TAKEOVERS GUIDE

AUSTRALIA

2020

Foreword

Since establishing the first global law firm in Australia, Baker McKenzie has been a key adviser to a range of leading Australian and international clients. Baker McKenzie has been involved in a number of significant public M&A transactions in recent years and is recognised for its extensive experience advising on takeovers and schemes of arrangement in Australia and its strong relationships with relevant regulators.

This Guide is designed to assist bidders, targets and their directors and advisers to understand and address the legal, structural and procedural issues associated with takeovers and schemes of arrangement in Australia.

Please contact us if you require further information or assistance.

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1. Introduction

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Public company control transactions, whether by scheme of arrangement or takeover bid, are highly regulated in Australia.

The main source of regulation of takeover offers is Chapter 6 of the Corporations Act as modified and interpreted by the exercise of broad discretionary powers vested in ASIC and the Takeovers Panel.

The aim of Australian takeovers regulation is to ensure fairness between all shareholders in the target, and to create a level playing field for participants in a takeover. It does this by requiring that:

- the acquisition of control over target companies takes place in an efficient, competitive and informed market (for example, by requiring the disclosure of all relevant information which is known to the bidder and the directors of the target);
- each shareholder in the target has an equal opportunity to participate in the benefits of the takeover proposal (such as any control premium paid); and
- a reasonable time is given to shareholders and directors of the target in which to consider the takeover proposal.

A public company takeover can also be implemented by way of a "scheme of arrangement", which is a court-approved form of transaction between a company and its shareholders. The main source of regulation for schemes of arrangement is Chapter 5 of the Corporations Act, together with ASIC policy on disclosure principles and other matters.

Other important rules dealing with takeovers are contained in the ASX Listing Rules, the Foreign Acquisitions and Takeovers Act, and other specific legislation that imposes restrictions on takeovers involving companies operating in particular sectors such as media, banking and insurance.

About this Guide

This Guide provides an overview of:

- the basic restriction on acquisitions of voting shares above the 20% takeover threshold;
- the methods by which acquisitions above 20% can be made without a full takeover bid or scheme of arrangement;
- various issues to consider before proposing a takeover bid;
- how to make a takeover bid, as well as how to respond to a takeover proposal;
- how to implement a scheme of arrangement; and
- associated matters such as Australian foreign investment and competition regulation.

Detailed timetables for off-market and on-market takeover bids, as well as for schemes of arrangement, appear in the Timetable section at the end of this Guide. Definitions of many of the technical legal terms and certain regulatory and other terms used in this Guide appear in the Glossary at the end of this Guide.

2. The 20% limit and key exceptions

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Although by international standards 20% is relatively low as a level of deemed control, it marks the fundamental threshold at which Australian takeovers law applies.

2.1 The 20% limit

The Corporations Act prohibits a person from acquiring a relevant interest in issued voting shares in a target if, because of the transaction, either that person's or someone else's voting power in the target increases:

- from 20% or below to more than 20%; or
- from a starting point that is already between 20% and 90%,

unless the acquisition is made under one of the permitted exceptions, such as those noted below.

2.2 Targets to which the 20% limit applies

The Corporations Act[1] regulates acquisitions of more than 20% of:

- the voting shares in a listed Australian company, or in an unlisted Australian company with more than 50 shareholders; and
- the voting interests in a listed managed investment scheme (the most common example of which is a listed unit trust, such as a REIT).

This Guide focuses on the acquisition of shares in a listed public company. The same rules and principles will generally apply to interests in a listed managed investment scheme (such as units in a unit trust).

However, only companies can use schemes of arrangement. Managed investment schemes have to use a special kind of "trust scheme" which is described in section 7.4.

The ASX Listing Rules do not separately regulate takeovers in any significant respect. This means that non-Australian companies which are listed on the ASX will generally be regulated only by the takeovers laws of their home jurisdiction, and will not be subject to Australian takeover regulation.

2.3 Calculation of the 20% limit and voting power

The key concept in determining whether an acquisition breaches the 20% limit is the "voting power" which results from the acquisition.

"Voting power" is a term which aggregates the "relevant interests" held by a person (a term which widely draws in all direct and indirect holdings), together with the relevant interests of the person's "associates". Only "voting shares" count in calculating a person's voting power. See the Glossary at the end of this Guide for more detail on these technical terms.

[1] Section 606(1).

2.4 Acquiring shares above the 20% limit

Control transactions

Where a bidder aims to take control of the target company (generally 100%, but can be as low as 50%), the main structures for achieving this result are:

- **Takeover bid** - either off-market or on-market. See section 6 for more information.
- **Scheme of arrangement** - which is a court-approved arrangement between a company and its shareholders. See section 7 for more information.
- **Selective capital reduction** - where all outstanding shares other than those held by the bidder are cancelled following a shareholder vote. This structure is far less common than a takeover bid or scheme of arrangement and can raise tax complexities. Selective capital reductions are not dealt with in detail in this Guide.

Other acquisitions

If someone does not want to bid for control of the target company, but does want to increase their shareholding to a level which is above the 20% limit, there are a number of ways permitted by the Corporations Act,[2] including:

Creeping acquisitions	Shareholder approval	Rights issues
"Creeping" acquisitions of up to 3% of the target's shares in a rolling six month period.	Acquisitions made with the approval of a vote of target company shareholders in general meeting.	Acquisitions made under a pro-rata rights issue offered to all target company shareholders.

Underwriting	Downstream acquisitions	Share buy-backs
Acquisitions as underwriter of a pro-rata rights issue, or of any other issue of shares offered under a prospectus issued by the target company.	Certain "downstream" acquisitions which are deemed to result from upstream share acquisitions in a different company.	An increase in a shareholder's percentage interest resulting from the company buying back shares held by other shareholders.

These permitted acquisitions are described in more detail in section 3.

No "follow-on" bid rule in Australia

Unlike the takeover laws of some other countries, there is no "follow-on" or "mandatory bid" rule in Australia which would allow a bidder to acquire shares above the 20% limit if it then immediately makes a general

[2] See section 611 for a full list of permitted exceptions.

offer to all other shareholders in the target. Instead, a bidder must stop at the 20% limit, and then make its takeover bid from that point.

Key shareholding thresholds

Key shareholding thresholds in publicly listed companies are as follows (these thresholds also apply to interests in listed managed investment schemes).

Shareholding	Implications
5%	Shareholder must publicly disclose information relating to their shareholding by filing a substantial holder notice with ASX (see section 10.1)
10%	Shareholder can prevent a takeover bidder from moving to 100% ownership via compulsory acquisition Certain transactions between the shareholder and the listed company may require shareholder approval
20%	Takeovers laws are triggered (see section 2) FIRB approval may be required (see section 12)
25%	Shareholder can block the approval of special resolutions, including resolutions to approve a scheme of arrangement
50%	Shareholder can unilaterally pass ordinary resolutions, including resolutions to replace and appoint directors
75%	Shareholder can unilaterally pass special resolutions, including a special resolution to amend the company's constitution Shareholder may apply for removal of the company from the ASX official list (subject to ASX requirements)
90%	Shareholder may be entitled to compulsorily acquire remaining shares without making a bid (see section 9)

3.

Non-control transactions above the 20% limit

3. Non-control transactions above the 20% limit

There are a number of exceptions to the restriction on acquisitions of shares above the 20% limit which do not require a takeover bid to be made to all shareholders. The main exceptions are described below.

3.1 "Creeping" acquisitions

The Corporations Act[3] permits acquisitions of shares to be made above the 20% limit where the acquirer does not increase its voting power in the target company by more than three percentage points over a rolling six month period. The "creeping" acquisition exception allows shares to be acquired in any way, such as buying shares on market, participating in a new issue of shares, or entering into options or other arrangements with other shareholders.

In order to rely on this exception, the acquirer must have held voting power in the target company of at least 19% throughout the six month period before the creeping acquisition.

3.2 Shareholder approval

An acquisition of shares (either by a purchase of existing shares or by receiving an issue of new shares) is permitted by the Corporations Act[4] if it has been previously approved by an ordinary resolution (that is, a simple majority vote) passed at a general meeting of shareholders of the target company. The parties to the transaction (together with their associates) cannot vote on the resolution. This exception is commonly used to facilitate significant equity placements which result in the issue of new shares.

The Corporations Act and published ASIC regulatory guidance[5] require detailed disclosure to be made to target company shareholders in connection with a proposed resolution of this kind. The required information includes a statement of the acquirer's intentions in relation to the future of the target company and its business. ASIC also typically requires an independent expert's report to be provided to target company shareholders stating whether, in the opinion of the expert, the proposal is "fair and reasonable" to target company shareholders who are not parties to the transaction.

3.3 Rights issues

A shareholder in a target company is permitted to increase its percentage holding in the company by taking up its pro-rata entitlement to new shares offered by the company under a pro-rata rights issue.[6] This exception also extends to an acquisition of shares by an underwriter or sub-underwriter to the issue, so as to allow them to acquire any shortfall not taken up by shareholders.

However, if there is potential for a rights issue to affect control, the directors of the company should carefully consider all reasonably available options to mitigate that effect, for example by allowing all shareholders to apply for some of the shortfall shares before they are taken up by the underwriter. ASIC and the Takeovers Panel have cautioned that they may take action and make remedial orders in relation to share acquisitions which are designed to take advantage of this exception or otherwise give rise to unacceptable circumstances.[7] For example, it may be unacceptable if the rights issue is priced at a premium to the

[3] Section 611, item 9.

[4] Section 611, item 7.

[5] ASIC Regulatory Guide 74 - Acquisitions approved by members

[6] Section 611, item 10.

[7] ASIC Regulatory Guide 6 - Takeovers: Exceptions to the general prohibition; Takeovers Panel Guidance Note 17 - Rights Issues.

market price of the target company's shares so that it will be unattractive to minority shareholders, or (conversely) if the discount to market price is so deep that any issue of shortfall will be highly dilutive to other shareholders.

3.4 Underwriting

The Corporations Act[8] permits a person to acquire shares in excess of the 20% limit if the acquisition is made as a result of underwriting an issue of securities under a prospectus (such as a pro-rata rights issue or an initial public offering). This exception extends also to sub-underwriters.

A major or cornerstone shareholder can use this exception (and the previous exception) to underwrite the shortfall under a pro-rata rights issue in addition to taking up its own entitlement under the issue.

In order to rely on this exception, the arrangement must be a genuine underwriting arrangement in that it must involve the assumption of shortfall risk by underwriter. ASIC has warned that where the arrangement does not, in substance, involve the assumption of this risk, it may take the view that the arrangement is not underwriting.[9] This may be the case where, for example, the terms effectively give the underwriter a general discretion to terminate the underwriting arrangement from the outset, or where the arrangement permits the underwriter to be relieved from its obligations following a default by a sub-underwriter, or due to the occurrence of a "hair trigger" termination event (such as a token fall in a relevant market index).

3.5 Downstream acquisitions

A relevant interest in target company shares can be deemed to be held indirectly through a series of related companies. The acquisition of a controlling interest (or even a minority interest which is above 20%) in one company can therefore lead to a deemed "downstream" indirect acquisition of a relevant interest in another company's shares that may breach the 20% limit. For example, an acquisition of more than 20% of the shares in an "upstream" listed company (whether or not it is an Australian company) which directly or indirectly holds more than 20% of the shares in a listed Australian company will trigger the Australian takeover threshold.

The Corporations Act[10] exempts a deemed downstream acquisition of this kind from breaching the 20% limit where the upstream acquisition is a lawful acquisition of shares in a body corporate which is listed either on the ASX or on an approved foreign stock exchange.[11] However, ASIC and the Takeovers Panel may still consider that an acquisition exempted by this exception gives rise to unacceptable circumstances where control of the downstream company appears to be a significant purpose of the upstream acquisition.[12]

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8 Section 611, item 13.

9 ASIC Regulatory Guide 6 - Takeovers: Exceptions to the general prohibition.

10 Section 611, item 14. It is arguable that the exception is not limited to upstream takeovers of listed companies, but ASIC is likely to take action where a contrived structure is involved.

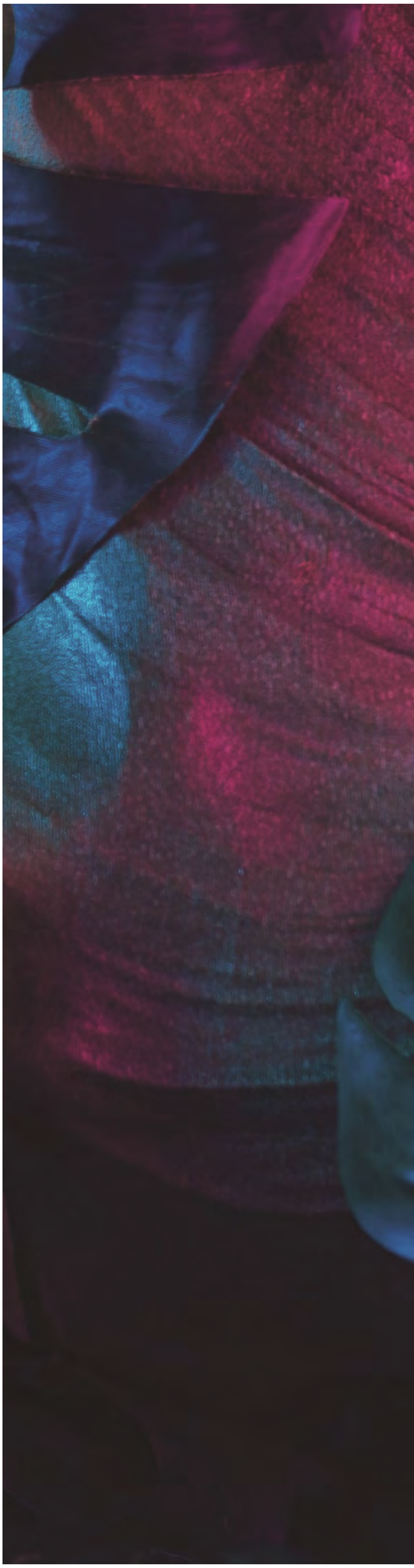
11 ASIC has approved a number of foreign exchanges for this purpose, including (among others) the New York, NASDAQ, London, Tokyo, Hong Kong, JSE South Africa, Singapore, Kuala Lumpur, Toronto, Deutsche Borse, Swiss, Euronext, Paris and New Zealand Stock Exchanges (main boards only if more than one board).

12 ASIC Regulatory Guide 71 - Downstream acquisitions.

3.6 Share buy-backs

It is possible that a shareholder's percentage interest in a public company could "passively" exceed the 20% limit by reason of the company buying back shares held by other shareholders, for example under an on-market share buy-back.

The Corporations Act[13] exempts an increase in percentage interest from breaching the 20% limit where it results from a share buy-back, provided the buy-back was carried out in accordance with the Corporations Act.



[13] Section 611, item 19.

4.

Control transactions: takeovers and schemes

4. Control transactions: takeovers and schemes

A key strategic decision to make, for both bidder and target in a control transaction, is which acquisition structure to use.

4.1 Overview of the two main acquisition structures

It is possible to acquire all the issued shares in an Australian public company by two principal means: a takeover bid (the off-market version of which is like a "tender offer" in some jurisdictions) or a scheme of arrangement (which is like a "merger" in some jurisdictions).

Takeover bid

A takeover bid is essentially a regulated offer to buy target company shares which is made on identical terms to each target company shareholder.

Takeover bids can either be:

- on-market (for quoted securities of listed targets only); or
- off-market (for listed or unlisted targets, and quoted or unquoted securities of a listed target).

Off-market bids can be conditional (for example, on obtaining sufficient acceptances to gain control or reach compulsory acquisition thresholds, and on obtaining regulatory approvals), and can offer any form of bid price, including equity securities or debentures of the bidder. On-market bids, on the other hand, must be unconditional and can only offer an all-cash price. For these reasons, off-market bids are far more common in Australia than on-market bids. The rest of this overview therefore focuses on off-market takeover bids.

A more detailed discussion of on-market and off-market bids is at section 6.1.

Scheme of arrangement

A scheme of arrangement is a court-approved form of corporate transaction, under which a bidder can acquire all of the shares in the target company. For a scheme of arrangement to become effective, it requires approval from both the court and target company shareholders in general meeting. The two shareholder voting thresholds (both of which must be satisfied) are:

- a special resolution of shareholders, which requires that at least 75% of the number of votes cast on the resolution are in favour of the scheme. This vote is taken on a poll, so it will be based on the number of shares voted; and
- approval from more than 50% of the number of shareholders who vote at the meeting, regardless of how many shares they hold.

Schemes arguably have a lower threshold than takeover bids for obtaining 100% control of the target, due to the 75% special resolution requirement being lower than the 90% shareholding threshold for compulsory acquisition under a takeover bid. However, it will ultimately depend on the number of shares that are actually voted. If the bidder has a significant existing shareholding (which it cannot vote), or if there is a low proportion of shareholder participation at the scheme meeting, a relatively small shareholding (potentially less than 10%) could be enough in a practical sense to defeat a scheme.

Further, the requirement for approval by more than 50% of shareholders who vote at the meeting can expose the scheme to a risk of defeat by a large number of shareholders with very small shareholdings.

However, the court does have a discretion to waive this "headcount" test in exceptional circumstances if it has been exploited, for example by means of deliberate share splitting.

4.2 Choosing a structure: takeover or scheme?

Takeovers and schemes are quite different ways of reaching a similar outcome. Choosing the best structure for an acquisition depends on a number of factors, some of which are summarised below.

More detail on the specific features of takeovers and schemes is set out in sections 6 and 7 respectively.

	Takeover Bid	Scheme of Arrangement
Control of the process	The bidder generally controls the process. Once started, the bidder can decide whether to waive conditions, extend the bid, or increase the bid price. A takeover, unlike a scheme, can proceed with or without the target board's continued support or recommendation.	The target runs the scheme process, including preparing shareholder meeting documents, obtaining the independent expert's report, ASIC filings and making applications to the court. A target can end a scheme process if a termination event arises under the Scheme Implementation Agreement such as a superior offer from a third party, generally leaving the bidder with a break fee as its only remedy.
Going hostile	It is possible to make a hostile or unsolicited bid, forcing the target to respond.	Not possible, because it is a target-driven structure. However, the bidder may attempt to approach the target on an unsolicited basis with a scheme proposal (which may be publicly announced) with the aim of putting pressure on the target board to provide due diligence access and negotiate the proposal. See section 5.3 for more detail.
Approval threshold	The bidder needs to achieve 90% shareholding to proceed to compulsory acquisition of the remaining shares. A higher test applies if the bidder's pre-bid holding exceeds 60%, in which case the bidder must receive acceptances for at least 75% of the shares which it did not own at the start of the bid. However, a bidder can declare its bid "unconditional" at any shareholding level it chooses if it does not require 100% control.	There are dual voting thresholds at the shareholder meeting: ▪ 75% by number of shares voted; and ▪ 50% by number of shareholders who vote. In each case, the test is based on only those shares which are actually voted. Where there are different classes of securities in the scheme, each class must separately vote and each must meet these thresholds. Court approval is also required.

	Takeover Bid	Scheme of Arrangement
Effect of pre-bid shareholding on approvals	Any existing shareholding counts towards the 90% compulsory acquisition threshold, making it easier to achieve. An existing holding exceeding 60% will increase the threshold (see above).	The bidder and its associates cannot vote their own shares in favour of the scheme. A call option over a third party's shares, however, will not always disqualify the third party from voting.
Certainty of outcome	Usually a bidder will have to declare its bid unconditional at an acceptance level below 90% to entice sophisticated shareholders to accept for their shares. An Institutional Acceptance Facility can sometimes help overcome this impasse, but often a bidder has to accept some risk of falling short of 90% when it goes unconditional. This can make debt financing more difficult. A takeover structure can be to a bidder's advantage if it is content with majority control, as the bid does not need to be conditional on reaching compulsory acquisition thresholds.	Schemes have a binary "all or nothing" outcome depending on whether the approval thresholds are met, and will generally complete on a date fixed in advance by the bidder and target. A scheme is generally preferable from a debt financier's perspective for this reason. Unlike a takeover bid, a bidder under a scheme of arrangement cannot end up with only partial success (such as majority control).
Timetable and completion process	As there is no court approval process, a takeover bid can be launched relatively quickly. A bidder can take early acceptances (if the bid is unconditional) to gain control in a matter of weeks. However, a takeover offer will often take some time to reach compulsory acquisition thresholds, as this depends on how quickly the remaining shareholders accept the offer. The timetable for a takeover is ultimately uncertain for this reason.	A scheme starts more slowly than a takeover as it requires review and approval of scheme documents by both ASIC and the court before they can be sent to shareholders, and then there is a minimum 28 days' notice to hold the shareholders' meeting. Unlike a takeover, the completion date of the scheme process can be fixed in advance, with the result that all the target shares are acquired by the bidder shortly after shareholder and court approvals.
Offer price	An off-market bidder can offer cash, securities, debentures, or any combination of alternatives. However, all target shareholders must be offered the same choices.	Separate and different offers are allowed, for example equity in the bid vehicle may be offered only to target management, with cash offered to other shareholders. This may create separate classes of shareholders for voting purposes, each of which will have to approve the scheme.

	Takeover Bid	Scheme of Arrangement
Minimum bid price	A takeover bid must offer at least the highest price paid for target company shares by the bidder (or its associates) in the four months before the bid.	No minimum offer price rule applies. However, the court may take pre-scheme purchase prices into account when exercising its discretion to approve the scheme.
Conditions precedent	There are some restrictions on the types of conditions precedent that can be included in an offer, for example conditions which depend on the bidder's opinion cannot be used. A bidder can generally waive any condition in its discretion (other than necessary regulatory approvals).	There are no restrictions on types of conditions precedent that can be included, although all conditions need to be either satisfied or waived by the time of the second court hearing. The bidder may not be able to waive conditions if they are expressed to be for the target's benefit.
Ability to respond to rival bid	A takeover bid is very flexible in relation to amending its terms. The bidder can unilaterally: ■ waive conditions (one at a time, or all at once); ■ extend the bid by any length of time; ■ increase the offer price by any amount; or ■ accelerate payment terms for acceptances, at its discretion and at any time during the bid (although some restrictions apply in the final seven days of the bid period). This flexibility allows a bidder to respond quickly to a rival bidder.	The terms of a scheme cannot be amended as easily. Any variation after the shareholders' meeting has been convened will usually require ASIC and court approval, and depending on the timing of the proposed variation, may require the meeting to be postponed which will delay the timetable. The offer price can be increased with some prior notice but it requires co-operation from the target. Payment terms cannot be accelerated for "early acceptances" before the shareholders' meeting as it is an "all or nothing" process. These features make it more difficult for a scheme bidder to respond to a rival bid.
Structural flexibility	Takeovers are subject to a high degree of prescriptive regulation, particularly regarding the conduct of bidders, pricing and conditions. Consequently, although a takeover offers flexibility to bidders in terms of varying a proposal, they are generally less flexible in terms of transaction structure.	Schemes are more structurally flexible than takeover bids because they are less prescriptive. They can include ancillary transactions such as reductions of capital, demergers or asset acquisitions or disposals. There is also scope for the structure to be changed once the scheme has been announced. However, ASIC and court approval is required where structural changes are proposed after shareholder documents have been issued.

4.3 Which structure do bidders usually choose?

The "all or nothing" outcome of a scheme generally makes it a favoured acquisition structure in Australia for friendly or agreed transactions. In leveraged acquisitions, where it is essential to obtain 100% control on a certain date, it may actually be necessary to proceed by way of scheme for this reason. Likewise, a "top-hat" restructure, where all classes of shares and convertible securities are to be simultaneously exchanged for equivalent securities in a new holding company, would generally also have to be structured as a scheme for similar reasons.

A scheme of arrangement might also be attractive where special corporate actions need to be undertaken in connection with the acquisition, such as where part of the acquisition price is in the form of a share buy-back or capital return that requires approval by a shareholder vote.

However, in a hostile situation a takeover bid is the only feasible structure.

In recent years, large value control transactions in Australia are more often undertaken by way of a scheme of arrangement rather than a takeover bid.

4.4 Other methods to acquire control

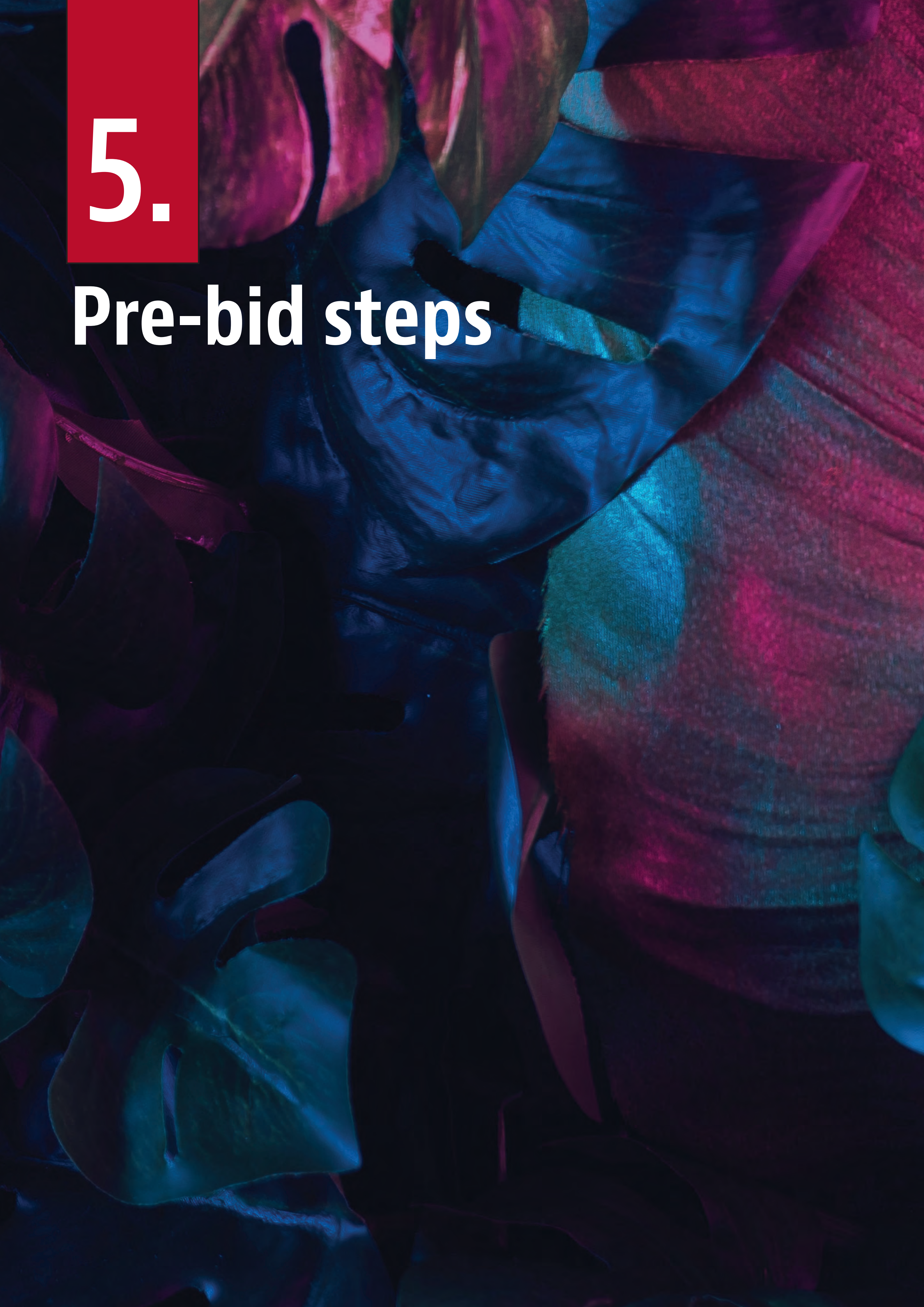
Takeovers and schemes are the principal methods used to acquire control of Australian public companies.

An alternative, but less used, method is to acquire control by way of cancelling all target shares held by shareholders other than the bidder, leaving the bidder as the sole shareholder. This can be achieved by way of a selective capital reduction, which requires approval by way of a special resolution (75% vote) of shareholders whose shares are to be cancelled. There is no court approval required, unlike a scheme of arrangement.

Selective capital reductions are less common because the acquisition price is paid directly by the target company as a return of capital to its shareholders (although the price may be indirectly funded by the bidder), and this kind of distribution can sometimes have adverse tax implications compared with an acquisition price which is directly paid to shareholders by a third party bidder.

5.

Pre-bid steps



5. Pre-bid steps

There are a number of tactical and strategic issues to consider before launching a bid.

5.1 Pre-bid due diligence

Friendly bids

In a friendly or solicited bid, the bidder may be given pre-bid access to confidential information of the target. However, once a bidder comes into possession of non-public, price-sensitive information its ability to acquire any shares before launching the bid may be hindered by insider-trading restrictions.

Standstills

As a trade-off for granting due diligence access, a target may require the potential bidder to agree to a standstill restriction. Standstills will generally last for between 6 to 12 months, and will prohibit the potential bidder from buying shares or launching a bid other than on terms which the target's directors have approved. Care needs to be taken before agreeing to a standstill, as they will be enforced by the Takeovers Panel. A bidder should therefore ensure that a standstill lasts for no longer than is necessary, and that it releases in appropriate circumstances such as upon a bid being announced by a third party.

Hostile bids

In a hostile bid, there will most likely be no opportunity to undertake detailed due diligence on the target, and the bidder has to take some risk that the target's public announcements may be incomplete or may not be sufficiently detailed.

This risk is usually dealt with by including "no material adverse change" type conditions in the takeover offer. Some bidders try to force target company directors to provide detailed financial information (such as earnings confirmations) by making it a condition of the bid that the target announces the information to ASX. However, these attempts are usually ignored by target company directors, and the Takeovers Panel has consistently said that a target is not obliged to comply with such a request.

Target company directors are generally not obliged to offer equal due diligence access to a bidder which they regard as hostile, allowing them to favour a "white knight" bidder. See section 8.4 for more detail.

5.2 Choice of bid vehicle

The taxation treatment of the bid vehicle should be considered. For example, whether a special purpose vehicle should be established, and whether the bid vehicle should be an Australian or off-shore incorporated company. It is important that specialist tax advice is sought in this regard.

5.3 The initial approach

A bidder will need to consider the format of the initial approach carefully. A common practice is an introductory call from a senior representative of the bidder to the target chairperson followed by a confidential, non-binding, indicative offer letter (NBIO) setting out the key terms of the offer.

A bidder may sometimes adopt the tactic of privately approaching a potential target stating that it will make an offer only on the basis of receiving a favourable recommendation from the target's board of directors (commonly referred to as a "bear hug" approach). The fact that such an approach has been made is often made public, either by the bidder or target. Such an approach is usually driven by the bidder's desire for a friendly transaction (which increases deal certainty) or where access to due diligence is required before committing to the deal. A bear hug approach can sometimes be a precursor to a hostile takeover bid.

5.4 Acquiring a pre-bid stake

A bidder can make pre-bid acquisitions of shares in the target company up to the 20% limit. If done quickly, the pre-bid acquisition can be in place before the substantial holder disclosure obligation arises (see section 10).

Benefits and risks of pre-bid stakes

There are several benefits to a bidder in acquiring a pre-bid stake, including:

- it forces the target to take the bid seriously, and to engage with the bidder;
- a bidder can deter potential rival bidders with a "blocking stake";
- the bidder has a first-mover advantage if the bid turns competitive;
- an existing holding counts towards the 90% compulsory acquisition threshold in a takeover bid; and
- it can reduce the overall average acquisition cost if acquired at below the bid price.

There are risks involved in acquiring a pre-bid stake, including:

- it may be viewed by the target as hostile, and may provoke a defensive response;
- it could cause the market price to run up on bid speculation, and remove the perceived "bid premium" being offered under the bid. See section 10.1 on public reporting obligations for pre-bid shareholdings;
- a bidder in a scheme of arrangement cannot vote its own shares, and so a pre-bid holding may be counter-productive to the success of a scheme; and
- if the bid is unsuccessful, the bidder could suffer a loss on the investment.

Finally, the price paid for any pre-bid acquisition will set the minimum bid price for any takeover offer made in the following four month period (see section 6.3).

Types of pre-bid stakes

A pre-bid stake can be acquired in a number of ways, including:

Outright purchase of shares	Shares can be bought on or off-market. In the case of on-market purchases, it may be difficult to accumulate a meaningful stake unless the target's shares are highly liquid. A common method for acquiring a meaningful stake is an off-market raid, where selected large shareholders are approached simultaneously with an offer to buy shares. Fast execution is key to a successful raid.
Bid acceptance agreement	This is an agreement under which a shareholder agrees to accept the bid when it is made. The agreement may allow the shareholder to accept a higher rival bid which is not matched by the bidder.

Pre-bid option

A bidder may negotiate a call option to buy shares from a specific large shareholder. An option will often allow the shareholder to participate in any increase in the bid price by accepting the shares into the bid.

Equity swap

A bidder can acquire a purely economic pre-bid interest by means of a cash-settled equity swap, a type of over-the-counter derivative which is usually written by an investment bank. A cash-settled swap generally does not give the bidder a “relevant interest” in the underlying shares (and therefore lowers the disclosure risk through tracing notices before launching a bid), unless one of the parties has an option to settle the transaction by physical delivery of shares.

The writer of the swap will often acquire shares to hedge its exposure, and this physical holding will be subject to substantial holder disclosure obligations if above the 5% reporting threshold. The writer will also retain all voting and other rights in the shares while it holds them.

Forward contract

A bidder can enter into a forward contract with a third party (usually an investment bank), which obliges the bidder to buy the underlying security from the third party at a set price and at a fixed time in the future. As settlement of the forward contract will result in physical delivery of the underlying shares, a forward contract will usually give the bidder a "relevant interest" in the underlying shares once the underlying shares are acquired by the third party (which would usually occur over a gradual basis during the term of the forward). Entering into a forward contract may be useful when a bidder is seeking to acquire a significant pre-bid stake, as it can lock in the price of the underlying shares up front, and may also assist to overcome practical difficulties in acquiring the desired percentage shareholding.

Escalation clauses

The Corporations Act[14] prohibits a pre-bid acquisition of shares from having an “escalation clause”, such as a provision which automatically increases the price payable to the pre-bid seller so as to match the bid price which is offered under a subsequent takeover bid. However, with careful drafting there are ways to achieve the same outcome in a pre-bid agreement without breaching the law.

Insider trading considerations

A bidder must comply with Australian insider trading laws when acquiring a pre-bid stake. Specifically, a bidder must not make pre-bid acquisitions when in possession of price-sensitive information which is not generally available, which can be a risk if due diligence has been undertaken.

However, this prohibition does not apply where the bidder’s intention to make a bid is the only inside information known to the bidder. This is known as the “own intentions” exception.

[14] Section 622.

5.5 Shareholder intention statements

In some overseas jurisdictions, it is common practice to enter into a pre-bid voting agreement with major shareholders to guarantee their support for a bid. However, in Australia, any agreement between a bidder and a target shareholder to accept a bid, or to vote in favour of a scheme, will give the bidder a relevant interest in the shareholder's shares, and hence would be strictly prohibited where the bidder and the relevant target shareholder(s) have an aggregate shareholding in excess of 20%.[15]

In Australia, it is more common to obtain the support for a change of control transaction from a target shareholder by using shareholder intention statements. These are public statements of a shareholder's intentions in relation to a bid or scheme, and when made with the shareholder's consent, would generally be binding under ASIC's "truth in takeovers" policy.[16] Such statements are usually expressed to be subject to no superior proposal, such that the shareholder can accept or vote in favour of a superior proposal if one is made.

ASIC has signalled concerns that shareholder intention statements are capable of giving rise to a relevant interest in the shareholder's shares, particularly where the circumstances surrounding the provision of the statement support an inference of association. For example, in the context of schemes, if ASIC considers that the bidder may have a relevant interest in the shares the subject of the shareholder intention statement, it may request that the court disregard the votes attached to those shares for the purpose of scheme approval. Accordingly, bidders need to exercise caution around the procurement of shareholder statements to reduce the risks of any regulatory concerns.

5.6 Pre-bid arrangements with the target: exclusivity, break fees, and lock-ups

In a friendly or recommended takeover bid, the bidder and the target will often enter into an implementation agreement to record the terms of the transaction. This document sets out the terms of the bidder's proposed offer as well as each party's obligations in relation to the transaction.

In return for the bidder's commitment in an implementation agreement, the target will usually grant the bidder:

exclusivity
where the target gives the bidder certain exclusive negotiation and dealing rights before and after the bid is announced

break fee
where the target agrees to pay a specific amount to the bidder if the bid fails in certain circumstances. Where there is a break fee there may also be a reverse break fee, where the bidder agrees to pay an amount to the target in certain circumstances

[15] Section 606.

[16] ASIC Regulatory Guide 25 - Takeovers: False and misleading statements.

The Takeovers Panel has issued a policy[17] on break fees, exclusivity agreements and asset lock-ups (collectively termed lock-up devices) which aims to ensure that target company boards do not hinder an efficient and competitive market for corporate control. The Takeovers Panel does not consider that lock-up devices are always unacceptable, but has laid down guidelines (detailed in sections 5.7, 5.8 and 5.9) to ensure that target companies do not use lock-up devices to shut out potentially higher competing bids.

Any kind of lock-up device should be publicly disclosed by the target.

5.7 Exclusivity arrangements

A pre-bid exclusivity period for due diligence and negotiations may be necessary to induce a bidder to invest time and costs in preparing for and making a bid. Exclusivity arrangements can continue after the bid is announced, and these will usually comprise a number of individual components:

no-shop
where the target agrees not to actively solicit offers from other parties

no-talk
where the target agrees (subject to the "fiduciary out" described below) not to respond to, or negotiate with, any third party, even if the third party makes an unsolicited approach

notification obligations
where the target agrees to notify and provide the bidder with details of any third party approaches received

matching rights
where the target is prevented from recommending a superior competing bid until the original bidder has been notified of the competing bid and been given a short time (typically three to five business days) to match or better the competing bid, in which case the revised bid will retain the target's recommendation

no-due diligence
where the target agrees (subject to the “fiduciary out” described below) not to provide any third party with due diligence access

The Takeovers Panel regards no-shop agreements as acceptable, as target directors do not have a legal duty to solicit other offers or to actively auction the company when a bid is received.

However, if another potential bidder approaches the target, the target's directors have a fiduciary duty to remain open to considering and recommending a new offer which is in the best interests of shareholders.

17 Takeovers Panel’s Guidance Note 7 - Lock-up Devices.

Accordingly, no-talk agreements will only be acceptable if they are subject to a carve-out which permits target directors to consider and recommend an unsolicited superior proposal in circumstances where it may be a breach of the directors' fiduciary or legal duties if they were to refuse to engage with the new bidder. This carve-out is commonly called a "fiduciary out".

5.8 Break fees

A "break fee" is a payment which a target agrees to make to a bidder to induce it to make (or to increase) a bid. The fee will generally be triggered if the bid is ultimately unsuccessful because it is overbid by another bidder, or if the target's directors recommend a competing proposal, or if the bidder terminates the bid implementation agreement as a result of a material breach by the target.

To ensure that the size of the break fee neither unacceptably pressures shareholders to approve the bid, nor deters a rival bidder, the Takeovers Panel recommends that target directors cap the maximum fee payable, with 1% of the equity value of the company at the bid price as a guideline. However, 1% may be too low for a low value bid, and in large bids a 1% fee may be excessive.

In principle, the break fee should do no more than reimburse the bidder’s costs of making the bid, and this can include external costs, internal costs and opportunity costs. In practice, a fixed amount is usually agreed at, or around, the 1% guidance level.

It is not uncommon for a “reverse break fee” to be agreed in the same implementation agreement. This is a payment by the bidder to the target, which may be triggered if the bidder materially breaches its obligations under the agreement. The amount of the bidder’s reverse break fee generally matches the target’s break fee amount. If appropriately drafted, a reverse break fee can act as a cap on a bidder’s liability.

5.9 Asset lock-ups

A bidder may seek to enter into an arrangement with the target for the sale, purchase or encumbrance of an important asset (often referred to as the "crown jewel") in exchange for proposing a bid, exclusivity or due diligence access.

The Takeovers Panel notes that asset lock-ups can make the target less attractive as an acquisition candidate or investment for shareholders, and could therefore potentially be both anti-competitive and coercive. In considering whether an asset lock-up agreement gives rise to unacceptable circumstances, the Takeovers Panel is guided by various factors including the commercial reason for it, the size or strategic value of the asset involved, and whether the agreement was negotiated on an arm's-length basis. Due to the potential effect on other interested parties, asset lock-ups in favour of a bidder are not commonly agreed by target company boards in the absence of a short term financial imperative.

5.10 Process Deeds

In some cases, if the target company receives an indicative non-binding offer from the bidder on terms which the target board is inclined to support, and in respect of which the target board is prepared to grant due diligence access to the bidder, as a precursor to entering into an implementation agreement, the parties may enter into a "process deed" to set out the parties' obligations to progress the proposal.

This document would commonly include provisions dealing with access to exclusive due diligence, the preparation and negotiation of a formal implementation agreement and exclusivity provisions in favour of the bidder (such as no-shop, no-talk, no-due diligence, notification and matching rights). Such deeds are often announced in conjunction with a statement by the target board that it "intends to recommend" the proposal subject to certain qualifications.

5.11 Warranty and indemnity (W&I) insurance

W&I insurance has been a common feature of Australian private M&A transactions for some time, but its use in the Australian public M&A context is recent and consequently much less developed. There is an increasing trend towards its use in public M&A, particularly with transactions involving foreign and private equity bidders. The use of W&I insurance in the public M&A context has the following potential benefits:

- it enables the bidder to seek an expanded set of business style target company warranties similar to those commonly provided by a seller in a private M&A transaction. The warranties typically provided by the target company in the implementation agreement are limited in scope to certain fundamental matters (such as incorporation, solvency, capital structure and market disclosure compliance);
- it enables the bidder to bring warranty claims against a funded insurer in circumstances where there is effectively no continuing vendor to respond to warranty claims following completion. Without W&I insurance, the only contractual recourse a bidder has to pursue a warranty claim is action against the target company (which becomes a subsidiary of the bidder upon completion); and
- it provides the bidder (and its financier) with a higher level of confidence in the target company and its business, which may assist them to get more comfortable with the risk profile of the acquisition.

6.

Takeover bids

6. Takeover bids

In order to achieve full control of a target company, it will usually be necessary to undertake a full takeover bid or a scheme of arrangement under the Corporations Act procedures.

6.1 Types of takeover: off-market and on-market

A takeover bid is essentially a regulated offer made to all target company shareholders to buy their shares. Takeover bids can be made in one of two ways: on-market or off-market.

The key differences between these two methods are as follows.

	Off-market bids	On-market bids
Bid procedure	The offer is made by sending personalised, formal, written offers to every target company shareholder on identical terms. Shareholders accept by responding to the bidder. If the bid is unconditional or subject only to the "no prescribed occurrences" condition, the bidder may also purchase shares on the ASX in the ordinary course of trading.	The bidder stands in the stock market (using a stockbroker) offering to buy all target shares at the offer price. Shareholders accept by selling on-market in the normal way, and settle sales on a standard T + 2 basis.
Types of target	Listed or unlisted companies. Quoted or unquoted securities.	Listed companies and quoted securities only.
Offer price	Cash, securities (shares, debentures, options, etc.), or any combination.	Cash only (like any on-market trade).
Conditions	Can be conditional on a wide range of events, subject to some limitations (see section 6.5). Common conditions include reaching a control or compulsory acquisition level of acceptances, obtaining regulatory approvals, and no "material adverse change". See section 12 for an overview of foreign investment and competition law approvals which may be required.	Must be unconditional. If a bidder requires foreign investment or competition regulatory approvals, an on-market bid may not be feasible.
Partial bids	Offer can be a full bid for 100% of each shareholder's shares, or a partial offer for up to a fixed proportion (such as 50%) of each holder's shares.	Not possible – the offer must be for 100% of target shares.
Increase to bid price	If the bid price is increased, those who had already accepted the bid are entitled to the increase.	An increase in the bid price is not passed on to those who have already sold into the bid.

On-market bids are more restrictive, as they must be unconditional and can only offer cash. For these reasons, off-market bids are far more common in Australia than on-market bids.

Timetables

Detailed timetables for off-market and on-market bids appear in the Timetables section at the end of this Guide.

6.2 Rules applicable to all takeover bids

Both types of takeover bid share a number of common characteristics, including:

Announcing a bid	Once a bidder publicly announces a proposal to make a takeover bid, it must make takeover offers under the bid within two months on terms no less favourable than the announced terms.[18]
Offer period	The takeover offer must be open for at least one month. Either kind of bid can be extended one or more times by the bidder up to a maximum offer period of 12 months. An extension of a conditional off-market offer by more than one month (in total) will give shareholders who had already accepted the offer a right to withdraw their acceptance. In some circumstances the offer will be automatically extended by up to 14 days by operation of the Corporations Act.[19]
Offer price	The same price must be offered to all shareholders, and the bidder may increase the price during the bid. Under an off-market bid, the increased price must be paid to all shareholders who accept the offer, even those who accepted before the bid price was increased. However, under an on-market bid the increased price is paid only to those shareholders who sell into the offer after the price has been increased. See section 6.3 for more detail about the offer price.[20]
Disclosure documents	The offers, when made, must be accompanied by a disclosure document called a Bidder's Statement (see section 6.6). The target company responds with its own disclosure document called a Target's Statement.
Selective benefits	There is a restriction on providing "benefits" during the offer period to some target company shareholders that are not extended to all shareholders.[21] For example, this means that a bidder could not buy assets that are unrelated to the takeover from one shareholder at above fair market value.

[18] Corporations Act section 631.

[19] Corporations Act section 624(2).

[20] See the timetables at the end of this Guide for details.

[21] Corporations Act section 623.

Disposal of shares by bidder	The bidder is not permitted to dispose of any target company shares during the bid period, unless another bidder makes or increases a competing takeover bid for the target.[22]
Compulsory acquisition	Following a bid, the bidder will generally be able to compulsorily acquire the shares held by the remaining minority shareholders at the bid price if it achieves at least a 90% holding in the target. See section 9.1 for a more detailed discussion.

6.3 The bid price

The bid price must equal or exceed the highest price paid (or agreed to be paid) by the bidder or any of its associates during the four months before the date of the bid.[23] If two or more alternatives are offered (for example, cash or scrip) then the value of each alternative must comply with the minimum bid price rule.

Where the price paid for a pre-bid acquisition, or the price offered under the bid, involves non-cash consideration (such as shares in the bidder), a comparative valuation will be required to determine whether the bidder has complied with the minimum bid price rule. The value of the bid price is assessed shortly before the offers are mailed out, rather than at an earlier date (such as announcement of the bid). This can expose a bidder that is offering scrip to the risk of a decrease in its own share price, even if the same quantity of the bidder's scrip is offered under the bid as was paid under a pre-bid acquisition.

If the price paid in a pre-bid acquisition was neither cash nor quoted shares, the Bidder's Statement must include an independent expert's report on the value of that pre-bid price so as to enable a proper comparison with the bid price.[24]

6.4 Funding

A bidder that publicly proposes a takeover bid must not be reckless as to whether it will be able to perform its obligations if a substantial proportion of the offers under the bid are accepted.[25]

The Takeovers Panel has advised that a bidder must, at all relevant times, either have sufficient funding to satisfy the offers, or a reasonable basis to expect such funding will be in place when required. Whether a bidder has a reasonable basis to expect it will have sufficient funding in place will depend on the circumstances of each case. However, the Takeovers Panel has advised that a bidder is unlikely to have a reasonable basis where its funding arrangements are informal, unenforceable or on a "best endeavours" basis.[26]

[22] Corporations Act section 654A.

[23] Corporations Act section 621(3). ASIC has modified this requirement via ASIC Corporations (Minimum Bid Price) Instrument 2015/1068 to allow the bid price to be less than the pre-bid purchase price if the target has paid a cash dividend, or undertaken a share split, since the pre-bid purchase was made.

[24] Corporations Act section 636(2).

[25] Corporations Act section 631(2)(b).

[26] Takeovers Panel Guidance Note 14 - Funding Arrangements.

6.5 Conditions in a takeover offer

While on-market bids must be unconditional, off-market takeover bids may be subject to defeating conditions. Some common conditions include:

- minimum acceptance condition (generally either 50.1% if the bidder merely wants to control the target or 90% if the bidder wishes to proceed to compulsory acquisition and own 100%);
- no material adverse change occurs to the financial position, business or assets of the target;
- all necessary regulatory approvals are obtained, for example foreign investment or competition approvals; and
- no "prescribed occurrence" occurs, which covers matters such as the target making changes to its capital structure or becoming insolvent.

Bids can also be conditional on external events, such as a fall in a specified market index.

However, the Corporations Act[27] provides that conditions of the following kind cannot be included:

- a maximum acceptance condition (for example, a condition that the bidder is not obliged to proceed if acceptances are received for more than a specified percentage of shares);
- a condition that allows the bidder to acquire shares from some, but not all, of the shareholders who accept the bid;
- a condition that target company shareholders approve or consent to a retirement payment being made by the target to any officer of the target; and
- a condition which is dependent upon the opinion, belief or other state of mind of, or an event that is within the sole control of, the bidder or any of its associates. For example, a condition that the bidder is "satisfied" with the results of its due diligence on the target company could not be included.

A "no regulatory intervention" condition will generally be unacceptable unless the condition expressly carves out remedial orders that may be made by the Takeovers Panel.

A condition that technically meets the above requirements, but could be triggered by immaterial events (sometimes referred to as a "hair trigger" condition), would generally be considered unacceptable on the basis that it offends the policy of certainty in bids. For example, a market fall condition that is triggered by a very small percentage movement is likely to be unacceptable. Broadly, bid condition triggers should be based only on actions that materially affect the financial or business position of the target company.

Where the bidder is listed on ASX and the bid would, if successful, result in the issue of more than 100% of the bidder's current issued shares, the offer must be conditional on approval by the bidder's own shareholders in general meeting.[28]

[27] Corporations Act sections 626 to 629.

[28] ASX Listing Rules 7.1 and 7.2 exception 6.

6.6 Bidder's disclosure obligations

The Corporations Act[29] requires that a Bidder's Statement must be sent by the bidder to all target company shareholders with its offer. The document must include a range of specific information, as well as general disclosure of all information (including confidential information) known to the bidder that would be material to a decision regarding the acceptance of the offer.[30]

The key specific disclosure requirements include:

- the identity of the bidder, including its controllers and associates;
- recent dealings by the bidder and its associates in the target's shares;
- the bidder's intentions regarding the continuation of the business of the target, the future employment of the present employees of the target, and details of the changes that may be made to the business of the target (such as any proposed restructuring or sale of non-core assets or divisions); and
- details of the consideration offered under the bid, and if the bid price includes cash, details of the bidder's arrangements for funding the bid.

If the bid price includes securities (such as shares in either the bidder or the parent company of the bidder), the Bidder's Statement must contain all information that would be required in a prospectus for a public offer of those securities. The prospectus disclosure test normally requires full details of the business and financial position of the issuer.[31] However, if the securities being offered have already been quoted on an Australian stock exchange (such as the ASX) for the preceding three months, then "short form" disclosure may be made instead.[32] Short form disclosure can be limited to material information about the bidder which has not yet been released to the market, and material information regarding the effect on the bidder of the acquisition of the target. Disclosure of the effect of the acquisition will generally require pro-forma combined historical financials for the merged group, and may include combined earnings forecasts if they are available and reliable.

In a hostile bid, perceived inadequacies in the disclosure of the bidder's intentions and, in the case of a scrip bid, pro-forma combined financial information, are common grounds of complaint to the Takeovers Panel by the target company.

6.7 Updating disclosure documents

There is a general obligation on the bidder and target to update their respective Bidder's Statement or Target's Statement if, during the bid period, they become aware of a new matter that is material to target shareholders.[33] The update is made by preparing a supplementary statement, which is lodged with ASIC and sent to ASX for public release.[34]

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[29] Section 635(1).

[30] Section 636(1).

[31] Corporations Act section 710(1).

[32] Corporations Act section 713(1).

[33] Corporations Act sections 643 and 644.

[34] Corporations Act section 670B(1). If the bid price is a cash sum only, the Bidder's Statement must be approved by at least a majority resolution of directors. However, if the price offered under the bid includes non-cash consideration, all directors must approve the Bidder's Statement (Corporations Act section 637(1)).

6.8 Disclosure document liability and due diligence defence

A bidder will be liable for any misstatement in, and any omission of relevant information from, a Bidder's Statement. This liability also extends to all directors who approved the Bidder's Statement.[35] Criminal liability will apply where the misstatement or omission was "materially adverse" to target company shareholders.[36] Corresponding civil and criminal liabilities apply to the target and its directors in relation to the Target's Statement.

There is a due diligence defence under the Corporations Act[37] to both civil and criminal liability in relation to defective takeover documents. The due diligence defence will apply to a misstatement if the person who is facing liability did not actually know that the statement was misleading or deceptive, and the defence will apply to an omission of information if the person did not actually know that there was an omission of relevant information. In relation to forecasts and other forward-looking statements, a person will be deemed to make a misleading statement about a future matter if they do not have "reasonable grounds" for making it.[38]

6.9 Truth in takeovers

ASIC's "truth in takeovers" policy[39] requires bidders, targets, and even shareholders, to be scrupulously accurate in all market announcements, media releases, press conferences and interviews. ASIC can (and does) apply to the Takeovers Panel to enforce compliance with its policy.

Of particular relevance to bidders is ASIC's view that any "last and final statement" cannot be departed from under any circumstances, unless the bidder expressly and clearly qualifies the statement. Last and final statements by a bidder include:

- that there will be no increase in the bid price. Statements such as "the offer is final" or "this is our last offer" fall into this category;
- that the offer period will not be extended; and
- that specified conditions of the offer will not be waived.

A last and final statement will have the effect of encouraging target shareholders to accept the bid at the current price. Unless the bidder makes a clear qualification expressly reserving its rights to change its mind (for example, in the event that a competing proposal is announced by a third party), that price and closing date are final and cannot be departed from.

Takeovers Panel policy states that is likely to be unacceptable if a bidder makes a statement to the effect that it will not increase its offer price, lets its bid expire, and then returns with a new takeover bid at a higher price within four months after the close of its previous bid.[40] The only exception to this rule is where the bidder has made a clear qualification to the no increase statement (as described above) and the circumstances contemplated by that qualification actually occur.

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[35] Corporations Act section 670A(3).

[36] Corporations Act section 670A.

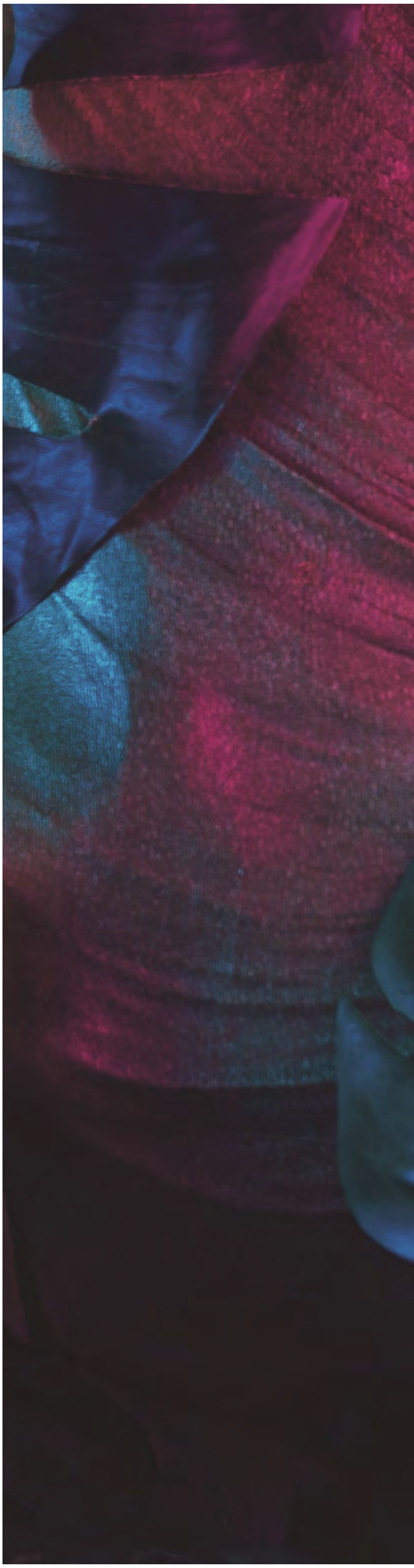
[37] Corporations Act section 670D.

[38] Corporations Act section 670A(2).

[39] ASIC Regulatory Guide 25 - Takeovers: False and misleading statements.

[40] Takeovers Panel Guidance Note 1 – Unacceptable Circumstances

To lessen the risk of infringing the policy and potentially inhibiting the progress of the bid, bidders should restrict all media contact to just one or two individuals who are well versed in what can and cannot be said.



7.

Schemes of arrangement

7. Schemes of arrangement

A scheme of arrangement is a popular structure for control transactions, with unique features which differentiate it from a takeover bid.

7.1 Overview of schemes as an acquisition structure

An alternative acquisition structure to a takeover bid is a "scheme of arrangement" (sometimes called a "merger"). A scheme is a court-approved form of corporate reconstruction governed by Chapter 5 of the Corporations Act. The scheme structure involves a shareholder vote rather than offers being made to, and accepted by, each shareholder individually (as occurs in a takeover bid), and depending on the outcome of the shareholder vote it delivers an "all or nothing" result.

If it is approved by shareholders and by the court, the scheme of arrangement binds all of the target company's shareholders, including those who voted against it (or did not vote at all). Conversely, if a scheme is not approved by the necessary thresholds then it does not become effective, even for those shareholders who voted in favour of the scheme.

The mechanics of a scheme usually involve a transfer of all existing target shares to the bidder in exchange for the offer price which, like a takeover, can involve cash, securities, or any combination. Schemes can also provide for the cancellation of all target shares other than those held by the bidder. In either case, the target company becomes a wholly owned subsidiary of the bidder. The target company does not "merge into" the bidder and cease to exist, unlike the merger procedure in certain other jurisdictions.

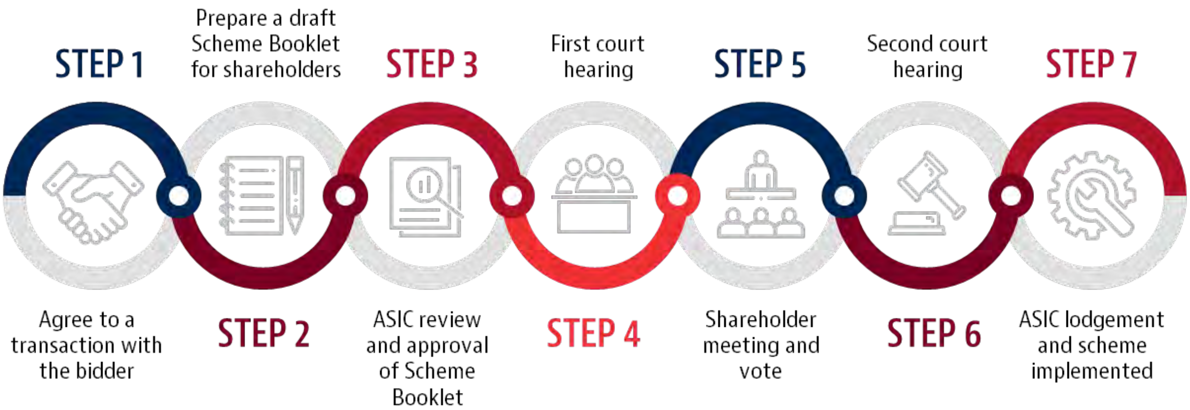
Outside of the takeovers arena, a scheme of arrangement can also be used to effect other types of corporate reconstructions, including de-mergers (spin-offs) and share buy-backs. Creditors' schemes can also be used to restructure debt arrangements with a company's creditors.

As it is the target company which has to prepare the scheme documents, apply to the court, and convene the shareholders' meeting, a scheme cannot be used for a hostile takeover.

7.2 The scheme of arrangement procedure

The scheme process involves the target engaging in a sequence of steps, each dealing with a different party: the bidder, ASIC, the court, the target's shareholders, and the court again.

These steps are outlined below.



STEP 1

Agree to a transaction with the bidder

Following due diligence and any other pre-bid steps, the first stage in the process is for the bidder and the target to negotiate and execute a Scheme Implementation Agreement and announce the transaction.

Once the deal has been agreed and the Scheme Implementation Agreement is signed, the target effectively leads each further step in the scheme process. The Scheme Implementation Agreement sets the commercial terms of the transaction and, importantly, provides a bidder with some level of contractual control over the scheme process to ensure that the scheme is conducted appropriately and in accordance with the agreed terms of the deal. The target, however, has the greatest degree of control over implementation of the transaction given it is the entity which is proposing the scheme to its shareholders.

STEP 2

Prepare a draft Scheme Booklet for shareholders

The Scheme Booklet is the combined notice of meeting, disclosure document and independent expert's report to be sent to target company shareholders for the purposes of convening a general meeting to vote on the scheme.

This document is described in further detail in section 7.3.

STEP 3

ASIC review and approval of Scheme Booklet

ASIC is entitled to review the Scheme Booklet for at least 14 days (or longer in the case of more complex schemes) prior to the first court hearing[41] and to have an opportunity to make submissions to the court in relation to the scheme and explanatory statement.[42]

ASIC's role is to assist the court to review the content of scheme documents and the terms of the scheme, and to represent the interests of shareholders. This is because ASIC may be the only party appearing at the court hearing other than the target and the bidder. ASIC also aims to ensure that all matters which are relevant to the court's decision are properly brought to the court's attention.[43] For this reason, it is advisable for the target company to raise with ASIC at an early stage any complex, novel or uncertain issues in the scheme or scheme documents so as to ensure that ASIC can consider them before the hearing and will be able to advise the court that it has no objections to the scheme.

[41] Corporations Act section 411(2)(a).

[42] Corporations Act section 411(2)(b)(ii).

[43] ASIC Regulatory Guide 60 - Schemes of arrangement.

STEP 4

First court hearing

The target company must apply to the court for approval to convene the shareholders' meeting to consider and vote on the scheme, and to approve the draft Scheme Booklet. This first court hearing is generally held shortly after the end of ASIC's 14 day review period.

In assessing whether or not to approve the Scheme Booklet and order a shareholders' meeting to be convened, the court will consider the structure of the proposed scheme, the adequacy of information and disclosures in the Scheme Booklet, and any objections or submissions from ASIC[44] or other parties.

Once approved by the court, the Scheme Booklet is registered by ASIC and mailed to all target company shareholders.

STEP 5

Shareholder meeting and vote

The shareholder approval thresholds for a scheme are:

- **headcount test** - approval from more than 50% of the number of shareholders who vote at the meeting, regardless of how many shares they hold;[45] and
- **voted shares test** - a special resolution of shareholders, which requires at least 75% of the number of votes cast on the resolution be in favour of the scheme.[46] Scheme votes are taken on a poll, which means that this test requires approval by at least 75% of the shares which are voted on the resolution.

In each case, the voting threshold is based on only those shareholders or shares which are actually voted (either in person or by proxy). Shares which are not voted do not count as "no" votes. The scheme meeting vote binds all shareholders, whether or not they vote on it.

If the headcount test fails due to deliberate share splitting or other form of exploitation, then the court does have a discretion to waive this test and approve a scheme where only the voted shares test is satisfied. This discretion will only be exercised in clear and exceptional circumstances.

Where there is more than one class of scheme shareholders, each class of shareholders must separately vote and pass the relevant voting thresholds. The long-established legal test for constituting a separate class is "a group of shareholders whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest". In practice, this test sets a high threshold for separation of classes, and usually there is only a single class of scheme shareholders. However, a separate class of shareholders may be formed where they are offered a different price from other shareholders, for example in a management buy-out where management is to receive equity in the bid vehicle and other shareholders are offered only cash.

[44] Corporations Act section 411(4)(a)(ii)(A).

[45] Corporations Act section 411(4)(a)(ii)(B).

[46] Corporations Act section 411(17).

STEP 6

Second court hearing

Once shareholders have voted to approve the scheme, a second court hearing will be held soon afterwards, at which the court will be asked to approve the scheme in order for it to become effective. Any shareholder or ASIC may appear at the second court hearing if they wish to object to the scheme. The court will generally be reluctant to refuse to approve a scheme if the objection was already raised (or should have been raised) at the first court hearing. The court's focus at the second hearing is primarily on ensuring that the procedural and voting requirements for the shareholder meeting were complied with. The court will also seek confirmation from the target and bidder that all conditions precedent in the Scheme Implementation Agreement have been satisfied.

Technically, the court cannot approve a scheme of arrangement unless either it is satisfied that the scheme has not been proposed for the purpose of avoiding the takeover provisions of Chapter 6 of the Corporations Act, or ASIC produces a no-objection letter to the scheme.[47] In practice, ASIC's policy is to provide such a no-objection letter if it was satisfied with the scheme structure and the Scheme Booklet disclosures at the time of the first court hearing.

STEP 7

ASIC lodgement and scheme implemented

Once the scheme is approved at the second court hearing, the court order is lodged with ASIC and the scheme becomes effective.[48]

After the effective date there will be a record date for determining entitlements of shareholders to participate in the scheme. Shortly after the record date the scheme will be completed by payment of the acquisition price, and transfer to the bidder of all target company shares. The target is then delisted soon afterwards.

See the Timetable at the end of this Guide for more detail on the timing of these steps.

[47] Corporations Act section 411(17).

[48] Corporations Act section 411(10).

7.3 Key documents for implementing a scheme of arrangement

There are several key documents required to implement a scheme of arrangement.

Scheme Implementation Agreement

The Scheme Implementation Agreement is the primary commercial document in an acquisition by way of scheme of arrangement. Apart from setting out the terms of the transaction including price and conditions precedent, the role of the Scheme Implementation Agreement (from the bidder's perspective) is to exercise some degree of control over the mechanics of implementing the transaction which is otherwise run by the target.

The obligations of the parties under the Scheme Implementation Agreement will typically be subject to a number of conditions (such as obtaining all necessary regulatory approvals, no material adverse change, no restraints, no prescribed occurrences etc.). The conditions must all be satisfied by the time of the second court hearing if the scheme is to be approved.

The Scheme Implementation Agreement will usually include exclusivity and break fee provisions similar to those discussed in sections 5.6 to 5.8.

Scheme Booklet for shareholders

The Scheme Booklet is the disclosure document which is sent to shareholders for the shareholder meeting. In addition to copies of the scheme of arrangement and the deed poll (described below), this document contains the following components and information:

Notice of Scheme Meeting	The notice of meeting convenes the shareholder meeting where the scheme is to be voted on. Ordinary notice periods apply (generally a minimum 28 days' notice for a public listed company).
Explanatory statement	This is the key disclosure document for shareholders, which must provide all information relevant to a decision as to whether or not to vote in favour of the scheme. It contains recommendations from the target's directors, together with their detailed reasons for the recommendation (including an analysis of why potential alternatives may have been considered and rejected). There is a range of technical information too, such as details of directors' interests. This document also typically includes a summary of the scheme implementation procedure as well as the key terms of the Scheme Implementation Agreement. In general terms, the explanatory statement must contain an equivalent level of disclosure to that which would be required to be given in a Bidder's Statement and a Target's Statement. For example, if the bid price is shares in the bidder, the explanatory statement must contain all information that would be required in a prospectus for a public offer of those securities. It also contains disclosures from the bidder which are equivalent to the disclosures that would be made in a Bidder's Statement, such as the bidder's intentions for the target's business and details of its source of cash funding (if the bid price involves a cash payment).

Independent expert's report	An independent expert's report (IER) opining on whether the scheme is in the "best interest" of the target company's shareholders will be required by law if: ▪ the bidder already holds 30% or more of the voting shares of the target company;[49] or ▪ the bidder and the target have one or more common directors.[50] Although such a report is often not legally required, ASIC and the court expect the inclusion of such a report in the Scheme Booklet. Accordingly, appointing an independent expert to provide a report for the benefit of shareholders is an almost invariable characteristic of schemes in Australia. In addition, target boards usually do not proceed with a scheme unless they have an expert's report confirming that the scheme is in the best interest of shareholders, and is fair and reasonable. Part of the reason for this approach is that the Scheme Booklet is the responsibility of the target's directors, and there is no "due diligence" defence to potential liability if there is a misstatement in or omission from the document (unlike the position regarding a Bidder's Statement or Target's Statement – see section 6.8). The expert's report will typically contain a detailed review and valuation of the target company, and will comprise a substantial part of the Scheme Booklet.

Scheme of arrangement

The scheme of arrangement is the technical document which gives effect to the scheme when approved by the court, and reflects the terms of the Scheme Implementation Agreement.

Deed poll

The deed poll is a unilateral, legally binding obligation of the bidder to comply with its obligations to target shareholders, which are principally to pay the bid price after the scheme becomes effective.

Without this document target shareholders cannot directly enforce the scheme against the bidder, as a scheme is (legally speaking) an arrangement only between the target company and its shareholders.

Again, it is a technical document that will simply reflect the Scheme Implementation Agreement's terms.

7.4 Trust schemes

Unlike a takeover bid (which can be used to acquire control of either a company or a managed investment scheme such as a unit trust), the scheme of arrangement procedure in Chapter 5 of the Corporations Act can only be used by a company.

However, an acquisition structure known as a "trust scheme" can be used instead, which involves amending the trust deed by a vote of unitholders to achieve a similar outcome. Like a scheme of arrangement, the amendment to the trust deed (or "constitution") requires a special resolution, which is a 75% vote of those units which are actually voted. Unlike a scheme of arrangement, there is no additional 50% by number of

[49] Corporations Regulations regulation 5.1.01(b) and Schedule 8 clause 8306.

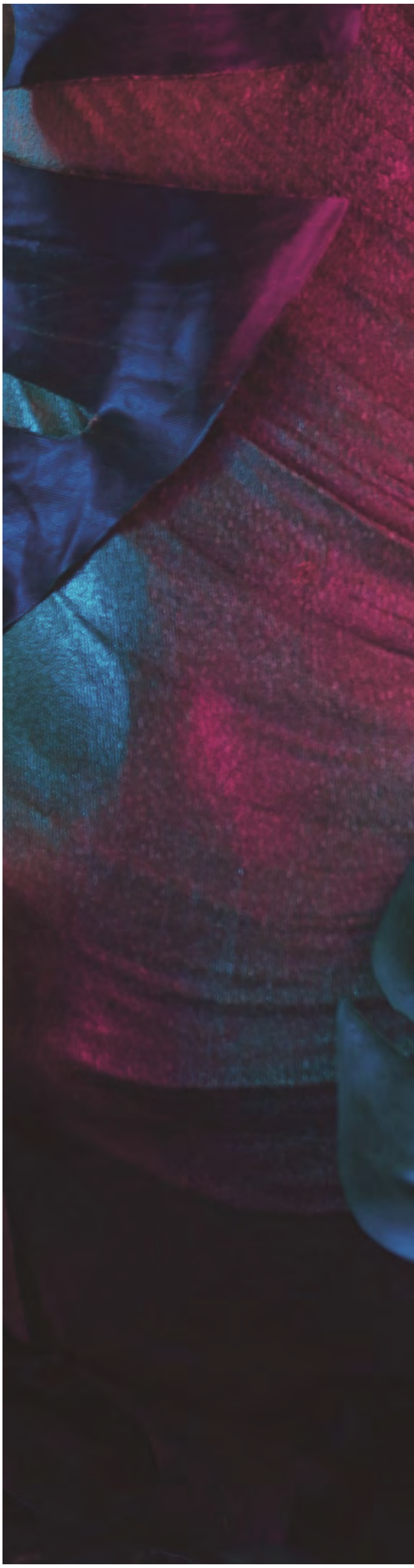
[50] Corporations Regulations regulation 5.1.01(b) and Schedule 8 clause 8303.

unitholders "headcount" test, nor is there a mandatory procedure for court approval.[51] In addition, an ordinary resolution (simple majority vote) will be required in order to approve the bidder acquiring control of the managed investment scheme.[52]

If the trust deed amendment is approved by the requisite majority of unitholders, it becomes binding on all unitholders. The effect of the amendment may be to compulsorily transfer all units to the bidder in return for the bid price, or to redeem all units for the bid price other than those held by the bidder. The choice of structure will depend on the price offered, tax considerations, and other factors.

Takeovers Panel policy[53] on trust schemes is that documents provided to unitholders by the responsible entity (trustee) in connection with the unitholder meeting should meet the disclosure standard of both a scheme of arrangement and a takeover bid. This means that an independent expert's report will be provided which opines as to whether the scheme is "fair and reasonable" to unitholders.

As with a company scheme of arrangement, it is Takeovers Panel policy that the bidder and its associates should not vote their units in favour of a trust scheme. Unlike a company scheme of arrangement, however, it is Takeovers Panel policy that some of the more prescriptive elements of takeover regulation should also apply to a trust scheme, including the minimum bid price rule, restrictions on selective collateral benefits, and restrictions on certain types of conditions precedent (see sections 6.3 to 6.5).



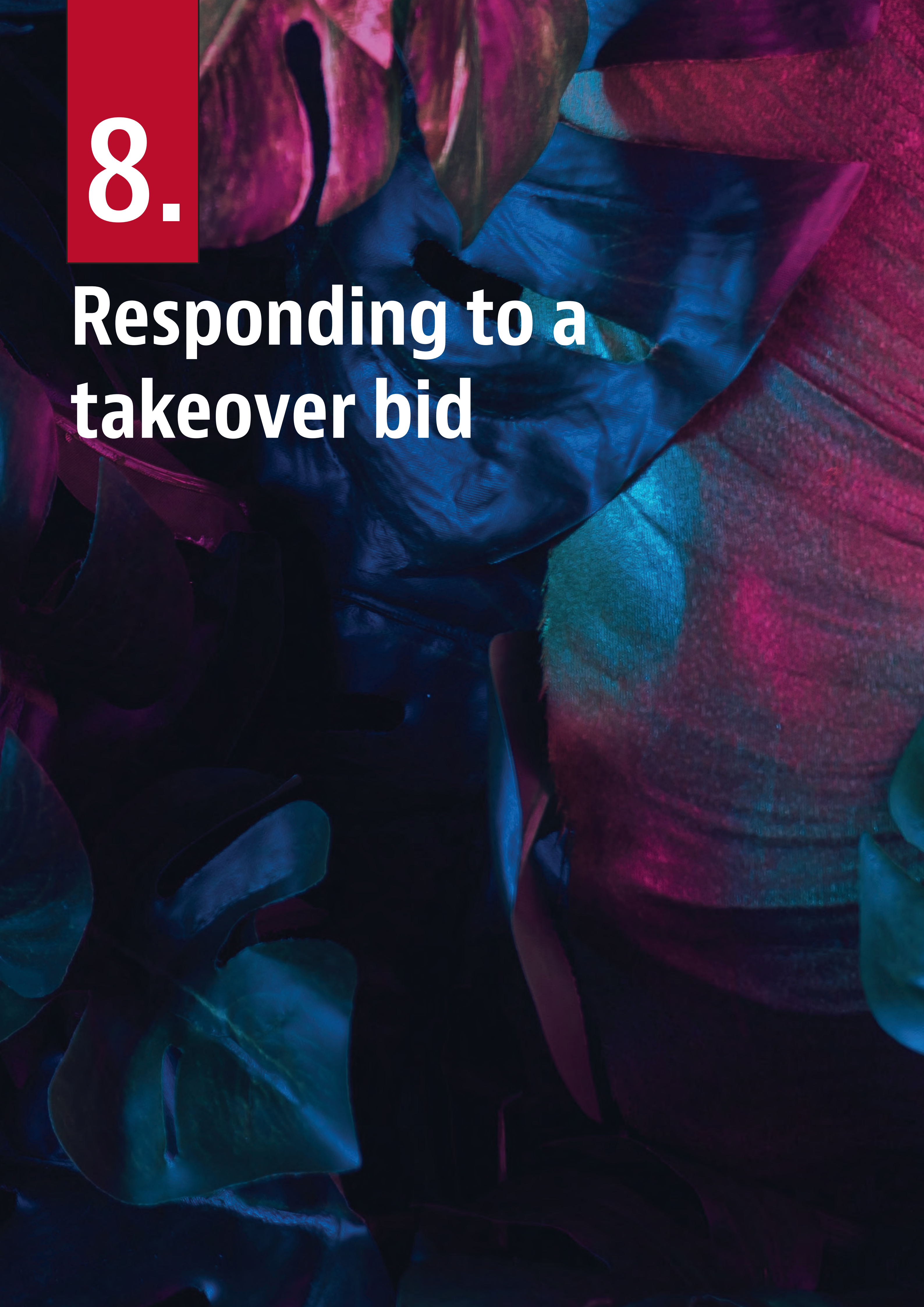
[51] The trustee (or "responsible entity") of the target trust may apply to the Supreme Court for judicial advice on a trust scheme, which will assist in showing that its fiduciary duties have been satisfied.

[52] ASIC relief will be required to allow target unitholders, as sellers, to vote on the section 611 item 7 resolution.

[53] Takeovers Panel Guidance Note 15 - Trust Scheme Mergers.

8.

Responding to a takeover bid



8. Responding to a takeover bid

Once an unsolicited takeover bid is received, the target company and its directors immediately become subject to the bidder's timetable, certain disclosure obligations and other restrictions. Accordingly, it is advisable for a listed company to prepare a bid response plan setting out its response strategy and legal requirements to assist its response team in understanding the takeover process.

8.1 Response to an unsolicited bid

A takeover bid can be commenced by a bidder without warning, and in a hostile bid the first thing a target may know of the bid is through a courtesy call to the Chairperson, or via an ASX announcement shortly before being served with the Bidder's Statement. Target directors need to act quickly, especially where the bid timetable has already commenced with formal lodgement of the Bidder's Statement.

First response points

- ✓ Hold a Board meeting promptly (without appointees of the bidder, if there are any), and consider delegating authority to a sub-committee to make quick decisions and respond to developments.
- ✓ Engage legal, financial, accounting, and other advisers as necessary. When appointing financial advisers, take care that any "success" fee is structured to maximise benefits to shareholders.
- ✓ Consider whether ASX announcements should be made to update the market in connection with the takeover proposal or other material business developments.
- ✓ Critically review the Bidder's Statement as soon as possible. Any complaints to the Takeovers Panel about deficient disclosure or the bid generally should be made promptly.
- ✓ Consider setting up a data room with important documents, presentations, financials, and other material information on the target. This will be useful to facilitate potential interest from competing bidders, for briefing the independent expert (if a report will be obtained), and for preparing the Target's Statement.
- ✓ Start preparing the Target's Statement. In an on-market bid, in particular, the target only has 14 days to prepare, print, lodge, and mail the document to shareholders.
- ✓ Consider whether tracing notices (see section 10.3) should be sent out to known custodians or nominees on the share register, or to any new large shareholders, to reveal the beneficial holders. It is also important to continually monitor the share register from a strategic perspective.
- ✓ Check the directors' Deeds of Access, Indemnity and Insurance, and directors' insurance policies, to make sure they are up to date and cover the bid response process.

8.2 Involvement of insiders in the bid

As soon as the target becomes aware of a bid (or potential bid) in which there are, or are likely to be, participating insiders involved in the bid, it is Takeovers Panel policy[54] that appropriate protocols should be established to ensure that other target shareholders are not disadvantaged.

An "insider" is a director, officer or adviser (including an external adviser) who is in a position to influence the target's consideration of the bid, or who possesses significant inside information as a result of their role with the target. The insider will be a "participating insider" if they will obtain a special benefit if the bid is successful, such as being offered equity in the bid vehicle or having an arrangement for a significant new employment or other agreement which is conditional on the success of the bid.

Normally the protocol will involve immediately establishing an independent board committee (IBC), consisting of those directors who are not participating insiders, to oversee the bid response. The IBC will then adopt protocols to ensure that participating insiders do not have an advantage over other bidders or over target shareholders generally. These protocols should address matters including:

- regulating the flow of the target's information, such as requiring that participating insiders do not have direct contact with bidders or potential bidders, employees, suppliers or customers (or that they do so only if a representative of the IBC is present);
- making the insider's own knowledge of the target's business available to the IBC, such as by obtaining information from the participating insider to assist with preparation of the Target's Statement and due diligence, and in particular to inform the IBC of any non-public information which was given to the bidder;
- ensuring that a bidder who is involved with participating insiders does not have an advantage over other potential bidders in relation to material information about the target company; and
- if necessary, requiring the participating insider to stand aside from his or her management or board position in order to pursue the bid. In this case, the insider would still be subject to obligations of confidentiality and assistance as noted above.

8.3 Defensive tactics

Once a takeover bid has been announced, the defensive tactics open to a target become very limited by a combination of directors' duties, ASX Listing Rule requirements and Takeovers Panel policy. The implementation of some defensive tactics may also be dependent on shareholder approval. For instance, there are specific restrictions on a listed target company:

- issuing any new shares, options or convertible securities without prior shareholder approval;[55] and
- providing its directors with termination benefits that are triggered by a change in control of the company.[56]

The target's directors also have to contend with the Takeovers Panel's policy on "frustrating action".[57] This policy broadly restricts the actions that a target can propose or undertake, if the effect of the action would

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[54] Takeovers Panel Guidance Note 19 - Insider Participation in Control Transactions.

[55] ASX Listing Rule 7.9.

[56] ASX Listing Rule 10.18.

[57] Takeovers Panel's Guidance Note 12 - Frustrating Action.

be to frustrate the bid or potential bid and cause it to fail. The policy will apply regardless of the motives or intentions of the target's directors. For example, if it is a condition of a hostile bid that the target does not sell particular assets, then the target's ability to sell those assets becomes restricted, even if directors believe that selling the assets would be in the best interests of the company.

The Takeovers Panel does set out a number of exceptions to its frustrating action policy, the main one being shareholder approval. By putting the proposed transaction to target company shareholders for consideration and approval, the shareholders can effectively choose between the price offered under the bid and the benefits of the alternative proposal put forward by the target's directors.

In light of these restraints, one of the best ways for a company to prevent a hostile bid is to make arrangements well in advance of any bid being announced. Appropriate arrangements could include share placements and strategic alliances with friendly parties, share buy-backs and other capital management tools, regular communication with shareholders, operational changes, and other measures designed to ensure the company's share price reflects the full value of its strengths and available opportunities.

Once a hostile bid is announced, the target's directors will often respond by attacking the Bidder's Statement or bid structure in the Takeovers Panel, or (where the bidder offers its own scrip) by attacking the value of the bidder's offer. Target directors may also try to improve the bid price by negotiating with the bidder in exchange for a recommendation to accept the offer, or by creating an auction to attract other bidders (see section 8.4).

8.4 Creating an auction

There are limited options available to the board once a target company is "in play". US-style "poison pill" defences are generally not available, due to the restrictions noted above.

A common response where target directors consider the bid price is too low is to try to create an auction by attracting competing bidders. The target can do this by engaging a corporate adviser to approach potential interested parties, opening a data room to approved potential bidders, and agreeing to exclusivity and/or break fee arrangements to secure a superior bid from a selected bidder (subject to the limitations noted in sections 5.7 to 5.8).

Target company directors are generally able to give due diligence access to a "white knight" bidder without offering equal access to a bidder which they regard as hostile. The exception to this rule is where a "participating insider" (see section 8.2) is involved in the bid. Where the insider has access to confidential information, the Takeovers Panel[58] generally expects the target to grant equal information access to other bidders, so as to maintain a competitive market for corporate control.

There is no positive legal duty for the target board to auction a target company before entering into a change of control transaction (the "Revlon duty" recognised by US courts does not apply in Australia). However, consistent with their fiduciary and statutory duties, the target board should facilitate a process that would maximise shareholder value. This would generally include ensuring that there are no significant barriers to the realisation of a superior proposal.

[58] Takeovers Panel's Guidance Note 19 - Insider Participation in Control Transactions.

8.5 Disclosure to shareholders: the Target's Statement

The directors of the target company must issue a disclosure document, called the Target's Statement, in response to the Bidder's Statement. Like a Bidder's Statement, a Target's Statement has both specific and general disclosure obligations.[59]

The specific disclosure obligations include a recommendation from each target company director as to whether or not the bid should be accepted, together with reasons for that recommendation (unless a recommendation cannot be made, for example where a director has a conflict of interest). Target directors can also be nuanced in their recommendation to shareholders to cater for the interests of different shareholder groups (for example, shareholders with a short term investment horizon versus shareholders with a longer term investment horizon).

The general disclosure obligation requires disclosure of all information known to the directors of the target company which shareholders of the target and their professional advisers would reasonably require to make an informed decision in relation to the bid. As with the Bidder's Statement, this includes material information which is otherwise confidential.

See section 6.7, regarding the need to issue supplementary Target's Statements, and section 6.8 regarding potential liability and due diligence defences for the target and its directors in relation to their Target's Statement disclosures.

8.6 Independent expert's report

There is no requirement to commission an IER except in circumstances where the bidder has voting power in the target of at least 30% or where a director of the bidder is also a director of the target.[60] Nonetheless, even when not legally required, a target may voluntarily obtain an IER to demonstrate the value of its shares, especially in a hostile bid. Where the target directors consider that the hostile bid undervalues the target company, an IER may be useful in demonstrating to target shareholders that the bid is too low. This may also encourage the bidder to make a revised, superior offer.

The IER is a comprehensive document, which compares the expert's valuation of a target company share (on a control basis) with the offer price under the bid. It is sent to target shareholders with the Target's Statement. ASIC has issued detailed guidance regarding the content of expert reports[61] as well as the independence of experts.

8.7 Truth in takeovers

ASIC's "truth in takeovers" policy (see section 6.9) also applies to public statements made by the target during a bid. For example, if a target publicly says that it is in discussions with other potential bidders, then it must update the market on the status of those discussions before the close of the bid. Target companies therefore need to be very careful as to what is said to the media and the market during the course of a bid.

[59] Corporations Act section 638.

[60] Corporations Act section 640.

[61] ASIC Regulatory Guide 111 - Content of expert reports and ASIC Regulatory Guide 112 - Independence of Experts.

9.

Compulsory acquisition of minority interests

9. Compulsory acquisition of minority interests

The Corporations Act allows successful takeover bidders and other shareholders who reach the 90% level to buy out the remaining minority. Minority shareholders also have a right to be bought out in some circumstances.

9.1 Compulsory acquisition following takeover bid

A bidder who has made either an off-market or an on-market takeover bid for a class of shares in the target company has the right to compulsorily acquire the shares held by the remaining shareholders, at the bid price, if the bidder satisfies both of the following thresholds by the end of the offer period:[62]

- the bidder and its associates have a relevant interest in at least 90% (by number) of the shares in that class; and
- the bidder and its associates acquired at least 75% (by number) of the shares in that class that were held by offerees. Shares held at the start of the bid by the bidder and its associates are excluded from this calculation.

In most cases the 75% test will not impose an additional requirement over and above the 90% test. The 75% test will only be relevant if the bidder and its associates hold more than 60% of the target's shares before the bid is commenced.

This post-bid compulsory acquisition procedure can only be used if it is commenced within one month after the end of the offer period.

9.2 Compulsory acquisition of minority shareholdings without a bid

The Corporations Act also gives a "90% holder" the power to compulsorily acquire minority holdings of shares and other securities in the target company, even if no takeover bid was made.[63]

A person will be a 90% holder in relation to a class of shares in the target if the person, together with its related bodies corporate, holds at least 90% (by number) of the shares in that class. A 90% holder of a class of shares is entitled to compulsorily acquire the rest of the shares in that class.

Further, if a person is a 90% holder in relation to a whole company, then the person will be able to compulsorily acquire all classes of shares in that company, together with all options and other securities which are convertible into shares, even if the person does not hold any of those other classes of shares or convertible securities. For example, it could be used by a bidder who successfully acquires 100% of the target company's shares to buy out any outstanding options after the close of the bid.

[62] Corporations Act section 661A.

[63] Corporations Act part 6A.2.

A person will be a 90% holder of a whole company if the person:

- has voting power in the company of at least 90%; and
- either alone, or with its related bodies corporate, holds full beneficial interests in at least 90% by value of all of the securities in the company that are either shares or convertible into shares. An independent expert must confirm that this overall valuation threshold is met.[64]

This general (non-bid) compulsory acquisition procedure is initiated by the 90% holder sending notices to all of the minority security holders offering a price (of its choosing) for their securities. The compulsory acquisition notice must be accompanied by an independent expert's report on whether the price offered by the 90% holder is a "fair value" for the target securities. Recipients of a compulsory acquisition notice may apply to the court to review the proposed acquisition, but the court is obliged to approve the compulsory acquisition if it provides a "fair value" for the securities.[65]

This general compulsory acquisition power can only be used within six months after the person becomes a 90% holder.[66]

9.3 Rights of minority to be bought out

Minority shareholders and holders of convertible securities have a right to be bought out in certain circumstances.

Shares, post-bid

Minority holders of shares have the right to be bought out by the bidder following a takeover bid, at the bid price, if at the end of the offer period the bidder and its associates have a relevant interest in at least 90% of the shares (by number) in the bid class.[67]

Options and convertibles, post-bid

The holders of options and other securities which are convertible into shares in the bid class have the right to be bought out following a takeover bid in the same circumstances.[68] The buy-out price is either as agreed between the holder and the bidder, or as determined by the court.

Options and convertibles, no bid

Holders of options and other securities which are convertible into shares have the right to be bought out by a person who has become the holder of 100% of the shares[69] (for example, as a result of using either the post-bid or non-bid compulsory acquisition procedures outlined above). The buy-out price is either as agreed between the parties, or as determined by the court.

64 Corporations Act section 667A(2).

65 Corporations Act section 664F(3).

66 Corporations Act section 664AA.

67 Corporations Act section 662A.

68 Corporations Act section 663A.

69 Corporations Act section 665A.

10.

Public reporting of shareholding

10. Public reporting of shareholding

Building a pre-bid stake can be complicated by having to publicly disclose even a 5% interest in a listed company.

10.1 Substantial holder notices

A person must notify a listed company or a listed managed investment scheme (such as a listed unit trust), as well as the ASX, if:

- the person becomes a "substantial holder" in the company or scheme. A person will be a "substantial holder" if it has voting power of at least 5% in the listed body;
- after having notified the initial substantial holding and any subsequent changes, the last notified holding increases or decreases by at least 1%; or
- the person ceases to be a substantial holder.

These notifications must be provided within two business days after the relevant event occurs, and the notification must be accompanied by a copy of any agreement or other document which relates to the relevant acquisition or disposal of securities.[70] If a takeover bid has been made for the listed body, the notification period is shortened so that notification is required by 9.30am on the next trading day after the relevant transaction occurs.

Notification to the ASX will result in all accompanying documents becoming immediately public.

10.2 Cash-settled equity swaps

An interest in a derivative instrument which does not allow for physical delivery of securities on settlement, and does not grant voting or other equity-related rights during the term of the instrument, will generally not create a "relevant interest" in shares under the Corporations Act definition of that term. An example is a purely cash-settled equity swap.

However, the Takeovers Panel considers that certain equity derivatives may give rise to unacceptable circumstances if they are not treated as creating a relevant interest for the purposes of the 5% disclosure threshold and the 20% takeover restriction. The Takeovers Panel has power to make disclosure orders (and potentially more onerous orders) where it finds unacceptable circumstances involving derivative interests even if they are not technically within the substantial holder reporting requirement. The Takeovers Panel's policy in this area is set out in its Guidance Note 20 - Equity Derivatives, and specific advice should be sought on this point if it may be applicable.

10.3 Tracing notices

A listed entity is entitled to issue a tracing notice to any registered holder of its securities.[71] Tracing notices are often used by targets to discover details of underlying holdings behind nominees and custodians. ASIC also has power to issue tracing notices.

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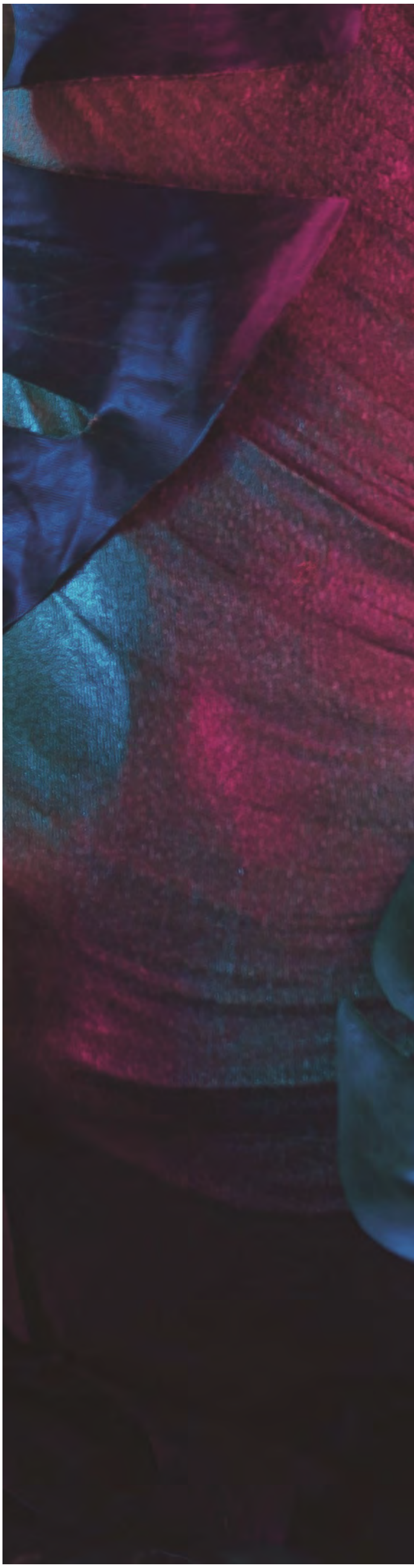
[70] Corporations Act section 671B.

[71] Corporations Act section 672A.

The recipient of a tracing notice must respond within two business days, disclosing full details of any other person who has a relevant interest in those securities, and every other person who has given the registered holder instructions regarding the acquisition or disposal of the securities or the exercise of voting or other rights attached to the securities. In each case, full details of all relevant circumstances must be provided.

In response to this information, the party which issued the original tracing notice may send further tracing notices to the persons identified as having relevant interests or having given instructions in relation to the securities.



11.

Administration of takeovers and schemes

11. Administration of takeovers and schemes

The regulators have very broad powers when it comes to administering and enforcing Australia's takeover laws.

11.1 Takeovers

The Takeovers Panel

The Takeovers Panel has primary responsibility during the currency of a takeover bid for:

- declaring "unacceptable circumstances" to have occurred where the spirit or policy of the Corporations Act has been infringed, whether or not there has been a breach of the law. For instance, the Panel's lock-up devices and frustrating action policies discussed in sections 5 and 8 are largely based on policy grounds, rather than legal duties. The Takeovers Panel has a wide range of powers which can be exercised in these circumstances; and
- reviewing administrative decisions of ASIC in relation to the takeover (see the discussion about ASIC's modification powers, below), and either confirming the original decision or substituting its own decision.

The Takeovers Panel has been vested with these powers to the exclusion of the courts to ensure that takeovers are governed by sensible commercial considerations rather than in an overly legalistic environment. Takeovers Panel actions are actively progressed by the Panel with rapid responses expected from the parties at all stages. The Panel's aim is to get a bid back on track as quickly as possible, and its orders are usually designed to facilitate instead of prevent a transaction.

To this end, the members of the Panel are drawn from a cross-section of the business, financial, legal, accounting and investment banking fields to ensure that an experienced commercial judgment is brought to bear upon takeovers disputes. The Panel publishes Guidance Notes which set out its expectations of how takeovers and other regulated transactions should be conducted.

Hostile bids are often brought before the Panel, sometimes on multiple occasions.

ASIC

ASIC also has a broad discretionary power to modify or grant exemptions from particular provisions of Chapter 6 of the Corporations Act, either in their application to a particular person or on a general basis by making legislative instruments that apply broadly to a particular class of persons. ASIC commonly exercises this power where the technical application of the Corporations Act produces an unintended or unworkable result, or where the modification or exemption is necessary to advance the clear policy of the law.

Due to the often complex and highly technical provisions of Chapter 6, bidders may often need to seek discretionary relief from ASIC. Many of the common modifications and exemptions have now been dealt with by ASIC making legislative instruments of general application to all bidders, the effect of which is that bidders may not need to apply for individual relief.

ASIC endeavours to make its attitude towards the exercise of its discretionary powers as transparent as possible, and has published a number of regulatory guides documenting the circumstances in which it is likely to provide relief.

11.2 Schemes of arrangement

ASIC

ASIC has an important role to play in schemes of arrangement. It has published a regulatory guide which explains ASIC's role in schemes of arrangement and the disclosures it expects to see in the Scheme Booklet.[72] ASIC has a right to a 14 day review period in relation to the draft scheme documents before the first court hearing. ASIC's comments on a draft Scheme Booklet will normally be accommodated before the booklet is submitted to the court for final approval in order to avoid the need for ASIC to appear at the first court hearing to raise objections about the structure of the scheme or the content of the disclosure document.

Further, there is a statutory requirement for the court to be satisfied that ASIC has had a reasonable opportunity to examine the terms of the proposed scheme and the draft Scheme Booklet, and to make submissions to the court, before it can approve a scheme.[73] ASIC also attends to registration of the Scheme Booklet.

The court

An approved scheme derives its force from the court order, rather than the resolution of shareholders. Accordingly, the court takes particular care to scrutinise a scheme before approving it. The court has a very broad discretion in considering whether to approve a scheme, but will generally be guided by ASIC's review of the documents and the independent expert's report.

[72] ASIC Regulatory Guide 60 - Schemes of arrangement.

[73] Corporations Act section 411(2).

12.

Foreign investment and competition regulation

12. Foreign investment and competition regulation

The following provides an overview of Australia's foreign investment and competition regulations as they apply in the context of takeovers and schemes of arrangement.

12.1 Foreign Investment Review Board approval

On 29 March 2020, the Treasurer announced certain temporary changes to Australia's foreign investment review framework in response to the COVID-19 pandemic. In summary, any proposed foreign investment into Australia that is subject to the *Foreign Acquisitions and Takeovers Act 1975* (Cth) will require approval, regardless of value or the nature of the foreign investor. These temporary measures are expected to remain in place for the duration of the coronavirus crisis. For acquisition agreements entered into after 29 March 2020, the relevant monetary thresholds referred to in the summary below have all been temporarily reduced to $0 until further notice, although the percentage thresholds below which approval is not required remain unchanged. Accordingly, the summary below should be read in light of these changes while they are in force.

Foreign bidders need to be aware of Australia's foreign investment regulations before proceeding with a public company control transaction or other investment in an Australian company.

Where a bidder is a non-Australian company, or is an Australian company in which a foreign entity holds a "substantial interest" (a 20% or greater interest) or two or more foreign entities together hold an "aggregate substantial interest" (an aggregate 40% or greater interest), the bidder cannot acquire 20% or more of an Australian target company without the Treasurer's approval under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (Foreign Acquisitions and Takeovers Act). The Treasurer or his delegate will take the advice of the Foreign Investment Review Board (FIRB) in making an approval decision. Where FIRB approval is required, the bidder will either need to obtain FIRB approval in advance of announcing the transaction, or will need to make the takeover bid or scheme conditional upon obtaining FIRB approval.

An acquisition will generally be exempt from the requirement for FIRB approval if the target company and its subsidiaries together have total assets of $275 million or less, and the market capitalisation of the target at the bid price is also $275 million or less. Investors from the US, New Zealand, Chile, Japan, China, Singapore, South Korea, Canada, Mexico, Vietnam, Hong Kong and Peru benefit from a higher exemption threshold of $1,192 million as a result of Free Trade Agreements between Australia and these countries, as long as the bidder is not a "foreign government investor" and the target operates only in non-sensitive sectors. In each case, these threshold amounts are as at 2020 and will be indexed annually for the increase in Australia's gross domestic product. Lower thresholds may apply in the case of target companies that have interests in Australian land, or carry on agribusinesses or Australian media businesses.

Where the foreign bidder is a "foreign government investor" (as defined in the applicable regulations), more onerous notification and approval requirements will generally apply. For example, a foreign government investor will need to seek approval before acquiring a passive 10% interest in the target company, a 5% interest in the target company if the person who acquires the interest has entered into a legal arrangement relating to the target company and the bidder's company, or before acquiring any percentage at all in the target company if it is in a position to influence or participate in certain management functions.

The Treasurer has the power to prohibit certain investments by foreign investors if they are contrary to the "national interest". There is no specific definition of "national interest" in the Foreign Acquisitions and Takeovers Act, although Australia's Foreign Investment Policy provides some guidance. Factors that will be taken into account include the character of the investor, any impact on competition, existing government policy and law, national security interests, any impact on Australia's economic development and the community, and the character of the applicant.

FIRB may impose conditions on any approval given in order to prevent the proposal from being contrary to Australia's national interest. For example, if FIRB considers that a particular acquisition involves a risk to tax revenues or the integrity of the tax system, it may impose certain tax related conditions. Conditions relating to preservation of data security are increasingly being imposed as well.

The Foreign Acquisitions and Takeovers Act (and associated regulations and policies) contains a number of complex provisions which are not detailed in this Guide. Accordingly, each potential acquisition needs to be examined on a case-by-case basis.

12.2 Australian Competition and Consumer Commission approval

The *Competition and Consumer Act 2010* (Cth) (Competition Act) prohibits mergers and acquisitions which have the likely effect of substantially lessening competition in a market. The Competition Act is administered by the Australian Competition and Consumer Commission (ACCC), which has a range of powers including the power to make divestiture orders.

The ACCC may initiate legal proceedings to prevent a takeover if it decides that the takeover would substantially lessen competition. As a result, many mergers of companies which operate in the same market will be conditional upon obtaining ACCC clearance via one of two processes.

A merger party can voluntarily apply to the ACCC for "informal clearance". Under this process, if the ACCC considers the merger is not likely to breach the Competition Act, it will issue a "no objection" letter. Such letters are not binding on the ACCC, but they provide significant regulatory comfort. Accordingly, this is the most common form of completion clearance applied for.

Alternatively, a merger party can make an application to the ACCC for "merger authorisation". In order to grant the authorisation, the ACCC will need to be satisfied that either:

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

The merger authorisation process enables interested parties to make submissions and intervene as part of a public process. Once the ACCC has made a determination, a merger party (or other person with a sufficient interest in the matter) may make an application to the Australian Competition Tribunal for review. The merger authorisation process should be used where there are likely to be substantial public benefits arising in connection with the merger as public benefits cannot be considered by the ACCC under the informal clearance process.

As individual acquisitions involve a great variety of facts and circumstances, each potential acquisition needs to be assessed from an Australian competition law perspective on a case-by-case basis.

Timetables

Timetables

Timetable for an off-market takeover bid

This indicative timetable is based on the minimum timetable for a bid. References to time are calendar days, not business days (unless otherwise noted). All section references are to the Corporations Act, unless otherwise indicated.

Timing	Action	Comments
On or before Day 1	Public announcement of intention to make a bid	Takeover offers must be sent to shareholders within two months of the announcement (section 631).
Day 1	Bidder's Statement (which includes the offer terms) lodged with ASIC	–
Day 1	Bidder's Statement served on target and given to ASX	The Bidder's Statement must be served on the target within 21 days after it is lodged with ASIC (section 633). If the target is listed, a copy must be given to ASX. Service is usually made on the same day as ASIC lodgement.
Every day during the bid period	Bidder lodges substantial holder notices as required	The bidder must notify the target and ASX of its total voting power: ▪ when it first makes the bid; ▪ when its voting power reaches 5%; and ▪ every day its voting power changes by at least 1% (for example as it receives acceptances). The notice must be given by 9.30am on the next trading day (section 671B).
Day 15	Bidder's Statement and offer document sent to target shareholders	Dispatch of these documents must be done within a three day period between 14 and 28 days after service on the target (section 633). The target may agree to an earlier dispatch date. In a hostile bid, an application by the target to the Takeovers Panel may delay the dispatch pending resolution of the dispute. Notice that the documents have been dispatched must be given to the target, ASIC and ASX (section 633).

Timing	Action	Comments
By Day 30	Target's Statement sent to bidder and target shareholders	The Target's Statement must be sent no later than 15 days after the bidder sends its documents to the target's shareholders (section 633). A copy is also given to ASIC and ASX.
Any time during the offer period	Extend the offer period	A formal notice of variation is sent to the target, ASIC and offerees (section 650D). If the offer is still conditional the offer period cannot be extended after the publication of the notice as to the status of the bid conditions (see below), unless a competing bid is announced or made after the date of publication or the consideration under a competing takeover bid is improved (section 650C). Any number of extensions can be made, up to a total offer period of 12 months (section 624(1)). An extension for more than one month (in total) will trigger withdrawal rights for previously accepted shares if the offer is still conditional.
Any day before or on the seventh day before the end of the offer period	Waive conditions of the bid	Notice waiving a condition is given to the target and ASX (section 650F). Conditions as to the non-occurrence of certain corporate actions by the target (section 652C(1) and (2) events, commonly called "prescribed occurrences") may be waived up to three business days after the end of the offer period.
Seven days before the end of the offer period	Publish notice as to the status of bid conditions	The offer document must specify a date between seven and 14 days before the end of the offer period for publishing this notice (section 630(1)). Seven days before the end is the day usually specified. The publication date is automatically deferred by the length of any extension in the offer period (section 630(2)). The notice is sent to the target and ASX.

Timing	Action	Comments
Day 15 plus one calendar month	Earliest date for close of the offer period	The offer period will be automatically extended under section 624(2) if, in the last seven days, the bid price is increased or the bidder's voting power in the target increases to more than 50%. The automatic extension is to 14 days after the relevant event.
Up to 21 days after the end of the offer period	Pay the bid price to accepting shareholders	The bid price must be paid by the earlier of: ▪ the later of one month after acceptance and one month after the bid becomes unconditional; and ▪ 21 days after the end of the offer period (section 620(2)).
Immediately after the end of the offer period	Commence compulsory acquisition procedure	A bidder which satisfies the 90% and 75% thresholds (see section 9.1) may send notices to the remaining target shareholders under section 661B to initiate the compulsory acquisition procedure. The notices must be sent within one month after the end of the offer period. The notice must be copied to ASIC and ASX.
Five business days after compulsory acquisition notices sent	Target shares are suspended from trading on ASX	This happens automatically (ASX Listing Rule 17.4).
Three business days after suspension of trading	Target is delisted by ASX	This happens automatically (ASX Listing Rule 17.14).
One month after compulsory acquisition notices sent	Complete compulsory acquisition procedure	The earliest that compulsory acquisition can be completed is one month after the notices are sent to shareholders (section 666A). However, the process can be delayed if minority shareholders apply to the court under section 661E to stop the acquisition on the grounds that the bid price is not fair value for the shares.

Timetable for an on-market takeover bid

This indicative timetable is based on the minimum timetable for a bid. References to time are calendar days, not business days (unless otherwise noted). All section references are to the Corporations Act unless otherwise indicated.

Timing	Action	Comments
On or before Day 1	Public announcement of intention to make a bid	The on-market takeover offer must be made within two months of the announcement (section 631).
Day 1	Bidder makes formal announcement of the bid to ASX	The contents of the formal announcement are set out in the ASIC Market Integrity Rules (Securities Market) 2017, at rule 5.12.1.
Day 1	Bidder's Statement lodged with target, ASIC and ASX	This must be done on the same day as the formal announcement to ASX (section 635).
Any time on or after Day 1	Bidder may purchase shares on-market	On-market purchases can be made after the formal announcement, even before the full on-market takeover offer commences (section 611, item 2).
Every day during the bid period	Bidder lodges substantial holder notices as required	The bidder must notify the target and ASX of its total voting power: ▪ when it first makes the bid; ▪ when its voting power reaches 5%; and ▪ every day its voting power changes by at least 1% (for example, as it receives acceptances). The notice must be given by 9.30am on the next trading day (section 671B).
By Day 15	Bidder's Statement sent to target shareholders	This must be done within 14 days after the formal announcement. Copies of all documents sent are lodged with ASIC and ASX (section 635).
By Day 15	Target's Statement sent to target shareholders and bidder	This must be done within 14 days after the bidder's formal announcement. Copies of all documents sent are lodged with ASIC and ASX on the same day (section 635).

Timing	Action	Comments
Day 16	Full takeover offer made on the ASX	A stockbroker acting for the bidder must make an on-market offer for all quoted shares in the target at the bid price on this day (section 635). Payment terms for on-market acquisitions (including under the bid) are full payment on the second trading day after the transaction (called "T + 2").
Up to five trading days before the end of the offer period	Increase the bid price	The broker acting for the bidder must publicly announce the increased price to ASX before placing the higher bid (ASIC Market Integrity Rule 6.2).
Up to five trading days before the end of the offer period	Extend the offer period	The extension is notified to ASX, the target and ASIC (section 649C). An extension cannot be made within the last five trading days of the offer period unless a competing bid is announced or made or the consideration under a competing takeover bid is improved in those last five trading days. Any number of extensions can be made, up to a total offer period of 12 months (section 624(1)).
Day 16 plus one month	Earliest date for close of the offer period	The offer period will be automatically extended under section 624(2) if, in the last seven days, the bidder's voting power in the target increases to more than 50%. The automatic extension is to 14 days after the bidder's voting power increases to more than 50%.
Immediately after the end of the offer period	Commence compulsory acquisition procedure	A bidder which satisfies the 90% and 75% thresholds (see section 9.1) may send notices to the remaining target shareholders under section 661B to initiate the compulsory acquisition procedure. The notices must be sent within one month after the end of the offer period. The notice must be copied to ASIC and ASX.

Timing	Action	Comments
Five business days after compulsory acquisition notices sent	Target shares are suspended from trading on ASX	This happens automatically (ASX Listing Rule 17.4).
Three business days after suspension of trading	Target is delisted by ASX	This happens automatically (ASX Listing Rule 17.14).
One month after compulsory acquisition notices sent	Complete compulsory acquisition procedure	The earliest that compulsory acquisition can be completed is one month after the notices are sent to shareholders (section 666A). However, the process can be delayed if minority shareholders apply to the court under section 661E to stop the acquisition on the grounds that the bid price is not fair value for the shares.

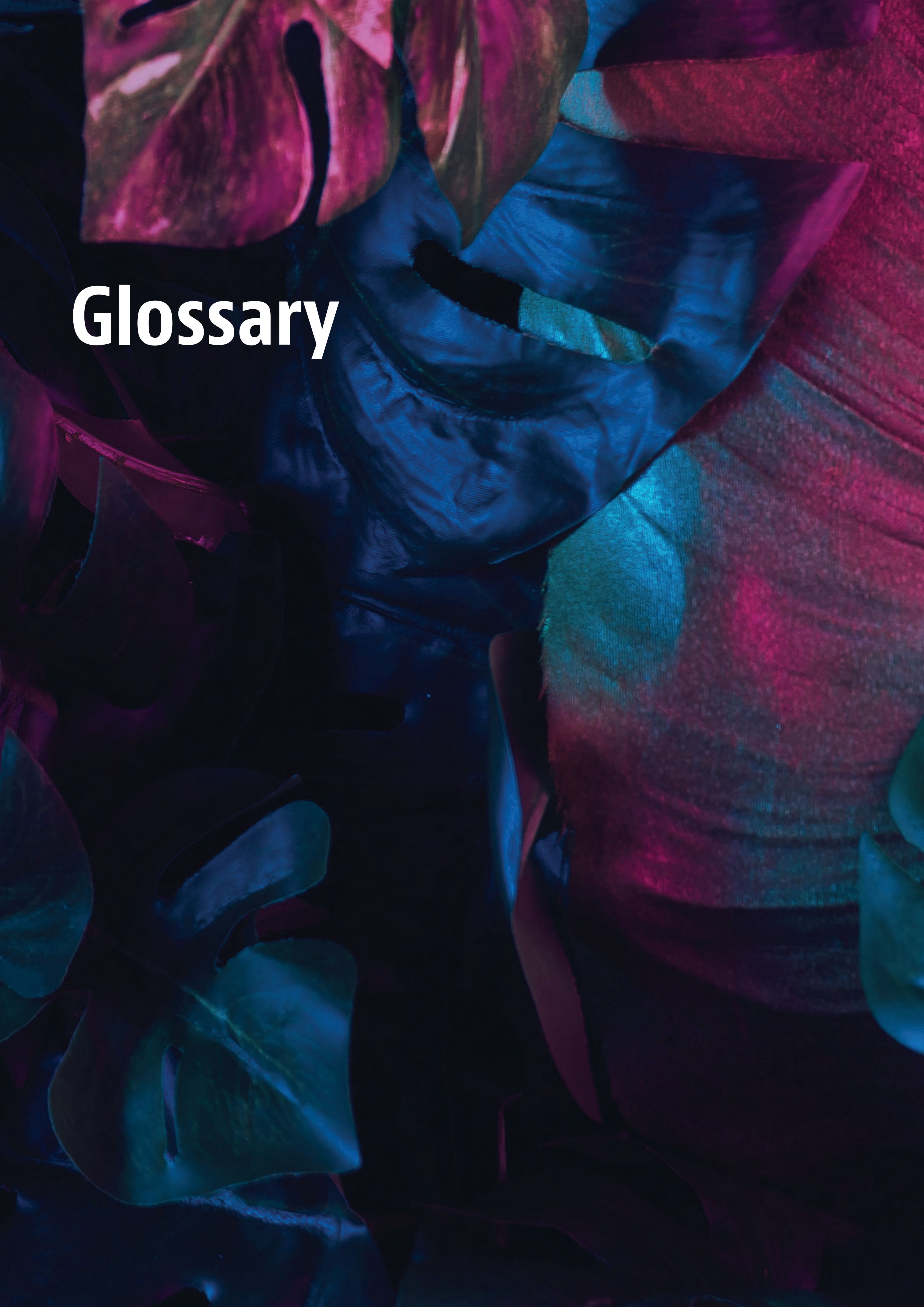
Timetable for a scheme of arrangement

This indicative timetable is based on the minimum timetable for a scheme of arrangement. References to time are calendar days, not business days (unless otherwise noted).

Timing	Action	Comments
On or before Day 1	Public announcement of agreed scheme terms (as set out in the Scheme Implementation Agreement between bidder and target)	Unlike a takeover bid, there is no specific legal obligation to send documents to target shareholders within a particular period after the announcement.
Day 1	Lodge draft Scheme Booklet, including independent expert's report and shareholder meeting documents, with ASIC. Apply for a court date	14 days' notice must be given to ASIC prior to the first court hearing, together with draft scheme documents.
Days 1 to 14	Consider ASIC comments. Lodge final documents with the court	–
Day 15	First court hearing	14 days after ASIC lodgement.
Day 22	Send Scheme Booklet and meeting documents to shareholders	Seven days assumed for printing and mailing.
Day 50	Scheme meeting	Minimum 28 days' notice of meeting.
Day 53	Second court hearing	–
Day 53	Effective Date	Lodge with ASIC a copy of the court order approving the scheme, and notify ASX. Trading in target shares is suspended from close of trading.

Timing	Action	Comments
Day 53 + 3 business days	Record Date	The Record Date for determining entitlements to receive scheme price (three business days after the Effective Date).
By Day 63	Implementation Date	The scheme is completed, and the scheme price paid to target shareholders (usually three to five business days after Record Date).

Glossary



Glossary

ACCC	Australian Competition and Consumer Commission. The ACCC regulates competition, fair trade and consumer protection in the market place to benefit consumers, businesses and the community. Its role with respect to takeovers is to ensure that the resulting corporate entity will not substantially lessen competition in the market.
ASIC	The Australian Securities and Investments Commission. This is the regulatory body charged with administering and enforcing the Corporations Act and regulating securities markets in Australia. ASIC has special discretionary powers in relation to takeovers laws, as discussed in section 11.1.
associate	An "associate" of a person includes: ▪ if the person is a body corporate – any related body corporate; and ▪ in any case – anyone with whom the person has, or proposes to enter into, an agreement, arrangement or understanding (whether or not enforceable) to control or influence the composition of the target company's board of directors, or the conduct of the target company's affairs, or otherwise to act in concert in relation to the target company's affairs. For example, a voting agreement between two shareholders which sets out how they will vote to appoint directors to the board of the target company will make those two shareholders associates of one another.
ASX	ASX Limited or the Australian Securities Exchange market which it operates, as the context requires.
Corporations Act	The *Corporations Act 2001* (Cth), federal legislation which is the primary source of corporate law and regulation in Australia.
Court	A scheme of arrangement can be approved by either the Federal Court of Australia or Supreme Court of one of the Australian States.
fiduciary out	A provision which allows the directors of a target company to be relieved of a lock-up device (or aspects of it) if their legal or fiduciary duties require them to do so.
Institutional Acceptance Facility	A facility operated by a third party (such as an investment bank) where shareholders can deliver revocable instructions regarding a takeover offer without actually formally accepting an offer.
REIT	A real estate investment trust, being a unit trust that owns income-producing real estate. REITs may be listed or unlisted.
related body corporate	A member of the same corporate group. That is, a subsidiary, a parent company, or a company under common control.

relevant interest

Broadly, a person will have a "relevant interest" in a share if the person holds the shares, has power to control the exercise of a right to vote attached to the shares, or can control the disposal of the shares. Examples include a direct holding of shares and a pre-emptive right over another person's shares (because this is a form of control over the disposal of those shares).

In addition, a person will be deemed to have the same relevant interests in shares that are held by a body corporate or managed investment scheme which the person controls, or in which the person's voting power is above 20%. In this way, an indirect holding through subsidiaries, or even through a non-controlling interest of more than 20% in a body corporate or unit trust, can give rise to a deemed relevant interest.

An agreement to do something which will, on its future performance, give rise to a relevant interest is deemed to create an immediate relevant interest. For example, a call option over another person's shares gives rise to a relevant interest even though there is no present holding of, or control over, the other person's shares.

Certain situations are excluded from giving rise to a relevant interest, such as shares held by a bare trustee, security over shares given to lenders on ordinary commercial terms, and exchange traded options and futures contracts (but only until an obligation to take delivery of the shares arises).

Scheme Booklet

The combined notice of meeting, disclosure document and independent expert's report to be sent to target company shareholders for the purposes of convening a general meeting to vote a proposed scheme of arrangement.

Scheme Implementation Agreement

The agreement between bidder and target under which a scheme of arrangement is documented.

T + 2

The second trading day after an on-market transaction.

Takeovers Panel

The Takeovers Panel adjudicates on disputes arising under takeovers in accordance with both the law and commercial principles. Its powers are discussed in section 11.1.

top-hat restructure

A restructure (usually by way of a scheme of arrangement) where a new holding company or trust acquires all outstanding shares and other securities in exchange for equivalent securities in the holding company.

voting interest

To be a "voting interest", an interest in a managed investment scheme (such as a unit in a unit trust) must carry voting rights beyond the right to vote in any or all of the following circumstances:

- on a proposal that would affect rights attaching to the interest;
- on a proposal to wind up the scheme;
- on a proposal for the disposal of the whole scheme property, business and undertaking; and
- during the winding-up of the scheme.

voting power

This is a percentage determined using the formula:

$$\frac{\text{Person's and associates' votes}}{\text{Total votes in body corporate}} \times 100$$

where:

- the "person's and associates' votes" is the total number of votes attached to all the voting shares in the body corporate in which the person or an associate has a relevant interest; and
- the "total votes" is the total number of votes attached to all voting shares in the body corporate.

Given the possibility that the number of votes attaching to various classes of voting shares may vary depending on the situation, the number of votes attaching to each share is to be counted as follows:

- the number that may be cast on the election of a director; or
- if no votes are cast for the election of a director, the number that may be cast on the amendment of the constitution.

voting share

Not all shares which carry a right to vote will be a "voting share" for the purposes of the Corporations Act. To be a "voting share", a share must carry voting rights beyond, or in addition to, the right to vote in any or all of the following circumstances:

- while a dividend in respect of the share is unpaid;
- on a capital reduction proposal;
- on a share buy-back proposal;
- on a proposal that would affect rights attaching to the share;
- on a winding-up proposal;
- during the company's winding-up; and
- on a proposal for the disposal of the whole of the company's property, business and undertaking.

Many preference shares have voting rights of this kind, but are not counted as "voting shares". Unissued shares are not voting shares.

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