the choice affect process?

The recommendation of the target directors will not affect the formal process required under a takeover offer.

A bidder would be unlikely to pursue a scheme of arrangement without the support of the target board, as discussed in question 3.1.

4 Information

4.1 What information is available to a buyer?

Publicly available information is reasonably extensive in Australia, particularly where the company is ASX-listed. The target company's share register may be requested and any filings lodged with ASIC are also able to be obtained. It is also possible to access the records of public registers in relation to land titles, personal property securities, litigation and trademarks.

A target board cannot be compelled to provide confidential information to a bidder, even when it has provided information to a rival bidder.

4.2 Is negotiation confidential and is access restricted?

The ASX Listing Rules on continuous disclosure contain an exception to disclosure for information which concerns an incomplete proposal or negotiation, provided that it remains confidential and a reasonable person would not expect the information to be disclosed. In this way, negotiations surrounding a proposed takeover transaction which are incomplete can take advantage of the exception, provided that such negotiations remain confidential.

There are no restrictions on approaching shareholders, but a bidder must be wary of entering into any arrangement giving it 'relevant interests' above 20%. Insider trading rules are also relevant.

4.3 When is an announcement required and what will become public?

The formal takeover process and timetable, in terms of the requirement to make an offer to target shareholders, is only triggered when the bidder publicly proposes to make a takeover offer, after which it must make the offer within two months, on the same terms and conditions set out in that proposal (or on terms no less favourable).

No such requirements or time limits apply where a potential offeror announces a proposed scheme of agreement.

If a proposed transaction loses its confidentiality, ASIC guidance states that an announcement should be made, setting out those facts which are definite and making clear the fact that the bid might not proceed and the reasons why.

4.4 What if the information is wrong or changes?

The bidder's and target's statements must be immediately updated for any material new information; once publicly proposed by the bidder, the bidder cannot revoke the takeover offer, unless a defeating condition has been triggered.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Once the offer period for an off-market bid has formally commenced, a bidder may only purchase shares through acceptances officially tendered, unless the bid is unconditional or subject only to 'prescribed occurrences'. Where that occurs, on-market purchases are permitted but not at a price higher than the takeover bid price.

A bidder acquiring securities outside of the scheme of arrangement process, or as part of a pre-bid stake, is not prohibited but tends not to occur, due to shares held by the bidder and its associates being unable to be voted to approve the scheme.

5.2 Can derivatives be bought outside the offer process?

Certain derivatives, such as a carefully structured cash-settled equity swap, may avoid giving rise to the derivative taker acquiring a 'relevant interest' in the underlying securities. As the transaction then falls outside of the takeover rules, this has, in the past, given rise to a concern that potential bidders or other takers of equity derivatives were using equity derivatives to affect the market in the underlying securities. In 2005, the Takeovers Panel declared 'unacceptable circumstances' in relation to the acquisition of cash-settled equity swaps by Glencore. The declaration and orders of the Takeovers Panel were subsequently quashed by the High Court of Australia (Glencore was advised and represented by Atanaskovic Hartnell throughout); however, the Corporations Act was subsequently amended. The Takeovers Panel's Guidance Note 20 on the disclosure and use of equity derivatives in circumstances of a 'control transaction' now states that disclosure is required where the combined interest in securities and economic 'long position' in underlying securities exceeds a notional 5% of the target company's securities.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

During the offer period, a bidder must disclose (in a 'substantial shareholder notice') any existing holding of a 'relevant interest' in target securities when the bid is launched by 9.30am on the next trading day, and must give a further notice each time its interest changes by at least 1%.

A substantial shareholder notice must attach the terms (in full) of any relevant agreement by which securities were acquired.

5.4 What are the limitations and consequences?

Stakebuilding is limited by the 20% prohibition outlined in question 2.4.

Any stakebuilding should also take place prior to initiating any contact with the target company, for reasons relating to insider trading.

Breach of the 20% rule and insider trading laws can result in civil and/or criminal liability.

Prospective bidders should also be aware that the price paid for target securities within the four-month period before the date of the bid sets a floor price for the bid.

6 Deal Protection

6.1 Are break fees available?

Yes. The Takeovers Panel suggests that break fees or other 'lock-up' devices are not unacceptable *per se*. The break fee should not, however, have the effect of deterring a potential competing bidder or 'coercing' shareholders into accepting a bid, by diminishing the value of their company should the bid not succeed.

A break fee not exceeding 1% of the equity value of a target company is generally acceptable.

6.2 Can the target agree not to shop the company or its assets?

Yes. Deal protection measures like 'no shop' restrictions, 'no talk' and 'no due diligence' are possible; however, these latter two must be subject to a 'fiduciary carve-out', where the target directors are entitled to act as required by their fiduciary duties.

6.3 Can the target agree to issue shares or sell assets?

ASX Listing Rule 7.9 prohibits an ASX-listed company from issuing shares within three months of receiving written notice of a proposed bid (unless approved by shareholders).

The policy of the Takeovers Panel is to prohibit a target board from taking any action (such as a major share issue or asset sale) that would purposefully frustrate a bid or a genuine potential bid from being made or proceeding, unless approved by shareholders.

6.4 What commitments are available to tie up a deal?

In addition to break fees and 'no shop', 'no talk' and 'no due diligence' obligations, other measures a target may be asked to take to support a particular bid include: seeking an up-front recommendation from the target board; and seeking to compress the bid timetable by preparing and mailing out the target's statement together with the bidder's statement.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

Off-market takeover bids may be subject to a wide range of defeating conditions. The Corporations Act prohibits conditions that: (i) relate to maximum acceptance thresholds, or allow the bidder to discriminate as to who it acquires securities from (i.e., the offer must be for all securities, save for 'proportional bids', where these are permitted); (ii) require a payment to a target officer or employee; or (iii) turn on the opinion or belief of the bidder or depend upon the happening of an event which is within the bidder's control.

The bidder may impose conditions that require some positive action from the target board in order to be satisfied (e.g., the bid is conditional upon receiving the recommendation of the target board, or upon the target providing due diligence), but the Takeovers Panel will not regard the failure of the target board to satisfy such a condition or otherwise facilitate a bid as constituting 'unacceptable circumstances'.

The invocation of defeating conditions is generally not restricted.

7.2 What control does the bidder have over the target during the process?

In the case of a hostile takeover, a bidder can seek to employ negative control conditions to exercise some level of control over the target during the bidding process (e.g., making the sale by the target of a key asset a defeating condition of the bid).

In the case of a friendly bid, the bidder can enter into an agreement with the target to ensure that the target operates its business in the usual course.

7.3 When does control pass to the bidder?

A company is controlled by its directors; therefore, practical 'control' will pass once the bidder's preferred directors are appointed. As a matter of practice, the outgoing board will usually appoint the bidder's new directors and then resign once the bidder has unconditional acceptances giving rise to an interest greater than 50% in the target.

If the bidder fails to obtain 100% of the target, its practical control over the target may be hampered by rights protecting minority shareholders from oppressive conduct (under the Corporations Act), and also by the ASX Listing Rules if the company remains listed.

7.4 How can the bidder get 100% control?

For a takeover offer, the Corporations Act permits the compulsory acquisition of outstanding shares (typically, at the bid price) if, at the end of the offer period, the bidder has received acceptances sufficient to give it 'relevant interests' in 90% or more of the target's voting securities *and* has acquired at least 75% of the securities that it offered to acquire under the offer. The latter '75%' test will be relevant for 'mop-up' type bids where the bidder already holds more than 60% of the target prior to bidding.

By comparison, where a scheme of arrangement takes effect, it is binding upon 100% of the securities to which it applies.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

No; however, see question 4.2 outlining continuous disclosure obligations.

8.2 What can the target do to resist change of control?

Where directors believe that a takeover bid is not in the best interests of the target, there are a relatively limited number of possible defensive actions they can employ. These include:

- Seeking or facilitating a higher rival proposal.
- Criticising the commercial merits of the proposal.
- Commissioning an expert to undertake a supportive valuation of the company.
- Taking action in the Takeovers Panel against what the target reasonably considers to be unacceptable conduct on the bidder's part.
- For certain transactions involving a foreign bidder, lobbying of the federal government might influence whether or not FIRB approval is provided.

'Poison pills', acquiring 'defensive cross-shareholdings', and other defensive or anti-competitive mechanisms will be likely to constitute 'unacceptable circumstances' and thus result in orders from the Takeovers Panel. The ASX also typically only permits the listing of companies that have a 'one (equity) share, one vote' structure (with some rare historical exceptions, such as News Corporation Limited).

8.3 Is it a fair fight?

Generally, yes. Takeovers law and practice is presently more 'bidder friendly' in Australia than in many other Western jurisdictions, including the United States and the United Kingdom.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

The co-operation and a favourable recommendation of the target's board of directors (or the target's independent directors, if the bidder already has representatives on the board) will strongly promote the success of the bid, at least in the absence of a higher bid subsequently materialising.

Other key influences include: offer consideration; the existence of rival bidders; regulatory considerations (including whether these might delay the timetable for the offer completing); and the general sentiment of the target's share registry. Speculative 'arbitrage' or 'special situations' fund investors can sometimes quickly scoop up large positions above the bid price and effectively take the matter out of the hands of the target board by then accepting an increased bid price from the bidder, should the bidder be prepared to make one.

9.2 What happens if it fails?

If a bidder attempts to acquire control and fails, there are no regulatory restrictions placed on the bidder in terms of making a subsequent bid.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

Media Ownership Laws

Substantial reforms were made by the *Broadcasting Legislation Amendment (Broadcasting Reform) Act 2017* in October 2017 and *Commercial Broadcasting (Tax) Act 2017* in September 2017, including the:

i. repeal of the reach rule, which prevented a person from exercising control of commercial television broadcasting licences whose combined licence area exceeds 75% of Australia's population. The repeal will allow mergers between metropolitan and regional broadcasters, providing for greater scale in operations;

ii. repeal of the rule banning a person controlling more than two-out-of-three platforms – TV, radio or newspaper – in any one commercial radio licence area;

iii. introduction of new requirements to boost local programming by regional TV broadcasters;

iv. limitation of gambling advertisements during live sports telecasts;

v. reduction in the number of quarantined sporting events on the anti-siphoning list that gives free-to-air broadcasters first rights, and change to the delisting time (26 weeks);

vi. abolition of the broadcasting licence fees and data-casting charges;

vii. introduction of 60 scholarships over two years, worth A$40,000 each, to study journalism, and 50 cadetships per year at regional and small media organisations;

viii. inquiry by the ACCC into Google and Facebook concerning the impact of digital platforms on the media landscape; and

ix. establishment of a fund for regional and small publishers, totalling A$60.4 million over three years, to be overseen by the Australian Communications and Media Authority (ACMA).

Insolvency Laws

Significant amendments to insolvency law were made by the *Insolvency Law Reform Act 2016* (ILRA), in March and September 2017.

Some of the key features include the:

i. rights of the creditors, by resolution, to request that an external administrator provide information, a report, or a document to the creditors;

ii. improved abilities for creditors to require the external administrator to convene a meeting of the creditors;

iii. rights of the creditors to give directions to an external administrator in relation to the external administration;

iv. inclusion of a new insolvent trading safe harbour protection provision, to provide a director with protection from an insolvent trading claim if the director starts to develop one or more courses of action that are reasonably likely to lead to a better outcome for the company at a time where they start to suspect that the *company* is or may become insolvent; and

v. introduction of a stay on enforcement of *ipso facto* clauses that previously allowed a contractual party to terminate a contract when an insolvency event arose.

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